IN THE INCOME-TAX APPELLATE TRIBUNAL "H" BENCH MUMBAI

BEFORE SHRI G.S. PANNU, JUDICIAL MEMBER AND

SHRI PAWAN SINGH, ACCOUNTANT MEMBER

ITA No. 1462/Mum/2017 (Assessment Year 2009-10)

DCIT, CC- 4(3) Central Range-4, Room No. 1921, C-11, 19th Floor, Air India Building, Nariman Point, Mumbai-400021.	Vs.	M/s Kargwal Products P. Ltd. Om Shiv Sai CHS, Off Eastern Express Highway, Opp Sion Chunabhati Signal, Sion, Mumbai-400022. **PAN: AADCK3047P**
Appellant		Respondent

Cross Objection No.132/Mum/2018 (Assessment Year 2009-10)

M/s Kargwal Products P. Ltd. Om Shiv Sai CHS, Off Eastern Express Highway, Opp Sion Chunabhati Signal, Sion, Mumbai-400022. **PAN: AADCK3047P**	Vs.	DCIT, CC- 4(3) Central Range-4, Room No. 1921, C-11, 19th Floor, Air India Building, Nariman Point, Mumbai-400021.
Appellant		Respondent

Appellant by	: Shri Dharmesh Shah (DR)
Respondent by	: Ms. Pooja Swaroop (Sr. AR)
Date of Hearing	: 11.07.2018
Date of Pronouncement	: 26.09.2018

ORDER UNDER SECTION 254(1)OF INCOME TAX ACT

PER PAWAN SINGH, JUDICIAL MEMBER;

1. The instant appeal by the Revenue is directed against the order of Ld. Commissioner (Appeals)- 12, Mumbai dated 16th December 2016 which in turn arises from assessment order dated 30th March 2015 passed under section 143(3) read with section 147 of the Act. On service of notice of appeal the assessee has filed its cross objections. The revenue has raised following grounds of appeal:

   (i) Whether on facts and in the circumstances of the case and in law, the learned Commissioner (Appeals) has erred in treating the notice under section 148 of the Act is invalid and bad in law by holding that assessing

officer does not have any tangible material either from assessment record or from any other source.

(ii) Whether on the facts and in the circumstances of the case and in law, the learned Commissioner appeal has erred in holding the order under section 143(3) read with section 147 of the act is invalid, hence failed to decide the issue to receipt of share application money/share capital/share premium treated as cash credit by the assessing officer on merits.

(iii) The appellant prays to leave, to add, to amend and/or to alter any of the grounds of appeal, if need be.

2. Brief facts of the case are that the assessee is engaged in the business of manufacturing, processing and dealing in civil items and job works, filed its return of income for Assessment Year 2009-10 on 31st March 2010 declaring taxable income at Rs.(-) 33230/-. The return of income was processed under section 143(1) of the Act. The assessment was reopened under section 147 on 29th March 2014. Accordingly, notice under section 148 was issued to the assessee on 29th March 2014. The assessee vide its letter dated November 2014 furnish the copy of acknowledgement of return filed earlier on 31st March 2010. The assessee requested for supply of reasons recorded. The following reasons were recorded by the Assessing Officer:

> *"From the records, it is seen that the assessee is in receipt of huge share premium to Rs. 1,33,77,000/- during the financial year 2008-09 relevant to assessment year 2009-10. As there was no scrutiny assessment and for this year, the so-called share premium having been received by the assessee was not examined. The assessee is an unlisted company and the nature of share application received (the intrinsic value of the share in comparison to the excess premium received) is not substantiated."*

3. The assessee vide its letter dated 15th July 2014 raised objection against the reopening. The objection of assessee was disposed of by Assessing Officer vide order dated 15th January 2014. After disposing the objection filed by assessee, the Assessing Officer proceeded to make the re-assessment. On perusal of details furnished by assessee, the Assessing Officer noted that during the relevant period the assessee company introduced a sum of Rs. 1,36,50,000/- on account of share application

money/share capital and share premium received on issue of 27300 equity shares to the face value of Rs. 10/- each at a premium of Rs. 490/- per share from the following four parties;

