

**IN THE INCOME TAX APPELLATE TRIBUNAL
“A” BENCH : BANGALORE**

BEFORE SHRI LAXMI PRASAD SAHU, ACCOUNTANT MEMBER
AND
SHRI SOUNDARARAJAN K., JUDICIAL MEMBER

ITA Nos.1568 to 1570/Bang/2024 & ITA Nos.1573 to 1575/Bang/2024
Assessment years : 2013-14, 2014-15 & 2015-16

N9 Sports & Leisure Holdings Pvt. Ltd., PAN: AAECN 0589Q & Hungry and Foolish Intellectual Properties Pvt. Ltd., PAN: AACCH 4329J No.102, Eden Park, No.20, Vittal Mallya Road, Bengaluru – 560 001.	Vs.	The Deputy Commissioner of Income Tax, Central Circle 1(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri C. Ramesh, CA
Respondent by	:	Ms. Neha Sahay, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	30.01.2025
Date of Pronouncement	:	24.03.2025

ORDER

Per Bench

These appeals are filed by two different assessee viz., N9 Sports & Leisure Holdings Pvt. Ltd. and Hungry and Foolish Intellectual Properties Pvt. Ltd., for assessment years 2013-14 to

2015-16 against the common order of the CIT(Appeals)-11, Bangalore dated 25.6.2024 for the assessment years under consideration passed separately in each of the assessee's appeals.

2. The grounds raised in all these appeals are similar in all the appeals and they were heard together. For the sake of convenience, we first take up ITA No.1568/Bang/2024 and its decision shall apply mutatis mutandis to the other appeals also.

3. Briefly stated the facts of the case are that a survey was conducted at M/s. Xentrix Studios Pvt. Ltd. on 4.5.2017. A sworn statement was recorded from Shri D.S. Nandish u/s. 131 of the Act. Shri D.S. Nandish was questioned about the origins of cash deposits in various bank accounts associated with entities closely linked to him. He admitted his inability to account for these deposits and voluntarily offered to declare the unexplained cash as income for the respective entities. The unaccounted cash deposits in the assessee company's account amounted to Rs.32,71,500 for AY 2013-14, Rs.22,84,500 for AY 2014-15 and Rs.1,05,06,500 for AY 2015-16.

4. A search was conducted on 28.8.2017 in the case of Mr. D.S. Nandish. During the course of statement u/s. 132(4), Mr. Nandish reaffirmed the statement recorded u/s. 131 of the Act and agreed to disclose additional income towards unexplained cash deposits. Accordingly the AO made addition u/s. 68 of the Act. Further the AO noted from the financial statements submitted by the Director during the scrutiny proceedings that the assessee has sundry creditors in the

balance sheet and assessee has paid interest on such creditors. The assessee was asked to justify the loans and advances appearing in the balance sheet. But the assessee could not substantiate and therefore interest paid on such creditors was disallowed u/s. 37 of the Act. The AO further noted that no TDS has been made on such interest. Accordingly, the AO disallowed the interest of Rs.53,60,000 u/s. 37.

5. During the course of appellate proceedings before the CIT(Appeals), the assessee raised various legal issues. The Id. First Appellate Authority (FAA) called remand report and as per the remand report, copy of the reasons recorded were supplied to the assessee (with proper DIN]. He noted that there was proper approval granted u/s. 151 sought by the AO from the Pr.CIT before reopening the case which was also provided to the assessee. The Id. FAA dismissed the appeal of the assessee. Aggrieved from the above order, the assessee filed appeals before the ITAT.

