

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, KOLKATA
(Before Shri A.T. Varkey, J.M. & Dr.A.L.Saini, A.M.)

ITA No. 2144/Kol/2017 Asstt. Year : 2009-10

DCIT, C.C -2(1), Kolkata (Department)	Vs	M/s. Kakrania Properties Pvt. Ltd PAN: AADCK 6121C (Respondent)
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C.O No. 91/Kol/2017
[ITA No. 2144/Kol/2017 A.Y : 2009-10]

M/s. Kankaria Properties Pvt. Ltd PAN: AADCK 6121C (Cross Objector)	Vs	DCIT, C.C -2(1), Kolkata (Department)
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ITA No. 2145/Kol/2017 Asstt. Year : 2009-10

ACIT, C.C -2(1), Kolkata Department.	Vs	M/s. Liza Vincom Pvt. Ltd PAN: AAACL-5419R (Respondent)
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C.O No. 90/Kol/2017
[ITA No. 2145/Kol/2017 A.Y : 2009-10]

M/s. Liza Vincom Pvt. Ltd PAN: AAACL-5419R (Cross Objector)	Vs	ACIT, C.C -2(1), Kolkata (Department)
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Department by : Shri C.J. Singh, JCIT, Id.Sr.DR
Assessee by : S/Shri R.P. Agarwal, Sr.Advocate,
Nirav Sheth, FCA, Id.AR

Date of Hearing : 09-04-2019	Date of Pronouncement: 04-06-2019
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ORDER

Per Dr. A.L.Saini, A.M.:

The captioned two appeals filed by the Revenue and two cross objections filed by the respective Assessee, pertaining to assessment year 2009-10, are directed against the separate orders passed by the Id. Commissioner of Income Tax (Appeals), Kolkata, in Appeal Nos. 11247/CIT(A)-20/Kol/CC-2(1)/16-17 and 11198/CIT(A)-20/Kol/CC-291/16-17 respectively, both dated 18-07-2017, which in turn arise out of separate

assessment orders passed by the Assessing Officer under section 143(3)/147 of the Income-Tax Act, 1961 (in short, the 'Act') dated 07.12.2016 and 31.10.2016 respectively.

2. Since, the issues involved in all the appeals and cross objections are common and identical; therefore, these appeals have been heard together and are being disposed of by this consolidated order. For the sake of convenience, the grounds as well as the facts narrated in Revenue's appeal in ITA No.2144/Kol/2017, for the A.Y 2009-10 and C.O No. 91/Kol/2017 for assessment year 2009-10, have been taken into consideration for deciding the above appeals and cross objections *en masse*.

3. Although, these two appeals filed by the Revenue for Assessment Year 2009-10 (in ITA No.2144/Kol/2017 and in ITA No.2145/Kol/2017) and Cross-Objections filed by the Assessee in Assessment Year 2009-10 (in CO. No.91/Kol/2017 and CO No. 90/Kol/2017) contain multiple ground of appeals. However, at the time of hearing, we have carefully perused all the grounds raised by the Revenue as well as cross objections raised by the Assessee. Most of the grounds raised by the Revenue as well as Assessee, are either academic in nature or contentious in nature. However, to meet the end of justice, we confine ourselves to the core of the controversy and main grievances of Revenue and the Assessee as well. With this background, we summarize and concise the grounds raised by the Revenue as well as Assessee as follows:

(1). The main grievance of the Revenue in revised grounds of appeal in ITANo.2144/Kol/2017 and in ITA No.2145/Kol/2017, is that on the facts and circumstances of the case, the Ld CIT(A) erred in law by allowing the technical grounds taken by the assessee holding the reasons recorded by the AO is void ab initio. The Ld. CIT(A) failed to examine the facts of this case in which original assessment was done u/s 43(1)(a) and not 143(3) and hence first proviso to section 147 did not apply in the instant case. And the Ld. CIT(A) erred in allowing assessee's appeal on the grounds that there was no material before AO to satisfy the requirements u/s 147 as

enough material was available with AO and assessee failed to disclose all materials facts for his assessment.

(2). The main grievance of the Assessee in Cross Objection and Revised Cross Objection in CO. No.91/Kol/2017 and in CO. No.90/Kol/2017, is that the Learned Assessing Officer has erred in making addition of Rs. 4,95,00,000/- under section 68 of the Income Tax Act on the basis that director of the share allottees company was not produced before him. Share applicants companies couldn't be physically found at their given address. The Ld. CIT (A) has erred in not adjudicating this ground on merit. Assessee also raised the technical ground in cross objection stating that Learned Assessing Officer has issued notice under section 148 of Income tax Act 1961 after the expiry of four years from the end of the relevant assessment year without satisfaction of Principal CIT on the reasons recorded as per the provision of section 151 of the Act. As such, the notice under section 148 of the Act is thus ab-initio void and consequential proceedings are liable to be quashed.

