

**IN THE INCOME TAX APPELLATE TRIBUNAL
(DELHI BENCH 'G' : NEW DELHI)**

**BEFORE SHRI ANIL CHATURVEDI, ACCOUNTANT MEMBER
and
SHRI KULDIP SINGH, JUDICIAL MEMBER**

(THROUGH VIDEO CONFERENCE)

**ITA No.3762/Del./2018
(Assessment Year : 2009-10)**

M/s. SJM International Ltd.,
561/2, Udyog Nagar,
Swarn Park, Mundka,
New Delhi – 110 041.

vs. DCIT, Circle 24(2),
New Delhi.

(PAN : AAACS3173M)

(APPELLANT)

(RESPONDENT)

ASSESSEE BY : Shri P.C. Yadav, Advocate
REVENUE BY : Shri Prakash Dubey, Senior DR

Date of Hearing : 12.07.2021
Date of Order : 09.08.2021

ORDER

PER KULDIP SINGH, JUDICIAL MEMBER :

Appellant, M/s. SJM International Ltd. (hereinafter referred to as 'the assessee') by filing the present appeal sought to set aside the impugned order dated 08.03.2018 passed by the Commissioner of Income-tax (Appeals)-28, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

- “1. That the order of CIT(A) is bad in law and on facts.**
- 2. On the facts and under the circumstances of the case, the assessment framed by the AO u/s 147/143(3) is void ab initio as the jurisdiction assumed by the AO u/s 147 is bad in law and on facts.**
- 3. On the facts and under the circumstances of the case, the jurisdiction assumed by the AO u/s 147, is bad in law, as the AO has presumed existence of non-existing facts/ incorrect facts.**
- 4. On the facts and under the circumstances of the case the AO has erred in relying on the statement of Sh. Aseem Gupta, ignoring that statements recorded on oath under survey have no evidentiary value.**
- 5. The AO has further erred in overlooking the guidelines of CBDT vis-a-vis relying on the statement of third party without there being any cross examination.**
- 6. The Jurisdiction assumed by the AO u/s 147 read with 148 after the expiry of four years from the end of relevant assessment year, is bad in law as there is no whisper in the reasons recorded that there is failure on the part of assessee to disclose the material facts fully and truly, particularly where original assessment has been made u/s 143(3) of the Act. .**
- 7. The Jurisdiction assumed by the AO u/s 147 read with 148 is bad in law as it is a case reopened after the expiry of four years from the end of relevant assessment year, and hence it is incumbent on AO to satisfy the requirements of the proviso of section 147.**
- 8. On the facts and circumstances of the case the AO has failed to appreciate that for assuming jurisdiction u/s 147 there must be reason to believe and the jurisdiction cannot be assumed for scrutinising the returns filed u/s 139(1) of the Act.**
- 9. Without prejudice to the above it is settled position of law that jurisdiction u/s 147 cannot be assumed for reappraisal of the already examined facts, as per the principle of change of opinion.**
- 10. Without prejudice to the above the sanction accorded by the CIT was mechanical as is evident from the sanction granted u/s 151 of the Act.**
- 11. The CIT (A) has erred in sustaining the addition of Rs.50,00,000/- as unexplained cash credit u/s 68 ignoring that the assessee has successfully discharged his burden and the AO failed to enforce the attendance as per the provisions of section 131 of the Act.**

12. The CIT (A) has erred in law and on facts in sustaining the additions made by the AO ignoring that AO has failed to refute the documentary evidence filed by assessee vis-a-vis establishing the ingredients of section 68.

13. The CIT (A) has erred in sustaining the direction to charge interest u/s 234B and 234A.”

2. Briefly stated the facts necessary for adjudication of the controversy at hand are : Assessee company filed return of income for AY 2009-10 on 29.09.2009 which was processed under section 143 (1) of the Income-tax Act, 1961 (for short ‘the Act’). Thereafter, assessee’s case was reassessed at the returned income of Rs.58,49,432/- on 27.03.2014 u/s 147/143(3) of the Act. Again, AO received information from Investigation Wing vide letter dated 15.03.2012 that assessee had obtained accommodation entries amounting to Rs.50,00,000/- under the garb of share capital/share premium from Aseem Gupta group, whose residential and business premises were searched/surveyed by the Investigation Wing on 26.03.2010. Details of share capital/share premium are as under :-