6. The Id. counsel for the assessee reiterated the submissions made before the lower authorities and submitted that before reopening the case u/s. 147/148, proper approval was not obtained as mandated u/s. 151 of the Act. He further submitted that the AO has wrongly issued notice u/s. 148, he should have issued notice u/s. 153C of the Act because the AO has relied on the material found during the course of search. Therefore notice issued u/s. 148 is bad in law. He further submitted that as Mr. D.S. Nandish has stated in the sworn statement that the entire cash deposits in the assessee's bank account are

deposited by him, hence it should be assessed in the hands of Mr. Nandish, not in the hands of the appellant company. The AO has made addition of entire cash deposits in the bank account whereas the net income should have been added. The entire cash deposits are not the income of the assessee. The assessee has earned interest income as well as paid interest on such loans. The AO has wrongly applied section 68 of the Act and the mandatory condition of section 68 has not been fulfilled. The Id. counsel relied on the judgment of the Hon'ble Apex Court in the case of Pr. CIT VS Abhisar Buildwell reported in [2023] 149 taxmann.com 399 (SC).

7. On the other hand, the Id. DR relied on the order of the lower authorities and submitted that during the course of appellate proceedings, the entire objections raised by the assessee has been complied and copy of reasons recorded were submitted to the assessee. The notice has been issued u/s 148 on the basis of statements recorded during the survey proceedings which is very much clear from the copy of reasons recorded but not on the basis of search, therefore the arguments advanced by the Id. AR regarding its validity is not correct. The Id. CIT(A) has incorporated in his order the reasons recorded and copy of approval granted by the Pr.CIT u/s. 151 of the Act. The Id. DR relied on the order in the case of Singhad Education Society reported in [2017] 84 taxmann.com 290 (SC) and the judgment in the case of Abhisar Buildwell (supra) at para no.3.1 (iii). She further submitted that the AO before reopening the case has followed the procedure in entirety. The DIN is also quoted in the respective documents. She

further submitted that during the course of assessment proceedings, the assessee was unable to provide the details of cash deposits in terms of section 68 of the Act. She further submitted that in the case of interest payment, the assessee has not deducted TDS and genuineness of the payment is also doubted. Therefore, the AO has also doubted the genuineness of expenditure incurred by the assessee for want of proper evidence. Therefore the AO has correctly disallowed interest u/s. 37 of the Act.

8. Considering the rival submissions, we note that a survey was conducted in the case of in the case of M/s Xentrix Studios P Ltd on 03.05.2017 and statements were recorded u/s. 131 of the Act, of Mr. D.S. Nandish which was reaffirmed in the statement recorded u/s. 132(4) during the search proceedings that he has deposited cash in various bank accounts. The AO on the basis of information recorded during the survey in the case of Shri D.S. Nandish the reasons have been recorded for issue of notice and sought approval from the Pr.CIT which is incorporated by the CIT(A) in his order. The very basis for reopening of the case is on the basis of survey conducted in the case of M/s. Xentrix Studios P Ltd. but not on the basis of search conducted u/s. 132. In view of this, the notice issued by the AO u/s. 148 is correct. Therefore the assessee's objection raised that notice should be issued u/s. 153C fails. For the sake of convenience, we are reproducing the reasons recorded in ITA No.1568/Bang/2024:-

“ Reasons for reopening of the Assessment in case of M/s N 9 Sports & Leisure Holdings P Ltd for Asst Year 2013-14 u/s 147 of I T Act

1. Brief Details of the assessee: The assessee filed its return of income on 26.09.2013 declaring loss of Rs.27,771/-. In the return of income filed the assessee has declared interest income of Rs.1,37,398/- from bank fixed deposits. There is no other income declared in the return of income.

2. Brief Details of the information collected/received by the AO : Survey u/s 133A of the Income-tax Act, 1961 was carried out in the case of M/s Xentrix Studios P Ltd on 03.05.2017. During the survey, it was found that Shri D S Nandish had floated several companies/firms/business concerns and utilised the bank accounts of these entities for depositing unaccounted and unexplained cash. It was also found that none of these entities were carrying any business activities, nor maintaining any books of account for the transactions in bank accounts and also not filing their returns of income. Shri D S Nandish accepted in his statement that entire cash deposits in these bank accounts were made by him from his unaccounted sources of income. During survey, it was found that there were cash deposits of Rs.33,22,000/- in the bank account of M/s. N 9 Sports & Leisure Holdings P Ltd during the Fin Year 2012-13. In absence of any books of accounts, documentary evidence or explanation to show the sources of unaccounted cash deposits, Mr D S Nandish admitted to disclose an additional income of Rs.32,22,000/- in the hands of M/s N 9 Sports & Leisure Holdings P Ltd in the capacity of promoter/director of the company.

