

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10-10-2018

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P. Nos.3405 and 43944 of 2016

And

W.M.P.Nos.2780 and 37778 of 2016

Dayanidhi Maran

.. Petitioner in both WPs

vs

The Assistant Commissioner of Income Tax,
Non-Corporate Circle-1,
Aayakhar Bhavan,
#121, Nungambakkam High Road,
Chennai-600 034.

.. Respondent in wp.no.3405/16

The Assistant Commissioner of Income Tax,
Non-Corporate Circle-1,
Room No.309, III Floor,
wanarparthy block,
121, Mahathma Gandhi Road,
Chennai-600 034.

.. Respondent in wp.no.43944/16

WP No.3405 of 2016 is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records relating to the notice issued by the respondent dated 27.3.2015 under Section 148 of the Income Tax Act, 1961 and the consequential order dated 13.1.2016 of the respondent and quash the same.

WP No.43944 of 2016 is filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records relating to the notice issued by the respondent in PAN: AGRPM1800D dated 18.2.2016 under Section 148 of the Income Tax Act, 1961 and the consequential order dated 8.12.2016 in PAN: AGRPM1800D of the respondent and quash the same.

For Petitioner in WP 3405/16 : Mr.G.Masilamani,
Senior Counsel

& WP 43944/16

for M/s.M.Sneha and L.S.M.Hasan
Fizal.

For Respondents in both WPs : Mr.G.Rajagopal,
Additional Solicitor
General of India assisted
by M/s.Hema Murali
Krishnan and D.Naveen Durai
Babu, Standing Counsel for
Income Tax.

C O M M O N O R D E R

The notice issued by the respondents dated 27.3.2015 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') and the consequential order dated 13.1.2016 are under challenge in WP No.3405 of 2016. The notice issued by the respondent in Pan AGRPM1800D dated 18.2.2016 under Section 148 of the Act and the consequential order dated 8.12.2016 are under challenge in WP No.43944 of 2016.

2. WP No.3405 of 2016 is in relation to the assessment year 2008-2009. WP No.43944 of 2016 is with regard to the assessment year 2009-2010. Thus, two separate notices issued for the assessment years 2008-2009 and 2009-2010 are challenged by way of two separate writ petitions.

3. The facts in general in respect of both the writ petitions are common. The writ petitioner Mr.Dayanidhi Maran assumed the Office of the Union Minister for Communications and Information Technology on 21.5.2004 and he resigned from the Office of the Union Minister on 13.5.2007. The writ petitioner states that he filed the income tax returns for the assessment year (AY) 2008-2009 within the prescribed time stipulated under Section 139(1) of the Act on 31.7.2008. The returns filed by the writ petitioner was assessed and the same reached finality.

4. While-so, the impugned notice has been issued by the respondent on 27.3.2015 under Section 148 of the Act to reopen the assessment of the year 2008-2009. On receipt of notice, the writ petitioner addressed a letter to the respondent to provide reasons for reopening the assessment for the assessment year 2008-2009. The said letter was sent to the respondent on 24.4.2015. However, on expiry of the statutory period of six years, in letter dated 8.5.2015, the respondent furnished the reasons for reopening the assessment year 2008-2009. By way of a letter dated 13.5.2015, the writ petitioner sought time for a detailed reply to the said letter of the respondent dated 8.5.2015.

5. On 1.6.2015, the writ petitioner requested the respondent to furnish the copies of the letter relied on by the respondent for reopening the assessment proceedings.

The respondent in turn furnished the letters to the writ petitioner as sought for vide letter dated 1.6.2015. The letters were sent on 1.7.2015 by the respondent. On 22.7.2015, the writ petitioner raised detailed objections for reopening the assessment proceedings for the assessment year 2008-2009.

6. On 8.12.2016, the respondents passed the impugned order, rejecting the objections and confirmed the reopening of the assessment proceedings for the assessment year 2008-2009. The writ petitioner states that at the time of issuing the notice under Section 148 of the Act, the charge sheet filed by the Central Bureau of Investigation in respect of the allegations was pending. However, the writ petitioner filed a discharge petition before the Central Bureau of Investigation Court and on 2.2.2017, the writ petitioner was discharged from the charges framed by the CBI Court under the Prevention of Corruption Act. Under these facts and circumstances, the learned Senior Counsel, appearing on behalf of the writ petitioner, made the following submissions.

PLEADINGS OF THE PETITIONER AS WELL AS THE ARGUMENTS:

7. Section 147 of the Act, states that "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 recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. 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 the 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 subsection (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."

8. The learned Senior Counsel, while elaborating the amended phrase by the Direct Tax laws (Amendment) Act, 1989 with effect from 1.4.1989 that "has reason to believe" emphasises that the right to get reason for reopening the assessment is the vested right of an Assessee. It is contended that such a vested right provided by way of a

Statute, more specifically, by amendment, cannot be taken away by the Assessing Officer. Thus, the vested right contemplated in respect of the reasons to be provided at the time of reopening of the assessment is mandatory and the same cannot be tinkered with by the respondents in order to harass the Assessee, who had already filed their returns long back and the same was assessed during the relevant point of time under the provisions of the Income Tax Act, 1961.

9. Section 147 of the Act, mandates the reasons to be recorded at the time of issuance of notice for reopening of the closed assessment. In the absence of recording the reasons for reopening the notice is to be construed as non est in law. The executive power conferred under the Act to the Executives, cannot be interpreted, so as to take away the vested right of an Assessee in respect of the closed assessments. Reopening of the assessment is not a routine affair or a normal event. Only in case of suppression of fact or the availability of new materials on record, then alone, the executive power can be exercised under Section 147 of the Act, for reopening the escaped assessment. The reasonings are mandatory. In the absence of adequate reasons, the notice issued under Section 148 is invalid. Thus, the notice itself must contain the reasons and the Assessing Officer must have a reason to believe that there is a suppression of material facts or the availability of any new materials for the purpose of reopening the closed assessment.

10. In all such cases, the subjective satisfaction of the Assessing Officer is contemplated under Section 147 of the Act, when the language employed in Section 147, "if the Assessing Officer has reason to believe". Therefore, there is no ambiguity in respect of the recording of reasons by the Assessing Officer for invoking Sections 147 and 148. Only if the Assessing Officer has recorded the reasons as contemplated under Section 147, he is empowered to issue notice to the Assessee under Section 148 by recording the reasons and communicating the same to the Assessee, enabling the Assessee to furnish his reply and defend his case in respect of reopening of the alleged escaped assessment. Thus, the very ingredients of Section 147 has not been satisfied in respect of the actions of the respondents in the present writ petitions. In view of the fact that the notice does not satisfy the requirements of the mandatory provisions of "reason to believe" and recording the reasons and communicate the same to the Assessee, the impugned notice issued under Section 148 is liable to be scrapped as in violation of the provisions of Sections 147 and 148 of the Act.

11. The learned Senior Counsel further urged this Court by stating that if a notice is decided to be issued by the Assessing Officer under Section 148 of the Act, then the reasons for reopening of the escaped assessment must be stated and communicated to the Assessee. The learned Senior Counsel is of a firm opinion that providing reasons subsequently after issuance of notice is not sufficient. The learned Senior Counsel further contended that it is a precondition that in the event of any reason to believe and a decision is taken by the Competent Authorities, then, the reasons must be recorded in the notice and the same should be communicated to the Assessee. Thus, the twin requirements as per the Act is that the Assessing Officer must have a reason to believe and such reasons which forms the basis for the reopening of the escaped assessment must be reduced in writing and communicated to the Assessee at the time of issuance of the notice. Thus, subsequent communication of the reasons will not save the defective notice issued by the Assessing Officer under Section 148 of the Act.

12. Section 148 defines issue of notice where the income has escaped assessment. Thus, even the decision is taken under Section 147 of the Act by the Assessing Officer. Such reasons must be communicated to the Assessee along with the notice issued under Section 148 of the Act.

13. Section 149 deals with time limit for notice, which reads as under:-

"(1) No notice under section 148 shall be issued for the relevant assessment year,—(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b); (b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.—In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section."

14. Section 149(1)(b) states that six years time limit is fixed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year. Thus, the case of the writ petitioner falls under the said category and accordingly, the time limit prescribed for reopening of the closed assessment is six years.

