

IN THE INCOME TAX APPELLATE TRIBUNAL

"C" BENCH, MUMBAI

BEFORE SHRI OM PRAKASH KANT, ACCOUNTANT MEMBER

SHRI SANDEEP SINGH KARHAIL, JUDICIAL MEMBER

ITA No. 1295/MUM/2024

(Assessment Year : 2014-15)

ACIT, Circle – 5(3)(1)

Room No.573,
5th Floor, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai, Maharashtra – 400020

..... Appellant

v/s

Rishabh Diamond Pvt Ltd.,

217/D, Panchratna, Opera House,
Mumbai, Maharashtra - 400004
PAN : AACCR8997A

..... Respondent

CO No. 75/MUM/2024

(Assessment Year : 2014-15)

Rishabh Diamond Pvt Ltd.,

217/D, Panchratna, Opera House,
Mumbai, Maharashtra - 400004
PAN : AACCR8997A

..... Cross objector
(Original Respondent)

v/s

ACIT, Circle – 5(3)(1)

Room No.573,
5th Floor, Aayakar Bhavan,
M.K. Road, Churchgate,
Mumbai, Maharashtra – 400020

..... Respondent
(Original Appellant)

Assessee by : Shri Suchek Anchaliya
Revenue by : Shri Krishnakumar (Sr.DR)

Date of Hearing – 24/09/2024

Date of Order - 29/11/2024

ORDER**PER SANDEEP SINGH KARHAIL, J.M.**

The present appeal by the Revenue and the Cross Objection by the assessee has been filed against the impugned order dated 22.01.2024 passed under section 250 of the Income Tax Act, 1961 (*"the Act"*) by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre, Delhi [*"learned CIT(A)"*], for the Assessment Year 2014-15.

2. In this appeal, the Revenue has raised the following grounds: -

"1. Whether on facts and circumstances of the case and in law, the CIT(A) erred in not considering the amendment of Explanation 1(ii) of section 148 of the Income Tax Act with effect from 01.04.2022 which specifies any audit objection and not only the C&AG audit objection thereby including the internal audit objection within the meaning of information for the purpose of section 148 which suggests that the income chargeable to tax has escaped assessment and the fact that the notice under section 148 of the Act in the case was issued on 27.07.2022.

2. Whether on facts and circumstances of the case and in law, the CIT(A) is justified in deleting the addition of Rs. 6,50,00,000/- of unexplained loan under section 68 of the Act without appreciating the verification and details discussed in the Assessment Order which shows that the creditworthiness of lender and genuineness of loan transaction remain unproved?

3. The appellant prays that the order of the CIT(A) on the grounds be set aside and confirm the order of the AO."

3. While in its Cross Objection, the assessee has raised the following grounds: -

"1. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) (NFAC) erred in holding the notice u/s 148 of the Act as valid without considering the fact that the same is time-barred as per the provisions of section 149 of the Act and therefore the reopening is bad in law.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) (NFAC) erred in not considering that the assumption of jurisdiction by the Ld. Assessing Officer is bad in law as the conditions laid down under the Act for initiating reassessment proceeding u/s 147 of the Act have not been satisfied.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in not holding the impugned assessment order as void ab initio as the order passed by the Ld. Assessing Officer dated 19.12.2016 does not bear any Document Identification Number (DIN) on its assessment order body as mandated by the Circular No. 19/2019 issued by the CBDT."

4. The learned Authorised Representative ("*learned AR*"), at the outset, wishes not to press grounds no.1 and 3 raised in the assessee's cross objection. Therefore, the aforesaid grounds are dismissed as not pressed.

5. Ground no.1 raised in Revenue's appeal and ground no.2 raised in assessee's cross objection pertains to the validity of the reassessment proceedings initiated under section 147 of the Act.