3. Analysis of information collected/ received : From the above information received, it is clear that M/s N 9 Sports & Leisure Holdings P Ltd was having other income for Asst Year 2013-14 and had not declared the same in its return of income.

4. Enquiries made by the AO as sequel to information collected /received : On verification from the ITD system, it is found that return of income filed for Asst Year 2013-14 by the assessee company does not declared its true income.

5. Findings of the AO : It is found that the assessee is having bank account no. 845603477 with Axis Bank, Karthik nagar, Bangalore. There were total cash deposits of Rs.32,71,500/- in bank account during the period 01.04.2012 to 31.03.2013. A copy of bank statement for the period 01.04.2012 to 31.03.2013 is on record. Further, it is seen that the assessee has made many transactions in its bank account but the same is not declared in its return of income filed.

6. Basis of forming reason to believe and details of escapement of income : On going through the statements of Shri D S Nandish dated 03.05.2017 and 28.08.2017 and enquiries made thereafter, it is clear that the assessee company was having unexplained income of Rs.32,71,500/- chargeable to tax in A.Y. 2013-14 and has not filed its return of income. After due consideration of the facts of the case, I have reason to believe that income chargeable to tax has escaped assessment for Asst Year 2013-14.

7. Applicability of the provisions of section 147/151 to the facts of the case: In this case return of income was filed for the Asst Year 2013-14, but no scrutiny assessment u/s 143(3) was made. Accordingly in this case, the only requirement to initiate proceedings u/s 147 is reason to believe which has been recorded above as per para 5 & 6.

It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment as stipulated under section 2(40) of the Act was made and the return of income was only processed u/s 143(1) of the I T Act. In view of the above, the provisions of clause (b) of Explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment. In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 has been obtained separately from Pr Commissioner of Income Tax as per the provisions of section 151 of the Act.”

9. The AO has also communicated copy of the reasons recorded with proper DIN to the assessee which is clear from the remand report submitted by the AO. The AO has made addition u/s. 68 of the Act. for want of explanation in terms of section 68 of the Act. On going through the above reasons recorded, we note that assessee has not maintained any books of account. Therefore, addition made u/s. 68 will not survive. The pre-condition for invoking section 68 is any amount credited in the books of account. For the sake of reference, we are reproducing section 68 of the Act:-

“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, satisfactory, the sum so credited may be charged to income-tax as the income of the assessee of that previous year :

[Provided that where the assessee is a company (not being a company in which the public are substantially interested), and the sum so credited consists of share application money, share capital, share premium or any such amount by whatever name called, any explanation offered by such assessee-company shall be deemed to be not satisfactory, unless—

(a) the person, being a resident in whose name such credit is recorded in the books of such company also offers an explanation about the nature and source of such sum so credited; and

(b) such explanation in the opinion of the Assessing Officer aforesaid has been found to be satisfactory:”

10. From the above section it is clear that the pre-condition to invoke section 68 is any sum 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. The assessing officer is very much sure while recording the reasons for reopening that the assessee has not maintained books of accounts. Here in the present case, it is clear that the AO himself is satisfied that no books of account was maintained by the assessee and therefore addition cannot be made u/s. 68. The coordinate bench of ITAT has explained the books of accounts in the case of DCIT vs GSNR Rice Industries S(P.) LTD REPORTED IN [2021] 128 taxmann.com 433 (Chennai - Trib.)/[2021] 90 ITR(T. In this judgement it has been held as under:-

“From the definition of 'books' or 'books of account', it is abundantly clear that books of account means regular books of account maintained by the assessee for any previous year to record day to day transactions of its business including ledgers, day-books, cash books, account books and other books. The term other books does not mean to include some dumb documents like diary, note book or deleted entries of computer CPU. The term other books refers to any other books which are relevant and in consonance with ledgers, day-books, cash books, account books, etc. Therefore, in order to include any other books of account maintained by the assessee within the ambit of term 'other books', those books must be relevant in the business of the assessee to keep track of transactions. Hence, other books refers to in the ordinary course of any business of the assessee are stock books maintained in the ordinary course of business to record movement of stocks, books of account maintained for recording salary and wages as required under the Wages Act and other statutory books prescribed under any other law. But, it does not include diary, note book and some other dumb documents maintained by any person for any reason. Thus, diary, note book and retrieved data from computer CPU are not books or books of account as defined under section 2(12A) and hence, those diary, note book and retrieved data cannot be considered as books for invoking provisions of sections 68 and 69/69A/69C.”