4. First, we shall take Revenue's appeal in ITA No.2144/Kol/2017, for the A.Y 2009-10 (lead case). The summarized and concise grounds of appeal is reproduced below for ready reference as follows:

(1). The main grievance of the Revenue in revised grounds of appeal in ITANo.2144/Kol/2017 and in ITA No.2145/Kol/2017, is that on the facts and circumstances of the case, the Ld CIT(A) erred in law by allowing the technical grounds taken by the assessee holding the reasons recorded by the AO is void ab initio. The Ld. CIT(A) failed to examine the facts of this case in which original assessment was done u/s 143(1)(a) and not 143(3) and hence first proviso to section 147 did not apply in the instant case. And the Ld. CIT(A) erred in allowing assessee's appeal on the grounds that there was no material before AO to satisfy the requirements u/s 147 as enough material

was available with AO and assessee failed to disclose all material facts for his assessment.

5. Brief facts qua the issue are that the assessee company filed its Return of income for the A.Y. 2009-10, u/s 139 on 05.09.2009 disclosing total income to the tune of Rs. Nil, which was processed u/s 143(1) of the Income tax Act, 1961. Later on, assessment was reopened by the assessing officer under section 147/148 of the Act. The assessing officer noticed that during the year under consideration, assessee company raised share capital of Rs.4,95,00,000/-. Subsequently on the basis of information available on record it is found that the capital raised by assessee company is nothing but unaccounted income which has been enrooled in the form of share capital through the Jamakharchi, shell, and Paper Companies amounting to Rs. 4,95,00,000/-. The assessing officer was of the view that assessee brought back its undisclosed income in the business in the guise of share Capital. Under these circumstances, there was reason to believe that income to the tune of Rs.4,95,00,000/- chargeable to tax has escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. Keeping in view the above facts, the notice u/s 147/148 of the Income Tax Act, 1961 was issued upon the assessee.

In response to this notice, assessee filed its return on 07.05.2016 declaring total income of Rs. Nil. The assessee has also asked for the reasons for reopening which was duly provided. The notice U/s 143(2) and 142(1) along with questionnaire was issued on 22.07.2016 which was duly served upon the assessee. The case was fixed for hearing on 19.07.2016 before the AO. In response to said notice, assessee submitted an objection petition against the notice u/s 148 of the Act and requested to pass a speaking order against the objections before proceeding for assessment. Accordingly, a speaking order was passed on 05.07.2016 in this respect and the said order was duly served upon the assessee.

6. Thereafter, the ld assessing officer dealt the issue on merits and he noticed from the paper books filed by the assessee that assessee company raised share capital of Rs.4,95,00,000/- at a face value of Rs. 10/- with premium of Rs.40/- per share during the

year under consideration. It was found that the share application money was received by the assessee from seventeen parties. A search and seizure operation was concluded on 19.11.2015 in the “CITY LIFE GROUP “of cases. M/s. Kakrania Properties Pvt. is a group company of “City Life Group”. The directors of the company are as follows:-

<i>Sl.No.</i>	<i>Name of Company</i>	<i>Name of directors</i>	<i>Address</i>
1	Kakrania Properties Pvt. Ltd	1 Devi Prasad Kakarnia 2 Manish Kakarnia 3 Pankaj Kakarnia	156, M.G Road, Kolkata-700 007.

The company was incorporated on 09.03.2009. It was found from the Profit and Loss account that the assessee company has shown loss of Rs.1,72,421/- during the year under consideration. During the course of hearing, assessee company produced the copy of Balance Sheet, Profit and Loss account for the year under consideration. It was noticed by AO that the company has charged premium of Rs. 40/- against each share. However, the company was incorporated on 9.3.2009 and the company charged premium against its share which is unusual. The financial results of the company do not support the basis of charging of such premium. The company has no business activities as apparent from the financial results and the company has either no income or has meager income from the inception of the company. The rational of charging of such premium is unusual in nature and against the normal business activities. The AO also noted that assessee has failed to prove the identity, creditworthiness and genuineness of the share subscribing companies therefore, he made addition to the tune of Rs. 4,95,00,000/-.

7. Aggrieved by the order of the AO, the assessee carried the matter in appeal before the Id. CIT(A). The Id CIT(A) noticed that the reasons recorded by the AO did not speak about the tangible material and the AO acted only on the basis of an information already available on record and information received from other sources. The reasons recorded did not give information as to who had given the bogus entries to the assessee about share capital and share premium. Therefore, based on these reasons, Id CIT(A) held that there is no tangible material and it is merely a borrowed satisfaction and hence reopening

of assessment under section 147/148 of the Act was not valid and therefore deleted the impugned addition made by the assessing officer. Aggrieved by the order of the Id CIT(A), the Revenue is in appeal before us and assessee is in cross objection before us.

8. Before us, the Id. DR for the Revenue has submitted written submission which is reproduced below:

“The case under appeal before Hon’ble ITAT is basically a share capital case. The assessee company raised share capital by Rs. 3 cr during the FY relevant to AY 2009-10. The case was reopened u/s. 148 beyond four years. Originally the return was processed u/s. 143(1). From the assessment record, it is seen that reopening was done on the basis of information from DIT(Inv), Kol, inasmuch as that a search and seizure was conducted on the City Life group. During the course of post-search investigation, it was ascertained that share capital raised by the assessee was unaccounted income routed through various shell companies in the guise of share applicant companies. The information was submitted before the AO vide official communication dt. 22.02.2016 and was received by the AO on 24.02.2016. Based on the information thus provided, the AO arrived at his prima facie formulation of reason to believe that income had escaped assessment in the case of the assessee and sought approval from the jurisdictional CIT on 15.03.2016. It is pertinent to mention that the AO took over 15 days to ponder over the matter and carry out his due diligence: the decision to go ahead with the reopening was not a hurried and spur-of-the-moment decision. Further, the AO was diligent enough to also provide the complete assessment record along with the information received from DIT (Inv), Kol, to the CIT in question while seeking approval for issuance of notice u/s 148.

