

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 10-10-2018

CORAM

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

W.P. No.44311 of 2016

And

W.M.P.No.38177 of 2016

M/s.SUN Direct TV Pvt Ltd.,
Represented by its Vice President-Finance/
Authorised Singatory,
No.73, Murasoli Maran Towers,
MRC Nagar Main Road,
MRC Nagar,
Chennai-600 028. .. Petitioner

vs

The Assistant Commissioner of Income Tax,
Non-Corporate Circle-20(1),
Room No.311, III Floor,
Aayakhar Bhavan,
#121, Mahathma Gandhi Road,
Chennai-600 034. .. Respondent

WP No.44311 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: AAICS7671L dated 30.3.2016 under Section 148 of the Income Tax Act, 1961 and the consequential order dated 16.12.2016 in F.No. SCR. 119/A/AAICS7671L/A.Y.2009-10/ACIT/NCC-20(1)/CHN of the respondent and quash the same.

For Petitioner : Mr.P.S.Raman,Senior Counsel
for Ms.M.Sneha.

For Respondent : M/s.J.Narayanaswamy

O R D E R

The writ petitioner filed this writ petition, challenging the notice issued by the respondent dated 30.3.2016 under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as the 'Act') in respect of the assessment year 2009-2010 and the consequential order dated 16.12.2016.

2. In this writ petition, the writ petitioner is M/s.Sun Direct TV Pvt Ltd., represented by its Vice President-Finance/Authorised Signatory.

PLEADINGS OF THE PETITIONER AS WELL AS THE ARGUMENTS:

3. The writ petitioner filed the returns of income for the assessment years 2009-2010 within the prescribed time limit. The returns were selected for compulsory scrutiny under CASS and scrutinised under Section 143(3) of the Act and the assessments were completed in respect of the returns. While-so, the impugned notice has been issued by the respondent in proceedings dated 30.3.2016 under Section 148 of the Act to reopen the assessment years 2009-2010.

4. The grievance of the writ petitioner is that the returns filed by the writ petitioner had been assessed under Section 143(1) of the Act and again as a special case under Section 143(3) by way of complete scrutiny of accounts. Under those circumstances, the completed assessments are sought to be reopened after a lapse of six years without any basis or reasons by the respondent. The writ petitioner by its letter dated 19.4.2016 sought for reasons for reopening of the assessments. The respondent by their letter dated 31.8.2016 furnished the writ petitioner with reasons for reopening of the assessments. The reasons cited for the reopening of the assessments, in brief, are:-

(a) We have received money from South Asia Entertainment Holdings Limited in the name of share subscription along with share premium - Rs.203.98 crores;

(b) Shri Kalanithi Maran and his wife Mrs.Kaveri Kalanithi Maran were allotted shares only at Rs.10 per share without any premium;

(c) Hence the share premium invested by M/s.South Asia Entertainment Holding Limited is clearly excess value received and has to be treated as income of the Assessee and the same should be brought to tax;

(d) The fact that this value has been received in excess has not been disclosed in the return of income;

(e) The high value of share premium with respect to South Asia Entertainment Holdings Limited, is not a genuine transaction details of which was not fully

disclosed by the Assessee;

(f) Thus, there is a failure on the part of the Assessee to disclose fully and truly all the material facts necessary for assessment, for the AY 2009-2010;

(g) The above transaction is not a genuine transaction and is required to be assessed to tax under Section 68 of the Income Tax Act, 1961.

