

THE INCOME TAX APPELLATE TRIBUNAL
"C" Bench, Mumbai
Before Shri B.R. Baskaran (AM) & Shri Ramlal Negi (JM)

I.T.A. No. 5060/Mum/2017 (Assessment Year 2010-11)

M/s. Pony Infrastructure & Contractors Pvt. Ltd. (Formerly known as Dynamix Balwas Infrastructure Pvt. Ltd.) DB House, Yashodham Gen. A.K. Vaidya Marg Goregaon East Mumbai-400 063. PAN : AACCD4446N (Appellant)	Vs.	ITO 13(1)(4) Room No. 216B 2 nd Floor Aayakar Bhavan M.K. Road Mumbai-400020. (Respondent)
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Assessee by	Shri Ajay Wadhwa
Department by	Shri H.N. Singh
Date of Hearing	29.8.2018
Date of Pronouncement	11.10.2018

ORDER

Per B.R. Baskaran (AM) :

The assessee has filed this appeal challenging the order dated 01-06-2017 passed by Ld CIT(A)-21, Mumbai and it relates to the assessment year 2010-11. The assessee is aggrieved by the decision of Ld CIT(A) in holding that the reopening of assessment is valid in law and also in confirming the addition of Rs.387.68 crores made by the AO u/s 68 of the Act.

2. The facts relating to the case are discussed in brief. The assessee company was earlier known as M/s Dynamix Balwas Infrastructure P. Ltd. and it was formed for carrying on business of undertaking turn-key contracts for construction of real estate projects. It filed its return of income for AY 2010-11 on 20-09-2010 declaring total loss of Rs.39.06 crores. In the return of income, it had claimed interest expenditure of Rs.38.93 crores. The assessing officer completed the assessment u/s 143(3) of the Act on 20-02-

2013 determining total loss at Rs.13,29,461/-, after disallowing interest expenditure claim of Rs.38.93 crores.

3. During the year under consideration, the assessee had received a sum of Rs.387.68 crores on issuing 7,75,304 Compulsorily Convertible Debentures (CCD) at a face value of Rs.5000/- per CCD to a non-resident Cyprus based company named M/s Greetham Investments Ltd, which was having registered office at Naousis 1, Karapatakis Building, P.C.6018, Larnaca 6018, Republic of Cyprus. The assessee had claimed interest expenses on the CCD issued to M/s Greetham Investments Ltd, which was disallowed during the course of original assessment proceedings.

4. Subsequently, the assessing officer reopened the assessment by issuing notice u/s 148 on 19-06-2014. In the mean time, the assessee filed a revised return of income on 09-08-2014 declaring total loss of Rs.13,32,557/-. Accordingly, in response to the notice issued u/s 148 of the Act, the assessee filed a letter dated 20-08-2014 requesting the AO to treat the revised return of income dated 09-08-2014 as the return of income filed in response to the notice issued u/s 148 of the Act.

5. The assessee requested the AO to furnish a copy of reasons for reopening and the same was supplied to the assessee by the AO on 21-08-2015. The assessee filed its objections to the reopening of assessment, vide its letter dated 24.11.2015. The assessing officer rejected the objections raised by the assessee, vide his letter dated 29-01-2016. Thereafter, the AO completed the assessment by assessing the amount of Rs.387.68 crores as income of the assessee u/s 68 of the Act.

6. Before Ld CIT(A), the assessee challenged the validity of reopening of assessment as well as the addition made u/s 68 of the Act. The various contentions raised by the assessee did not find favour with Ld CIT(A), who confirmed the validity of reopening of assessment as well as the addition made

by the AO u/s 68 of the Act. Aggrieved by the order passed by Ld CIT(A), the assessee has filed this appeal before the Tribunal.

7. The first issue relates to validity of reopening of assessment. Before considering the rival contentions, we feel it pertinent to extract below the reasons for reopening of assessment. The same is also extracted by the AO at page 2 of the assessment order:-

"During the assessment proceeding the A.O. obtained address of M/s. Greetham Investments Ltd., which was Naousis 1, Karapatakis Building, P. C. 60018, Larnaca 6018, Republic of Cyprus. Hence, to verify the genuineness of the deposits of Rs. 3.87,68.70,0007- received by M/s, Dynamix Bed-was Infrastructure Pvt. Ltd. (now known as M/s. Pony Infrastructure Pvt. Ltd.) a letter -was -written to Under Secretary (FT & TR-III(l), New Delhi through the CIT-9, Mumbai vide letter dated 25.07.2013 (sic.25-07-2012). In response to the correspondence made by the CIT-9, Mumbai, The FT & TR Division, Exchange of Information Cell, New Delhi vide their letter dated 31.12.2012 forwarded the requisite information provided by the Competent Authority of Cyprus along with relevant bank slips for the transfer of money (copy enclosed). In the information provided by the Cyprus Tax Authorities, Company's Director have given written confirmation which is reproduced as under:-

"Greetham Investments Ltd. has invested in the Company "Dynamix Balwas Infrastructure Pvt. Ltd." In India the total amount of INR 3,87,68,70,000 in seven installments/ transfers as tabulated below:-

Tr. No.	Date	UDS	INR (rounded)
1.	04.06.2009	8.200.000	387.942.000
2.	18.06.2009	14.995.000	721.109.550
3.	23.06.2009	5.000.000	242.250.000
4.	07.07.2009	28.999.700	1.416.635.345
5.	08.07.2009	10.200.200	499.380.000
6.	21.07.2009	9.995.000	483.818.500
7.	30.07.2009	2.609.000	125.737.839
	13.08.2009	1.300	

On verification of all the above aspects, it is seen that the transaction proposed for verification have been occurred in F. Y. 2009-10 i.e. A. Y. 2010-11.

