

आयकर अपीलिय अधिकरण "C" न्यायपीठ मुंबई में।

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

श्री महावीर सिंह, उपाध्यक्ष एवं श्री एम. बालगणेश, लेखा सदस्य के समक्ष ।

BEFORE SRI MAHAVIR SINGH, VP AND SRI M. BALAGANESH, AM

आयकर अपील सं./ ITA No. 3191/Mum/2017
(निर्धारण वर्ष / Assessment Year 2009-10)

आयकर अपील सं./ ITA No. 3192/Mum/2017
(निर्धारण वर्ष / Assessment Year 2011-12)

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| M/s Ideacount Education Pvt. Ltd. 101/108, 1 st Floor, Shoppers Point, S.V. Road, andheri (West), Mumbai-400 058 | बनाम/ Vs. | The Asst. Commissioner of Income Tax, Aayakar Bhavan, M.K. road, Churchgate, Mumbai-400 020 |
| (अपीलार्थी / Appellant) | | (प्रत्यर्थी/ Respondent) |
| स्थायी लेखा सं./PAN No. AABCF1631Q | | |

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|------------------------------------|---|-------------------------|
| अपीलार्थी की ओर से/ Appellant by | : | Shri Dr. K Shivram, AR |
| प्रत्यर्थी की ओर से/ Respondent by | : | Shri LKS Dehiya, CIT DR |

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| सुनवाई की तारीख / Date of hearing: | 16.06.2021 |
| घोषणा की तारीख / Date of pronouncement: | 23.07.2021 |

आदेश / O R D E R

महावीर सिंह, उपाध्यक्ष के द्वारा /

PER MAHAVIR SINGH, VP:

These appeals of assessee are arising out of the orders of the Commissioner of Income Tax (Appeals)-4, Mumbai, [in short CIT(A)], in appeal Nos. CIT(A)-4/IT-30/ACIT-16(1)/2015-16 & CIT(A)-4/Tr-377/Appeal(3)/ACIT-11(1)/2014-15 dated 13.02.2017 & 14.02.2017.

The assessments were framed by Asst. Commissioner of Income Tax, Circle-16(1) & 11(1), Mumbai (in short 'ACIT/ ITO) for Assessment Years 2009-10 & 2011-12 vide order dated 27.03.2015 & 30.03.2014 under section 143(3) read with section 147 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act').

2. The first issue in this appeal of assessee is against the order of CIT(A) confirming the action of the Assessing Officer in reopening under section 147 read with section 148 of the Act. For this, assessee has raised the following two grounds:-

"1. On the facts and circumstances of the case and in law, the learned commissioner of Income Tax (Appeals) has erred in confirming the reopening of assessment under section 147 of the Act.

2. Without prejudice to the aforesaid ground of appeal No.1, on the facts and circumstances of the case and in law, the learned assessing officer has erred in making addition under section 68 of the Act, under the situation wherein the assessment was re-opened under section 147 of the Act only for assessing the extra premium charge on allotment of shares, whereas no addition was made in this re-assessment order under section 143 read with section 147 on account of such extra premium charged."

3. Briefly stated facts are that the assessee company is engaged in the business of trading and production of Animation Visual Effects and Gaming's. The assessee for the relevant assessment year 2009-10 filed its return of income on 30.09.2009 declaring a loss of Rs. 3,73,34,214/- and therefore revised its return of income, revising the loss at Rs.4,08,06,083/-. The Assessing Officer framed the assessment under section 143(3) of the Act on 23.12.2011 assessing the loss at Rs.3,67,29,710/-. Subsequently, the Assessing Officer received intimation from the DGIT (Investigation) Mumbai vide letter bearing No. DGIT(Inv)/Corr. Field/ 2012-13 dated 26.12.2012, wherein it was stated that the assessee is a beneficiary of bogus bills of purchases issued by few of the hawala parties, which was received from Sales Tax Department, Govt. of Maharashtra. Accordingly, notice under section 148 of the Act was issued vide dated 23.03.2014 and reassessment was completed under section 143(3) read with section 147 of the Act by making addition of bogus purchase at ₹1352.00/- vide order dated 10.01.2014. Further, after completion of this reassessment, the Assessing Officer issued further notices under section 148 of the Act on 29.03.2014 and in response to the same notice, the assessee vide letter dated 09.02.2015 requested the Assessing Officer to treat the revised return of income filed by the assessee as return in pursuant to this notice under section 148 of the Act. The assessee also requested copy of reasons for reopening of assessment in pursuant to notice under section 148 of the Act dated 24.03.2014. The Assessing Officer vide notice under section 142(1) of the Act vide No. ACIT-16(1)/142(1)/401/2014-15 dated 03.03.2015 along with show cause notice also provided reasons for reopening and the relevant reasons as provided in Para 2 of the letter at page 1 and 2 reads as under: -

"Please refer to this office notice under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'Act') dated 29.03.2014 issued and served on you by speed post on 03.04.2014, wherein you were required to deliver return of income within 30 days on receipt of this notice. In response to the said notice, there was no compliance. However, vide order representative's letter dated 09.02.2015, you have requested to treat the revised return of income filed on 25.09.2010 as return filed in response to notice under section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'Act') and also requested to give the reasons for re-opening the assessment.