In turn, the jurisdictional CIT recorded his satisfaction by his own hand in the approval form for issuance of notice u/s 148, writing that "Considering the relevant facts and the reasons recorded by the AO, I am satisfied that it is a fit case for issue of notice u/s 148" before signing and dating it as 17.03.2016. Intimation of the said approval was provided vide official communication dt. 21.03.2016 to the AO, wherein it is also mentioned that the relevant assessment record in one part is returned back to him. Thereafter, the AO, armed with the approval thus accorded by the CIT, issued computer-generated notice u/s.148 dt. 22.03.2016 to the assessee-company. Reasons for reopening were asked for and provided. The assessee filed objection vide letter dt. 27.06.2016, which was disposed off promptly by speaking order dt. 05.07.2016. Notice u/s 142(1) along with specific requisition of relevant details was issued and served on the assessee-company, but the same was only partly complied with. Thereafter, notices u/s 133(6) were issued to the share subscribing companies. However, except for one share subscriber, Shreyas Holding P. Ltd., the notices were returned by the postal authorities. Also, Shreyas Holding P. Ltd. did not comply with the notice u/s 133(6). The assessee-company was further asked on 22-09-2016 vide letter to prove identity of the share subscribers, genuineness of the relevant transactions and credit worthiness of the share subscribers, but there was no compliance. Thereafter, on 07-10-2016, vide letter, the assessee was

asked to produce the directors of the relevant share applicant companies. But there was no compliance to the same. Subsequently, Rs. 1 cr. was added back u/s 68 as well as Rs 2 lacs u/s 69C as commission paid to the entry operator for the purpose of providing the relevant accommodation entries.

The Ld. CIT(A) allowed the assessee's Appeal on two counts: One, that the AO's "reason to believe" as per notice u/s 148 is not in accordance with the facts and circumstances of the case and as such, consequent order u/s 143(3)/147 is void ab inito and liable to be quashed. Two, the order of the AO is bad in law and hence, deserves to be struck down. These two grounds are covered by the assessee's Grounds of Appeal Nos. 1 and 8. Perusal of the CIT(A)'s order reveals that the assessee has relied on the following broad arguments to buttress his points:

1. Lack of Tangible Material based on which the AO formed his "Reason to believe" (refer page 8 of CIT(A)'s order).
2. Absence of Live Link between the Information received by the AO and the Formation of belief by him (refer pages 6-8 of CIT (A)'s order).
3. Lack of Independent Application of Mind by the AO in formulation of his "reason to believe", relying instead on "Borrowed Satisfaction" of the ADIT(lnv), Kolkata, whence the information flowed (refer pages 6-8 of CIT(A)'s order).
4. Vagueness in respect of Reasons to believe on the part of the AO (refer page 8 of CIT (A)'s order).

The assessee-company relied mainly on the following judgements to buttress its arguments :--

1. ITO vs Lakhmani Mewal Das (103 ITR 437)
2. Signature Hotels P. Ltd. vs ITO (20 taxmann.com 797)
3. PCIT-6 vs Meenakshi Overseas P. Ltd. (82 taxmann.com 300)
4. CIT-V vs Orient Craft Ltd (354 ITR 536)
5. PCIT vs. Tupperware India P. Ltd. (236 Taxman 494)

At the outset, the aforesaid arguments of the assessee are rebutted as below :---

1. Now, on perusal of the assessment records sent by the AO to the office of the undersigned during the course of appellate proceedings before Hon. ITAT, it is seen that DDIT(lnv), Unit-2(1), Kolkata, provided information that a search and seizure operation was conducted on the City Life group. During the course of post- search investigation, it was ascertained that share capital raised by the assessee was unaccounted income routed through various shell companies in the guise of share applicant companies. Along with the information, from the assessment record, it is found that the that DDIT(lnv), Unit-2(1), Kolkata, had also provided copies of notices u/s 131 issued by his office to the share applicant companies which could not be served properly / not complied with. In respect of the relevant untraceable companies, the DDIT(lnv), Unit-2(1), Kolkata, had also provided photocopies of the envelopes showing the relevant postal remarks, which buttressed his point that the said companies were not traceable at their given addresses. From this discussion, it is very much crystal clear that there was

no dearth of Tangible Material based on which the AO formed his "Reason to Believe". Unfortunately, Ld. CIT(A) did not refer to the assessment records nor did he initiate remand proceedings before ruling, thus erroneously as is apparent from the above facts, in favour of the assessee.