Thus, the source of fund generation and its genuineness which is seen from information received from the letter dated 25.02.2014 shows that assessee has not disclosed fully and truly all material facts regarding the above mentioned transaction necessary for his assessment."

8. The Ld D.R, in his written submissions, has narrated the events that led to the reopening of assessment of AY 2010-11. The assessing officer originally reopened the assessment of AY 2009-10 on 16.7.2012 on the basis of information received from Central Circle regarding receipt by assessee of deposits of Rs.387 crores from M/s Greetham Investments Ltd. Thereafter a reference was made by the AO to Foreign Tax & Tax Research Division (FT & TR) of CBDT on 25.07.2012. In response thereto, the FT & TR division, vide their letter dated 31.12.2012, forwarded the information received from Competent Authority of Cyprus, which contained the confirmation letter given by the Director of M/s Greetham Investments Ltd along with the relevant bank slips for the transfer of funds to the assessee. Subsequently, another letter dated 25-02-2014 was received from FT & TR containing copies of Bank Statements of M/s Greetham Investment limited, which showed that the assessee has received funds during the FY 2009-10 relevant to AY 2010-11. Accordingly a proposal was sent on 03-03-2014 to Ld CIT-9, Mumbai to drop the reassessment proceedings of AY 2009-10. Thereafter, notice u/s 148 of the Act was issued for AY 2010-11 on 19-06-2014, since the assessee has received funds during the financial year relevant to AY 2010-11.

9. The ld A.R submitted that the assessee has furnished all the details relating to CCDs issued by it to the AO during the course of original assessment proceedings completed u/s 143(3) of the Act on 22-02-2013 for AY 2010-10, i.e., the year under consideration. He submitted that the assessing officer has raised queries on secured and unsecured loans taken by the assessee and specifically called for details of all loans during the course of assessment proceedings. The assessee had claimed interest payable on CCDs as deduction. The AO has taken conscious decision to disallow the same on the reasoning that the assessee did not carry on any business during the instant year. The AO has made relevant discussions about CCDs in paragraph 3 of the original assessment order. Accordingly the Ld A.R submitted that the AO has fully applied his mind to the fact of receipt of funds by way of CCDs during the course of original assessment proceedings and accepted the same.

10. The Ld A.R further submitted that the assessment has been reopened within four years from the end of the present assessment year and hence the AO is only required to show that there is reason to believe that there is escapement of income. He submitted that, on a perusal of the reasons recorded by the AO for reopening, it can be noticed that the AO has started enquiries "in order to verify the genuineness of deposits of Rs.387.68 crores" during the course of reassessment proceedings for AY 2009-10. For this purpose, he has written a letter dated 25.07.2012 to the Under Secretary (FT & TR-III(1), New Delhi. The FT & TR division of CBDT has written letter to the Competent Authority of Cyprus, who forwarded the details in the form of copies of bank slips and the confirmation letter obtained from the director of M/s Greetham Investments Ltd. In the confirmation letter, the subscriber of CCDs has furnished the details of payments made by it to the assessee.

11. The Id A.R submitted that the assessee has received funds on issuing CCDs to M/s Greetham Investments Ltd and all the relevant details were furnished to the AO during the course of original assessment proceedings. All of them were examined by the AO and he has taken a conscious decision to disallow interest payable on CCDs. The AO has collected relevant details from the Subscriber of CCDs, viz., M/s Greetham Investments Ltd through Government Channels. The subscriber has, in turn, confirmed the transactions by furnishing a confirmation letter along with copies of bank slips evidencing transfer of funds. The independent enquiry made by the AO very much revealed that the transactions of issuing of CCDs were genuine. Accordingly the Ld A.R contended that, under these set of facts, the question of forming reasonable belief about escapement of income does not arise at all. The AO, in order to justify the reopening, has further observed as under:-

"Thus, the source of fund generation and its genuineness which is seen from information received from the letter dated 25-02-2014 shows that the assessee has not disclosed fully and truly all the material facts regarding the above mentioned transaction necessary for his assessment."

12. The Ld A.R submitted that the AO has reopened the assessment within a period of four years from the end of the assessment year. The question of showing failure on the part of the assessee to disclose fully or truly all material facts shall arise only if the assessment is reopened after a period of four years. However, in the reasons for reopening as well as in subsequent discussions, the AO is mentioning that there was failure on the part of the assessee to disclose fully and truly all material facts, even though there is no requirement to show the same. This discussion of the AO itself clearly shows that the AO has not applied his mind properly to the legal position as well as to facts of the present case. He submitted that the question of not disclosing the material facts does not arise in this case, as the assessee has disclosed all the material facts relating to CCDs during the course of original assessment proceedings.