6. The brief facts of the case as emanating from the record are: The assessee is a private limited company and is engaged in the business of import, export and trading in cut and polished diamonds. For the year under consideration, the assessee filed its return of income on 20.09.2014 declaring a total income of Rs.63,31,860 under the normal provisions of the Act and book profit of Rs.62,19,095 under section 115JB(2) of the Act. The return filed by the assessee was selected for scrutiny and vide order dated 19.12.2016 passed under section 143(3) of the Act, the assessment was completed accepting the returned income. Subsequently, it was observed from the balance sheet that the assessee has taken a loan from Mr. Ajay Kumar Dhupiya for Rs.6,50,00,000, who in response to the notice issued under section 133(6) of the Act only filed a copy of the ledger account, balance sheet and part bank statement of Diam-o-star, where he is the proprietor. A copy of the profit and loss account, audit report and

computation of income was not filed. Further, from the balance sheet of Mr. Ajay Kumar Dhupiya, it was observed that Rs.6,50,00,000 is reflected as sundry debtors in the name of the assessee and Rs.52,35,01,452 was shown as sundry creditors. Since the party had huge sundry creditors and did not have sufficient income, thus the grant of an interest-free loan to the assessee by such party was doubted. Accordingly, notice under section 148 of the Act was issued on 29.06.2021 on the basis that income to the extent of Rs.6,50,00,000 chargeable to tax has escaped assessment within the meaning of section 147 of the Act. Pursuant to the decision of the Hon'ble Supreme Court in the case of Union of India vs. Ashish Agarwal, reported in (2022) 444 ITR 1 (SC), notice dated 29.06.2021 issued under section 148 of the Act was deemed to have been issued under section 148A of the Act, as substituted by the Finance Act, 2021, and was construed to be a show cause notice in terms of the provision of section 148A(b) of the Act. In view of the aforesaid decision of the Hon'ble Supreme Court in Ashish Agarwal (supra), the assessee was provided with the copy of reasons recorded prior to the issuance of the notice under section 148 of the Act, necessary approval to issue the said notice and also the details of the underlying information leading to the issue of the said notice under section 148 of the Act. Further time was granted to the assessee to furnish its explanation in support of its claim. After rejecting the objection filed by the assessee, an order under section 148A(d) of the Act was passed on 27.07.2022 declaring that it is a fit case for passing an order under section 148A(d) and issuance of notice under section 148 of the Act. On 27.07.2022 notice under section 148 of the Act was issued by the Assessing Officer ("AO"). Thereafter, statutory notices

under section 143(2) and section 142(1) of the Act were issued and served on the assessee. After considering the submissions of the assessee, the AO vide order dated 13.05.2023 passed under section 147 r.w. section 144B of the Act held that proper verification, creditworthiness and genuineness of the loan transaction remains unverified. In the absence of evidence/proof in support of the loan transaction, made during the year under consideration, the amount of Rs.6,50,00,000/- was treated as cash credit under section 68 of the Act and was added to the total income of the assessee.

7. In its appeal before the learned CIT(A), the assessee raised various grounds challenging the initiation of re-assessment proceedings under section 147 of the Act on various aspects and also challenging the addition made by the AO under section 68 of the Act. The learned CIT(A), vide impugned order, rejected various submissions of the assessee in respect of its challenge against the initiation of proceedings under section 147 of the Act, however concurred with the contention of the assessee that the AO had issued notice under section 148A(b) of the Act without fulfilling the condition of "*information*" as envisaged in Explanation to Section 148 of the Act. The learned CIT(A) following the decision of the Hon'ble Bombay High Court in the case of Hashmukh Estates Pvt. Ltd. vs. ACIT, reported in (2023) 459 ITR 524 (Bom) held that the internal audit memo upon which the re-assessment is based does not qualify as valid information under the specified criteria as provided in Explanation 1 to Section 148 of the Act. The learned CIT(A) further held that the re-assessment proceedings in the present case have been initiated on the basis of a change of opinion. Accordingly, the learned

CIT(A) set aside the re-assessment proceedings. On the merits of the addition made under section 68 of the Act, the learned CIT(A) decided the issue in favour of the assessee and held that the assessee has duly recorded the loan transaction of Rs.6,50,00,000/- and offered the reasonable explanation in respect of creditworthiness and genuineness of the transaction. It was held that the loan lender responded to the notices issued under section 133(6) of the Act also goes on to prove the identity of the lender. Accordingly, the learned CIT(A) concluded that section 68 of the Act is not attracted to the facts of the present case. Accordingly, the addition of Rs.6,50,00,000/- made by the AO was directed to be deleted. Being aggrieved, Revenue is in appeal before us, whereas the assessee has filed the Cross Objection.