15. Section 151 speaks about the sanction for issue of notice. "(1) In a case where an assessment under sub-section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice: Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice."

16. Thus, it is made clear that in the event of reopening of the closed assessment, the Competent Authorities are bound to follow all the procedures contemplated under Sections 147 to 153 of the Act.

17. Referring the above provisions of the Act, the learned Senior Counsel for the writ petitioner contended that the impugned notice issued under Section 148 is barred by the period of limitation. As per the writ petitioner, the period of limitation is six years. However, in the present cases on hand, the notice under Section 148 of the Act, was issued before the expiry of the period of six years. However, the reasons for reopening of the assessments were provided after the expiry of the six years. Thus, the learned Senior Counsel for the writ petitioner is of an opinion that the date of communication of the reasons for reopening of the assessment must be taken into consideration for the purpose of reckoning the period of limitation. In other words, the reasons communicated to the writ petitioner after the expiry of the period of limitation of six years will vitiate the entire proceedings. Since law requires that along with the notice, the reasons must be communicated. If the reasons are communicated belatedly, then also the actions become null and void. Thus, the impugned notice under Section 148 of the Act, is hit by the law of limitation prescribed under

Section 149(1)(b) of the Act.

18. The learned Senior Counsel for the writ petitioner further contended that the Assessing Officer has not provided any independent reasons for reopening of the assessment. The Assessing Officer relying on the charge sheet filed by the CBI, issued notice under Section 148 of the Act. The writ petitioner has already been discharged from the CBI case. However, it is informed that the appeal filed against the order of discharge is now under challenge before the High Court of Delhi. The above cited "has escaped assessment" is construed as a quid pro quo.

19. Thus, in the event of not establishing the reasons for such reopening of the assessment quid pro quo, the impugned orders are non est in law. In the event of coming to the conclusion that the criminal case registered by the CBI is a source of new information for the respondents to reopen the closed assessment, then the order of discharge will have an impact in respect of the notice issued under the Act.

20. The learned Senior Counsel for the writ petitioner is of an opinion that even the said amount has not been traced out in the accounts of the writ petitioner. The respondents are of the opinion that there is a common economic interest in respect of company belongs to his blood brother himself. The concept of common economic interest is unknown to the Income Tax Law. Unlike the Companies Act, 1956, such a principle of common economic interest cannot be invoked for the purpose of making an Assessee liable, more specifically, in the absence of providing reasons for reopening of the closed assessment.

21. The writ petitioner is no way connected with the company of his brother, namely, M/s.Sun Direct TV Pvt. Ltd. The respondents have not conducted any independent investigations in respect of the connectivity. The writ petitioner is a third party to the Company of his brother. The concept of common economic interest contemplated by the respondents are certainly inapplicable in the case of the writ petitioner. Such a concept can never be adopted against an Assessee for imposing tax under the Income Tax Act, 1961.

22. This apart, on the basis of the very same charge sheet filed by the CBI, notice under Section 148 of the Act was given to four persons, the writ petitioner, Sun Direct TV Pvt. Ltd., the writ petitioner's blood brother Mr.Kalanithimaran and his wife Smt.Priya Maran. Thus, the multiple choice cannot be a source of issuance of notice

under the provisions of the Act. Absolutely, no evidence to show that the writ petitioner is having any connection with the company belongs to his blood brother. The writ petitioner is neither a partner nor having any other interest in respect of the company, namely, M/s.Sun Direct TV Pvt. Ltd.

23. This apart, for the same charge sheet in respect of the same amount, there cannot be notice for four different persons. Thus, the respondents themselves are not clear in respect of the transactions done between a foreign company and the company belongs to the blood brother of the writ petitioner. Under those circumstances, a mere suspicion would not provide a cause of action for reopening of the closed assessment. Reopening of the closed assessment cannot be done in a routine manner. There must be some concrete evidence and the authorities must have a reason to believe and such reasons must be reduced in writing and communicated to the Assessee. In the absence of complying all these ingredients under the provisions of the Act, the notice impugned cannot be sustained at all. A mere suspicion in respect of certain transactions cannot constitute a cause of action for the respondents to reopen the closed assessment. Thus, the very basis for the issuance of the impugned reopening of assessment is not supported with the provisions of the Income Tax Act, 1961 and accordingly, the same is liable to be scrapped.

24. The learned Senior Counsel for the writ petitioner in support of the arguments cited the judgment of the Allahabad High Court in the case of Shrawan Kumar vs. U.P. Institutional Service Board through its Chairman, Lucknow and others [decided on 30.8.2006 in CMWP No.19260 of 2005 connected with CMWP No.53585 of 2004] and reported in 2006 SCC Online ALL 766, wherein in paragraph-12, it has been held as follows:-

"12. Co-operation is a movement. People with similar interests and goal get together to form a society. A co-operative society by its very nature is an organization where people voluntarily associate together on the basis of equality for the promotion of their common economic interest which they cannot achieve by individual isolated action because of the weakness of the economic position of a large majority of them. It is purely a private organization having no nexus with the affairs of the State. No doubt, it is controlled and regulated

by the U.P. Co-operative Society Act, 1965, but its character remains private and individual. Rules have been framed for maximizing economic outcome and to regulate the recruitment and conditions of service of its employees. The employees are paid from the coffers of the society and are its employees for all purposes and do not hold any civil post under the State. As noticed in the opening part of this judgment, Rules have been framed under the 1965 Act. Rules of 1972 only apply to Government Servants and not to employees of Cooperative Societies, therefore neither ratio in Raj Vikram Khare (supra) nor the rules apply in the present case."

25. Relying on the above judgment, the learned Senior Counsel for the writ petitioner is of an opinion that the concept of common economic interest can be invoked only in certain areas like co-operative movement, people with similar interest and goal get together to form a Society and in certain company matters. However, the very principle of common economic interest cannot be applied in the absence of any clinching materials to show that the Assessee had acted in violation of the provisions of the Act. Thus, the usage of the term "Common Economic Interest" by the respondents for invoking the provisions under Sections 147 and 148 of the Act, is untenable.

26. In the case of Shri Balwant Rai Wadhwa vs. ITO, decided by the Income Tax Appellate Tribunal, Delhi Bench on 14.1.2011 in I.T.A.No.4806/Del/10, the period of limitation was considered and paragraph-4 of the judgment, is partly extracted:-

"4. We have duly considered the rival contention and gone through the record carefully. Admittedly the reasons were not supplied to the assessee by 31st March, 2008 i.e. within a period of 6 years from the end of the asstt. year. The question before us is whether valid service of notice has been served upon the assessee within the limitation provided u/s 149 (1) (b) of the Act. According to this section the notice ought to be served within 6 years from the end of the asstt. year. The contention of the assessee is that

Hon'ble Delhi High Court has held that if the reasons recorded by the AO for reopening of assessment has not been supplied or served within 6 years then it will be construed that no valid notice has been served upon the assessee within 6 years."

27. In the case of Haryana Acrylic Manufacturing Co. vs. Commissioner of Income Tax [(2008) 175 Taxman 262 (Delhi)], wherein the Hon'ble High Court of Delhi, in paragraphs-20 and 24, it has been held as follows:-

"20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his

assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above.

24.

This means that a notice under section 148, in the present case, could not, in any event, have been issued after six years from the end of the assessment year 1998-99, i.e., after 31-3-2005. In whichever way we look at it, a notice under section 148 without the communication of the reasons therefor is meaningless inasmuch as the Assessing Officer is bound to furnish the reasons within a reasonable time. In a case, where the notice has been issued within the said period of six years, but the reasons have not been furnished within that period, in our view, any proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand. The expression 'within a reasonable period of time' as used by the Supreme Court in GKN Driveshafts (India) Ltd.'s case cannot be stretched to such an extent that it extends even beyond the six years stipulated in section 149. For this reason also, even assuming that we overlook all that has happened between 11-5-2004, when the petitioner sought the reasons, and 5-11-2007, when the said form annexed to the counter-affidavit was filed in this court, the validity of the notices under section 148 issued on 29-3-2004 and any proceedings pursuant thereto cannot be upheld."