It has been held that if there is no books of account maintained, no addition can be made u/s. 68 of the Act. The above judgment is squarely applicable in the present case on hand.

11. Further the addition made by the AO towards interest payment u/s. 37 also fails. In this case, the very purpose of reopening of the case is not sustainable, then subsequent addition made by the AO which are not part of the very basis for reopening or part of the reasons recorded, therefore during the course of reassessment proceedings any further addition is made by AO is also not sustainable. Our view is supported by the decision of the coordinate Bench of ITAT Agra reported in [2014] 41 taxmann.com 380 in the case of Asha Kansal wherein it is held as under:-

“ 7. Section 147 provides that if the Assessing Officer has reasons 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 proceedings under this section." Explanation 3 to Section 147 inserted by Finance Act 2009 specifically provides that the "Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue has come to the notice subsequently in the course of proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under such Section 2 of Section 148". Elaborating upon the scope of these provisions, and dealing with the question whether any addition can be made on account of issues other than the issue in respect of which reasons for reopening have been recorded in a situation in which no additions are made for the reasons recorded, Hon'ble Bombay High Court, in the case of CIT v. Jet Airways

(I.) Ltd. [2011] 331 ITR 236/[2010] 195 Taxman 117, has observed as follows :—

'Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has the power to assess or reassess the income, which he has reason to believe had escaped assessment and also any other income chargeable to tax. The words "and also" cannot be ignored. The interpretation which the Court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words "assess or reassess such income and also any other income chargeable to tax which has escaped assessment", the words "and also" cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word "or". The Legislature did not rest content by merely using the word "and". The words "and", as well as "also" have been used together and in conjunction.

The Shorter Oxford Dictionary defines the expression "also" to mean 'further, in addition, besides, too'. The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the

proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the season to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from 1-4-1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.'

8. The legal position is thus clear. When the reasons for reopening the assessment itself is incorrect, as evidenced by the fact that the Assessing Officer accepts that position by not making related addition, no further additions can be made in the course of such reassessment proceedings. The very initiation of reassessment proceedings in such a case ceases to be of any effect. In other words, the resultant reassessment proceedings are rendered infructuous. The underlying principle is not difficult to fathom. When it is a position accepted by the Assessing Officer that no addition can be made on the basis of reasons for which reassessment proceedings were initiated, there cannot be any legal basis for the resultant reassessment proceedings either.

9. Taking the above principle to a little further, we find that whether such an addition is not made by the Assessing Officer himself or whether the Assessing Officer does not challenge the CIT(A) deletion of such additions made by the Assessing Officer, the legal situation remains the same. In both the situations, the Assessing Officer accepts that addition cannot be made on the basis of reasons recorded by him while reopening the assessment. The common thread in both these situations is that the Assessing Officer accepts the situation that based on the reasons recorded, while reopening the assessment, legally sustainable additions

cannot be made or deletion of such additions cannot be challenged. Once he accepts such a position, whether at the stage of assessment by not making the related addition, or at a later stage by not challenging CIT(A)'s order deleting such an addition, the reassessment proceedings are rendered infructuous because no other additions, even if any, made by the Assessing Officer can survive the legal scrutiny. It is also important to bear in mind that while deleting the addition before us, as we have seen earlier in this order, learned CIT(A) has given categorical findings which run contrary to the reasons recorded while reopening the assessment and yet the revenue authorities have not raised, either in appeal or by any other mode, even a whisper against such findings which have thus reached finality. While on this issue, it is also important to note that, as is the settled legal position, the reasons recorded for reopening the assessment are to be read exactly as these are recorded and it cannot be open to the Assessing Officer to fill in the gaps, even if any, while justifying the reassessment proceedings. Nothing can be added to these reasons nor anything can be deleted from the same. To highlight this aspect of the matter, we may refer to the following observations made by their Lordships in the case of Prashant S. Joshi v. ITO [2010] 324 ITR 154/189 Taxman 1 (Bom.).