8. During the hearing, the learned Authorized Representative ("*learned AR*") vehemently relying upon the order passed by the learned CIT(A) submitted that reopening of assessment under section 147 of the Act, in the present case, is bad in law as the information relied upon by the AO for initiating the re-assessment proceeding does not fall within the ambit of the term "*information*" as provided in Explanation 1 to Section 148 of the Act. The learned AR further submitted that in the present case, the information was received from an internal audit memo dated 06.02.2018 issued by ACIT (OSD) Audit – 1(2), Mumbai and thus the same cannot be considered to be an objection raised by the Comptroller and Auditor General of India ("*CAG*"). The learned AR further submitted that this issue was examined in detail by the AO during the scrutiny assessment proceedings under section 143(3) of

the Act and after considering the detailed response filed by the assessee scrutiny assessment order was passed under section 143(3) of the Act accepting the returned income of the assessee. Thus, it was submitted that initiating the re-assessment proceedings on the basis of an internal audit memo, which also does not refer to any new tangible material, only tantamount to a change of opinion on the part of the Revenue on the basis of the very same material which was in the possession at the time of scrutiny assessment proceedings.

9. On the contrary, the learned Departmental Representative ("*learned DR*") submitted that the provisions of Explanation 1(ii) of Section 148 of the Act were amended w.e.f. 01.04.2022 by Finance Act, 2022, whereby the scope and ambit of the term "*information*" for initiating the re-assessment proceedings were amended and now any audit objection to the effect that the assessment in the case of the assessee has not been made in accordance with the provisions of the Act is also considered to be a valid information for the purposes of section 148 and section 148A of the Act. The learned DR further submitted that since in the present case notice under section 148 of the Act was issued on 27.07.2022 therefore, the provisions of Explanation 1 to Section 148 of the Act as amended by Finance Act, 2022 w.e.f. 01.04.2022 shall be applicable. Therefore, the initiation of re-assessment proceedings on the basis of an internal audit memo, in the present case, is valid.

10. We have considered the submissions of both sides and perused the material available on record. Before proceeding further, it is pertinent to note the provisions of the Act, which are relevant for deciding the issue at hand. The relevant provisions of section 148 of the Act, as amended by the Finance Act, 2021 w.e.f. 01.04.2021, read as follows: -

"148. Before making the assessment, reassessment or recomputation under section 147, and subject to the 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, requiring him to furnish within such period, as may be specified in such notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139:

Provided that no notice under this section 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.

Explanation 1.— For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—

(i) any information flagged in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any final objection raised by the Comptroller and Auditor General of India to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act."

11. Further, the provisions of section 148A of the Act, as inserted by the Finance Act, 2021 w.e.f. 01.04.2021, read as follows: -

"148A. The Assessing Officer shall, before issuing any notice under section 148,—

(a) *conduct any enquiry, if required, with the prior approval of specified authority, with respect to the information which suggests that the income chargeable to tax has escaped assessment;*

(b) *provide an opportunity of being heard to the assessee, with the prior approval of specified authority, by serving upon him a notice to show cause within such time, as may be specified in the notice, being not less than seven days and but not exceeding thirty days from the date on which such notice is issued, or such time, as may be extended by him on the basis of an application in this behalf, as to why a notice under section 148 should not be issued on the basis of information which suggests that income chargeable to tax has escaped assessment in his case for the relevant assessment year and results of enquiry conducted, if any, as per clause (a);*