2) The reasons for re-opening is given hereunder:

In this case information has been received from Chief Commissioner of Income Tax, Mumbai vide letter No. Mum/CCIT/Coord/ U-III/Share Premium/ 2013-14/ 1514 dated 10.02.2014 that the assessee, during Financial Year 2008-09, has issued shares on huge premium. On collecting information it came to notice that during Financial Year 2008-09 assessee has issued 10,00,000 shares (having face value of ₹10) at a price of ₹115 per share. However, book value of share of

the assessee, as calculate below, is ₹18.63. Thus, the assessee has issued the share at the price much higher than the fair book value of the shares.

| | | |
|---------------------------------------|-----------------------------------|-------------------------------|
| Fair Market Value of Unquoted Shares= | (A-L) (Total Number of shares) | (66,53,95,213) 1,00,00,000 |
| A | | |
| BOOK VALUE OF ASSETS IN B/S | | ₹(-) 66 16,60,00,000 |
| Less: P&L Debit Balance | | 4,86,80,711 |
| | Total A | 11,73,19,289 |
| L | | |
| BOOK VALUE OF LIABILITIES IN B/S | | 16,60,00,00 |
| Less: Liabilities on Provision | | 6,73,12,998 |
| | Total L | 9,86,87,002 |

*Fair Market Value of Unquoted Shares = (A-L)/
(No. of Shares) 11,73,19,289-9,86,87,002*

10,00,000

=Rs.8.63

The assessee has sold the shares for the considerations at much higher price than the fair price of the shares. The extra consideration is amounting to ₹9,86,87,002/- (₹(115-18.63) X 10,00,000]. Therefore, this is income of the assessee from the source other than the defined sources of income. Therefore, it is treated as income of the assessee from other sources.

Thus an amount of ₹9,86,87,002/- has escaped to assessment due to failure on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment.

Therefore, I have reason to believe that an amount of ₹9,86,87,002/- has escaped assessment and I am satisfied that this is a fit case, for re-opening of assessment within meaning of section 147 of the Income Tax Act, 1961."

4. As per the above reasons, the assessee has issued 10 lakh shares at a price of ₹148 per share, however, the book value per share was ₹118.63 according to Assessing Officer, hence, the sum of ₹9,86,87,002/- being excess on account of charged over book value had escaped taxability and same has to be taxed as income from other sources. During the course of reassessment proceedings, the Assessing Officer issued notices under section 143(2) along with 142(1) of the Act and noted that the assessee failed to justify the premium or prove the identity or creditworthiness or genuineness of the transactions then addition under section 68 of the Act will be made. The assessee vide letter dated 26.03.2015 filed various details regarding receipt of share application money and share allotment to two major investors who paid premium of ₹148 per share. The parties were i.e Business Match Services India Ltd. share in number 5 lakh and and Walkwater Media Ltd. Share in number 5 lakh at a share premium of Rs.148 per share. The assessee has also given details that these two major investors were allotted 10 lakh shares (party paid up) on 30.09.2008. Similarly, the

promoters were also allotted shares on 22.09.2008 and following are the details :-

| Sr. No | Name | Share Capital |
|--------|--------------------------|---------------|
| 1. | Amit Gupta | 15,000 |
| 2. | Manish Goel | 15,000 |
| 3. | Naveen Kumar Gupta | 2,65,000 |
| 4. | Navneet Singh | 1,00,000 |
| 5. | Niyati Turakhia | 3,10,000 |
| 6. | Reno Subramaniam | 15,000 |
| 7. | SachinBhatnagar | 15,000 |
| 8. | SupreetJhamrah | 1,00,000 |
| 9. | Tajinderjeet Singh | 15,000 |
| 10. | Team India Managers Ltd. | 50,000 |

5. The Assessing Officer framed the reassessment order under section 143(3) read with section 147 of the Act dated 27.03.2015 making addition of share premium amount of Rs.14.80 crores and share capital of Rs.80 lakh received from Businessmatch Services I. Pvt. Ltd. & Walkwater Media Ltd. Further, addition of share capital of Rs. 1.70 crores was made being share capital received from promoters, shareholders. Thereby, the total addition made under section 68 of the Act was Rs.16.50 crores. The assessee challenged the reopening before CIT(A) who confirmed the action of the Assessing Officer by observing in Para 3.2 as under:-