'Sec. 147 provides that if the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may subject to the provisions of ss. 148 to 163, 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 the section. The first proviso to s. 147 has no application in the facts of this case. The basic postulate which underlines s. 147 is the formation of the belief by the AO that any income chargeable to tax has escaped assessment for any assessment year. The AO must have reason to believe that such is the case before he proceeds to issue a notice under s. 147. The reasons which are recorded by the AO for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided.

The reason recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well settled that the question as to whether there was reason to believe, within the meaning of s. 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the AO. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under s. 148.

10. A Division Bench of this Court speaking through Mrs. Justice Sujata Manohar (as the learned Judge then was) held thus in N.D. Bhatt, IAC v. I.B.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 s. 148 by virtue of the provisions of s. 148(2) at the relevant time. Only the reasons so recorded can be looked at for sustaining or setting aside a notice issued under s. 148. In the case of Equitable Investment Co. (P) Ltd. vs. ITO (1988) 73 CTR (Cal) 236 : (1988) 174 ITR 714 (Cal), a Division Bench of the Calcutta High Court has held that where a notice issued under s. 148 of the IT Act, 1961, after obtaining the sanction of the CIT 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 CIT has been obtained. The IT Department cannot rely on any other material apart from the report."

11. The same principle was reiterated in a judgment of the Division Bench of this Court in Hindustan Lever Ltd. v. R.B. Wadkar [2004] 268 ITR 332/137 Taxman 479 (Bom):

".....the reasons are required to be read as they were recorded by the AO. 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 AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. 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 AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons must be able to justify the same based on material available on record. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit of making oral submission, otherwise, the reasons which are lacking in material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.'

10. For the reasons set out above, and in view of the fact the Assessing Officer has not challenged the CIT(A)'s deletion of quantum addition made on the basis of reasons recorded for reopening the assessment, we hold that the reassessment proceedings were infructuous and no other additions could have been made by the Assessing Officer either. As we have also observed earlier in this order, learned CIT(A) has given categorical findings which run contrary to the reasons recorded while reopening the assessment and yet the revenue authorities have not raised, either in appeal or by any other mode, even a whisper against such findings which have thus reached finality. In response to specific question by us, learned Departmental Representative could not find out any infirmity in the action of the CIT(A) or factual inaccuracies in the observations made by the CIT(A) on this issue. The very reassessment proceedings were also thus based on, what is now a settled position, erroneous reading of facts which cannot lead to a legally sustainable addition. The reassessment proceedings were thus infructuous and invalid. The assessee succeeds for this short reason alone. In any case, the reasons recorded while reopening the assessment are disapproved, on merits, by the CIT(A) and those findings remain unchallenged and controverted. In this view of the matter, we also see no need to deal with many other erudite contentions raised by the learned counsel. All those aspects will be academic in the situation before us.”

12. Respectfully following the above decision, we delete the addition u/s. 37 . The ld. DR has also filed written synopsis and relied on the case laws on the merits as well as on legal issue of the addition which do not support the case.

13. In the result, the appeal of the assessee for AY 2013-14 is partly allowed.

14. To sum up all the appeals are partly allowed. Copy of the common order passed shall be kept in the respective case file.

Pronounced in the open court on this 24th day of March, 2025.

Sd/-

(SOUNDARARAJAN K.)
JUDICIAL MEMBER

Sd/-

(LAXMI PRASAD SAHU)
ACCOUNTANT MEMBER

Bangalore,
Dated, the 24th March, 2025.

/Desai S Murthy /

Copy to:

1. Appellant
2. Respondent
3. Pr. CIT
4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.