28. In respect of exhausting the alternate remedy, the learned Senior Counsel for the writ petitioner relying on the case of Union of India vs. Ajit Jain [(2003) 129 Taxman 74 (SC)], wherein the Hon'ble Supreme Court held as follows:-

"The availability of an alternative remedy is not an absolute bar to the entertainment of a petition under Article 226 of the Constitution, though on account of availability of statutory remedies Courts normally do not entertain the writ petitions but where an action is wholly without jurisdiction and results in the infringement of any fundamental right, the plea of alternative remedy is of no avail. The instant case did fall in that category."

29. In the case of Principal Commissioner of Income Tax vs. Meenakshi Overseas (P) Ltd [(2017) 82 Taxmann.com 300 (Delhi)], wherein the Hon'ble High Court of Delhi, in paragraphs 23, 24 and 26, held as follows:-

"23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow.

This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

26. The first part of Section 147 (1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre-condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment."

Relying on the abovesaid judgment, the learned Senior Counsel urged this Court by stating that in any angle, the impugned order cannot survive for want of legal support and accordingly, the same is liable to be quashed.

PLEADINGS OF THE RESPONDENT AS WELL AS THE ARGUMENTS:-

30. The respondent raised a preliminary objection with regard to the maintainability of the writ petitions in view of the fact that an alternate remedy is available and provided under the Income Tax Act itself. Without exhausting the remedies provided under the Statute, the present writ petitions cannot be entertained and accordingly, they are liable to be rejected in limine.

31. In this regard, reliance is placed on the judgment of the Allahabad High Court in the case of DOKI Nandan Singhania vs. CIT [190 ITR 289], Zigma Commodity P Ltd vs. ITO, Ward-5(3), Kolkatta [46 Taxmann.com 339], Dr.Nedunchezhan vs. CIT [279 ITR 342 (Madras)], CIT vs. Chhabil Das Agarwal [357 ITR 357 SC] and that of Kone Elevators India Ltd [35 Taxmann.com 102 (Madras)].

32. It is contended that the information provided by the CBI would fall under the category of new information based on which the Assessing Officer has reason to believe and formed his opinion. It is pertinent to state that in case of Mrs.Rama Sinha vs. CIT [(2003) 130 Taxman 139 (P&H)] has held that the reassessment proceedings cannot be questioned since the Assessing Officer initiated the reassessment proceedings on the basis of the definite information received from the CBI about the Assessee. Further, in the case of Balram Jagar vs. CIT [(2002) 120 Taxman 464 (P&H)], it was held that the question whether the petitioner could held liable for an offence under the Prevention of Corruption Act or any other contemporaneous Statute could not have any bearing on his liability to be taxed under the Act and the Competent Authority constituted under the Act would not be denuded of his jurisdiction to determine the petitioner's liability to pay tax in relation to the particular assessment year simply because in a criminal case, charge had not been framed.

33. The settled position of law is that there is no mandatory requirement as per the Income Tax Act, 1961, furnishing the reasons to the Assessee at the time of the issuance of the notice. As per the decision of the Apex Court, in the case of GKN Driveshaft [259 ITR 19], it was held that the due procedure to be followed during reopening proceedings was that once the notice is served the Assessee would have to necessarily file its return and then on request, the Assessing Officer should furnish the reasons for reopening of the assessment. The time limit provided under the Act is therefore, only for proper issue and service of notice which had been duly followed in the present cases.

34. The writ petitioner questioned the sufficiency of the reasons and the modus operandi of the investigation if any conducted which is not for the writ petitioner to question. The fact that scrutiny proceedings were conducted in a different entity does not absolve the writ petitioner of the proceedings being initiated against him in the light of the new information concerning the writ petitioner's case. Further, in the following cases, the Courts have held that the information received from the Investigation Wing would constitute material based on which reason to believe could be formed. [See AGR Investment Ltd vs. Additional CIT and Another [333 ITR 146 (Del); and Salimar Builtcon P. Ltd vs. ITO-ITAT, Jaipur [136 TTJ 701].

35. The settled position of law regarding sufficiency of the reason is not up for questioning when the Assessing Officer has formed his belief for the same.

Substantive proof for escapement of income in order to make any additions can only be made after verification of details during the proceedings. The writ petitioner had quoted from the speaking order but had conveniently omitted a line in between there by changing the context of the sentence with the intention to mislead this Court. Courts have consistently held that at the time of reopening, the Assessing Officer should possess of some material and is not required to establish the escapement of income, the validity of the reassessment on the basis of the final outcome of the reassessment proceeding on that item could not be proper. [See Sri Krishna P. Ltd vs. CIT [221 ITR 538 (SC)] and in the case of Central Province Manganese Ore Co. Ltd vs. ITO [191 ITR 662], which support the stand of the Department.

36. The Assessee contends that foreign investments were brought into the country after obtaining various approval from the Government Agency. However, the CBI report suggest that the Assessee has used his personal influence and had obtained illegal gratification during the said process. Further, during the relevant time, when the writ petitioner was holding a key position in the Government of India and therefore, the transaction cannot be simply brushed aside sighting that it was approved in various stages by the Government. The writ petitioner can prove the same by availing this opportunity for due hearing during the scrutiny proceedings. The writ petitioner is entering into the shoes of the Assessing Officer and was citing method of investigations which should be carried out for forming a reason which is an entirely subjective position provided under the Statute.

37. The proceedings under the Income Tax Act and the proceedings conducted by CBI are different and distinct from each other. The Income Tax Act provides for limitation of time, for reopening of the assessment upto six years from the relevant assessment year whereas the proceedings under the CBI would take more time for Courts to decide and if the Department has to wait till the outcome of the proceedings of the CBI then the proceedings under the Income Tax Act would get time barred leading to a potential leakage of revenue for the Nation. Thus, both are different and distinct proceedings and the level of evidence vary. A notice under Section 148 can be issued once the reason for belief is formed on the information in the possession of the Assessing Officer. Proceedings are initiated to verify the same and the writ petitioner would be given a fair opportunity for defending his case by submitting proof and arguments. In fact the Hon'ble Apex Court in a case reported in 103 ITR 437 has held that Court cannot go into

adequacy of material if reason for information of believes has a rational connection with the formation of belief.

38. In the case of Raymond Woolen Mills reported in 236 ITR 34, the Hon'ble Supreme Court had reiterated the position that Courts can only consider whether there was a prima facie case for reassessment and that sufficiency of material or correctness of the material is not to be considered at that stage.

39. The writ petitioner has filed the above writ petitions, challenging the notice issued by the Department dated 27.3.2015 under Section 148 of the Act and the consequential order dated 13.1.2016 disposing of the objection of the writ petitioner and for quashing the same. The Statute has provided an alternate remedy under the Income Tax Act whereby the writ petitioner can challenge the said order by filing an appeal and therefore on this sole ground, the above writ petitions have to be dismissed in limine.

40. The learned Additional Solicitor General of India, at the first instance, made a submission that in respect of WP No.3405 of 2016, the order of assessment had already been passed by the Assessing Officer and the same has not given effect to on account of the pendency of the present writ petition. In respect of WP No.43944 of 2016, the order passed by the Assessing Officer is kept under the sealed cover, so also the assessment order passed with reference to WP No.44311 of 2016 has not given effect to.

41. The learned Additional Solicitor General of India, at the outset, disputed the interpretations provided by the learned Senior Counsel appearing for the writ petitioner with reference to Sections 147 and 148 of the Income Tax Act, 1961. In respect of maintainability of the writ petitions, it is contended that the writ petitioner is bound to participate in the process of assessment based on the notice issued by the Competent Authority under Section 148 of the Act and after passing of the assessment order, the writ petitioner is having appellate remedy under the provisions of the Act.

42. Pursuant to the amendment made on 1.4.1989, there is a change in the provisions of the Income Tax Act and the original term "reasons to be recorded in writing" has been amended as "has reason to believe". Thus, it is the subjective satisfaction of the Assessing Officer whether there is any reason to believe for the purpose of reopening the escaped assessment. The Assessing Officer, undoubtedly, has to record the reasons for reopening of the

escaped assessment. However, the sufficiency of the materials available with the Assessing Officer cannot be questioned nor provide a cause of action for the writ petitioner to challenge the very notice by way of a writ petition under Article 226 of the Constitution of India. There is an application of mind on the part of the Competent Authorities while recording the reasons as the provision warrants such an exercise. However, the same need not be communicated at the notice stage and the reasons were already communicated in respect of the writ petitioner at his request. Thus, the procedures contemplated under the Act, are followed scrupulously by the Competent Authorities and there is no infirmity or irregularity.