S.N	Name of the person	No of shares	Face value	Issue price	Premium per share	Money Received towards Share capital, share premium & **Total**		
(1)	(2)	(3)	(4)	(5)	(6)	(7)=(3)*(4)	(8)=(3)*(6)	(7)+(8)
1.	K.R.C. Trading Co. Pvt. Ltd.	13,400	10	500	490	134000	65,66,000	67,00,000
2.	Gyaneshwar Trading & Finance Co. Ltd.	1000	10	500	490	10000	4,90,000	5,00,000
3.	Oshin Investment & Finance P. Ltd.	5300	10	500	490	53000	25,97,000	26,50,000
4.	Doldrum Investment & Finance Pvt. Ltd.	7600	10	500	490	76000	37,24,000	38,00,000
Total		27,300				2,73,000	1,33,77,000	1,36,50,000

4. The assessee was asked to furnish share valuation report to justify the issue of share at a huge premium. In response to the notice of the Assessing Officer, the assessee vide its reply dated 2nd March 2015 furnished the copy of share valuation report. The Assessing Officer issued notice under section 133(6) dated 02.02.2015 to all four parties who have acquired share on payment of premium for identification of parties, business profile and performance, capacity to invest, credit worthiness and source of funds. The notice sent to all the parties were return back. The assessing officer issued show cause to the assessee as to why the entire amount of Rs. 1.36 crore should not be treated as unexplained credit under section 68 of the act. The assessee filed its reply and contended that section 68 is not applicable in the present case. The assessee filed its detail explanation with regard to source and nature of the proceed from the issue of share and submitted various evidences. The contention of assessee was not accepted by the assessing officer. The Assessing Officer made the

addition of entire amount under section 68 of the Act. On appeal before the Ld. Commissioner (Appeals), the reopening was held as invalid. The Ld. Commissioner (Appeals) held that the basic requirement of reopening of the assessment i.e "reason to believe" is not fulfilled at the time of recording the reasons for reopening. Since reopening was held as invalid, therefore the other grounds of appeal raised by assessee was not adjudicated by Ld. Commissioner (Appeals). Thus, aggrieved by the order of Ld. Commissioner (Appeals) the revenue has filed the present appeal before us. On service of notice, the assessee has raised Cross Objection for not adjudicating the grounds of appeal by Ld. Commissioner (Appeals).

5. We have heard the learned DR for the revenue and learned AR of the assessee and perused the material available on record. We have also deliberated on various case laws referred by lower authorities. The ld. DR for the revenue supported the order of Assessing Officer. The ld. DR further submits that the Assessing Officer supplied the reasons of reopening. The objection of assessee was disposed of. The assessment was completed under section 133(1) on 31.03.2010 and the Assessing Officer has no occasion to examine the issue of share premium received by assessee during the relevant period.

6. On the other hand, the ld. AR of the assessee supported the order of Ld. Commissioner (Appeals). The ld. AR further submits that the reasons recorded by the Assessing Officer were not valid to invoke section 148 of the Act. The reopening is without tangible material available with Assessing Officer for doubting the receipt of share application money. There was no evidence before the Assessing Officer at the time of recording the reasons which could prove that some income had escape assessment. It was further submitted that in case the reasons recorded are insufficient to establish any belief of Assessing Officer, such reason cannot be said to be giving rise to the jurisdiction of the Assessing Officer

to reassess the income. Unless any tangible evidence is referred and relied upon while recording the reasons, the Assessing Officer have no jurisdiction to reopen the assessment. The ld. AR further submits that the shares were subscribed by the holding and associate company, whose identities cannot be doubted and without group concern valuation cannot be suspected. In support of his submission, the ld. AR of the assessee relied upon the decisions of Hon'ble Bombay High Court in case of NIVI Trading Ltd. vs. Union of India (278 CTR 219), CIT vs. Smt. Maniben Valji Shah [283 ITR 453 (Bom)], Infrastructure and Energy Services Ltd. Vs. ACIT [332 ITR 587(Bom)], Khubchandani Health parks Pvt. Ltd. vs. ITO & Ors [384 ITR 322], Hon'ble Gujarat High Court in case of Krupesh Ghanshyambhai Thakkar vs. DCIT [77 taxmann.com 293], Hon'ble Delhi High Court in CIT vs. Batra Bhatia Company [321 ITR 526], CIT vs. Orient Craft Ltd. [354 ITR 536], Decision of Hon'ble Supreme Court in case of CIT vs. Kelvinator of India Ltd. [320 ITR 561(SC)] .