Name of Company used for providing Accommodation entry	Cheque/ Instrument	Cheque Date	Bank Name and address	Amount
Moderate Credit Corp Ltd.	RTGS	09.03.2009	Corp Bank, CP, New Delhi	17,00,000
Moderate Credit Corp Ltd.	RTGS	12.03.2009	Corp Bank, CP, New Delhi	8,00,000
Moderate Credit Corp Ltd.	RTGS	24.03.2009	Corp Bank, CP, New Delhi	25,00,000

3. Accordingly, AO has issued a notice u/s 148 of the Act annexed with reasons recorded. On receipt of notice u/s 148 of the Act, assessee has filed return of income and has also filed reply to explain the receipt of share application money. Declining the contentions raised by the assessee, AO proceeded to conclude that the assessee has taken accommodation entries amounting to Rs.50,00,000/-, the immediate source of this amount was found in the entities controlled by Aseem Gupta and thereby made an addition of Rs.50,00,000/- as the assessee has failed to prove the genuineness of the transactions and assessed the total income at Rs.1,08,49,430/-.

4. Assessee carried the matter before the Id. CIT (A) by way of filing appeal who has confirmed the addition by dismissing the appeal. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

5. We have heard the Id. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

6. Ld. AR for the assessee challenging the impugned order passed by the Id. CIT (A) contended inter alia that AO while recording the reasons for reopening has recorded incorrect facts;

that AO has reopened the assessment without applying independent mind; that there was no failure on the part of the assessee to disclose the material facts fully and truly during the assessment proceedings; that the Id. CIT (A) has also not applied his independent mind rather accorded mechanical approval; that reopening in this case amounts to “change of opinion” and relied upon the decisions rendered by Hon’ble Supreme Court, Hon’ble High Courts and coordinate Bench of the Tribunal to be discussed in the succeeding paragraphs.

7. Ld. DR for the Revenue, on the other hand, relied upon the order passed by the AO as well as Id. CIT (A) and further contended inter alia that when the assessee has not disclosed share premium receipt, the information supplied by Investigation Wing from the case of Aseem Gupta was an additional fact on the basis of which assessment has been framed; and that valid approval has been accorded by the Id. Addl. CIT/Pr.CIT after perusing the entire record.

8. Undisputedly, original return of income filed by the assessee on 29.09.2009 was processed u/s 143(3) of the Act and thereafter, on receipt of information from CIT, Central-II, New Delhi, assessee’s case was reopened and assessment was framed u/s 147 read with section 143(3) of the Act vide order dated 27.03.2014. It

is also not in dispute that again on 22.03.2016, reasons were recorded on receipt of information from Investigation Wing and case of the assessee was reopened second time. It is also not in dispute that when the assessee's case was reopened for the first time information as to the receipt of share application money of Rs.50,00,000/- by the assessee from entity, namely, M/s. Moderate Credit Corp Ltd. of Aseem Gupta group of companies was available with the AO and again on receipt of some information from the Investigation Wing, case was reopened second time.

9. Before proceeding further, we would extract the "reasons recorded" by the AO for the purpose of reopening as under :-

"Reasons for reopening the case of M/s SJM International Limited, AY 2009-10, u/s 147/148 of the Income tax Act,1961:-

As per information received from Commissioner of Income tax, Central-II, New Delhi vide his letter F.No.CIT©-II/2011-12/2068 dated 15.03.2012 the above assessee has received and is a beneficiary of accommodation entries provided by entry operator Sh Aseem Kumar Gupta, CA (Annexure-A). The Investigation wing of the department had carried out search/survey operations at various residential and business premises of the entry operator Sh Aseem Kumar Gupta group on 26.03.2010. As informed by the Investigation wing of the department, Sh Aseem Gupta has admitted to provide accommodation entries to several beneficiaries with the help of several bank account opened in the name of several proprietary concerns and companies in which either he himself, or his employees, were director or proprietor.

2. The general modus operandi of Sh. Aseem Kumar Gupta was to accept cash from the beneficiaries. The cash was deposited in the bank accounts and cheques were then issued to the beneficiaries. In order to disguise his transactions as genuine, Sh. Aseem Kumar Gupta has been following Layering of accounts, whereby cash was introduced in various

bank accounts in the names. of proprietary concerns of his employees and beneficiaries were issued cheques from one of his intermediary company after routing the funds among several intermediaries.