2. Again, on going through the assessment record and the relevant information provided by DDIT(lnv), Unit-2(1), Kolkata, as detailed above (supra), it is once again crystal clear that there was never any Absence of Live Link between the Information received by the AO and the Formation of belief by him. The information in question received from DDIT(lnv), Unit-2(1), Kolkata, was in respect of the assessee-company itself and the findings recorded therein pertain to the assessee-company and to no other person within the definition of "person" of the I. T. Act. In the face of such information which is damaging to the assessee-company, the AO acted in an entirely reasonable manner and arrived at his formulation to believe that income had escaped assessment in respect of his assessee and initiated proceedings u/s 147. However, it is unfortunate to note that the Ld. CIT(A) did not refer to the assessment records nor did he initiate remand proceedings before ruling, thus erroneously as is apparent from the above facts, in favour of the assessee.

3. The assessee-company, before the Ld. CIT(A), had also argued that there was Lack of Independent Application of Mind by the AO in formulation of his "reason to believe", relying instead on "Borrowed Satisfaction" of the ADIT(lnv), when the information flowed. However, it is crystal clear from the discussion in the above two paragraphs that there was Tangible Material available before the AO for him to form his "Reason to believe", in addition to which there existed also Live Link between the Information received by the AO and the Formation of belief by him in respect of income having escaped assessment on the part of the assessee-company. From a reading of the recorded reasons, it is clear that the AO has first referred to the assessment records inasmuch as he observes in the third paragraph that the case was assessed u/s 143(3) and therefore this issue could not be examined. Furthermore, it is noticed that the AO had downloaded from the Departmental e-filing portal the original ITR-6 for AY 2009-10 filed by the assessee-company on 05.09.2009, along with details of processing u/s 143(1) and PAN-based jurisdictional officer's query as down loaded by him from the Departmental online ITD portal. Approval from jurisdictional CIT was sought vide the AO's official communication dt. 15.03.2016, wherein it is clearly mentioned that Assessment Record in one part is enclosed along with the said application. From this discussion, it is abundantly clear that there was no failure on the part of the AO in respect of Non-Application of Mind and hence, there was never any question of the AO solely relying on "Borrowed Satisfaction" of the DDIT(lnv), Kolkata, in the formulation of his Belief that Income had Escaped Assessment in the instant case. Yet again, it is unfortunate to note that the Ld. CIT(A) did not refer to the assessment records nor did he initiate remand proceedings before ruling, thus erroneously as is apparent from the above facts, in favour of the assessee.

4. Last, the fourth pillar of the assessee-company's arguments is that the reasons recorded were "vague". Perusal of the copy of the said recorded reasons as prepared by the AO and on which basis the proceedings u/s 147 took place, reveal to any reasonable

person reading the same that there was no vagueness in the said reasons at all. Rather, they are specific, as regard to the source and circumstances in which the information has come about, and names the assessee-company in no uncertain terms as being culprit and is also specific as to the nature of the offence claimed therein. The reasons are hard-hitting and damning to even a casual observer of the same. The material relied upon by the AO, viz. the information from DDIT(Inv), Unit-2(1), Kolkata, is also specific, concrete, hard-hitting and certainly not vague. It is pertinent to mention here that it is only in the latter stages, at the time of reassessment proceedings, that the AO clarifies while disposing off objection to the reason vide office letter dt. 05.07.2016 that one Ritesh Kedia, a key person and director of the City Life group, had admitted to the group's receiving its own unaccounted moneys through the share capital route via jama-kharchhi companies. Whether or not the assessee-company itself was named by Ritesh Kedia is by itself a moot point and a relatively minor bone of contention. But the fact of the matter that comes shining through is that the Inv. Wing did not rest on its haunches but in fact, during the course of post-search investigations, it enquired into all the group companies to spot similar irregularities and thence, came upon the assessee-company itself and proved to itself that the alleged transgressions were indeed true and correct. In the face of such potent and damaging information which assailed the assessee, it was but logical on the part of the AO and in fact, of any reasonable person, to form the Belief that Income had Escaped Assessment and that initiation of proceedings u/s 147 was the only course left to follow. Here too, the Ld. CIT(A) unfortunately, missed the opportunity to verify the claims and contentions of the assessee-company by calling for a remand report from the AO, whereupon it is evident that he would have ruled differently had he been armed with the true and correct facts of the case.

To sum up the above discussion, it is evident that the Ld. CIT(A) admitted these new arguments raised by the assessee company in appellate proceedings before him for the first time but, in violation of Rule 46A of I.T Rules, 1962, did not initiate remand proceedings to the AO nor afford him any opportunity to examine the fresh evidences admitted for the first time by the assessee and rebut the same. Thus, the Ld CIT(A)'s order suffers from such infirmity that the same is fit to be quashed and the original assessment order passed by the AO is fit to be upheld.”