(c) *consider the reply of assessee furnished, if any, in response to the show-cause notice referred to in clause (b);*

(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 in which the reply referred to in clause (c) is received by him, or where no such reply is furnished, within one month from the end of the month in which time or extended time allowed to furnish a reply as per clause (b) expires:*

Provided that the provisions of this section shall not apply in a case where,—

(a) *a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A in the case of the assessee on or after the 1st day of April, 2021; or*

(b) *the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any money, bullion, jewellery or other valuable article or thing, seized in a search under section 132 or requisitioned under section 132A, in the case of any other person on or after the 1st day of April, 2021, belongs to the assessee; or*

(c) *the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner that any books of account or documents, seized in a search under section 132 or requisitioned under section 132A, in case of any other person on or after the 1st day of April, 2021, pertains or pertain to, or any information contained therein, relate to, the assessee.*

Explanation.—For the purposes of this section, specified authority means the specified authority referred to in section 151.]”

12. From a careful perusal of the aforesaid provisions of Section 148 and Section 148A of the Act, it is evident that before issuing any notice under section 148 of the Act, the AO is authorized to conduct any enquiry with

respect to the information which suggests that the income chargeable to tax has escaped assessment. Further, the AO is required to provide an opportunity of being heard to the assessee by serving upon him a show cause notice as to why the notice under section 148 of the Act should not be issued on the basis of the information which suggests that the income chargeable to tax has escaped assessment in his case for the relevant assessment year. After considering the reply of the assessee, in response to the show cause notice issued, the AO has to decide whether or not it is a fit case for issuance of notice under section 148 of the Act. Section 148 of the Act as amended by Finance Act, 2021, w.e.f. 01.04.2021, provides that before making the assessment, re-assessment proceedings, re-computation under section 147 and subject to the provisions of Section 148A of the Act, the AO shall serve a notice to the assessee along with a copy of the order passed under section 148A(d) of the Act requiring him to furnish a return of his income or the income of any other person in respect of which he is assessable under the Act.

13. Thus, from the analysis of the provision of section 148 and section 148A of the Act, it is *prima facie* evident that before issuing the notice under section 148 of the Act, the AO has to compulsorily follow the procedure as provided in section 148A of the Act. The first proviso to section 148 of the Act further provides that no notice under this section shall be issued unless, (i) there is information with the AO which suggests that the income chargeable to tax has escaped assessment in the case of the assessee in the relevant assessment year, and (ii) the AO has obtained the prior approval of

the specified authority to issue such notice. In the present case, there is no dispute regarding the second condition as required in the first proviso to section 148 of the Act. Insofar as the first condition as required in the first proviso to section 148 of the Act, it is the plea of the assessee that at the time of issuance of show cause notice under section 148A(b) of the Act the term "*information*" was defined in Explanation 1 to Section 148 of the Act as, (i) the information in accordance with the risk management strategy formulated by the Board from time to time or (ii) any final objection raised by the CAG to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provision of the Act.

14. We find that the Finance Act, 2022, w.e.f. 01.04.2022, amended the provisions of Explanation 1 to Section 148 of the Act and clause (ii) was substituted. The amended Explanation 1 to Section 148 of the Act, read as follows: -

"Explanation 1.—For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,—

(i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time;

(ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or

(iii) any information received under an agreement referred to in section 90 or section 90A of the Act; or

(iv) any information made available to the Assessing Officer under the scheme notified under section 135A; or

(v) any information which requires action in consequence of the order of a Tribunal or a Court.]”

15. Thus, from the perusal of the amended Explanation 1 to Section 148 of the Act, it is evident that the same now also includes any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act.