3. It is informed by the Investigation wing of the department that from the verification of the documents seized, it clearly appears that the following accommodation entries were provided from various paper companies of Sh. Aseern Kumar Gupta group to the above assessee:

Name of the Company used for providing accommodating Entry	Cheque/ Instrument	Cheque Date	Bank Name & Address	Amount
Moderate Credit Corp Ltd.	RTGS	09.03.2009	Corp Bank, CP, New Delhi	17,00,000
Moderate Credit Corp Ltd.	RTGS	12.03.2009	Corp Bank, CP, New Delhi	8,00,000
Moderate Credit Corp Ltd.	RTGS	24.03.2009	Corp Bank, CP, New Delhi	25,00,000
	TOTAL			50,00,000/-

I have gone through information of the CIT, Central Circle-II, New Delhi and have perused the documents/data available with this office viz, return of Income for AY 2008-09 and subsequent assessment years. The facts which have emerged out are as under:

1. The company has filed its return of income on 29.09.2009 for the assessment year 2009-10. Thereafter, the return was processed under 143(1) of the LT. Act at an income of Rs.58,49,430/- on 4.2.2011. However, the case was not selected for scrutiny.

2. Subsequent to the processing of the case u/s 143(1) of the IT Act,1961 on 04-02-2011, an information was received from CIT Central Circle-ii vide letter dated 15.3.2012.

3. In the light of the above information, return of the assessee for the A.Y. 2008-09 & 2009-10 (Placed as Annexure-B) was downloaded from the ITD. It is seen from the return of the assessee for the AY 2009-10 that it E-filed the return of income for the AY 2009-10 on 29.09.2009 declaring total income of Rs.28,49,430/-. The case was processed u/s 143(1) of the Income Tax Act, 1.961 on 04.02.2011. When compared with

the return of AY 2008-09 it is seen that assessee has received share capital of Rs.5,00,000/- and security premium Of Rs.45,00,000/- during FY 2008-09 relevant to AY 2009-10, thus total receipt is of Rs.50,00,000/- which exactly matches with the information received from CIT Central Circle-II, vide letter dated 15.3.2012.

4. During the course of survey u/s 133A, Sh. Aseem Kumar Gupta, admitted in his statement recorded under oath that he was deriving Commission income from the accommodation entry business (Answer of Q.3 of statement of Sh.Aseem Kumar Gupta during the course of survey).

In view of the facts as mentioned above, the case of the assessee company needs to be re-opened, as the above entries has been obtained through the entry operator. I, therefore, have reasons to believe that this amount of 50,00,000/- represents income of the assessee chargeable to tax and which has escaped assessment for the A.Y. 2009-10. In order to verify the genuineness, identification and creditworthiness of the aforesaid transactions, the case needs to be re-opened u/s 147 of the I.T. Act, 1961.

Since more than four years have been elapsed from the end of the relevant A.Y. i.e. 2009-10, necessary statutory approval u/s 151(2) of the LT. Act may kindly be accorded to issue notice u/s 148 for the A.Y. 2009-10 for the purpose of reopening of the case u/s 147 of the LT. Act. 1961. The limitation for issuing the notice is expiring on 31.03.2016.

Submitted for kind perusal and approval please.

Sd/-
22.03.2016
(RAGHUNATH)
Deputy commissioner of Income tax
Circle-23(2), New Delhi”

10. Ld. AR for the assessee contended that first of all, he would argued on the legal ground that, *“the assessment framed by AO u/s 147/143(3) of the Act is void ab initio as the jurisdiction assumed by the AO u/s 147 is bad in law and on facts.”*

11. Challenging the impugned reopening, ld. AR for the assessee contended that factually incorrect facts have been recorded by the AO in the “reasons recorded” just to justify the reopening that, “*this case was not selected for scrutiny*”, whereas it is admitted fact that this case was subjected to scrutiny and assessment was framed vide order dated 30.03.2003 u/s 147 read with section 143(3) of the Act. Bare perusal of the reasons recorded, available at pages 5 & 6 of the paper book, shows that AO has categorically recorded the fact that, “*this case was not selected for scrutiny*”. At the same time, AO recorded in the assessment order that earlier assessment was framed vide order dated 27.03.2014 u/s 147 read with section 143(3) of the Act. All these facts go to prove that the AO has proceeded with reopening and thereafter framing assessment as per his whims and fancies and not in accordance with law. We are of the considered view that when reasons recorded are based on factually wrong facts, assumption of jurisdiction is bad in law.