13. The Ld A.R took us through the paper book and various documents in order to buttress his contentions that the assessee has furnished all the details to the AO during the course of assessment proceedings, more particularly, to the following documents furnished before the AO:-

- (a) APB-43:- Tax Audit report, wherein the details of CCDs issued and the name of subscriber M/s Greetham Investments Ltd are disclosed.
- (b) APB-57:- Copies of Annual report, wherein due disclosure has been made about the CCDs issued by the assessee. This note also contains the name of subscriber, M/s Greetham Investments Ltd.
- (c) APB-82:- Copy of agreement dated 08-02-2010 entered between the assessee and M/s Greetham Investments Ltd. He submitted that this agreement clearly shows the address of M/s Greetham Investments Ltd.
- (d) APB 65:- Query raised by the AO during the course of original assessment proceedings asking for details of secured and unsecured loans raised by the assessee.
- (e) APB – 95:- The discussions made by the AO in the original assessment order about the CCDs issued by the assessee to M/s Greetham Investments Ltd.

14. Accordingly the Ld A.R submitted that the assessing officer did not have any fresh material that could have urged him to take a different view and led

him to form belief that there was any escapement of income. He submitted that the materials claimed to have been received along with letter dated 25-02-2014 were only the copies of bank statements of M/s Greetham Investments Ltd. He submitted that the revenue has not furnished copy of letter dated 25-02-2014 to the assessee nor was it brought on record by the AO. In any case, the copies of bank statements of M/s Greetham Investments Ltd only prove that the transactions were carried through banking channels and the same could not, in any manner, lead to the belief that there is escapement of income. Accordingly he submitted that there is no nexus between the material and the reasons cited by the AO. He further submitted that the AO has not stated or alleged in the reasons for reopening that there is escapement of income. What the AO has done is only to carry out a verification exercise and hence for that purpose, the AO is not permitted to reopen the assessment. In any case, it is only a case of change of opinion only as the AO has already accepted the genuineness of loan taken through issuing CCDs. Accordingly he submitted that the reopening of assessment is bad in law.

15. The Learned AR further submitted that reason for reopening mentioned in the assessment order is different from the copy of reasons for reopening furnished to the assessee. He invited our attention to the copy of reasons for reopening furnished in the paper book filed by the Revenue, wherein following paragraph 5 has been included over and above the reasons extracted in the assessment order:-

“5. In view of the above facts, I have reason to believe that income of ₹ 3,87,00,00,000/-, chargeable to tax has escaped assessment by reason of failure on the part of assessee to disclose fully and truly all material facts with the meaning of section 147 of the I.T. Act, 1961.”

The Learned AR submitted that the Assessing Officer is not entitled to improve reasons that were originally recorded at the time of reopening of the assessment. Learned AR submitted that by including paragraph 5 to the reasons, the Assessing Officer has improved reasons, which is not permitted as per decision rendered in following cases :-

- (i) Indivest Pte. Ltd. Vs. Add. DIT (350 ITR 120)
- (ii) Aroni Commercials Ltd. (367 ITR 405)

16. The Learned DR, however, submitted that the Assessing Officer during course of original assessment proceedings did not examine the details of funds received by the assessee by issuing CCDs (compulsory convertible debentures) to the Cyprus based company named M/s Greetham Investments Ltd. The Central Circle of Income Tax Department collected address details of M/s. Greetham Investments Ltd. Accordingly, during the course of reassessment proceedings for AY 2009-10, information was sought by the Assessing Officer from FT & TR Division of CBDT about the investments made by M/s. Greetham Investments Ltd., in the assessee's company. Based on the details received from FT & DT Division, it was noticed that investments have been made by above said Cyprus based company in financial year 2009-10 relevant to A.Y. 2010-11 and hence assessment of the year under consideration was reopened by issuing notice u/s. 148 of the Act. Though the information in the form of confirmation letter from M/s. Greetham Investments Ltd. was received on 31.12.2012, yet it did not contain copies of bank statements of M/s. Greetham Investments Limited. Subsequently, the bank statements of M/s. Greetham Investments Ltd., were received by the Assessing Officer through letter dated 25.2.2014. It was noticed from the bank statement that M/s. Greetham Investments Ltd. had in turn received funds from Bermuda based company named ADG Absolute. It is known fact that Cyprus and Bermuda are tax havens. The Assessing Officer, during the course of original assessment proceedings, did not verify these facts and also details of source of M/s Greetham Investments Ltd. Only upon receipt of information by way of bank statements, it came to the notice of the Assessing Officer that the assessee did not disclose details of transactions fully and truly and hence the Assessing Officer has reopened the assessment by issuing notice u/s. 148 of the Act.