5. In response to the reasonings furnished by the respondent for reopening of the assessments, the writ petitioner submitted the following objections on 22.11.2016:-

(a) The receipt of share application money, on a higher premium, from South Asia Entertainment Holding Limited, a foreign investment regulated through SEBI, RBI, Registrar of Companies and the Ministry of Finance Approvals, is a fact, which is available in the Financials submitted during the course of scrutiny assessment, on the basis of which the questionnaire was issued and finally the assessment was completed after satisfying about the correctness and completeness of the accounts;

(b) It was not reasonably explained in the recorded reasons as to how the excess premium received from South Asia;

(c) Entertainment Holding Limited, which was received as a capital receipt, could be treated as 'income', being in the revenue nature. Even according to the respondent, the amount of share application money on premium was 'invested' by M/s.South Asia Entertainment Holding Limited. If it was so, then an investment by a legal foreign entity, which is a capital receipt in the hands of petitioner, could never be income in the hands of the petitioner. Therefore, the respondent's reasoning in treating the same as income is totally untenable in law;

(d) The respondent without taking into consideration that the entire investment is reflected in the financial accounts, which in fact was the reasons for issuing of questionnaire during the course of original assessment had stated that the increase in share application money on premium was not disclosed. If according to the respondent if the same has not been disclosed, which is not true, then it is the duty of the respondent to record as from where such information was received. The alleged information for reopening was already available before the Assessing Officer during the course of scrutiny assessment and there was no fresh information for him to hold that the transaction as not genuine or a capital receipt has escaped assessment as income. Therefore, it was only a change of opinion that a capital receipt is an income as against the earlier decision in a validly concluded scrutiny assessment that the receipt of

share application money on premium from M/s.South Asia Entertainment Holding Limited, was only a capital investment by a foreign legal entity in an Indian Legal Entity, going through a spate of approvals and legal channels, and hence accepted the income returned without making any adjustment on this issue;

(e) The last alleged reason is that the transaction is not genuine and required to be assessed under Section 68 of the Act. The transaction which was a genuine transaction in the original scrutiny assessment has now become a non-genuine transaction without any fresh material/information/investigation coming into your possession or done by you and such 'fresh information' not forming part of the reasons recorded for believing that any income has escaped assessment which has to be brought to tax under Section 68 of the Income Tax Act, 1961, and consequently to issue a notice under Section 148 of the Act;

(f) It was also objected that the issuance of the notice under Section 148 of the Act, is prima facie illegal for the fact that the alleged reasons recorded for reopening the assessment were communicated after the end of six years i.e., after 31.3.2016.

6. Without considering the objections submitted by the writ petitioner, the respondent rejected the same through their order dated 16.12.2016 on the following grounds:-

(a) The Assessee did not inform the details of share premium in the return of income filed and hence the Assessee failed to disclose fully and truly all the material facts necessary for its assessment;

(b) There is no change of opinion, relying on certain decisions;

(c) Stated that the Apex Court decision in the case of Lovely Exports, is not applicable to the facts of the case.

7. The writ petitioner contended that the Assessing Officer in his reasons recorded for reopening of the assessment states that there was no disclosure of fully and truly all material facts necessary for assessment. However, the Assessing Officer in his order dated 6.12.2016 had not disclosed the details from where share premium details were derived from. The non-disclosure of the source will clearly establish the fact that, the abovesaid entire details were readily available in the financials and formed part of records during the course of original assessment and there are no new materials which came to the possession of the Assessing Officer after completing and accepting the assessment. This will clearly establish the fact that the reason for reopening of the assessment is nothing but mere

'change of opinion' without any new material factors. In the case of the petitioner also the petitioner had filed its return under Section 143(1) of the Act and thereafter, as a special case it was directed to file the return under Section 143(3) of the Act, after issuing a questionnaire which was answered and the returns were accepted. When entire investment is reflected in the financial accounts, which in fact was the reasons for issuing of questionnaire during the course of original assessment and the same being accepted, the present reasons for reopening of the assessment is nothing but change of opinion.

8. In support of the said submission, the petitioner has cited certain judgments which we will deal little later. The contention of the petitioner is that respondent deliberately failed to take into consideration the judgment with regard to the limitation provided under the Act for issuance of notice under Section 148 with reference to the Law of Limitation prescribed under the Act.