7. We have considered the rival submission of the parties and have gone through the orders of authorities below. The assessee filed return of income on 31.03.2010 for Assessment Year 2009-10. The assessment was processed under section 143(1). The assessment was reopened on 29.03.2014 without four year from the end of relevant Assessment Year. We have noted that the Assessing Officer nowhere mentioned in the reasons recorded that any tangible material either from assessment record or from other source has come in the notice of Assessing Officer for his reason to believe that any income has escape assessment. Therefore, the basic requirement of reopening of the assessee i.e. reason to believe was not fulfilled at the time of recording the reasons of reopening.

8. The Hon'ble Bombay High Court in case of NIVI Trading Ltd. (supra) held as under:

"25. .....The principal condition for issuance of notice is to be found in section 147 of the Income Tax Act and that is on the reason to belief that any income chargeable to tax has escaped assessment for any assessment year, then, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be. In the present case, the Respondents do not state that any income chargeable to tax has escaped assessment. All that the Revenue desires is verification of certain details and pertaining to the gift. That is not founded on the belief that any income which is chargeable to tax has escaped assessment and hence, such verification is necessary. That belief is not recorded and which alone would enable the Assessing Officer to proceed. Thus, the reasons must be founded on the satisfaction of the Assessing Officer that income chargeable to tax has escaped assessment. Once that is not to be found, then, we are not in a position to sustain the impugned notice."

9. Further, the Hon'ble jurisdictional High Court in case of Khubchandani Health parks Pvt. Ltd. (supra) held that notice issued under section 148 would be without jurisdiction for absence of reason to believe that income had escaped assessment even in case where assessment has been completed earlier by intimation under section 143(1).

10. The Hon'ble Gujarat High Court in Krupesh Ghanshyambhai Thakkar vs. DCIT (supra) held as under:

"11. …….as per the reasons recorded, the notice has been issued and assessment is sought to be reopened for deep verification of the claims. Even in the order disposing of the objections, it has been specifically stated that to verify whether all the criteria are met by the said transaction of Rs. 50 lakhs routed through the group and also to verify the claim of having recorded these transactions in the regular books of account, notice under Section 148 has been issued. Even with respect to investment in shares of M/s. Rushil Decor, it has been submitted that whether the investment in shares of M/s. Rushil Decor were acquired from the capital of the assessee and the same is duly recorded in the books of account, needs to be verified and for that purpose, the assessment for A.Y 2009-2010 is sought to be reopened.

12. In case of *Inductotherm (India) (P.) Ltd.* (*supra*), Division Bench of this Court has observed that for a mere verification of the claim, the power of reopening of assessment could not be exercised. It is further observed that the Assessing Officer under the guise of power to reopen an assessment, cannot seek to undertake a fishing or roving inquiry and seek to verify the claims, as if it were a scrutiny assessment.

12.1 Similar view has been expressed by the Division Bench in case of *Deep Recycling Industries* (*supra*) wherein it has been held and observed that for mere scrutiny, reopening of the assessment would not be permissible. It is further observed that the reopening of the assessment could be made if the Assessing Officer had formed a belief that income chargeable to tax had escaped assessment. The Court has further observed that in order to do so, the Assessing Officer must have some tangible material having live link with the escapement of the income on the basis of which he can form a *bona fide* belief of escapement of income chargeable to tax. It has also been observed that reopening cannot be resorted to for fishing or roving inquiry on mere suspicion that income chargeable to tax may have escaped assessment.