43. The learned Additional Solicitor General of India once again gone through the ingredients of Section 147. The language employed in Section 147 of the Act is that "If the Assessing Officer 'has reason to believe' that any income 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".

44. The learned Additional Solicitor General of India is of an opinion that it is the subjective satisfaction of the Assessing Officer in respect of the requirement that he has a reason to believe. Secondly, the Assessing Officer is empowered to assess or reassess such income and also any other income chargeable to tax which has escaped assessment. The intention of the Section is unambiguous that the Assessing Officer is empowered to make an assessment or reassess the assessment already reached finality. Thus, the fresh assessment in respect of certain materials is also permissible under Section 147 as well as reassessment is also permissible under the Act. When assessment as well as the reassessment is permissible and if the Assessing Officer has got a reason to believe that there are some materials for reopening of the assessment, then he can issue notice under Section 148 of the Act.

45. Explanation 1 to Section 147 states that "production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso". Explanation 1 to Section 147 enumerates that mere production of a document is not a ground to dispute the reopening of the assessment nor amount to a disclosure in respect of the escaped assessment. It clarifies that even in case where the Assessee had produced the document showing the income which

was not assessed earlier, is also a ground for reopening of the assessed returns. Thus, the Assessee cannot plead that he had already produced the documents along with the returns at the time of filing and therefore, the Assessing Officer cannot reopen the assessment already reached finality with reference to Section 143(1) of the Act.

46. It is further contended that an Explanation 2 (c) (1) to Section 147 of the Act, reads as under:-

"(c) where an assessment has been made, but-(i) income chargeable to tax has been underassessed ; or (ii) such income has been assessed at too low a rate ; or (iii) such income has been made the subject of excessive relief under this Act ; or (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed."

The above Explanation 2 also provides power to the Assessing Officer that income chargeable to tax has been underassessed or such income has been assessed at too low a rate or such income has been made the subject of excessive relief under the Act or excessive loss or depreciation allowance or any other allowance under this Act has been computed.

47. It is stated by the respondent that various circumstances are provided under the provisions of Section 147 for the reopening of the assessment. Thus, the provision does not restrict a particular circumstance or event, number of circumstances and the reasons are provided for reopening of the assessment in order to protect the revenue and to ensure that the Assessee are brought under the Taxnet in respect of the entire income. Such circumstances are enumerated in Section 147 to ensure that the Act is implemented in its letter and spirit and the object is achieved.

48. The learned Additional Solicitor General of India contended that under Section 252 of the Act, after an order is passed, the writ petitioner shall approach the Appellate Tribunal by way of an appeal. Section 260-A provides an appeal to the High Court and Section 261 provides an appeal to the Supreme Court. Thus, the present writ petitions cannot be entertained in view of the fact that it is only an initiation and the Assessing Officer has not yet arrived a conclusion in respect of the escaped assessment. The power of the Assessing Officer cannot be questioned in view of the fact that the notice under Section 148 has been issued based on certain materials

brought to the notice of the Assessing Officer. Thus, the Assessing Officer has every authority to cull out the truth behind such materials or informations made available to him. In the event of curbing the powers of the Assessing Officer, the Department will not be in a position to impose the tax in respect of all such escaped assessments and further the same will pave the way for the Assessee to avoid or evade payment of income tax as per the provisions of the Act.

49. Notice is a proposal mooted out by the Assessing Officer under Section 148 on coming to the conclusion that the authorities has got a "reason to believe" in respect of the materials available on record. Thus, the very notice will not provide a cause of action for the writ petitioner to file the present writ petitions. This apart, the writ petitioner had already been responded to the notice and pursuant to the request made by the writ petitioner, the reasons recorded by the Assessing Officer were furnished to the writ petitioner, enabling him to submit his assessment as required under the provisions of the Act. As of now, there is no due of tax under the provisions of the Act. In the absence of any demand of tax and in the absence of any decision in respect of assessment, the writ petitions are certainly premature and filed only based on the presumptions and assumptions and such writ petitions filed on the apprehensions can never be entertained by this Court.

50. There is no bar for the authorities to form an opinion based on the Criminal Court charge sheet that it is a fit case for reopening of the assessment. The sufficiency of the materials can never be questioned by the Assessee. Contrarily, it is the duty of the Assessee to establish his case before the Assessing Officer, so as to come to a conclusion and pass an order on merits and in accordance with law. Thus, the present writ petitions are premature and are liable to be rejected.

51. In support of the arguments, the learned Additional Solicitor General of India, cited the following judgments:-

In the case of Biswanath Bhattacharya vs. Union of India and Others [(2014) 4 SCC 392], the Hon'ble Supreme Court, in paragraphs 13, 14 and 16, held as follows:-

"13. Though Section 127 expressly provided for recording of reasons it did not expressly provide communicating the same to the assessee. Still, this Court held that such a communication is mandatory: (Ajantha Industries case

[Ajantha Industries v. CBDT, (1976) 1 SCC 1001 : 1976 SCC (Tax) 127] , SCC p. 1005, paras 10-11)

"10. The reason for recording of reasons in the order and making these reasons known to the assessee is to enable an opportunity to the assessee to approach the High Court under its writ jurisdiction under Article 226 of the Constitution or even this Court under Article 136 of the Constitution in an appropriate case for challenging the order, inter alia, either on the ground that it is mala fide or arbitrary or that it is based on irrelevant and extraneous considerations. Whether such a writ or special leave application ultimately fails is not relevant for a decision of the question.

11. We are clearly of opinion that the requirement of recording reasons under Section 127(1) is a mandatory direction under the law..."

14. In our view, such a conclusion in Ajantha Industries case [Ajantha Industries v. CBDT, (1976) 1 SCC 1001 : 1976 SCC (Tax) 127] must be understood in the light of the observation of the Court that there was no provision of appeal or revision under the Income Tax Act against an order of transfer. For the same reason, this Court distinguished and declined to follow an earlier judgment in S. Narayanappa v. CIT [AIR 1967 SC 523] where this Court on an interpretation of Section 34 of the Income Tax Act, 1922, opined to the contra. Section 34 provided for reopening of the assessment with the prior sanction of the Commissioner, if the Income Tax Officer has "reasons to believe" that taxable income had been underassessed. Dealing with the question whether the reasons which led the Commissioner to accord sanction for the initiation of proceedings under Section 34 are required to be communicated to the assessee, this Court held: (S. Narayanappa case [AIR

1967 SC 523] , AIR p. 525, para 4)

"4. ... There is no requirement in any of the provisions of the Act or any section laying down as a condition for the initiation of the proceedings that the reasons which induced the Commissioner to accord sanction to proceed under Section 34 must also be communicated to the assessee."

16. We reject the submission of the appellant for the following reasons. Firstly, there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act. Secondly, the reasons, though not initially supplied along with the notice dated 4-3-1977, were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents. Thirdly, we are of the opinion that the case on hand is squarely covered by the ratio of Narayanappa case [AIR 1967 SC 523] . The appellant could have effectively convinced the respondents by producing the appropriate material that further steps in furtherance to the notice under Section 6 need not be taken. Apart from that, an order of forfeiture is an appealable order where the correctness of the decision under Section 7 to forfeit the properties could be examined. We do not see anything in the ratio of Ajantha Industries case [Ajantha Industries v. CBDT, (1976) 1 SCC 1001: 1976 SCC (Tax) 127] which lays down a universal principle that whenever a statute requires some reasons to be recorded before initiating action, the reasons must necessarily be communicated."

The Apex Court in paragraph 16 of the abovesaid judgment said that there is no express statutory requirement to communicate the reasons which led to the issuance of notice under Section 6 of the Act. Secondly, the reasons, though not initially supplied along with the notice dated 4-3-1977, were subsequently supplied thereby enabling the appellant to effectively meet the case of the respondents.