9. The learned Senior Counsel, appearing on behalf of the writ petitioner, forcibly contended that the impugned notice dated 30.3.2016 and the rejection of objections by the respondent are clearly barred by limitation prescribed under the provisions of the Income Tax Act, 1961. The failure on the part of the respondent in not producing the reasons along with the impugned notice caused a stigma and has got certain civil consequences.

10. In the present cases, it is contended that it is a "change of opinion by the Assessing Officer". It is not a case of "reason to believe" contemplated under Section 147 of the Act. "Change of opinion" is impermissible in view of the fact that the very same merits were considered at the time of concluding the assessments during the relevant point of time in respect of the returns filed by the writ petitioner for the respective assessment years, namely, 2009-2010, 2010-2011 and 2011-2012. Forming second opinion in respect of the closed assessments are impermissible under the Act.

11. On a perusal of the rejection order issued by the respondent, it is unambiguous that the opinion formed by the respondent is nothing but the reappraisal of the fact which were already disclosed and assessed by the Assessing Officer during the relevant point of time. The writ petitioner-Company explained the nature of transactions and issue of shares and other details. No sale happened actually. Transfer of shares with reference to the Companies Act, 1956 is permissible and therefore, such a transaction can never be construed as a new material or a

suppressed material, so as to reopen the closed assessment under Section 148 of the Act. All these particulars in relation to the issuance of shares were communicated along with the returns filed by the writ petitioner. The working sheets valuation and other details were also furnished. It is relevant to cite that the foreign investment promotion board, Reserve Bank of India, Ministry of Finance and all other Governmental officials had approved the transactions and necessary clearances also were given to in respect of all such transactions. Thus, the impugned notice issued under Section 148 of the Act, now after a lapse of six years, is nothing but a "change of opinion", can never be construed as a "reason to believe".

12. There was no suppression of fact absolutely in respect of the returns filed by the writ petitioner with reference to the transactions now they are cited in the reasonings. Thus, the impugned notices are amounts to abuse of power warranting quashing of the notice. The respondent has not established any fresh material or identified suppression of fact, in the absence of any one of these ingredients, the Assessing Officer has no authority to invoke Section 148 by issuing the impugned notice.

13. Section 143 of the Act, deals with "assessment". In the case of the writ petitioner, the assessment had been completed with reference to Section 143 (3) of the Act. The Tax Questionnaire issued to the writ petitioners were answered properly and the Assessing Officer considered the same and concluded the assessment. This being the factum, there is no reason to believe for reopening of the assessments, which were closed.

14. At the outset, the learned Senior Counsel is of an opinion that "change of opinion" in the absence of any new material or suppression of fact is impermissible under the Act. The reopening of assessments and the notices under Section 148 of the Act, were issued in respect of four different Assesseees. Therefore, the principles of "one income", "one tax" had not been considered by the Assessing Officer. Thus, the very action is mala fide, perverse and in violation of the provisions of the Act.

15. The learned Senior Counsel, with reference to the point raised by the Additional Solicitor General of India that the writ petition is not maintainable, contended that the Hon'ble Division Bench of this Court passed an order in the writ appeal in W.A.No.347 to 349 of 2014 etc. batch, on 4.7.2014. In the writ appeals the issues raised before the Hon'ble Division Bench were answered against the Assesseees and in favour of the revenue and the writ

petitions were dismissed against the Division Bench Order. An appeal was filed before the Supreme Court of India in Civil Appeal No.11189 of 2016, the Hon'ble Supreme Court of India by citing the judgment of Calcutta Discount Limited Company vs. Income Tax Officer, Companies District I, Calcutta [(1961) 41 ITR 191 (SC)], set aside the cases and remanded the matters back to the High Court. It is further observed that each case shall be examined on its own merits keeping in view the scope of judicial review while entertaining such matters, as laid down by the Hon'ble Supreme Court in various judgments. The Supreme Court further observed that "we are conscious of the fact that the High Court has referred to the judgment of this Court in Commissioner of Income Tax vs. Chhabil Dass Agarwal [(2013) ITR 357 (SC)]. We find that the principle laid down in the said case does not apply to these cases." Relying on the observations, the learned Senior Counsel is of an opinion that the present writ petition is also to be decided on merits and the same cannot be dismissed merely on the ground of maintainability as raised by the respondent that the writ petitioners are having alternate remedy under the provisions of the Act.

16. A mere suspicion in respect of certain transactions cannot constitute a cause of action for the respondent to reopen the closed assessments. The charge sheet filed by the CBI alone cannot constitute a ground for the purpose of reopening of the closed assessments and therefore, the impugned orders are to be set aside.

17. 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."

18. 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."

19. 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."

20. 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.

21. The learned Senior Counsel referred the case of Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd (now known as Whirlpool of India Ltd.) [(2010) 187 Taxman 312 (SC)], wherein the Hon'ble Supreme Court, in paragraph-4 of the judgment, held as follows:-

"4. On going through the changes quoted, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re- open the assessment.

Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.--A

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

22. In the case of Allied Strips Ltd vs. Assistant Commissioner of Income Tax, Central Circle-15 [(2016) 384 ITR 424 (Delhi)], wherein the Hon'ble Delhi High Court, in paragraph 10, held as follows:-

"10. It is clear from the above, that the present case is one of change of opinion. The questionnaire and particularly question B.1 specifically raise the issue with regard to share capital. It requires the petitioner to give a list, source, genuineness, identity of the share holders along with confirmation copies of the ledger account of the party including confirmation of the mode, date, address and acknowledgement of return, etc. from the said party along with source and relevant bank entries. The said information was provided by the assessee. After receipt of the said information, Assessing Officer did not think it fit to make an addition and, under these circumstances, no addition itself amounts to forming an opinion as has been held in Usha International Ltd. (supra)."

23. In the case of Commissioner of Income Tax VI, New Delhi vs. Usha International Ltd [(2012) 253 CTR 113

(Delhi)], the term "change of opinion" has been explained in paragraph-6 as under:-

"6. The questions of law at serial Nos. 1 to 3 referred to the Full Bench are inter-connected. They deal with the term and facets of the term -change of opinion?. The expression -change of opinion? postulates formation of opinion and then a change thereof. In the context of Section 147 of the Act it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under Section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view."

24. Further in paragraphs 12, 13 and 14, the power to review by the Assessing Officer has been stated as under:-

"12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in Kelvinator of India Limited (supra) in Eicher Limited (supra). The said decision in Eicher Limited (supra) makes reference to the decision of KLM Royal Dutch Airlines vs. Assistant Commissioner of Income Tax [2007] 292 ITR 49 (Delhi). KLM Royal case (supra) deals with some other issues on which we do not express or make any observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. (supra).

13. It is, therefore, clear from the aforesaid position that:

(1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143 (1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of -change of opinion?.

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

14. In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in CIT vs. DLF Powers Limited, ITA 973/2011 decided on 29th November, 2011 and BLB Limited vs. ACIT Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. In the last decision it has been observed:

"13. Revenue had the option, but did not take recourse to Section 263 of the Act, inspite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be

correct, when jurisdiction
under Section 263 is invoked."

25. Relying on the abovesaid judgment, the learned Senior Counsel for the writ petitioner, urged this Court by stating that in any angle, the impugned orders cannot sustain for want of legal support and accordingly liable to be scrapped.

PLEADINGS OF THE RESPONDENT AS WELL AS THE ARGUMENTS:-

26. The respondent raised a preliminary objection with regard to the maintainability of the writ petition 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 petition cannot be entertained and accordingly, they are liable to be rejected in limine.

27. 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.Nedunchezian 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)].

28. 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.

29. 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.

30. 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].

31. 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.

32. 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.

33. 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.

34. 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.

35. 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.

36. 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 present writ petition, 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.

37. 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.

38. 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".

39. 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.

40. 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.

41. 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.

42. 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.

43. 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 petition cannot be entertained in view of the fact that it is only an initiation and the Assessing Officer has not yet arrived at 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.