13. Applying the aforesaid two decisions to the facts of the present two cases on hand and the reasons recorded to reopen the assessment, we are of the opinion that under the guise of reopening of the assessment, the Assessing Officer wants to have a roving inquiry; as observed hereinabove. Even as per the Assessing Officer in the reasons recorded has specifically mentioned that for the purpose of verification/deep verification of the claim, it is necessary to reopen the assessment. Under the circumstances, it cannot be said that the Assessing Officer had any tangible material to form an opinion that the income chargeable to tax has escaped the assessment. Under the circumstances, the *impugned* action of reopening of the assessment in exercise of power under Section 148 of the I.T Act for the reasons recorded hereinabove cannot be sustained".

11. The Hon'ble Delhi High Court in CIT vs. Batra Bhatia Company (supra) held as under:

"A reading of the reasons recorded did not disclose that the Assessing Officer, in fact, had reasons to believe that any income had escaped assessment. It is not just the belief of the Assessing Officer that is material, but such a belief must be based on certain reasons. There was no indication as to on what information or on what material the Assessing Officer had harboured the belief that the claim of the assessee required deeper scrutiny. In fact, no new material was on record after the filing of the return till the issuance of notice under section 147. The proceedings under section 147 are not to be invoked at the mere whim and fancy of the Assessing Officer. It has to be seen in every case as to whether the invocation is arbitrary or reasonable one. Merely because the Assessing Officer felt that the issue required 'much deeper scrutiny', it was not enough ground for invoking section 147. It is not belief per se that is a pre-condition for invoking section 147, but a belief founded on reasons. The expression used in section 147 is 'If the Assessing Officer has reason to believe' and not 'If the Assessing Officer believes'. There must be some basis upon which the belief can be built. It does not matter whether that belief is ultimately proved right or wrong, but there must be some material upon which such a belief can be founded."

12. Further, the Hon'ble Delhi High Court in CIT vs. Orient Craft Ltd. (supra) held it is not permissible to adopt different standards while interpreting the words 'reason to believe' vis-à-vis section 143(1) and section 143(3), the Hon'ble Court had held as under:

> **"13.** Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under Section 143(1) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in Section 147; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed.
>
> **14.** Certain observations made in the decision of *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section 148, the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(1) can be

subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that the assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in *Rajesh Jhaveri Stock Brokers (P.) Ltd.* (*supra*) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements.

15. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in *Kelvinator of India Ltd.* (*supra*). The reasons recorded by the Assessing Officer in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147."

13. Considering the above factual and legal discussion that in absence of reason to believe that income had escape assessment. We do not find any illegality or infirmity in the order passed by ld. Commissioner (Appeals) in holding the reopening as invalid. Hence, the grounds of appeal raised by revenue are dismissed.

14. In the result, appeal of the Revenue is dismissed.

C.O. No. 132/Mum/2018

15. The assessee has raised the following grounds of appeal:

1. The ld. Commissioner of Income-tax (Appeals) has erred in law and facts in not adjudicating the ground no.3 relating to addition on account of share capital and share premium amounting to Rs. 1,36,50,000/-.
2. The ld. Commissioner of Income-tax (Appeals) has erred in law and facts in not adjudicating that the addition on account of share capital and share premium amounting to Rs. 1,36,50,000/- treating the same as unexplained cash credit u/s. 68 of the Act was incorrect and unjustified.

16. Considering the fact that we have dismissed the appeal of the Revenue, the grounds raised in Cross Objection by assessee have become infructuous.

17. In the result, the Cross Objection of assessee is dismissed as infructuous.

Order pronounced in the open court on 26/09/2018.

Sd/-	**Sd/-**
G.S. PANNU	**PAWAN SINGH**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Date: 26.09.2018
SK

Copy of the Order forwarded to :

1. Assessee
2. Respondent
3. The concerned CIT(A)
4. The concerned CIT
5. DR "H" Bench, ITAT, Mumbai
6. Guard File

BY ORDER,
Dy./Asst. Registrar
ITAT, Mumbai