This apart, the appellant could have effectively convinced the respondents by producing the appropriate material that further steps in furtherance to the notice under Section 6 need not be taken. At the outset, the Apex Court says that the reasons can be provided even after the issuance of the notice in a format. Thus, there is no infirmity in respect of providing reasons even in such circumstances, the Assesseees can submit their returns effectively in respect of reassessment and defend their case by producing materials and by convincing the Assessing Officer in respect of the stand taken by them. Contrarily, the writ petitioner cannot challenge the very issuance of notice which was done with reference to Sections 147 and 148 of the Act.

52. In the case of Bal Ram Jakhar vs. Commissioner of Income Tax [(2002) 120 Taxman 464 (Punjab & Haryana)], the Hon'ble Punjab and Haryana High Court, in paragraphs 4 and 5, held as follows:-

"4. We have thoughtfully considered the arguments/ submissions of learned counsel, but have not felt persuaded to agree with him that the jurisdiction of this court under article 226 should be exercised for quashing of the impugned notice and, in our opinion, the writ petition deserves to be dismissed as premature. It is not the petitioner's case that he has filed a return in pursuance of the impugned notice and any order prejudicially affecting his rights or interest has been passed by the concerned authority. In view of this, we do not find any justification to entertain the petitioner's prayer for quashingb of the notice issued under section 148 of the Act.

5. In view of this conclusion, we would have refrained from expressing any opinion on the merits of the reasons recorded by the Assistant Commissioner of Income-tax, Circle-cum-New Assesseees Circle, Bhatinda, for initiating proceedings under section 147 read with section 148 of the 1961 Act, but as Shri Mittal made repeated efforts to persuade us to nullify the notice solely on the ground that/the Special Judge, Delhi, has not framed charges against the petitioner, we are

constrained to observe that an order, like the one passed by the Special Judge, Delhi, not framing the charge cannot be treated as conclusive, so far as the proceedings under the 1961 Act are concerned. A careful reading of the order, annexure P-12, passed by the Delhi High Court in Criminal Revision No. 473 of 1997 shows that the Central Bureau of Investigation had not pressed for framing of charges against the petitioner on the issue of receipt of Rs. 51,24,800 because at that stage it did not have sufficient evidence to corroborate the allegations. The question as to whether the petitioner could be held liable for an offence under the Prevention of Corruption Act or any other contemporaneous statute does not, in our opinion, have any bearing on his liability to be taxed under the 1961 Act and the competent authority constituted under that Act cannot be denuded of its jurisdiction to determine the petitioner's liability to pay tax in relation to the particular assessment year simply because in the criminal case charge has not been framed."

The Hon'ble High Court of Punjab and Haryana, in the abovesaid judgment, dismissed the writ petition as premature on the ground that the question as to whether the petitioner could be held liable for an offence under the Prevention of Corruption Act or any other contemporaneous statute does not, in our opinion, have any bearing on his liability to be taxed under the 1961 Act and the competent authority constituted under that Act, cannot be denuded of its jurisdiction to determine the petitioner's liability to pay tax in relation to the particular assessment year simply because in the criminal case charge has not been framed.

53. In the case of K.M.Bansal vs. Commissioner of Income Tax and Another [1991 SCC Online AII 1283], the Hon'ble Allahabad High Court came to the conclusion that "the function of the Assessing Officer at the stage of issuance of notice under Section 148(1) is administrative in nature. It becomes quasi-judicial once the notice is served upon the assessee. Since reasons are recorded at a stage anterior to issuance and serving of the notice, it is held that reasons need not be communicated. But once the

proceedings become quasi-judicial and more important, and once it is admitted that, in such proceedings, the assessee has a right to question the validity of initiation of reassessment proceedings, refusal to communicate the reasons becomes unsupportable". The following propositions are formulated that "while the recording of reasons as contemplated by sub-section (2) of Section 148 is obligatory, the reasons so recorded need not be communicated to the Assessee along with the notice under sub-section (1) of Section 148. It is also not open to the Assessee to straightaway call upon the Assessing Officer to disclose or communicate reasons to him, as soon as he receives the notice under Section 148(1). He must first file his return or a revised return, as the case may be, and if he raises a contention either that no reasons were recorded or that the reasons recorded are not relevant and germane, then the Assessing Officer has to communicate the reasons to him".

54. The abovesaid judgment also reiterates that it is mandatory on the part of the Assessing Officer to communicate the reasons along with the notice issued under Section 148(1) of the Act. The Assessee has to respond to the notice at the first instance by filing his return. If there is no discrepancy, then the Assessing Officer can close the file. In the event of any discrepancy, then the further proceedings can be continued. In such circumstances, the Assessee also is entitled to seek reasons for reopening of the assessment. Thus, the proposition laid down by the Courts are very clear that the reasons need not be communicated to the Assessee at the time of issuing the notice under Section 148(1) of the Act.

55. In the case of GKN Driveshafts (India) Ltd vs. Income Tax Officer [(2002) 125 Taxman 963 (SC)], the Hon'ble Supreme Court of India, in paragraph-5, held as follows:-

"5. सत्यमेव जयते

However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order."

In the abovesaid judgment, the Hon'ble Supreme Court has clarified that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order.

56. The Hon'ble Supreme Court reiterated the principles in GKN Driveshafts (India) Ltd's case that reasons need not be communicated along with the notice issued under Section 148 (1) of the Act. If there is a request made by the Assessee then the reasons shall be communicated, enabling the Assessee to respond to the reasons recorded by the authorities concerned.

57. In the case of Dr.K.Nedunchezian vs. The Deputy Commissioner of Income Tax [(2005) 4 CTC 161 (SC)], the Hon'ble Supreme Court, held that "particularly in tax matters, there should be no short circuiting of the alternative statutory remedies as has been repeatedly emphasised by the Supreme Court. When there is an alternative remedy ordinarily writ jurisdiction of this Court under Article 226 of the Constitution should not be invoked. Where there is a hierarchy of appeals provided by the statute the party must exhaust the statutory remedies before resorting to writ jurisdiction, especially income tax related matters, have exhausted the remedies available under the Statutes".

58. In the light of the abovesaid judgments, the learned Additional Solicitor General of India contended that the present writ petitions challenging the very notice is untenable and premature. This apart, there is no cause of action for the purpose of entertaining a writ petition against the notice which is nothing but an initiation of reopening of an assessment under the provisions of the Act, which is administrative in nature and the Assessing Officer has not yet passed any orders nor formed any adverse opinion or imposed tax on the writ petitioner. Thus, there is no cause of action for filing of the writ petitions. Accordingly, the writ petitions are liable to be dismissed.

59. In reply, the learned Senior Counsel for the writ petitioner reiterated the arguments by stating that there is no appeal provision against the notice issued under Section 148(1) of the Act. Thus, the writ petitions are maintainable. When the notice was issued not in compliance with the provisions of the Act, then the

aggrieved persons have liberty to challenge the same under Article 226 of the Constitution of India. It is a precondition that a notice issued under Section 148(1) should contain the reasons. In the absence of any such reason, then it is to be construed that the authorities had not formed an opinion required under Section 147(1) of the Act. The reason to believe does not mean that the reasons can be recorded subsequently or communicated to the Assessee at a later point of time. Once the reasons are recorded and the assessment is proposed to be reopened, then the Assessee is entitled to know the reasons already said to have been recorded by the authorities concerned.

DISCUSSIONS:

60. Considering the contentions raised by the respective parties to the cases on hand, this Court is of an opinion that issuance of the notice under Section 148 of the Act is nothing but initiation of the proceedings for reopening of the assessment already finalised. Undoubtedly, such reopenings are to be done cautiously and the reasons for reopening is also mandatory. In the absence of any substantial reason, the Assessing Officer cannot reopen the assessment which was closed long back.

61. The very object of the provision under the Income Tax Act is to ensure that the suppressed materials or facts and the new availability of materials to the Department are also to be dealt with for the purpose of taxation. In order to cover the loopholes in the Tax Regime, and to control and evasion of tax by the individuals, the provision of reopening of assessments are made and such provisions are to be certainly invoked by following the procedures contemplated under the Act.

62. Let us now look into the manner in which the initiations are done by the respondents in respect of the present writ petitions. Undoubtedly, the writ petitioner filed the returns for the respective assessment years, within the time limit prescribed under Section 139 (1) of the Income Tax Act, 1961. It is an admitted fact that the impugned notices are issued within the period of six years as contemplated under Section 149(1)(b) of the Act. Thus, the notice was issued informing the Assessee to take note of the fact that the Department has collected some materials in respect of the assessment of the particular assessment year and therefore, they have got every reason to believe to reopen the assessment.