17. The Learned DR submitted that Hon'ble Supreme Court has held in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (291 ITR 500) as under :-

16. Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. **The word “reasons” in the phrase “reason to believe” would mean cause or justification.** If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in *Central Provinces Manganese Ore Co. Ltd. v. ITO* [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see *ITO v. Selected Dalurband Coal Co. Pvt. Ltd.* [1996 (217) ITR 597 (SC)]; *Raymond Woollen Mills Ltd. v. ITO* [1999 (236) ITR 34 (SC)]).

17. The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a) But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section

147. The case at hand is covered by the main provision and not the proviso.

The Learned DR submitted that the Assessing Officer, in the instant case, has sufficient cause or justification to believe that income has escaped assessment, since the funds have come to the assessee from tax heaven countries. The Learned DR also placed reliance on the decision rendered by Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal (203 ITR 456), wherein Hon'ble Supreme Court has held that where transaction itself is found to be bogus transaction on the basis of subsequent information, mere disclosure of that transaction at the time of original assessment proceedings cannot said to be disclosure of true and full facts. The Learned DR submitted that the AO has found on the basis of subsequent information that the assessee has received money from Cyprus based company which has in turn received money from Bermuda based company, which facts lead the AO to be believe that transactions are bogus in nature. Accordingly, learned DR submitted that the Assessing Officer was justified in reopening the assessment u/s. 148 of the Act.

18. With regard to the contentions of the Ld A.R that the AO has improved the reasons originally recorded, the Learned DR submitted that there is no improvement of reasons as alleged by Ld A.R. He submitted that the reasons for reopening was originally recorded by the Deputy Commissioner of Income Tax named Mr. Harkamal Sohi Sadhu. However, the copy of the reasons for reopening was furnished to the assessee by Income Tax Officer named Mr. Praveen B. Kuhikar. Accordingly the Learned DR submitted that it was only an inadvertent mistake in not including paragraph no.5 in the copy of reasons supplied to the assessee or that mentioned in the assessment order. Hence the same does not amount to improvement of reasons for reopening.

19. In the rejoinder, the Ld A.R submitted that the Ld D.R is trying to improve the case of the AO by submitting that M/s Greetham Investments Ltd is a Cyprus based company and it has received funds from a Bermudas based

company named ADG Absolute. The Ld A.R submitted that M/s ADG Absolute is the major shareholder of M/s Greetham Investments Ltd. Simply for the reason that these companies are located in Cyprus and Bermudas, the AO could not have come to the conclusion that these are sham companies, without bringing any other credible material on record. The Ld D.R is only drawing adverse inference in this matter and it is not the case of the AO at all. In any case, the Cyprus tax authorities have confirmed the transactions by furnishing relevant documents.

20. We have heard rival contentions and perused the record. The original assessment, for the instant year, was completed u/s 143(3) of the Act on 22.02.2013. The assessing officer has reopened the assessment by issuing notice u/s 148 of the Act on 19-06-2014. The assessment year under consideration is AY 2010-11. Hence the assessment has been reopened within a period of four years from the end of the relevant assessment year.

21. In the reasons for reopening, which is extracted above, it is stated by the AO that the assessee has not disclosed fully and truly all material facts regarding the above mentioned transaction (i.e., transaction of receipt of money by issuing CCD) necessary for the assessment. Apparently, the AO is referring to the first proviso to sec.147 of the Act, which reads as under:-

*“Provided that where an assessment under sub- section (3) of section 143 or this section has been made for the relevant assessment year, **no action shall be taken under this section after the expiry of four years** from the end of relevant assessment year, **unless any income chargeable to tax has escaped** assessment for such assessment year **by reason of the failure on the part of the assessee** to make a return under section 139 or in response to a notice issued under sub- section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.”*

The above said proviso, in our considered view, gives protection to the assessee against reopening of assessment after expiry of four years from the end of the assessment year, i.e., after expiry of prescribed period of four years, the AO is entitled to reopen the assessment only if there is failure on the part of the

assessee to comply with notices or to disclose fully and truly all material facts necessary for his assessment for that assessment year. In the instant case, the assessment has been reopened within four years from the end of the assessment year 2010-11 and hence the question of failure on the part of the assessee need not be established. On a combined reading of sub sec(1) of sec. 147 of the Act along with first proviso would show that the AO can reopen the assessment, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. If the reopening is done after expiry of four years from the end of the relevant assessment year, then the AO is duty bound to show that there was failure on the part of the assessee as mentioned in the first proviso to sec.147. Hence in the instant case, the AO is not required to show that there was failure on the part of the assessee as mentioned in the first proviso to sec. 147 of the Act. Hence we are unable to understand as to why the AO has stated or stressed the point that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for AY 2010-11.