9. On the other hand, the ld. Counsel for the assessee has defended the order of the ld. CIT(A).

10. We have heard both the parties and perused the material available on record. First of all, we shall examine the reasons recorded by the assessing officer for re-opening of assessment under section 147/148 of the Act. The reasons were recorded by the ld assessing officer before issuing notice under section 148 of the Act, which is given below for ready reference:

“ On perusal of records it has been noticed that the assessee company had allotted 990,000 shares at premium of Rs.40/- to the following paper/jamakharchi companies whose physical existence have not been found at their given address:

Sl. No.	Name & address	No. of Shares	Amount (Rs.)
1	M/s. Ramesh Mercantile Pvt. Ltd 77B Nimtala Ghat Street, Kolkata-700006	80,000	40,00,000
2	M/s. Prechha Commercial Pvt. Ltd 9 Ashotosh Mukherjee Lane, 3 Floor, Block-A, Howrah-711106	70,000	35,00,000
3	M/s. Pratius Commercial Pvt. Ltd 2 Narayan Chandra Sen, Salkia, Howrah	70,000	35,00,000
4.	M/s. Sepra Traders Pvt. Ltd. 3/2 Banstalla Ghat Road, Howrah-711101	80,000	40,00,000
5.	M/s. Shreya Holding Pvt. Ltd. 31 Giribabu Lane, Kolkata-700 006	80,000	40,00,000
6.	M/s. Calypso Tie Up & Finance Pvt. Ltd. 77B Nimtala Ghat Street, Kolkata-700006	20,000	40,00,000
7.	M/s. Srija Chemo Pvt. Ltd 37 Bazal Para Lane, Bandha Ghat Howrah-711106	80,000	40,00,000
8.	M/s. Goodview Agencies Pvt. Ltd 523 G.T Road (South), Howrah-711101	70,000	35,00,000
9.	M/s. Ranjana Commotrade Pvt. Ltd 132 Cotton Street, Kolkata-700 007	90,000	45,00,000
10.	M/s. Akroo Mercantile Pvt. Ltd 9 Lal Bazar Street, Kolkata-700 001.	20,000	10,00,000
11.	M/s. Anweshan Commercial Pvt. Ltd 9 Lal Bazar Street, Kolkata-700 001.	20,000	10,00,000
12.	M/s. Kamrup Credit & Leasing Private Limited 32 Ezra Street, 6 th Floor, Kolkata-700001.	50,000	25,00,000
13	M/s. Blue Bird Mercantile Pvt. Ltd 9 B Golf Towers. 9 Prince Gulam Mohammed Shak, Kolkata-700 095.	50,000	25,00,000
14.	M/s. Tara Vinimay Pvt. Ltd. BD/41 Rabindra Pally, Kolkata-700 001.	30,000	15,00,000
15	M/s. Emerald Trade Com. Pvt. Ltd. 2 Mullick Street, 1 st Floor, Kolkata-700 007.	40,000	20,00,000
16.	M/s. Rose Goods Pvt. Ltd. 2Mullick Street, 1 st Floor, Kolkata-700 007.	30,000	15,00,000
	Total	9,90,000	4,95,00,000

There is information from DDIT (Inv) U 2(1), Kolkata on record that the assessee company had been raised bogus share capital during the financial year 2008-09 relevant to the A.Y 2009-10. In view of the above, I have reason to believe that Income chargeable to tax on Rs.4,95,00,000/- has escaped within the meaning of section 147.”

The Id Counsel for the assessee submitted before us that above cited 'reasons for reopening assessment' which were recorded by the assessing officer (AO) suffer following drawback, which is being highlighted as follows:

- (1). The reasons recorded does not spell out who has given the bogus entries to the assessee.
- (2). The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee.
- (3). The reasons recorded does not show, what was the information given by Investigation wing.
- (4). The date of the information received by the AO has not been spelt out in the reasons recorded.
- (5). In the reasons recorded, the Assessing Officer has not mentioned how he came to the conclusion that share allottee companies are paper/jamakharchi companies. It is unfounded allegation.
- (6). The AO did not mention the details of transactions that represented unexplained income of the assessee company.
- (7). The reasons recorded do not establish any live link between the share capital raised and undisclosed income of the assessee.
- (8). The reasons recorded by the Assessing Officer do not disclose his mind as to what was the nature, mode or way and amount of transaction or entries, which had been given or taken by the assessee in the relevant year and who was the entry provider.
- (9). The Assessing Officer also has not paraphrased any investigation report which may form the basis of the reasons. Further, the reasons recorded did not contain any inquiry conducted by the Assessing Officer on the same and the conclusion thereof.
- (10). According to the Assessing Officer, the case of the assessee for A.Y. 2009-10, was not assessed under section 143(3) of the Act and therefore this issue of

share capital could not be examined at the time of issuing notice under section 148 of the Act. Relevant extracts of reasons recorded are reproduced below:

"It may be mentioned that for the A. Y. 2009-10 the case of Liza Vincom Pvt. Ltd. was not assessed u/s 143(3) of I. T. Act 1961 and therefore, this issue could not be examined. In view of the above, I have reason to believe that the income of the assessee for the F. Y 2008-09 relating to A. Y 2009-10 chargeable to tax has escaped assessment for the said year within the meaning of section 147 of the IT Act, 1961".

As such, it is evident that in the instant case, the Assessing Officer has not made any enquiry and the notice was being issued under section 148 of the Act for examination of share capital raised during the instant year which has not been examined earlier. His later recitation of the mandatory words that he believed that income chargeable to tax has escaped assessment, would not cure this fundamental defect. In the present case, reopening of the assessment was made for fishing or a roving inquiry.