16. In the present case, there is no dispute regarding the fact that vide the internal audit report dated 06.02.2018, the learned ACIT (OSD) Audit - 1(2) Mumbai noted that the loan of Rs.6,50,00,000/- advanced by Mr. Ajay Kumar Dhupiya has remained unexplained. Further, from the copy of approval granted under section 151 of the Act by the learned Principal Commissioner of Income Tax, Mumbai – 5 dated 28.06.2021, we find that for similar reasons it was alleged that income to an extent of Rs.6,50,00,000/- which is chargeable to tax has escaped assessment within the meaning of section 147 of the Act. Accordingly, on 29.06.2021, the AO issued a notice under Section 148 of the Act. Since the aforesaid notice was issued under the erstwhile provision of the Act dealing with the re-assessment proceedings, therefore pursuant to the decision of the Hon'ble Supreme Court in Ashish Agarwal (supra), the said notice was deemed to be a show cause notice in terms of provision of section 148A(b) of the Act and was deemed to have been issued under section 148A of the Act. Accordingly, in the light of the directions issued by the Hon'ble Supreme Court in Ashish Agarwal (supra), the AO in the present case sought

explanation and details from the assessee as required under section 148A(b) of the Act. In the present case, it is further undisputed that the aforementioned internal audit memo was the only information on the basis of which re-assessment proceedings were initiated in the present case, therefore it needs to be examined whether the internal audit memo can be considered to be an "*information*" for the purpose of Explanation 1 to Section 148 of the Act. Before answering the aforesaid question, it is pertinent to note that both for the purpose of section 148 and section 148A of the Act, Explanation 1 to Section 148 of the Act provides meaning to the term "*information*". Therefore, it cannot be said that the material which is not "*information*" for the purpose of section 148A is "*information*" for the purpose of section 148 of the Act or vice-versa. Thus, once the proceedings are initiated under section 148A of the Act on information, the same results in a notice issued under section 148 and the ultimate order passed under section 147 of the Act. In the present case, it is undisputed that the notice issued under section 148 of the Act on 29.06.2021 was deemed to be a show cause notice issued under section 148A(b) of the Act, pursuant to the decision of the Hon'ble Supreme Court in Ashish Agarwal (supra), and no separate notice under section 148A(b) of the Act was issued by the AO. Such being the facts, the date of the notice under section 148 (which is now considered to be a show cause notice under section 148A(b) of the Act), i.e., 29.06.2021 is relevant for the instant case. As noted in the foregoing paragraph, section 148A(b) of the Act specifically requires the AO to provide an opportunity of being heard to the assessee by issuing a show cause notice as to why the notice under section 148 should not be issued on the

basis of the information which suggests that income chargeable to tax has escaped assessment. Therefore, we are of the considered view that whether the material satisfies the criteria of "*information*" as per the provisions of Explanation 1 to section 148 of the Act has to be analysed on the date of issuance of show cause notice under section 148A(b) of the Act, since such information remains constant till the culmination of the entire proceedings resulting in issuance of notice under section 148 of the Act and ultimately passing of the assessment order under section 147 of the Act. Therefore, if a material does not satisfy the criteria of "*information*" as provided in Explanation 1 to section 148 on the date of issuance of show cause notice under section 148A(b) of the Act, we are of the considered view that no notice under section 148 of the Act can be issued since the twin conditions, as noted in the foregoing paragraph, in the first proviso to section 148 of the Act are not satisfied. Therefore, in the instant case, since the only information available with the Revenue for initiating the re-assessment proceedings was the internal audit memo dated 06.02.2018, we are of the considered view that on the date of issuance of show cause notice under section 148A(b) of the Act, which in the present case is 29.06.2021, the same does not fall within the scope and ambit of the term "*information*" as provided in Explanation 1 to Section 148 of the Act.

17. We find that the Hon'ble Jurisdictional High Court while considering the similar objection against the initiation of re-assessment proceedings in Hashmukh Estates Pvt. Ltd. (supra) held that the re-assessment notice issued by the AO based on an internal audit objection would not be

permissible in law. The relevant findings of the Hon'ble High Court, in the aforesaid decision, are reproduced as follows: -

"10. We have heard learned counsel appearing for the parties and have perused the documents with their assistance. The factual and admitted position is as follows:

(a) The AO has dealt with the entire issue of long term capital gains during the course of original assessment proceedings including the fact of deduction of compensation/damages of an amount of Rs. 6 Crores from the agreed consideration of Rs. 18 Crores and the stamp valuation shown to be Rs. 16.50 Crores.