63. Mere issuance of notice cannot be construed as a final order. Initiation of the proceedings are to be construed as informations to the Assessee and can never be concluded as a final proceedings. Thus, the issuance of

notice is an information provided to the Assessee, enabling him to avail of all further opportunities contemplated under the Statutes. Thus, the Court cannot come to the conclusion that non quoting of the reasons by the Assessing Officer in the impugned notice will vitiate the entire proceedings. If such a proposition is adopted, then it would be certainly difficult for the Executives to reopen the cases as per the provisions of the Act. The procedures are contemplated under the Act, enabling the Assessee to avail the opportunity and defend their case in accordance with law.

64. Thus, certain aspects which is contemplated under the provisions of the Act, cannot be interpreted, so as to defeat the purpose for which such a provision was enacted by the Legislators. Constructive interpretation of the Act and the Rules are of paramount importance. The Rule of constructive interpretation requires that the possible object and the purpose to be achieved is met out by adopting not only the balancing approach, but also by providing all reasonable opportunities to the persons, who all are connected or aggrieved.

65. The purpose of the Income Tax Act, more specifically, Sections 147 and 148 of the Act, is to ensure that the Assessee, who have suppressed the fact at the time of filing of their income tax returns or if the Department is in possession of certain new materials in respect of the assessment of a particular year, then the Assessee must be informed about the decision to reopen the assessment and after such information is provided, the procedures must be followed for the purpose of concluding the reassessment.

66. In the present cases on hand, the proceedings have not reached its finality. It is only an initiation of proceedings under Sections 147 and 148 of the Act. The very initiation cannot be interfered with by the Courts in a routine manner. Judicial review against such initiations under the provisions of the Act, is certainly limited. The Court cannot intervene on such initiations in a routine manner in the absence of any valid and acceptable legal grounds. Thus, the exercise of judicial review in such matters regarding the initiation of the proceedings are to be exercised cautiously.

67. Let us now meet the grounds raised on behalf of the writ petitioner that Section 147 requires that the reasons must be recorded in the notice and in the absence of any reasons communicated along with the notice under Section 148 of the Act, the entire proceedings become null

and void. If such an interpretation is accepted by this Court, then one can presume that the authorities are bound to pass a final order at the notice stage itself. That is not the intention of the Statute. The intention of the Statute is that the authorities on receipt of new material facts or regarding any suppression of materials by the Assessee, is bound to initiate proceedings by invoking Sections 147 and 148 of the Act.

68. The amended phraseology of "reason to believe" must be interpreted that the Assessing Officer on receipt of any such new material or materials in relation to suppression of fact by the Assessee has made out a prima facie opinion that it is a case for reopening of the assessment, then he can issue notice under Section 148 and thereafter, the procedure of furnishing the reasons, receiving objections and conducting scrutiny and all other procedures contemplated under the provisions of the Act will suit as follow. Thus, it is not as if at the very issuance of notice requires that the reasons must be recorded in the notice itself.

69. The very meaning of the word "Notice" is that "information that tells you or warns you about something that is going to happen". Thus, the mere notice providing an information to the Assessee that the authorities have got every reason to believe to reopen the assessment does not mean that all opinions and reasons formulated by the Assessing Officer must be communicated to the Assessee in the very notice issued under Section 148 of the Act.

70. On a perusal of the impugned notice dated 27.3.2015, the Assistant Commissioner of Income Tax has stated that "whereas I have reason to believe that your income tax in respect of which you are assessable/chargeable to tax for the assessment year 2008-2009 as escaped assessment within the meaning of Section 147 of the Act.

71. Let us now examine whether such an information provided by the Assessing Officer is adequate and satisfying the requirements contemplated under Section 147 of the Income Tax Act, 1961.

72. The very concept of notice is that the authorities while issuing notice should not predetermine the issues or arrive a conclusion. In the event of stating the reasons elaborately, it is to be construed that such reasonings are recorded without providing an opportunity to the Assessee and such a procedure now argued by the writ petitioner deserves no merit consideration.

73. Thus, the notice is issued based on certain materials available with the Department and on receipt of the notice, the Assessee has got right to seek for the reasons from the Department and the Department is bound to provide reasons, enabling the Assessee to submit his explanations/objections in order to defend his case. Thus, mere issuance of notice will not preclude the writ petitioner from seeking the reasons and other documents.

74. In the present cases, admittedly, on receipt of the notice, the writ petitioner submitted a letter to the respondents on 24.4.2015, seeking reasons for reopening of the assessment for the assessment years 2008-2009 and 2009-2010. The respondents also furnished the reasons for reopening of the assessment on 8.5.2015. Thereafter, the Assessee must co-operate for the scrutiny and for completion of the reassessment process.

75. The writ petitioner, who was holding the high position as Union Minister, is duty bound to respond to the notice to prove his innocence or otherwise. Contrarily, the writ petitions are filed at the notice stage itself, and the same will hamper all further proceedings of the Department and such an idea would if any developed can never be encouraged by the Courts. On receipt of the notice impugned in the present writ petitions, rightly the writ petitioner had approached the respondents for furnishing the reasons. The respondents have also furnished the reasons and the letters. Thus, it is left open to the writ petitioner to defend his case in the manner known to law and allow the officials to scrutinise the assessments based on the new materials available and thereafter, take a decision and pass assessment or reassessment orders by following the procedures contemplated under the Act.

76. In view of the fact that the requirement under Section 147 of the Act i.e., the reason to believe, does not mean that the authorities at the time of issuance of notice under Section 148 should furnish all the reasons and the decisions taken by the authorities to reopen the closed assessment which is certainly unwarranted. Such a procedure is not contemplated and not intended by the provision of law. By adopting the principles of constructive interpretation, any law enacted should achieve its purpose and the object sought to be achieved. If the argument of the writ petitioner is considered, then the very purpose and object of the provisions and the amendments made thereunder will be defeated and the Authorities Competent would not be in a position to reopen any assessment at all.

77. Thus, the reason to believe has been incorporated for the subjective satisfaction of the Assessing Officer and not for the purpose of communicating all the reasons even at the initial stage of issuance of notice to the Assessee under Section 148 of the Act. The provision is a check for the Income Tax Officials. Such a check provided under the Statute to the Officials, cannot be taken undue advantage by the Assessee. The word "reason to believe" incorporated is to indicate the Officials that, they cannot reopen the assessment in a routine and mechanical manner. The Assessing Officer in the event of receipt of any new material or information regarding the suppression, must have a reason to believe and the reasons must be recorded in the files and thereafter issue notice to the Assessee and the Assessee on receipt of the notice is entitled to seek the reasons or otherwise from the respondents, enabling them to adjudicate the matter in the manner known to law. This being the interpretation to be adopted, the arguments as advanced on behalf of the writ petitioner deserves no consideration at all.

78. In respect of exhausting the appellate remedy available under the provisions of the Act, this Court is of an opinion that the writ petitioner has to exhaust the remedy provided under the Act, this Court cannot entertain the writ petition, when there is a remedy available to the aggrieved person under the Statute. The High Court cannot usurp the power of the Appellate Authorities in respect of the adjudication of the merits and the demerits of the matter. The High Court cannot appreciate the mixed question of law and facts, at the initial stage, when a notice under Section 148 of the Income Tax Act, 1961 was issued to the Assessee for reopening the assessment. Such complex facts and circumstances are to be adjudicated by producing documents and by adducing evidences by the parties concerned. Such an exercise can never be done by the High Courts under Article 226 of the Constitution of India. Thus, entertaining a writ petition at the notice stage, must be sparingly and cautiously done. The High Courts must be restrained from entertaining such writ petitions when the very notice itself is under challenge.

79. Undoubtedly, the legal principles settled in this regard that the writ petition can be entertained if the notice has been issued by an incompetent authority having no jurisdiction or if the allegation of mala fides are raised or if the same is in violation of any Statutory Rules in force. Even in the case of raising an allegation of mala fides, the authorities against whom such an allegation is raised to be impleaded as party respondent in his personal capacity. In the event of not establishing any

such legal ground, no writ proceedings can be entertained against a notice in a routine manner and the judicial review in this regard is certainly limited.