"I have considered the findings of the Assessing Officer as well as rival submission of the Appellant, carefully. I find that in this case information was received by the Assessing Officer from the Office of the CCIT through letter No. Mum/CCIT/Co-ordination/U-III/Share Premium/2013-14/1514 dated 10.02.2014 that

during the year the Assessee has received share on huge premium against the market value of shares. The market price of shares is of Rs.18.63 whereas the Assessee has charged share premium @Rs. 115/- per share. Thus, some information was there giving basis for Assessing Officer to form opinion that a huge premium had been charged without any visible reason, hence such transaction is not genuine one. Thus, there is some material on the basis of which belief has been formed. Therefore, the reopening of completed assessment is approved because of the reason that after completion of escapement assessment, the new information was received that huge premium was charged which was against the market value of share hence, escapement assessment was there. Therefore, in such facts & circumstances, escapement assessment proceeding is worth approval. At the time of reopening of assessment, the Assessing Officer is not required to establish escapement of income vide: Srikrishna (P) Ltd. v/s. CIT 221 ITR 535 (SC). It is also to be noted that reassessment is permissible even if information is obtained after proper investigation of material on records or from any inquiry or research into facts or law. Such proposition is there in the case of CIT & Anr. v/s. Rinku Chakraborty 56 DIR 227(Kar) and

Kalyanji Mavji & Co. v/s. CIT 102 ITR 287 (SC). Here in this case, it was found that shares have been issued to the company not having .real capacity and Appellant was a loss making company. Therefore, no genuine investor could invest on higher premium in such company unless there is something else in such process. Such element was detected only later on hence, information were collected by the Department and was forwarded to the concerned Assessing Officer for necessary action as per law. In this case, the Ld. Assessing Officer after receiving such information has proceeding with new reasoning for reopening of completed assessment. Therefore in such circumstances, issue of notice u/s.148 and making of escapement assessment is approved.”

Aggrieved, now assessee is in appeal before us on the issue of reopening.

6. We have heard the rival contentions and gone through the facts and circumstances of the case. The learned Counsel for the assessee argued that the reopening was done by recording the reasons and as per the reasons, the Assessing Officer has invoked the provisions of Section 56 of the Act. As per the above reason, according to Assessing Officer that the higher premium charged by the assessee than the fair price of the shares, it is to be treated as income from other sources. The learned Counsel for the assessee stated that the Assessing Officer while framing the assessment has made addition under section 68 of the Act.

He took us to the assessment order and drew our attention to Para 14 of the assessment order, which read as under: -

"In the view of above legal judgments and facts of the case, assessee company failed to establish the creditworthiness and genuineness of Investor parties. Thus it is concluded that amount credited in the books of account i.e., an amount of Rs.16,50,00,000/- received as share capital & share premium money is treated as unexplained credit u/s 68 of the I. T. Act, 1961 and added back to the income of the assessee. Penalty proceedings u/s 271(1)(c) of the I.T. Act, 1961 are initiated separately for furnishing inaccurate of income and concealment of income."

7. In view of the above, the learned Counsel for the assessee stated that the Assessing Officer has no jurisdiction to make addition under section 68 of the Act because no addition has been made of the income for which notice under section 148 of the Act is issued. Hence, he argued that there was also no reason to belief that income has escaped assessment at the time of issuance of notice under section 148 of the Act qua the addition made by Assessing Officer under section 68 of the Act. The learned Counsel for the assessee relied on the decisions of Hon'ble Bombay High Court in the case of CIT Vs. Jet Airways (I) Limited [2011] 331 ITR 236 (Bom) and the relevant Para of Hon'ble High court cited before which read as under:-

".....If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the AO 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 s. 148(2), the AO 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 s. 147 w.e.f. 1st April, 1989 clearly stipulated that the AO 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..