12. Further, it was contended by the ld. AR for the assessee that the entire investigation made by the AO is based upon information received from Investigation Wing and without applying his mind, he has made the addition. So, without independently examining and corroborating the information received from Investigation

Wing, AO has acted like a post office. AO to achieve the desired result has categorically ignored the fact of earlier assessment framed vide order dated 27.03.2014 wherein the issue as to receipt of accommodation entry of Rs.50,00,000/- was looked into and decided by the AO. Ld. AR for the assessee drew our attention qua the statement of Jasdeep Singh, Son of Baldip Singh recorded u/s 131(1) of the Act by Shri Vikas Singh, DCIT, Circle 7 (1), New Delhi (AO) during the assessment proceedings on the basis of which assessment u/s 147/143(3) dated 27.03.2014 was framed, available at pages 9 & 10 of the paper book. AO, during the remand assessment proceedings u/s 147/143(3) of the Act, put pertinent questions no.4 & 5 to Jasdeep Singh which are as under :-

“Que 4 I have asked query of share capital (balance sheet, P&L account, confirmation from company invested in your company as share capital) on 06.01.2014 and further on 21.01.2014 which were not submitted by your counsels till date? I am again confronting you the queries and you are directed to give your reply on the raised queries?”

Ans Since we have to call the details from Kolkata it is taken time and all these details are under compilation, therefore, I request you to grant some time to submit them through my counsels. The time till 14.03.2014 may be granted to submit the details.

Que 5 I have issued a notice to M/s. Moderate Credit Corporation Ltd. which is being confronted to you for furnishing confirmation of share capital, copy of ITR & bank statement but they not responded till date?

Ans After perusing your notice it is seen that the notice has been sent on the old address and the company M/s. Moderate Credit Corporation Ltd. has changed its address and the new address will be communicated to you by 13.03.2014.

Thereafter, you may sought details from them from the new address.”

13. Aforesaid questions and answers given thereto apparently bring on record the fact that due enquiry was made by the AO regarding share capital received from M/s. Moderate Credit Corporation Ltd. and after being satisfied, he accepted the returned income of the assessee vide order dated 27.03.2014 passed u/s 147/143(3) of the Act. AO while framing assessment order dated 27.03.2014 by way of first reopening recorded the fact that, *“the statement of assessee has been recorded u/s 131(1) of the Act and the facts were again verified during the course of statement under oath.”* These facts again go to prove that AO has reopened the assessment second time without application of mind solely on the basis of information received from the Investigation Wing which is bad in law.

14. Perusing of the reasons recorded and assessment order framed in this case further shows that, *“the entire reopening and assessment proceedings have been based upon the information received by the AO from the Investigation Wing of Income-tax, where Aseem Gupta had admitted to provide accommodation entries to several beneficiaries with the help of several bank accounts opened in the name of several proprietary concerns and*

companies in which either he himself or his employees were Director or proprietor.” Apart from this information, which has been taken as gospel truth by the AO, no independent enquiry has been made to collate and corroborate this statement and information provided by Aseem Gupta to Investigation Wing. Because Aseem Gupta has retracted his said statement recorded with Investigation Wing and this fact has been recorded by the **coordinate Bench of the Tribunal in the case of Sungrow Impex in ITA No.4183/Del/2019 order dated 19.03.2021** and proceeded to hold that statement recorded on oath of Aseem Gupta would have no evidentiary value against the assessee because he himself has retracted his own statement recorded on oath.

15. It is further contended by the Id. AR for the assessee that even the approval accorded in this case by Id. CIT is mechanical without applying his mind. Bare perusal of reasons recorded and show-cause notice issued does not disclose an iota of fact that there was failure on the part of the assessee to disclose fully and truly all material facts during assessment for escapement of income of Rs.50,00,000/-, but reasons recorded, show-cause notice issued and approval accorded are primarily based upon the reasons that an income of Rs.50,00,000/- has escaped assessment for AY 2009-10 due to failure of the assessee. Furthermore, while recording of

reasons for reopening AO has recorded factually incorrect facts that “this case was not subjected to scrutiny” whereas assessment order dated 27.03.2014 was passed u/s 147/143(3) of the Act in this case. All these material facts go to prove that ld. CIT has accorded approval in a mechanical manner without application of mind. Had he gone into factual details put forth by the AO for grant of approval, the approval would not have been granted. In these circumstances, we are of the considered view that mechanical approval granted by the CIT makes the entire assessment proceedings nullity.