22. The sub sec (1) of sec. 147 reads as under:-

“147. Income escaping assessment:- *If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)”*

A careful reading of the sec. 147 would show that the assessing officer is entitled to reopen the assessment if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. Once the AO has reason to believe that there was escapement of income, then as per provisions of sec.148(1) of the Act, he shall serve on the assessee a notice requiring him to furnish a return of income within such period... The provisions of sec.148(2) states that the AO shall, before issuing any notice

under that section, record his reasons for doing so. Hence it is imperative on the part of the assessing officer to record his reasons for reopening of assessment and in the said reasons; it is required for the AO to show that there was reason to believe about escapement of income. From the reasons so recorded by the assessing officer, it is possible to examine as to whether the AO had reason to believe that there was escapement of income. Hence, whenever the assessee challenges the validity of the reopening of assessment on the ground that the AO did not have reason to believe that there was escapement of income, it is necessary to examine the reasons critically in order to address the ground so raised.

23. We shall now examine the reasons recorded by the assessing officer. In the reasons, the AO states that, during the assessment proceedings the AO obtained address of M/s Greetham Investments Ltd. The Ld A.R pointed out that the assessee has furnished the copy of agreement entered by it with M/s Greetham Investments Ltd (which is placed at page 82 of the paper book) and the said agreement mentions the address of the above said company. Hence the Ld A.R disputed the observation of the AO that he has obtained address. The contention of the AR was that there was no failure on the part of the assessee to furnish the details, while the AO appears to have observed so to prove that there was failure on the part of the assessee to furnish all material facts. In the preceding paragraph, we have already observed that “failure on the part of the assessee” is not relevant for the year under consideration and hence the observation made by the AO that he “obtained the address of M/s Greetham Investments Ltd” will not have much significance.

24. Next, the AO has record as under:-

“Hence, to verify the genuineness of the deposits of Rs.3,87,68,70,000/- received by Dynamix Balwas Infrastructure Pvt Ltd (now known as M/s Pony Infrastructure Pvt Ltd) a letter was written to Under Secretary (FT & TR-III(1), New Delhi, through the CIT-9, Mumbai vide letter date 25/07/2013.”

The above observation of the Assessing officer would show that he has written letters to FT & TR in order to “verify the genuineness of the deposits”.

25. Next, the AO has stated that the FT & TR division...., vide their letter dated 31.12.2012, has forwarded the requisite information provided by the Competent Authority of Cyprus along with relevant bank slips for the transfer of money. In the information provided by the Cyprus Tax Authorities, Company’s Director has given written confirmation. The AO has reproduced the confirmation letter also in the reasons recorded by him. Thus, we notice that the AO himself records in the reasons that the director of M/s Greetham Investments Ltd has confirmed the transactions relating to investment made by it in the assessee company. In the said confirmation, the above said company has furnished break-up details of investment made by it date wise. Accordingly, up to this stage of reasons recorded by AO, nothing turns out to show that there was anything available with the AO to believe that there was escapement of income.

26. The AO further records as under in the reasons for reopening:-

“On verification of all the above aspects, it is seen that the transaction proposed for verification have been occurred in FY 2009-10, i.e., AY 2010-11.”

The above said observation of the AO would show that the assessing officer was not aware of the period during which the money was received by the assessee, when he reopened the assessment of AY 2009-10 initially. It appears that the AO was in possession of information that the assessee has received money on issuing CCDs and was not aware of the year in which the money was received. Hence he has written letter to FT & TR division of CBDT “in order to verify the genuineness of deposits”. Hence it is a case of “information collection exercise” done by the AO. Based on the information so collected, it came to the notice of the AO that the money has been collected by the assessee in FY 2009-10 relevant to AY 2010-11.

27. The AO then writes in the reasons for reopening as under:-

“Thus, the source of fund generation and its genuineness which is seen from information received from the letter dated 25-02-2014 shows that the assessee has not disclosed fully and truly all material facts regarding the above mentioned transaction necessary for his assessment.”

In this part, the AO is only observing that the assessee has not disclosed fully and truly all material facts relating to the impugned transaction because the details of source of fund generation and its genuineness came to his notice only from the information received from FT & TR Division, vide their letter dated 25-02-2014. The Ld A.R submitted that the letter dated 25-02-2014 has not been brought on record. From the submissions made by Ld D.R, we notice that the AO has received the copies of bank account of M/s Greetham Investments Ltd, only along with the letter dated 25-02-2014. We have seen earlier that the above said company has furnished details of money invested by it in the assessee company and also confirmed the transaction, which were forwarded to the assessing officer, vide letter dated 31.12.2012 issued by FT & TR division. The said information also contained dates of making payments to the assessee.

28. Thus, what we notice is that the assessing officer has independently collected details relating to investments made by M/s Greetham Investments Ltd in the assessee company. In fact, the information so collected by the AO independently proves the genuineness of loan taken by the assessee by way of CCDs. In the above paragraph, the AO has alleged that the assessee has not disclosed fully and truly all material facts regarding the above transaction. On the contrary, we notice that the assessee has disclosed the relevant details to the AO during the course of original assessment proceedings. At the cost of repetition, we extract below the discussion made by us in the earlier paragraphs with regard to the documents furnished by the assessee before the AO during the course of original assessment proceedings relating to the money collected by issuing CCDs:-

- (a) APB-43:- Tax Audit report, wherein the details of CCDs issued and the name of subscriber M/s Greetham Investments Ltd are disclosed.

(b) APB-57:- Copies of Annual report, wherein due disclosure has been made about the CCDs issued by the assessee. This note also contains the name of subscriber, M/s Greetham Investments Ltd.

(c) APB-82:- Copy of agreement dated 08-02-2010 entered between the assessee and M/s Greetham Investments Ltd. He submitted that this agreement clearly shows the address of M/s Greetham Investments Ltd.

(d) APB 65:- Query raised by the AO during the course of original assessment proceedings asking for details of secured and unsecured loans raised by the assessee.

(e) APB – 95:- The discussions made by the AO in the original assessment order about the CCDs issued by the assessee to M/s Greetham Investments Ltd.

The above documents would show that the assessee has furnished all the details available with it to the assessing officer during the course of assessment proceedings. The documents collected by the AO independently through FT & TR division also show that M/s Greetham Investments Ltd has also confirmed the transactions and also furnished copies of bank statements, which also prove the creditworthiness of the above said party. By collecting these external documents, the AO has taken the view that there is failure on the part of the assessee to disclose fully and truly all material facts. There should not be any dispute that the documents in the form of confirmation letter, bank slips, bank statements are the documents belonging to M/s Greetham Investments Ltd and the assessee could not have control over it. Hence we are unable to understand as to how the assessee could be charged that there was failure on the part of the assessee to disclose material facts fully and truly in respect of documents belonging to the other party, on which the assessee does not have any control.

29. In the reasons recorded by the AO, as stated earlier, following paragraph was not communicated to the assessee:-

“5. In view of the above facts, I have reason to believe that income of Rs.3,87,00,00,000/- chargeable to tax has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts with the meaning of section 147 of the IT Act, 1961.”

We have earlier noticed that the AO has carried out only “information collection” exercise. Further the information so collected by the AO independently, in fact, vindicates the transactions entered by the assessee with regard to the CCDs issued by it. Since the documents collected by the AO are third party documents on which the assessee does not have any control, we have also observed that the assessee cannot be charged for the failure to disclose all material facts fully and truly. In the information so collected, M/s Greetham Investments Ltd has confirmed the money invested by it in the assessee company. The bank statements of M/s Greetham Investments Ltd also show the movement of funds from the above said company to the assessee. All these facts show that the assessee has received money from M/s Greetham Investments Ltd on issuing the CCDs. However, from these facts, the AO has concluded that he has reason to believe that income of Rs.387 crores chargeable to tax has escaped assessment. We are unable to understand as to how the AO could have come to such a conclusion, when the details of loan taken by it in the form CCDs were confirmed by the other party during the course of independent enquiry conducted by the AO.

30. The only provision under which the AO could have assessed the above amount as income of the assessee is the provisions of sec.68 of the Act. In the original assessment proceedings, the AO has seen that the assessee has received money by issuing CCDs. The assessee has also furnished the details of CCDs through various documents. The assessee has also provided for interest payable on CCDs and claimed the same as deduction. The AO has disallowed the interest claim by discussing about the CCDs and the business activities of the assessee. Thus, we notice that the assessing officer has examined the details of money received by issuing CCDs from M/s Greetham Investments Ltd during the course of original assessment proceedings. The information and details independently collected by the AO, in fact, proves the genuineness of the funds received by the assessee by issuing CCDs. Accordingly we are of the view that a properly instructed officer could not have come to the conclusion that there was escapement of income in respect of

funds received by issuing CCDs. Hence we are of the view that there is no live link between the information received by the assessee and the belief entertained by the assessee that there was escapement of income.

31. The Ld D.R, by placing reliance on the decision rendered by Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal (supra), contended that the transaction, if found to be bogus on the basis of subsequent information, then reopening is valid. In the case before Hon'ble Supreme Court, the lender has confessed before his AO that he was only a name-lender and had not advanced any loan to any party during the relevant assessment years. Whereas in the instant case, the investor viz., M/s Greetham Investments Ltd, has confirmed the loan transactions. Hence the revenue could not take support of the above said decision. The decision rendered by Hon'ble Supreme Court in the case of Rajesh Jhaveri stock brokers (P) Ltd (supra) only explains the provisions of Law on reopening in paragraph 16 and 17 of its order. In the instant case, the information/details obtained by the AO only vindicate the transactions and hence it cannot be said that those information/details provide cause or justification in reopening of the assessment of the assessee for the year under consideration.

32. In the case of Kelvinator India Ltd (2010)(320 ITR 561)(SC), the Hon'ble Supreme Court has held that the Assessing officer has power to reopen the assessment provided there is "tangible material" to come to the conclusion that there is escapement of income. Further it was held that the reasons must have a live link with the formation of belief, which in our view is absent in the present case. From the discussions made supra, we agree with the submission of Ld A.R that the assessing officer could not have come to the conclusion that there was escapement of income. We notice that the AO has only suspected the genuineness of transactions and could not have had reason to believe that there was escapement of income.