.....Section 147 has this effect that the Assessing Officer has to assessee or reassess the income ("such income") which escaped assessment and which the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped

assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee”

8. The learned Counsel for the assessee also relied on the decision of Hon'ble Bombay High Court in the case of Vodafone India Services P Ltd. v. UOI (2014) 50 taxmann.com (Bom) dtd 10.10.2014, wherein it is held that an amount received on issue of shares at a premium is not income because it is capital receipt. It was contended that the above decision of Hon'ble Bombay High Court is accepted by the Revenue and CBDT also issued a Circular F.No 500/15/2014/APA-1 dtd. 29.01.2015. It was contended that the ultimately no addition was made under section 56 of the Act on share premium for which reopening was done after recording of reasons. Hence, reopening is bad in law in view of Hon'ble Bombay High Court decision in Jet Airways (I) Limited. On the other hand, the learned Sr. DR heavily relied on the order of Assessing Officer and that of the CIT(A). Further, the learned Counsel for the assessee relied on the following cases:-

(a) Olwin Tiles (India) P. Ltd. Vs. DCIT- High Court of Gujarat – (2016) 66 taxmann.com 8 (Gujarat).

(b) Trans Corporate Advisory Services (P.) Ltd- High court of Madras – (2017) 77 taxmann.com 21 (Madras)

9. We noted from the facts that the original assessment was framed under section 143(3) of the Act by the Assessing Officer on 23.12.2011 and subsequently, assessment was also reopened and assessment was framed under section 143(3) read with section 147 of the Act vide order dated 10.01.2014. This is second reassessment and for this, the Assessing Officer issued notices under section 148 of the Act on 29.03.2014. In view of the above reasons recorded for the reopening of the assessment done to tax Rs. 9,86,87,002/- being excess the premium charged as revenue income under section 56 of the Act. The reasons recorded for the same, the relevant read as under:-

".....The assessee has sold the shares for the considerations at much higher price than the fair price of the shares. The extra consideration is amounting to ₹9,86,87,002/- (₹(115-18.63) X 10,00,000]. Therefore, this is income of the assessee from the source other than the defined sources of income. Therefore, it is treated as income of the assessee from other sources... "

10. Ultimately in the reassessment order passed under section 143(3) of the Act read with section 147 of the Act, no addition was made under section 56 of the Act of share premium as recorded in the reasons. However, the Assessing Officer made addition of share capital under

section 68 of the Act. In our view no addition under section 68 of the Act on account of share capital could have been made only if addition under section 56 of the Act on share premium was also made. This is because Assessing Officer had no reasons to belief that income has escaped assessment under section 68 of the Act being cash credit on account of share premium or share application money or share capital as the case may be. We noted that the assessee's issue is squarely covered by the decision of Hon'ble Bombay High Court in the case of Jet Airways (supra).

11. The assessee has also argued that reopening is bad in law on account of change of opinion because both increase in share capital and share premium is completely disclosed in the balance sheet and in the original assessment proceedings, entire details of share capital were available before the Assessing Officer in respect of these two companies Business Match Services India Ltd. and Walkwater Media Ltd. Further, the complete details of share allotted to promoters were also available. Hence, it was contended that proceedings are nothing but change of opinion and even from the reasons recorded it is clear that the reopening is not based on any new material. However, since, we have already quashed the reopening by following the Hon'ble Bombay High Court Judgement in the case of Jet Airways (supra) we need not to go into the change of opinion of the assessee. Even we need not to go into the merits of the case, because we have already allowed the jurisdictional issue of the assessee. This appeal of assessee is allowed.

12. Coming to assessee's appeal in ITA No.3192/Mum/2017 for AY 2011-12.

13. At the Outset, it is noticed that the first ground of assessee's appeal is as regards to the order of CIT(A) not allowing sufficient opportunity to argue his case. For this assessee has raised the following ground No.1:-

"1. At the outset, the learned CIT(A) has erred in not giving sufficient opportunity to represent the case and as a result decided the appeal on Merit.

14. The learned Counsel for the assessee took us through the order of the CIT(A) and shown us that order of CIT(A) is ex-parte and a non-speaking order. When these facts were confronted to the learned Sr. DR, he fairly agreed that the matter can be restored back to the file of the CIT(A). As both consented that the opportunity of being heard is to be provided to the assessee to represent his case and the order of CIT(A) is ex-parte, we set aside the same and restore this appeal back to his file for fresh adjudication. The appeal of assessee is allowed for statistical purposes.

15. In the result, the appeals of the assessee are allowed for statistical purposes.

Order pronounced in the open court on 23.07.2021.

Sd/-

(एम. बालगणेश / M. BALAGANESH)

(लेखा सदस्य / ACCOUNTANT MEMBER)

Sd/-

(महावीर सिंह / MAHAVIR SINGH)

(उपाध्यक्ष / VICE PRESIDENT)

मुंबई, दिनांक/ Mumbai, Dated: 23.07.2021

सुदीप सरकार, व. निजी सचिव/ Sudip Sarkar, Sr.PS

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

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT(A)
4. आयकर आयुक्त / CIT
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई /
DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार/Asstt. Registrar/ व. निजी सचिव/Sr. Private
Secretary/

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai