

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

CWP No. 27068 of 2016

DATE OF DECISION : 27.04.2018

Rakesh Gupta

.... PETITIONER

Versus

Commissioner of Income Tax, Panchkula and another

.... RESPONDENTS

CORAM :- HON'BLE MR. JUSTICE S.J. VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN

Present : Mrs. Radhika Suri, Senior Advocate, with
Mr. M.S. Kanda, Advocate,
for the petitioner.

Mr. Yogesh Putney, Senior Standing Counsel,
for the respondents.

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AVNEESH JHINGAN, J.

The petitioner is an assessee under the Income Tax Act, 1961 (for short, 'the Act'). This petition has been filed challenging the notice dated 31.03.2016 for re-assessment, and the order dated 07.10.2016 rejecting the objections raised for re-opening.

2. For the assessment year 2009-10, the petitioner filed his return showing his income to be 'Nil'. There was a deemed acceptance of return under Section 143 (1) of the Act. The petitioner during the relevant year was engaged in trading in shares through his broker M/s Competent Finman Pvt. Ltd. A trading loss of ₹ 46,56,820/- was claimed.

3. The Principal Director of Income Tax (Investigation),

Ahmedabad, conducted a survey under Section 133-A of the Act at the premises of twelve brokers. During investigation, it was found that Client Code Modification (CCM) was being used as a tool for tax evasion. The losses were being shifted out of the profit of the clients. A detailed investigation report was sent to respondent No.2 in a Compact Disc. In the investigation report, the details of Client Code Modification (CCM) used by the broker of the petitioner were also there.

4. A notice dated 31.03.2016 under Section 148 of the Act was served upon the petitioner by the respondent, after obtaining necessary satisfaction of the Principal Commissioner of Income Tax, Panchkula.

The petitioner vide letter dated 26.08.2016 sent a copy of the income tax return filed for the assessment year 2009-10 stating that it be treated as the return filed in response to the notice under section 148. The petitioner also requested the respondent to furnish the reasons for re-opening the assessment.

5. At the petitioner's request, the reasons for initiating proceedings under Section 147 of the Act were supplied to the assessee. The reasons read as follows :-

“The assessee has filed return of income for the Assessment Year 2009-10 on 30.09.2009 showing total income as Rs. Nil.

Information has been received from Principal Director of Income Tax (Investigation), Ahmedabad vide his Letter No. PDIT (Inv)/AHD/CCM/Dissemination/15-16 dated 08.03.2016 through Range head of this office.

The information pertains to modus operandi adopted Share Brokers during Modification of Client Code to manipulate income/loss of their clients. The investigation team has conducted surveys u/s 133A of Income Tax Act, 1961 at the premise of twelve brokers and few of their clients across India on 23.05.2015 and a detailed investigation report has been sent to the undersigned in CD, which is part of record. It has been revealed that Client Code Modification (CCM) has been used as a tool for tax evasion by the brokers and they have booked losses and shifted out profits of their clients.

Information has revealed that the assessee had been engaged in trading of shares through his broker M/s Competent Finman Pvt. Ltd. and during the relevant period has shifted-in losses amounting to ₹ 46,56,820/- through his broker and has definitely reduced his profits from trading in shares. In view of above I have reason to believe that the income of ₹ 46,56,820/- have escaped assessment within the meaning of section 147 of the Income Tax Act, 1961.

Proceedings are thus initiated against the assessee under section 147 of the Income Tax Act, 1961. Notice u/s 148 of the Income Tax Act, 1961 for the assessment year 2009-10 is being issued in the case.”

6. A notice dated 05.09.2016 was issued fixing the case for hearing on 26.09.2016. The petitioner was called upon to furnish various documents.

7. The petitioner by a letter dated 07.09.2016 raised objections as to the jurisdiction of the respondent for issuing the notice under Section 147 of the Act.

By the impugned order dated 07.10.2016, the respondent rejected the objections. It was held that re-opening was justified. The respondent held that there was sufficient material to form the belief that the income of the assessee had escaped assessment. The petitioner was directed to submit his reply and to avail the opportunity of being heard.

8. Mrs. Suri, the learned Senior Counsel appearing on behalf of the petitioner submitted that the assumption of jurisdiction was without there being reason to believe that the income has escaped assessment; that the proceedings were merely on the directions of the Principal Director of Income Tax (Investigation), Ahmedabad; that the AO had acted only upon borrowed satisfaction, instead of satisfying himself and the satisfaction recorded by the Principal Commissioner of Income Tax, Panchkula under Section 151 was in a mechanical manner and without application of mind.

9. The relevant provisions of the Act are as follows :-

143. (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely :—

(a) the total income or loss shall be computed after making the following adjustments, namely :—

- (i) *any arithmetical error in the return;*
or
- (ii) *an incorrect claim, if such incorrect claim is apparent from any information in the return;*
- (b) *the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);*
- (c) *the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;*
- (d) *an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and*
- (e) *the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:*

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the

assessee is adjusted but no tax or interest is payable by, or no refund is due to, him:

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.

Explanation—For the purposes of this sub-section,—

(a) “an incorrect claim apparent from any information in the return” shall mean a claim, on the basis of an entry, in the return,—

(i) of an item, which is inconsistent with another entry of the same or some other item in such return;

(ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or

(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;

(b) the acknowledgement of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a).