44. Notice is a proposal mooted out by the Assessing Officer under Section 148 on coming to the conclusion that the authorities have 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 petition. 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 petition is 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.

45. 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 petition is premature and is liable to be rejected.

46. 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 Assessee 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.

47. 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 quashing 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 Assessee's 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.

48. 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".

49. 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.

50. 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.

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.

51. 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.

52. 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".

53. The learned Standing Counsel for the Income Tax Department contended that the Income Tax Department did not know the income of the Assessee. Only after filing of

the return by the Assessee, the Department came to know the actual income of an Assessee. Thus, the officials competent are empowered to call for the sources if they have received any informations or materials both from the returns or through external sources. The power of reopening under the provisions of the Income Tax Act is wider and in the event of new material or suppression of fact, the reassessment can be dealt with under Sections 148 to 153 of the Act. Even during the course of the proceedings, if any new materials or informations are received by the Assessing Officer, even then powers are conferred upon him to proceed against such new materials or informations. Thus, Section 147 of the Act, is an enabling Section and in the presence of any tangible materials available on record, the Assessing Officer is empowered to proceed against the Assessee for the purpose of reopening of the assessments.

DISCUSSIONS:

54. 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.

55. 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.

56. Let us now look into the manner in which the initiations are done by the respondent in respect of the present writ petition. 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.

57. 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 formed 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.

58. 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.

59. 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.

60. 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.

61. 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.

62. 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.

63. 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.

64. 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.

65. 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.

66. 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.

67. 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.

68. In the present case, admittedly, on receipt of the notice, the writ petitioner submitted a letter to the respondent on 24.4.2015, seeking reasons for reopening of the assessment for the assessment years 2008-2009 and 2009-2010. The respondent 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.

69. The writ petitioner, being a 'Company', is duty bound to respond to the notice to prove their innocence or otherwise. Contrarily, the writ petition is filed at the notice stage itself, and the same will hamper all further proceedings of the Department and such an idea if any developed can never be encouraged by the Courts. On receipt of the notice impugned in the present writ petition, rightly the writ petitioner had approached the respondent for furnishing the reasons. The respondent has also furnished the reasons and the letters. Thus, it is left open to the writ petitioner to defend their 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 orders by following the procedures contemplated under the Act.

70. 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.

71. 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 respondent, enabling him 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.

72. 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.

73. 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.

74. 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 of 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.

75. 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 the 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.

76. 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.

77. 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.

78. 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 the filing of the returns, the Department of Income Tax came to understand that 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, in such circumstances, the authorities must be in a position to reopen the assessment and impose tax. In the absence of any such lucid provision, enabling the Department reopening a case, there is a possibility of escapement of payment of tax by large number of Assessee. 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.

79. 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 to reopening of the assessment and to ensure that all external materials and the informations received from various sources should also be dealt 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 Assessee 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 petition, it is six years.

80. 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".

81. 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.

82. 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.

83. 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.

84. 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.

85. On a perusal of the 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.

86. This Court is of a 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.

87. 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.

88. 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.

89. In the present writ petition, 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 petition 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 petition, challenging the notice.

90. 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.

91. 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 make a request and accordingly the same shall be furnished by the Assessing Officer to the Assessee.

92. 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.

93. 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."

94. 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.

95. 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 petition 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 petition and this Court has no hesitation in holding that the writ petition is not only premature, even on merits the writ petitioner has failed to establish any acceptable reason to grant the relief, as such, sought for.

96. 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 respondent 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 petition is devoid of merits. The respondent is empowered to proceed further in accordance with law. Accordingly, the writ petition stands dismissed. However, there shall be no order as to costs. Consequently, connected miscellaneous petition is also dismissed.

Sd/-

Svn

Assistant Registrar(CS ii)

//True Copy//

सत्यमेव जयते
Sub Assistant Registrar

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WP 44311 of 2016

ASK(30/10/2018)