33. The Ld A.R also contended that the assessing officer has re-opened the assessment merely on change of opinion on the facts already considered by

him. He contended that the reopening done on change of opinion is liable to be quashed. In this regard, the Ld A.R placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Jet Speed Audio (P) Ltd (2015)(372 ITR 762). In the above said case, the Hon'ble High Court noticed that the assessing officer had raised a query during the course of original assessment proceedings and the same was responded by the assessee. The AO sought to reopen the assessment on the very same issue. It was noticed that the AO did not refer to any tangible material in the reasons recorded for issuing reopening notice u/s 148 of the Act. Accordingly the Hon'ble jurisdictional High Court held that there is no fault in the findings given by the Tribunal that there is no tangible material mentioned in the reasons recorded by the revenue which would warrant a different opinion being taken than which was taken when the original order of assessment was passed. It was further held that a reopening notice can be sustained only on the basis of grounds mentioned in the reasons recorded. It was further held that it is not open to the Revenue to add and/or supplement later the reasons recorded at the time of issuing reopening notice. The Ld A.R also relied upon the following cases in support of these contentions:-

(A) ON AVAILABILITY OF TANGIBLE MATERIAL:-

- (a) Rushab Enterprises vs. ACIT (2015)(60 taxmann.com 134)(Bom)
- (b) ACIT vs. Rolta India Ltd (2011)(132 ITD 98)(Mum-Trib)
- (c) ITO vs. Deepa Restaurent & Bar P Ltd (62 SOT 268)(Mum-Trib)
- (d) Abu-Dhabi commercial bank Ltd vs. DCIT (145 ITD 354)(Mum-Trib)
- (e) Swarn Singh Sokhey vs. ITO (18 SOT 122)(Mum-Trib)
- (f) R.P. Survarna vs. ITO (68 taxmann.com 14)(Mum-Trib)

(B) ON CHANGE OF OPINION:-

- (g) Direct Information (P) Ltd vs. ITO (349 ITR 150)(Bom)
- (h) Plus paper Foods Pac Ltd vs. ITO (374 ITR 485)(Bom)
- (i) OHM Stock Brokers (P) Ltd vs. CIT (351 ITR 443)(Bom)
- (j) CIT vs. Central Warehousing Corporation Ltd (382 ITR 172)(Delhi)

34. In the instant case, we have earlier noticed that the assessee has furnished the details relating to the CCDs issued by it in various documents furnished to the AO during the course of original assessment proceedings. While disallowing interest expenditure relating to CCDs, the AO has also taken note of the receipt of funds by the assessee through issuing of CCDs. In the original assessment proceedings, the AO appears to have accepted the genuineness of the loan received by the assessee in the form CCDs from M/s Greetham Investments Ltd. The independent enquiries made by the AO through FT & TR division, as noticed earlier, did not bring any fresh material to take a different view than that was taken by the AO during the course of original assessment proceedings. On the contrary, those information only supported the case of the assessee. Hence there was no tangible material in the present case also supporting the view taken by the AO for reopening of assessment. Hence we agree with the contention of the assessee that the AO has reopened the impugned assessment merely on change of opinion.

35. We have earlier observed that the assessing officer has undertaken "information collection exercise" through FT & TR division of CBDT in respect of funds collected by the assessee by issuing CCDs. In the reasons recorded by the AO also, it is stated that "in order to verify genuineness of transactions" the information were sought. The Ld A.R submitted that information collection exercise cannot be a substitute for the reasons for reopening, which would lead the AO believe that income chargeable to tax has escaped assessment. In support of this proposition, the Ld A.R placed his reliance on the decision rendered by Hon'ble Bombay High Court in the case of Nivi Trading Ltd vs. Union of India (2015)(375 ITR 308)(Bom), wherein it was held as under:-

"24) Thus, if more details are sought or some verification is proposed that cannot be a substitute for the reasons and which led the Assessing Officer to believe that an income chargeable to tax has escaped assessment.

25) We are not in agreement with Mr. Gupta because the clear language of [section 147](#) of the IT Act reveals that if the Assessing Officer has reason to believe that any income has escaped assessment, then, he can resort to such power. While it is true, as Mr. Gupta argued, that sub-section (1)

of [section 148](#) of the IT Act enables issuance of notice before the assessment, reassessment or re-computation under [section 147](#) of the IT Act, but that is dealing with the service of the notice. The principal condition for issuance of notice is to be found in [section 147](#) of the IT 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 recompute 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. Having reproduced the same and contents thereof being clear, it is not possible to agree with Mr. Gupta that this Court should not interfere at the threshold. We find additionally that in the affidavit in reply the Revenue has stated that the concept of gift prevails between two individual persons out of love and affection, which does not prevail in the case of companies. In the case of companies, the financial transaction exists to earn profit and the transaction of the so called gift made by the Assessee is only for the purpose of avoiding capital gains tax.