(b) The AO clearly accepted the non-applicability of Section 50C of the Act to the transaction of sale while issuing the original assessment order.

(c) An audit memo dated 29th March 2019 raised an objection regarding applicability of Section 50C of the Act.

(d) The audit memo was raised by an internal audit of the Department and not by CAG as required by the provision which was, in effect prior to the amendment which came into force w.e.f. 1st April 2022, and applicable to the present case.

(e) The AO namely, Mr. Rajesh Meshram conveyed his objections to the audit memo maintaining that the original assessment order was correct.

(f) The ACIT once again maintained its objections. This time the said Mr. Rajesh Meshram accepted that the AO did not properly examine the allowability of Rs. 6 Crore expense under the long term capital gains head. Hence, the audit objection was accepted leading to re-opening of the assessment of the income of Petitioner.

(g) Relying upon the decision of the Apex Court in the matter of Ashish Agarwal (supra) the notice under section 148 of the Act dated 21st April 2021 issued under the old law was treated as notice under section 148A(b) of the Act.

11. The admitted facts clearly indicate that the basis of which the AO issued notice alleging that there was "information" that suggests escapement of income was an internal audit objection. What is information is explained in Section 148 of the Act to mean "any objection raised by the Comptroller and Auditor General of India....." and no one else. This itself makes the re-opening of assessment in the present case impermissible.

12. Consequently, de-hors any audit objection raised by the CAG, a view deviating from that which was already taken during the course of issuing the original assessment order is nothing but a 'change of opinion' which is impermissible under the provisions of the Act.

13. In a decision of this Court itself in the matter of Bakhtawar Construction Co. (P.) Ltd. (supra) we have already held as follows:

"18. This court in *Commissioner of Income Tax-II v. Jet Speed Audio (P.) Ltd.* [2015] 55 taxmann.com 531 has held that during the original assessment proceedings, once a query was made with regard to the same issue which was responded to by the assessee and on satisfaction of the same, the assessing officer has passed an assessment order, reopening would be purely on the basis of change of opinion. Moreover, the court has held that the tangible material urged should emanate from the reasons recorded for issuing reopening notice under section 148 of the Act. The tangible material as stated in the affidavit in reply and by counsel for revenue are the audit objections received by the assessing officer. But there is no mention of this in the reasons recorded for issuing reopening notice under section 148 of the Act. Therefore, the audit objection cannot be termed as tangible material.

20.Therefore, it is apparent that the applicability of Section 50C was a subject of consideration of the assessing officer while completing the assessment. A Division Bench of this court in *Aroni Commercials Ltd. v. Deputy Commissioner of Income Tax-2(1)* (2014) 44 taxmann.com 304 (Bombay) has held that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under section 143(3) of the Act.

21. Therefore, there can be no doubt in the facts of this case that the reopening of the assessment by the impugned notice is merely on the basis of change of opinion of the assessing officer from that held earlier during the course of assessment proceedings leading to the assessment order dated 30th September 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.

22. The fact that the notice was issued based on audit objections received by the assessing officer also does not find mention in the impugned notice. The assessing officer does not even mention in the impugned notice what was the information that he had received. The assessing officer has, as recorded in the notice, formed an opinion that because the assessee had gifted to Bezan Chenoy as per the Memorandum recording family arrangement, petitioner had resorted to colorable device by way of gift of the said property to avoid tax liability. Therefore, this was a fit case for invoking provisions of Section 50C of the Act. This does not indicate about any opinion having been received by the assessing officer by way of audit objections. Therefore, we will also have to hold that there can be no tangible material mentioned in the reasons recorded by the revenue which would want a different opinion being taken than which was taken when the original assessment order was passed. As held by this court in *Jet Speed Audio (P) Ltd.* (supra) it is settled law that the reopening notice can be sustained only on the basis of the ground mentioned in the reasons

recorded. It is not open to the revenue to add and/or supplement later the reasons recorded at the time of reopening notice."