16. As discussed in the preceding paras, the issue in question that assessee company has received accommodation entry from Moderate Corporate Corp. belonging to one Aseem Gupta, CA was subject matter of the earlier assessment framed u/s 147 read with section 143 (3) of the Act.

17. Ld. DR for the Revenue contended that return of income filed by the assessee company does not disclose the factum of share premium received, so this issue was not discussed earlier. We are of the considered view that when assessment was reopened for the first time this issue was before the AO who recorded statement of Jasdeep Singh qua the issue in question and has also during the assessment proceedings perused balance sheets, statement of

accounts, ITR, bank statements, to enquire into the share capital received by the assessee from M/s. Moderate Corporate Corp., reopening on the same issue certainly amounts to “change of opinion” which is not permissible under the law.

18. Hon’ble Supreme Court in the case of **CIT vs. Kelvinator of India Ltd. – (2010) 320 ITR 561 (SC)** while examining the identical issue as to reopening on the basis of change of opinion has held that it would give arbitrary power to the AO to reopen assessment u/s 147 on the basis of mere “change of opinion”, which cannot be per se reason to reopen. Operative part of the judgment is extracted for ready perusal as under :-

“6. 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 fulfillment 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 fulfillment 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. Hence, after 1st April, 1989, the Assessing Officer has power to reopen,

provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) I, 29), which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.-A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

For the aforesaid reasons, we see no merit in these civil appeals filed by the Department; hence, dismissed with no order as to costs."

19. Furthermore, it is contended by the Id. AR for the assessee that in the reasons recorded, AO has observed that he has assumed the jurisdiction to examine genuineness and creditworthiness of the alleged entities, which cannot be a ground to reopen the assessment.

20. Last sentence of the reasons recorded apparently goes to prove that AO has reopened assessment u/s 147/148 of the Act to

verify the genuineness, identification and creditworthiness of the aforesaid transaction. It is settled principle of law that jurisdiction u/s 147 can only be assumed to enquire into the escapement of income or on the basis of some tangible material. Identical issue has been decided by the **coordinate Bench of the Tribunal in case of SBS Realtors in ITA No.7791/Del/2018 order dated 01.04.2018** and held that jurisdiction u/s 147 of the Act cannot be assumed for verification of the cash credit entry by returning following findings :-

“The conclusion of the Assessing Officer at the end of the reasons recorded as noted above is contradictory. In the first two lines, the Assessing Officer has recorded the finding that the sum of Rs.2,35,00,000/- has escaped assessment but in the last two lines, he has recorded that the case is being reopened to verify the genuineness, identification and creditworthiness of the aforesaid transactions. If the case is being reopened for the purpose of verification of the genuineness, how can there be satisfaction of escapement of income. Any satisfaction with regard to escapement of income or otherwise can be recorded only after the verification of genuineness, identification and creditworthiness of the transaction and not earlier. Thus, we are of the opinion that the Assessing Officer has reopened the case under Section 147 for the purpose of verification of genuineness, identification and creditworthiness of the transactions mentioned in the information supplied by the DIT (Investigation) and this is what the Assessing Officer has concluded at the end of the reasons recorded for issue of notice under Section 148. Now, the question remains whether an assessment can be reopened under Section 147 for the purpose of verification of genuineness, Identification and creditworthiness of any transaction. In our opinion, the reply is clearly NO.”

21. In view of what has been discussed above, we are of the considered view that assessment framed in this case is not sustainable since the very jurisdiction assumed by the AO u/s 147

of the Act is bad in law and assessment framed on the basis of “change of opinion” u/s 147/143 (3) is void ab initio and is not sustainable in the eyes of law, hence quashed. Since assessment framed is not sustainable in the eyes of law on legal grounds, grounds raised on merits are not required to be disposed off. Consequently, appeal filed by the assessee is allowed.

Order pronounced in open court on this 9th day of August, 2021.

**Sd/-
(ANIL CHATURVEDI)
ACCOUNTANT MEMBER**

**sd/-
(KULDIP SINGH)
JUDICIAL MEMBER**

**Dated the 9th day of August, 2021.
TS**

Copy forwarded to:

- 1.Appellant
- 2.Respondent
- 3.CIT
- 4.CIT(A)-28, New Delhi.
- 5.CIT(ITAT), New Delhi.

**AR, ITAT
NEW DELHI.**