26) This is a stand taken in the affidavit in reply but what we find is that the gift without any consideration and as noted in the reasons recorded and supplied has not been termed as one which attracts any tax or which is chargeable to tax and therefore there is any income which has escaped assessment. In other words, the amount of Rs.1,21,33,429/- shown as gift has not been termed as an income and which is chargeable to tax and which has escaped assessment. All that is required from the Assessee is a verification and in terms of [section 47\(iii\)](#) of the IT Act and for enabling it, the Assessee was called upon to appear before the Assessing Officer. Thus, it is for verification of the value of these shares and whether the computation is on the market rate on the date of such transfer. This, to our mind, would not in any manner enable the Revenue/Respondents to resort to [section 147](#) of the IT Act. In the view that we have taken above, it is not necessary to refer to other Judgments relied upon by Mr. Pardiwalla and which also reiterate the settled principle that the reasons ought to be recorded on the date of the issuance of the notice and which must disclose the requisite satisfaction. The reasons as recorded cannot then be substituted or supplemented by filing an affidavit in the Court. Thus,

additional reasons cannot be supplied and on affidavit. We are of the view that it is not necessary to refer to this principle any further in the facts and circumstances of the present case.”

36. In the case of *Krupesh Ghanshyambhai Thakkar vs. DCIT (2017)(77 taxmann.com 293)*, the Hon’ble Gujarat High Court held that

“under guise of reopening of the assessment, the Assessing Officer wants to have a roving inquiry. 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 assessment. Under the circumstances, the impugned action of reopening of the assessment in exercise of power under section 148 for the reasons recorded hereinabove cannot be sustained.”

Identical view was expressed by Hon’ble Delhi High Court in the case of *CIT vs. Batra Bhatta Company (321 ITR 256)*. In the instant case also, we have noticed that the assessee has furnished the details of funds collected by it by issuing CCDs to the AO in the original assessment proceedings. The AO also applied his mind on it and accordingly disallowed interest expenditure claimed on the CCDs. Through the information collection exercise and consequent reopening of assessment, the AO has only sought to make roving enquiries. The Ld CIT(A) has also expressed the view that the AO did not examine the identity, credit worthiness and genuineness of the investor in respect of amount received by the assessee by issuing CCDs. Accordingly the Ld CIT(A) has upheld the reopening of assessment. We have also observed earlier that the information so collected by the assessing officer, in fact, supports the genuineness of the transaction and also proves that the investor had enough funds for making investment in the assessee company. There was no doubt about the identity of the investor, as the Government of Cyprus has passed on necessary information about the investor. Accordingly we have observed that the information so collected would not lead a properly instructed officer to come to the conclusion that there was escapement of income.

37. The Ld A.R has also contended that the assessing officer has improved the reasons for reopening. In this regard, we agree with the facts narrated by the Ld D.R. We notice that the reasons for reopening was recorded by the Deputy Commissioner of Income tax named Shri Harkamal Sohi Sandhu in June, 2014. However the reasons were supplied to the assessee by the Income tax officer in August, 2015. The copy of reasons given to the assessee did not contain paragraph 5, referred earlier. In these facts, the truncated reasons supplied to the assessee may be due to inadvertent mistake. Hence there cannot be a case of improvement of reasons, as contended by the assessee.

38. In view of the foregoing discussions, we are of the view that there was no material or information available with the assessing officer that would have led him to believe that income chargeable to tax has escaped the assessment for the year under consideration. The assessing officer has collected information in order to verify the genuineness of funds received by the assessee by issuing CCDs and hence it was only "information collection exercise" carried out in order to verify certain transactions. The information so received from Cyprus authorities, in fact, proves the genuineness of the receipts and would not lead to believe that there was escapement of income. Accordingly we have observed that there is no live link between the materials available with the AO and the belief entertained by him. Since the assessee has furnished all the available details relating to CCDs to the AO during the course of original assessment proceedings and the AO has also applied his mind on it while disallowing interest expenditure, the present view taken by the AO to reopen the assessment could fall under the category of change of opinion. We have noticed earlier that the information collected by the AO is the personal information of the investor (being a third party) and hence the assessee could not have laid its hands on them. In that case, the assessee could not be charged that there was failure on its part to disclose fully and truly all material facts, even though the above said charge shall not apply to the reopening done within four years. The submission of Ld D.R was that the investor company is Cyprus based company and it has borrowed funds from a Bermudas based

company and both the companies are located in tax havens. Though the AO has not stated these facts in the reasons, yet the observations made by Ld D.R could lead to a suspicion on the transactions and it may not form reason to believe that there was escapement of income. Accordingly we agree with the contentions of Ld A.R that the reopening of assessment is bad in law on account of multiple reasons discussed above. Accordingly we quash the orders passed by Ld CIT(A)/AO on this legal ground.

39. Since we have quashed the orders passed by Ld CIT(A) and AO, we do not find it necessary to address other grounds urged by the assessee.

40. In the result, the appeal of the assessee is treated as allowed.

Order has been pronounced in the Court on 11.10.2018.

Sd/-
(RAMLAL NEGI)
JUDICIAL MEMBER

Sd/-
(B.R.BASKARAN)
ACCOUNTANT MEMBER

Mumbai; Dated : 11/10/2018

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent
3. The CIT(A)
4. CIT
5. DR, ITAT, Mumbai
6. Guard File.

//True Copy//

BY ORDER,

(Senior Private Secretary)
ITAT, Mumbai

PS