In the matter of Kelvinator of India (supra), the Apex Court held as under:

"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer".

14. Considering the admitted factual position and the settled legal position, we find it unnecessary to go into the merits of the case in respect of other submissions advanced by the parties since we are convinced that prima facie the information which formed the basis of re-opening itself does not fall within the meaning of the term 'information' under the 1st Explanation to Section 148 of the Act and hence, the re-opening is not permissible as it clearly falls within the purview of a 'change of opinion' which is impermissible in law.

15. In view of the above discussion, the Writ Petition is allowed. Rule is made absolute in terms of prayer clause (a), which reads as thus;

"(a) that this Hon'ble Court may be pleased to issue a Writ of Certiorari or Writ in the nature of Certiorari or any other appropriate Writ, order or direction, calling for the records of the Petitioner's case and after going into the legality and propriety thereof, to quash and set aside (i) Notice u/s 148 dated July 30, 2022 issued by the Respondent No. 1 for AY 2015-16[Ex-Q], (ii) Approval u/s 151 dated 29/7/2022 [Ex-R] (iii) the impugned order dated July 29, 2022 passed under section 148A(d) by the Respondent No. 1 for A.Y. 2015-16 [Ex-P], (iv) Notice under section 148A(b) being the Notice u/s 148 dated May 31, 2021/April 21, 2021 for AY 2015-16 [Ex-A], and (v) the communication/letter dated May 28, 2022 [Ex-J]"

18. Therefore, respectfully following the decision of the Hon'ble Jurisdictional High Court and in view of the detailed analysis of the relevant

provision of the statute, we find no merits in the submission of the Revenue that the amended provisions of Explanation 1 to section 148 of the Act, w.e.f. 01.04.2022 are applicable in the present case. Since the internal audit memo has been found to be outside the scope and ambit of the term "information" as provided in Explanation 1 to section 148 of the Act, prior to its amendment by the Finance Act, 2022, we are of the considered view that the learned CIT(A) has rightly quashed the re-assessment proceedings. Accordingly, we find no infirmity in the impugned order passed by the learned CIT(A) on this aspect of the invocation of jurisdiction under section 147 of the Act. Accordingly, we are of the considered view that the notice issued under section 148 of the Act is *void ab initio* and bad in law and therefore is rightly quashed. Consequently, the entire reopening proceedings and the assessment order passed under section 147 r.w.s. 144B of the Act is also quashed.

19. Since the relief has been granted to the assessee on the afore-noted jurisdictional aspect, the other contentions raised by the assessee challenging the jurisdiction under section 147 of the Act are rendered academic and therefore are left open. Accordingly, Ground No.1 raised in Revenue's Appeal is dismissed while Ground No.2 raised in assessee's Cross Objection is allowed.

20. In view of our aforesaid findings Ground No.2 raised in Revenue's appeal challenging the deletion of addition under section 68 of the Act is rendered infructuous and therefore is dismissed.

21. In the result, the appeal by the Revenue is dismissed, while the Cross Objection by the assessee is partly allowed.

Order pronounced in the open Court on 29/11/2024

Sd/-

**OM PRAKASH KANT
ACCOUNTANT MEMBER**

Sd/-

**SANDEEP SINGH KARHAIL
JUDICIAL MEMBER**

MUMBAI, DATED: 29/11/2024

Prabhat

Copy of the order forwarded to:

- (1) *The Assessee;*
- (2) *The Revenue;*
- (3) *The PCIT / CIT (Judicial);*
- (4) *The DR, ITAT, Mumbai; and*
- (5) *Guard file.*

By Order

Assistant Registrar
ITAT, Mumbai