(11). Although the reasons recorded make reference to information received from the Directorate of Income Tax (Investigation), Kolkata of DDIT(Inv.), Unit 2(1), Kolkata, however such documents and/or relevant portions of such information was not enclosed along with the reasons.

(12). In the reasons recorded, it is not clear as who and how it has ascertained that the capital raised is nothing but unaccounted income which has been routed in the form of share capital.

(13). In the reasons recorded, the Assessing Officer has not pointed out what he found when he went through the information to form the belief that the capital raised is nothing but unaccounted income which has been routed in the form of share capital.

(14). In the reasons recorded, the Ld. Assessing Officer has only provided the conclusion and not reasons to believe. The Id. Assessing Officer has not made applications of his mind and issued notice u/s 148 of the Act on the basis of borrowed satisfaction.

Based on the submissions of the Id Counsel, we note that the reasons recorded by the AO are totally vague, scanty and ambiguous and demonstrate nothing but borrowed satisfaction.

11. We note that the assessee company filed its Return of income for the A.Y. 2009-10 u/s 139 on 05.09.2009 disclosing total income to the tune of Rs. Nil, which was processed u/s 143(1) of the Income tax Act,1961. Later on, assessment was reopened by the assessing officer under section 147/148 of the Act. Therefore, it is abundantly clear that in the assessee`s case under consideration no any scrutiny assessment under section 143(3) was done by the department.

We note that a return of income filed ends in an intimation u/s.143(1) of the Act. The revenue has the power to proceed to frame an assessment u/s.143(3) of the Act. The procedure to be followed is that a notice u/s.143(2) of the Act has to be issued within a particular time frame. If notice is not so issued, the intimation u/s.143(1) is treated as an Assessment.

1)If the AO wants to initiate reassessment proceedings in a case where intimation u/s.143(1) is issued and not notice u/s.143(2) is issued within the time limit laid down in section 143(2), then the AO should be in possession of some material based on which he should entertain belief that income of the Assessee has escaped assessment. CIT Vs. Orient Craft Ltd. 354 ITR 536 (Del). In a later decision of the Delhi High Court in the case of Indu Lata Rangawala Vs. DCIT WP(C) 1393/2002 dated 18.5.2016, the Delhi High Court clarified that reassessment proceedings initiated on a Section 143(1) intimation cannot be challenged on the ground of change of opinion because in Section 143(1) intimation, no opinion is expressed and the return is merely accepted as it is. Delhi High Court referred to decisions of Supreme Court in ACIT Vs. Rajesh Zaveri Stock Brokers (P) Ltd. 291 ITR 500 SC and DCIT Vs. Zuari Estate Development & Investment Co. Ltd. 373 ITR 661 (SC). In para-37 of its order the Court in the case of Indu Lata Rangwala (supra) refused to express any opinion on the question whether fresh material is required for forming believe regarding escapement of income.

2) When time for issue of notice u/s.143(2) of the Act is still available, the AO cannot entertain belief that income chargeable to tax has escaped assessment because, whatever is the escapement can be brought to tax by issue of notice u/s.143(2) of the Act and by framing an assessment u/s.143(3) of the Act.

3) When an Assessment is made u/s.143(3) of the Act. What are the conditions laid down in Section 147 and why the legislature has laid down such conditions before the authority can assume jurisdiction to reassess income. The conditions will equally apply to initiating reassessment proceedings when an intimation u/s.143(1) is issued and not notice is issued u/s.143(2) within the time laid down in that sub-section.

12. Now, we shall narrate the conditions mentioned in section 147 of the Act. Which are as follows:

Conditions laid down in section 147 :

“If the A.O. has reason to believe that any income chargeable to tax has escaped assessment for any assessment year.”

- There must be material for the belief.
- Circumstances must exist and cannot be deemed to exist for arriving at an opinion;
- Reasons to believe must be honest and not based on suspicion, gossip, rumour or conjecture
- Reasons referred to must disclose the process of reasoning by which the AO holds “reasons to believe” and change of opinion does not confer jurisdiction to reassess;
- There must be nexus between material and belief; and
- Reasons recorded must show application of mind by the AO.

In CIT vs. Kelvinator of India Ltd. 256 ITR 1, the Full Bench of the Delhi High Court was considering a case of reopening u/s 147 within 4 years from the end of the assessment year. The Court held that when a regular order of assessment is

passed in terms of section 143 (3) of the Act, a presumption can be raised that such an order has been passed on application of mind. It was held that if it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong. It was held that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. On appeal by the department to the Supreme Court,(reported in 320 ITR 561(SC)) it was held that though the power to reopen under the amended section 147 is much wider, one needs to give a schematic interpretation to the words “reason to believe” failing which section 147 would give arbitrary powers to the AO to re-open assessments on the basis of “mere change of opinion”, which cannot be *per se* reason to re-open. One must also keep in mind the conceptual difference between power to review and power to re-assess. The AO has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then in the garb of re-opening 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 AO. Hence, after 1.4.1989, the AO has power to re-open, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment.

We note that in the assessee’s case under consideration, there is no tangible material to reopen the assessment. The information about issue of share capital and share premium was there in the return of income filed by the assessee under section 139 (1) of the Act, which was processed by the department under section 143(1) of the Act. Hence, without tangible material reopening is not justified.