80. In the present cases, the point of limitation raised deserves no consideration in view of the fact that the notice under Section 148 of the Act, was issued to the writ petitioner within the time limit prescribed under Section 149(1)(b) of the Act. The date of communication of the reason cannot be the point for reckoning period of limitation. Thus, there is no infirmity in respect of the notice issued to the writ petitioner under Section 148 of the Act.

81. The "common economic interest" term used by the respondents cannot have any implication in respect of the notice issued under Section 148 of the Act. The word "common economic interest" has been used not as a concept by the respondents. The phrase has been used to denote that the money has been transferred to the company belongs to the blood brother of the writ petitioner and they are having certain interests in business and family interest for their business activities and therefore, informations now received by the respondents are subject to further investigations and for scrutiny.

82. When one of the family members or one of the families have dealt with the issues in a particular manner creating an impact in respect of other family members and the transaction appears to be having some interest over the writ petitioner, who was holding high position of the Union Minister, then the Department has every reason to believe that the transactions are multifolded and the interests in respect of the persons concerned are wide, warranting further investigation and scrutiny. Therefore, the issuance of notices on mutiple choice cannot be found fault with. Such notices are certainly required for the Department to cull out the truth regarding the transactions. The very purpose and the object of the investigation is to investigate all such complex factual issues and to cull out the truth, enabling the Department to arrive a conclusion in respect of facts as well as the law applicable.

83. This being the principles to be adopted, the usage of the word "common economic interest" cannot be construed as a concept. In the present cases, the same is used to denote the nature of the transactions to be investigated and scrutinised. Thus, the arguments in this regard is not based on the established principles.

84. In respect of the defence raised on behalf of the writ petitioner that the term of "common economic

interest" used by the Assessing Officer is in violation of the provisions of the Income Tax Act. There is no question of "common economic interest" in respect of the tax payments and the said "common economic interest" has not been enumerated in the impugned notice.

85. In response to the contention, the learned counsel, appearing on behalf of the Income Tax Department, urged this Court by stating that the materials, more specifically, the charge sheet in details, filed by the CBI categorically enumerates the nexus between the writ petitioner and his blood brother in respect of certain business interest. In this regard, it is relevant to extract one of the paragraphs of the charge sheet, which read as under:-

"2. During monitoring of the investigation in CBI case No.RC-DAI-2009-A-0045 (2G Spectrum Case), Hon'ble Supreme Court of India vide order dated 16.12.2010 directed the CBI to investigate the irregularities committed in the grant of licenses from 2001 to 2007 with particular emphasis on the loss caused to the public exchequer and corresponding gain to the licenses / service providers. In compliance to the above order, the CBI registered a preliminary Enquiry No.PE DAI-2011-A-001 was registered on 4.1.2011 at CBI, ACB, New Delhi. After conclusion of the said Preliminary Enquiry, a case vide RC-DAI-2011-A-0022 was registered by the CBI against the assessee Sri Dayanidhi Maran, his brother Sri Kalanithi Maran, Director of Sun Direct TV Pvt. Ltd., Chennai, Sun Direct TV Pvt. Ltd., and several others on the allegation that Dayanidhi Maran, the then MOC & IT, in abuse of official position, deliberately delayed grant of licenses in 7 telecom circles and other approvals / permissions on various issues pending before the Department of Telecommunication (Dot) related to M/s.Aircel Televentures Ltd., on frivolous grounds with an intent to force its exit from telecom business by constricting its businesses environment. It is alleged that the sale of these companies held by Sri C.Sivasankaran to M/s.Maxis

Communication (through its subsidiary M/s.Global Communications and a joint venture company named M/s.Deccan Digital Networks Pvt. Ltd., formed between Indian partner M/s.Sindya Securities and M/s.Global Communications) was also with the intervention of Sri Dayanidhi Maran (the assessee) and his brother Sri Kalanithi Maran. However, after the change of ownership, the applications for issuance of licenses and other requests/approvals pending since long before the Department of Telecommunications were acceded to and undue favour was given these companies after such transfer for which alleged illegal gratification was paid by M/s.Astro All Asia Networks Plc., to M/s.Sun Direct TV Pvt. Ltd., to Sri Kalanithi Maran, in the garb of purchase of it shares at a premium of Rs.69.57/- per share through its subsidiary M/s.South Asia Entertainment Holdings Ltd., while Smt.Kavery Maran w/o. Sri Kalanithi Maran got shares of M/s.Sun Direct TV Pvt. Ltd @ Rs.10/- per share. It is alleged that the active intervention of Sri Dayanidhi Maran and his brother in restricting the businesses environment of Siva Group, change of ownership to M/s.Maxis Communications and undue favour post this change was for mala fide considerations. An illegal gratification of Rs.549,96,01,793/- was accepted as quid pro quo through his brother Sri Kalanithi Maran in the garb of share premium invested in Sun Direct TV by South Asia Entertainment Holdings Ltd (a fully owned subsidiary of Astro All Asia Networks Plc.)."

86. Our Great Nation is a fast developing country in the world. We are effectively performing in respect of the developmental and technological activities. Greedy men are attempting to exploit the situations in many places. Corruption in our country are mounting and it becomes a routine affair in certain public businesses. When corruption is spreading like a Cancer in our Great Nation, such provisions are to be interpreted constructively by not

allowing the offenders to escape from the clutches of law. The scientific way of transactions by using the modern technologies are to be keenly addressed by the officials also. The corrupt activities are being injected deep into the system and it is very difficult for the authorities to cull out the modus operandi of such corrupt activities. Investigations are to be modernised and the method of investigations are to be improved, so as to match the level of corruption and the modus operandi of corruptions in certain areas.

87. The huge transactions like that of the present cases on hand, the authorities must be in a position to investigate the issues thoroughly and by using an intelligent way of investigation. Under these circumstances, the Courts cannot interfere in a routine manner in respect of the notice issued under Section 148 of the Act. Whenever such allegations are raised against the Assessee, who was holding a high position of Union Minister, then the Department shall be allowed to investigate the matter with all fairness and by adopting an intelligent way of investigating the issues.

88. The very concept of income tax assessment is that the Assessee is taxed by the Department based on the returns filed by the Assessee. Section 2 of the Act provides "definitions". Section 2(8) defines "assessment includes reassessment". Thus the very meaning of the assessment provided under the Act includes reassessment also. Thus, the reassessment is not a separate concept and it is included within the meaning of the assessment under Section 2(8) of the Act. Thus, an assessment and reassessment are part and parcel of the procedures and therefore, there cannot be any doubt in respect of the power of reassessment provided under the Act.

89. The Income Tax Department may not be aware of the income of the individual Assessee. They are assessing the tax based on the returns filed by the respective Assessee. Thus, the very concept of assessment is that the Officer who is scrutinising the returns did not aware of the income of an individual. For this reason only Act provides adequate power to deal with the cases, where there is evasion or suppression or otherwise by the Assessee. The very source of assessment is the returns filed by the Assessee concerned. Only after filing of the returns, the Department of Income Tax came to know about the income of the person concerned. Thus, the reassessment may arise on several occasions and on several grounds. The Income Tax Department may receive informations from many other sources. The Income Tax Department may get some external

materials as well as from various other sources. It is the process of investigation. On receipt of such materials or informations from various other sources, the authorities may be in a position to reopen the assessment and impose tax. In the absence of any such lucid provision, enabling the Department to reopen a case, there is a possibility of escapement of payment of tax by large number of Assesseees. The very nature of the Act is to ensure that the informations and the materials collected or received from various other sources are also dealt with by the Department of Income Tax appropriately and with reference to the provisions of the Act.

90. The power of reopening of the assessment is certainly wide in nature. If it is restricted, then the very purpose and object of the Income Tax Act will be defeated. The wide power provided to the authorities competent are to reopen the assessment and to ensure that all external materials and the informations received from various sources are also dealt with in accordance with the provisions of Law. Thus, it does not mean that the Income Tax Authorities may reopen at any point of time. In order to protect the Assesseees a definite time limit has been provided under the Act itself. Thus in the event of receiving any informations or materials from any other sources can be a ground for reopening of the assessment and the period of limitation is four years and six years respectively and in respect of the present writ petitions, it is six years.