13. We note that “Reasons must have a live link with the formation of the belief”. This is supported by Circular No.549 dated 31.10.1989 which clarified that the words “reason to believe” did not mean a change of opinion. The Hon’ble Supreme Court in ITO vs Lakhmani Mewal Das [1976]103 ITR 437 has lucidly explained the power of assessing officer to bring to tax income escaping assessment u/s.147 of the Act. The Hon’ble Court first held that the section provides that there must exist “reasons to believe“ and not “reasons to suspect”. The following were the relevant observations:

“The fact that the words "definite information" which were there in section 34 of the Act of 1922, at one time before its amendment in 1948, are not there in section 147 of the Act of 1961, would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence. The powers of the Income-tax Officer to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed.”

The purpose behind the relevant provisions imposing condition precedent for initiating reassessment proceedings is to ensure finality of proceedings. The Act also provides that such reason must be recorded in writing before issue of notice of reassessment so as to judge the existence of such belief before initiating reassessment proceedings by issue of notice u/s.148 of the Act. The above requirements are meant to ensure that powers to initiate reassessment proceedings are not exercised in an arbitrary manner.

The Courts have analysed and explained in several cases as to what could be the valid reason to believe escapement of income, which would enable the Assessing Officer to successfully reopen the assessment. It has been held that the words ‘reason to believe’ are stronger than the words ‘reason to suspect’ or ‘reason to doubt’. It requires more than merely ‘satisfaction’ of the Assessing Officer. The belief entertained by the Assessing

Officer must not be arbitrary or irrational. The expression 'reason to believe' does not mean purely subjective satisfaction of the Assessing Officer. The belief must be held in good faith. It cannot be merely pretence. Again, the belief must be of an honest and reasonable person based upon reasonable grounds. The Assessing Officer may act upon direct or circumstantial evidence, but his belief must not be based on mere suspicion, gossip or rumours. The Assessing Officer would be acting without jurisdiction, if the reasons for his belief are not material or relevant. There should be nexus between the information coming into possession of the AO and his belief on the basis of such information that income of the Assessee chargeable to tax has escaped assessment.

We note that in the assessee's case under consideration the reasons recorded does not spell out who has given the bogus entries to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. The reasons recorded does not show, what was the information given by Investigation wing. In the reasons recorded, the Assessing Officer has not mentioned how he came to the conclusion that share allottee companies are paper/jamakharchi companies. It is unfounded allegation. The reasons recorded do not establish any live link between the share capital raised and undisclosed income of the assessee. The reasons recorded by the Assessing Officer do not disclose his mind as to what was the nature, mode or way and amount of transaction or entries, which had been given or taken by the assessee in the relevant year and who was the entry provider. The Assessing Officer also has not paraphrased any investigation report which may form the basis of the reasons. Further, the reasons recorded did not contain any inquiry conducted by the Assessing Officer on the same and the conclusion thereof. It is not clear as who and how it has ascertained that the capital raised is nothing but unaccounted income which has been routed in the form of share capital. In the reasons recorded, the Ld. Assessing Officer has only provided the conclusion and not **reasons to believe**. The Ld. Assessing Officer has not made applications of his mind and issued notice u/s 148 of the Act on the basis of

borrowed satisfaction. Hence, reassessment proceedings, in the assessee's case is bad in law.

14. We note that from the assessment records that reopening was done on the basis of information from DIT(Inv), Kol, inasmuch as that a search and seizure was conducted on the City Life group. During the course of post-search investigation, it was ascertained that share capital raised by the assessee was unaccounted income routed through various shell companies in the guise of share applicant companies. The assessee-company, before the Ld. CIT(A), had also argued that there was Lack of Independent Application of Mind by the AO in formulation of his "reason to believe", relying on "Borrowed Satisfaction" of the ADIT(Inv), when the information flowed. It is submitted by Id Counsel that where assessment u/s 147 of the Act were made merely on the basis of information provided by DDIT (Investigation) without applying his own mind to the information and examine the basis and material of the information, the proceedings under section 148 were to be quashed. We note that the Ld. CIT(A) allowed the assessee's appeal observing the following:

1. Lack of Tangible Material based on which the AO formed his "Reason to believe" (refer page 8 of CIT(A)'s order)
2. Absence of Live Link between the Information received by the AO and the Formation of belief by him (refer pages 6-8 of CIT (A)'s order).
3. Lack of Independent Application of Mind by the AO in formulation of his "reason to believe", relying on "Borrowed Satisfaction" of the ADIT(Inv), Kolkata, where from the information flowed (refer pages 6-8 of CIT(A)'s order).
4. Vagueness in respect of Reasons to believe on the part of the AO (refer page 8 of CIT (A)'s order).

We note that on identical facts the Coordinate Bench of ITAT Kolkata in the case of DCIT, Circle-6, Kolkata vs Great Wall Marketing Pvt Ltd Kolkata in ITA No.660/Kol/2011 dated 03-02-2016, has held as follows:

"The submissions of the learned counsel for the assessee before us was that the reasons recorded by the AO were mere information received from DIT (Investigation), New Delhi. There was not independent application of mind by the AO based on which it can be said that he arrived at the satisfaction that the income of the assessee is chargeable to tax has escaped assessment. In this order, it was further held that in AY 2002-03 information received by the AO was vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which reasonable person can form belief regarding escapement of income. Reliance was placed by the learned counsel for the assessee on the decision of the Hon'ble Delhi High Court in the case of CIT vs Insecticides (India) Ltd 357 ITR 330 and CIT vs SFIL Stock Broking Ltd 325 ITR 285 (Delhi). In both the aforesaid decisions the reasons recorded by the AO for initiating proceedings u/s 148 of the Act the Hon'ble Delhi High Court upheld the order of the Tribunal quashing the proceedings. Reliance was also placed on the decision of ITAT, Kolkata 'C' Bench in the case of M/s Controlla Electrotech (P) Ltd vs DCIT in ITA Nos. 1443 & 1444/Kol/2014 wherein on identical facts the Tribunal was pleased to quash the reassessment proceedings. On merits the learned counsel for the assessee relied on the order of CIT(A)."

The Coordinate Bench further held as under:

"We have given a careful consideration of the submissions made by the learned counsel for the assessee. It is clear from the reasons recorded by the AO that the AO acted only on the basis of a letter received from Investigation Wing, New Delhi. The reasons recorded does not give as to who has given the bogus entries to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. The reasons recorded which are extracted in the earlier part of the order does not show, what was the information given by DIT(Inv.), New Delhi. The date of the information received by the AO were not spelt out in the reasons recorded. The involvement of the assessee is also not spelt out, except mentioning the corporate bodies who had subscribed to the share capital of the assessee were non-existent and not creditworthy. On identical facts the Hon'ble Delhi High Court in the case of CIT vs Insecticides (India) Ltd (supra) has taken a view that the reasons recorded were vague and uncertain and cannot be construed as satisfaction on the basis of the relevant material on the basis of which a reasonable person can form a belief that income has escaped assessment. The Hon'ble Delhi High Court has also come to the conclusion that the reasons recorded did not disclose the AO's mind regarding escapement of income. The Hon'ble Delhi High Court ultimately held that initiation of proceedings u/s. 148 of the Act was not valid and

as such in ITA No.660/Kol/2011 Great Wall Marketing (P) Ltd., the initiation of proceeding u/s 147 was quashed. The facts and circumstances in the present case are identical to the case decided by the Hon 'ble Delhi High Court. Following the said decision we hold that initiation of re-assessment proceedings is not valid. On this ground, the assessment is liable to be annulled.”

15. We have considered reasons recorded by the AO for issuance of the notice. It is clear from the reasons recorded by the AO that the AO acted only on the basis of a information received from Investigation Wing. The reasons recorded does not give as to who has given the bogus entries to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. Assessing officer did not apply his mind, it is a borrowed satisfaction, hence, we quash the reopening and we hold that initiation of re assessment proceedings is not valid. That being so we decline to interfere in the impugned order of the ld. CIT(A), his order on this issue is hereby upheld and grounds raised by the revenue are dismissed in both the appeals (being, ITA Nos. 2144 & 2145/Kol/2017 for the A.Ys. 2009-10).

Since we have already decided these two appeals of Revenue on technical ground, therefore, we are not inclined to adjudicate appeals on other grounds on merit raised by Revenue.

16. The additional grounds of cross objections filed by the assessee in CO. No. 91/Kol/2018 and CO No. 90/Kol/2017 for the A.Y 2009-10 which arise out of ITA Nos. 2144/Kol/2017 and 2145/Kol/2017, are supportive of the orders of the CIT(A), which we have already upheld. Both the Cross Objections filed by Assessee is in support of the order of Ld. CIT(A). Since we uphold the order of Ld. CIT(A) in dismissing the Revenue's appeal and the additional grounds filed by the assessee in Cross Objection are in support of the order of CIT(A), therefore, we dismiss the assessee's Cross Objection being infructuous. In both the cross objections, the assessee also raised the grounds on merits which we do not adjudicate, as we have already adjudicated issue on technical ground of 'reopening of assessment' and upheld the order of ld CIT(A).

17. In the result, the both appeals of Revenue are dismissed and cross objections of Assessee are also dismissed being infructuous.

Order Pronounced in the Open Court on 04-06-2019

Sd/-
(A.T. Varkey)
Judicial Member

Sd/-
(Dr. A.L.Saini)
Accountant Member

Dated: 04 -06-2019

*PRADIP (Sr.PS)

Copy of the order forwarded to:

1. The Appellant/Department: ACIT, C.C 2(1)/DCIT, C.C 2(1), Kolkata 3rd Fl., Aaykar Bhawan, Poorva E.M Bye Pass, 110 Shanti Pally, Kolkata-107.
2. The Respondent/Assessee: M/s.Kakrania Properties Pvt.Ltd. 8/3 Rupchand Roy Street, Kolkata-7 & M/s. Liza Vincom Pvt. Ltd 156 M.G Road, 1st Floor, Kolkata-7.
3. The CIT-,
4. The CIT(A)-,
5. DR, Kolkata Benches, Kolkata

True Copy, By order,

Asst. Registrar
ITAT, Kolkata Benches