91. The procedure of reopening of the assessment is contemplated under Sections 148 to 153 of the Act. Once again looking into the spirit of Section 147, it is unambiguously enumerated that "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".

92. The language employed in Section 147(1) of the Act is that "which comes to his notice subsequently in the course of the proceedings under the Section". Thus even after initiation of reopening of assessment proceedings under Section 147 of the Act. If during the course of the proceedings if any materials or informations are received by the Assessing Officer that also can be taken into consideration for the purpose of reassessment. It is crystal clear that the reasons recorded before the initiation of the reopening of the assessment alone need

not be a ground for reassessment. Even after reopening of the assessment if any materials or informations are received by the Assessing Officer that also shall be included part and parcel of the proceedings and sufficient explanations shall be called for from the Assessee and accordingly a reassessment order can be passed. Thus, two circumstances arise after the conclusion of the assessment. Firstly, if the assessment is finalised, the reopening in respect of the escaped assessments can be made if any new materials or suppression of materials are identified. On such reopening of the assessment and during the course of the proceedings, if the Assessing Officer noticed any other materials or informations in respect of escaped assessment and the same also can be treated as part and parcel of the reassessment proceedings which is reopened.

93. On going through the said ingredients of the Section 147, this Court has no hesitation to conclude that the Assessing Officer has got wider power in respect of covering the escaped assessments for the purpose of reopening the assessment. The proviso to Section 147 states that "provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment". This also provides various circumstances enabling the Assessing Officer to assess or reassess such income other than the income involving the matters which are the subject matters of any appeal, reference or revision. The wideness of the power has been further clarified in the said proviso clause.

94. Explanation 2 sub-clause (b) to Section 147 also provides power to the Assessee where a return of income has been furnished by the Assessee but no assessment has been made and it is noticed by the Assessing Officer that the Assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return.

95. The circumstances are narrated wherein certain materials and informations are provided by the Assessee at the time of filing of the returns and if the same has not been assessed by the Assessing Officer during the relevant assessment year and if it is subsequently noticed, then also the Assessing Officer is empowered to reopen the assessment in respect of the escaped assessments.

96. On a perusal of various circumstances incorporated under Section 147 of the Act, for reopening of the escaped assessment, this Court is of an opinion that it

is certainly flexible and wider power has been provided, enabling the Assessing Officer to reopen the assessment in the interest of revenue and to ensure that the Assessee pay the correct tax with reference to the provisions of the Act.

97. This Court is of the firm opinion that where certain doubts in respect of the reasons or otherwise has been raised by the Assessee, such benefit of doubt should be held in favour of the revenue and not in favour of the taxpayer. Contrariness is to be established by the Assessee, while scrutinising the materials available with the Assessing Officer.

98. It is for the Assessee to convince the Assessing Officer in respect of all such escaped assessments, informations and materials available and submit the returns. This being the legal principles to be followed, the provisions are to be interpreted to achieve its purpose and the object and therefore the wider powers provided under Section 147 of the Act, for reopening of the escaped assessments can never be restricted by imposing certain conditions on the Assessing Officer.

99. Even in case of certain procedural lapses, this Court is of an opinion that such procedural lapses can be taken advantage of by the Assessee only if it causes prejudice to the proceedings, if any. Such procedural lapses not causing any prejudice to the rights of the Assessee during the course of the proceedings of the reassessment, then the Assessee cannot file a writ petition, seeking quashing of the entire proceedings. Such writ petitions also cannot be entertained in view of the fact that such procedural lapses or omissions or commissions have not caused any prejudice to the interest of the Assessee nor resulted in denial of fair procedure and opportunity to the Assessee.

100. In the present writ petitions, this Court is of an opinion that undoubtedly notice was issued based on the reasons recorded by the Assessing Officer under Section 147 of the Act. However, the reasons arrived had not been communicated to the writ petitioner. But the writ petitioner requested the reasons to be furnished. Responding to the letter sent by the writ petitioner, the Assessing Officer communicated the reasons to the Assessee/writ petitioner and the objections were rejected. Thus, the writ petitioner has not been prejudiced in respect of the proceedings communicated by the Assessing Officer. Thus, this Court, has to consider the very fact that, whether any prejudice has been caused to the Assessee

resulting any injustice or otherwise in the present writ petitions on hand. The writ petitioner very well can respond to the Assessing Officer and establish his genuinity or otherwise by producing the materials available with him and by providing informations known to him. Without doing so, the writ petitioner filed the present writ petitions, challenging the notice.

101. Let us now look into Section 148 of the Act. Section 148 speaks about "the issuance of notice where income has escaped assessment". Section 148(2) stipulates that "the Assessing Officer shall, before issuing any notice under this Section, record his reasons for doing so". Whether the said provision can be interpreted as if recorded reasons by the Assessing Officer should be communicated along with the notice. The very purport of the Act is to ensure that the Assessing Officers are acting with reasons and judiciously. The Statute provides that the Assessing Officer should record the reasons only with an object to ensure that the Assessing Officers/Competent Authorities cannot act with callousness and without any basis.

102. Every actions of the Authorities Competent must be on reasonings and the same must be recorded in files. The reasons to be recorded by the Assessing Officer for taking decision to reopen the escaped assessment does not mean that such reasons are to be communicated along with the notice itself. The notice directs the Assessee to submit his returns. If the Assessee is of an opinion that he requires the reasons recorded by the Assessing Officer for reopening of the assessment, then he can made a request and accordingly the same shall be furnished by the Assessing Officer to the Assessee.

103. In the present cases on hand, the request made by the writ petitioner had been complied with and the reasons for reopening of the escaped assessment had been communicated to the writ petitioner. The said propositions are very well recognised by the Supreme Court of India in the case of GKN Driveshafts (India) Ltd. Thus the very provision stating that the Assessing Officer should record the reasons does not mean that the same should be communicated along with the notice itself. The provision is incorporated in order to ensure that the Assessing Officers act with responsibility and make sure that they are reopening the assessment only based on some reasons and the materials available on record. Such provisions provided to avoid the arbitrariness on the part of the Assessing Officer cannot be taken advantage by the Assessee by contemplating the procedures that the reasons so recorded

by the Assessing Officer should be communicated to the Assessee along with the notice issued under Section 148(1) of the Act. Such a proposition cannot be appreciated and that is not the intention of the Act itself. Thus, the very arguments advanced in this regard by the writ petitioner deserves no merit consideration.

104. In case of M/S. Phool Chand Bajrang Lal vs Income-Tax Officer And Another [1993 203 ITR 456], it has been held as follows:-

"One of the purposes of Section 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude."

105. A careful consideration of all the judgments, cited supra, this Court is of an undoubted opinion that if the Assessing Officer has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment. It is however, to be noted that the conditions stipulated in the Act must be fulfilled if the case falls within the ambit of Section 147.

106. Considering the fact that there are some materials on record and the informations with the Department of Income Tax, the reopening of the assessment in the writ petitions with reference to Sections 147 to 153 of the Act, is in accordance with law and there is no infirmity, as such. Thus, the writ petitioner is bound to respond to the Assessing Officer for the purpose of arriving a conclusion and for taking a decision. In the event of passing an order of assessment or reassessment, then the writ petitioner is entitled to prefer an appeal contemplated under the provisions of the Act. Contrarily, based on the preliminary informations gathered by the Assessing Officer, the notice issued for the purpose of reopening of the assessment would not provide a cause of action for filing of the present writ petitions and this Court has no hesitation in holding that the writ petitions are not only premature, even on merits the writ petitioner has failed to establish any acceptable reason to grant the relief, as such, sought for.

107. This being the principles to be followed, the writ petitioner has miserably failed to establish any legally acceptable ground for the purpose of interfering with the actions initiated by the respondents by invoking the provisions of the Income Tax Act, 1961. Thus, there is no infirmity as such, in respect of the initiation of the proceedings for reopening of the assessment under the Act and the writ petitions are devoid of merits. The respondent is empowered to proceed further in accordance with law. Accordingly, the writ petitions stand dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petitions are also dismissed.

Sd/-

Assistant Registrar(CS II)

//True Copy//

Sub Assistant Registrar

Svn
To

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+1cc to L.S.M.Hasan Fizal., Advocate SR.No. 70287

WPs 3405 & 43944 of 2016

ASK(26/10/2018)

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