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147. 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 (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under subsection (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 :

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision,

which is chargeable to tax and has escaped assessment.

Explanation 1.—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 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;*
- (b) 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 ;*
- (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.*

10. There was a substantial change made in Section 143 (1) of the Act with effect from 01.06.1999. Earlier, the AO could make assessment under Section 143 (1) of the Act without requiring the presence of the assessee but the order of assessment had to be passed. After the amendment, under Section 143 (1) of the Act no assessment order is required to be passed but the intimation sent under Section 143 (1) of the Act was deemed to be an assessment order. It is only in cases selected for scrutiny that assessment under Section 143 (3) of the Act is passed.

11. During the relevant assessment year, in order to initiate proceedings under Section 147 of the Act, in case assessed under Section 143 (1) of the Act, the AO should have reason to believe that the income chargeable to tax has escaped assessment.

The petitioner was assessed under Section 143 (1) of the Act. The only requirement is that the AO had reason to believe that there is escapement of income chargeable to tax.

12. Before considering Mrs. Suri's submissions, especially as to whether the respondent himself had reason to believe that income had escaped assessment or whether it was on borrowed satisfaction on his part, it is necessary to examine the material that was before the respondent.

13. In this regard, a letter dated 08.03.2016 from the Principal Director of Income-Tax (Investigation) Ahmedabad, is of vital importance. The letter was addressed to the Chief Commissioner of Income-tax, Panchkula. The subject of the letter referred to a survey report in respect of Client Code Modification (CCM) being forwarded regarding the dissemination of beneficiary clients who have taken losses and shifted out profits during the financial years 2008-09 to 2011-12. The letter explains that modification of the client code is a practice under which brokers change the client code in sale and purchase orders of securities after the trades are conducted. It further rightly explains that while it is permissible to rectify inadvertent errors, there were concerns that modifications could be made to manipulate the activities in the market. Thus, for instance, if a particular transaction is undertaken in the name of a client, it cannot be shifted to the name or account of another client unless it was on account of an inadvertent error. The letter stated that SEBI had conducted a probe into the matter pursuant to the observations by the Finance Ministry about many such modifications having taken place in derivative transactions in the National Stock Exchange during March, 2010. Accordingly, the Ahmedabad Investigation Directorate, carried out coordinated limited purpose surveys under Section 133A of the Act at the premises of twelve brokers and a few

of their clients across India on 23.03.2015. The ADIT prepared a report, which on the basis of the above information concluded that CCM had been used as a tool for tax evasion. In the result, for four years, 4890 assesseees had availed contrived losses of over ₹ 1206 crores. The letter enclosed a pen drive, the contents whereof are tabulated in the letter. The report was in two parts. Part 1 pertained to the survey report containing 593 pages. Part 2 contained Annexures B, C, D, T and Utilities. Annexure B contained a list of the assesseees who had taken losses of ₹ 1,00,000 and above and assesseees who had shifted out profits of ₹ 1,00,000 and above. The rationale of setting ₹ 1,00,000 as the limit was a threshold monetary limit of ₹ 1,00,000 for re-opening the cases beyond four years. Annexure C contained details of cases proposed for centralization where contrived losses and shifting of profits were to the tune of ₹ 1 crore or more. Annexure D contained the original data received from the Bombay Stock Exchange and the National Stock Exchange; analysis of CCM data done at CFL, Ahmedabad, and details of trades and shifting of contrived profits in respect of each transaction for the particular day. Annexure S contained submissions, survey folders and annexures. Annexure T contained the PAN details of each beneficiary and an analysis of the utilisation of the modified client data. Paragraphs 7 and 8 of the letter read as under :-

“7. The beneficiaries pertaining to your jurisdiction may be segregated by using the “Sort & Filter” tools of MS Excel on Column NO. 7 “Jurisdictional Pr. CCIT”. The data for F.Ys 2008-09 to 2011-12 starts from column No. O to

AA of Annexure-B whereas net effect in all the four years is mentioned in column AA of Annexure-B.

8. The reopening of cases for FY 2008-09 is getting barred by limitation of time on 31.03.2016. You are, therefore, requested to initiate necessary action in the case of the beneficiary clients pertaining to your jurisdiction noted in the Pen Drive. These cases may also be closely monitored as huge revenue stake is involved.”

14. Based on the above information, details regarding the petitioner were tabulated. The table contained several details regarding the petitioner. These details pertained to the alleged sham transactions between the petitioner and his broker M/s Competent Finman Pvt. Ltd. What is important to note is that between 19.12.2008 to 10.09.2009 i.e. within a period of about nine months, there were 74 modifications. In our view, this material undoubtedly justifies the need to investigate the transactions and the manner in which they have been recorded by the broker. These were not stray cases of modification. There were 74 modifications within a period of about nine months. There may well be a valid explanation for the same. The fact however remains that the number of modifications would justify a consideration of the matter. It would be necessary for instance to examine the circumstances and the reasons for which the errors allegedly occurred. In other words, it is necessary to ascertain whether these were inadvertent errors or were deliberate adjustments/shifts from the broker's other clients,

as a result whereof either the petitioner alone or the petitioner and the corresponding client derived benefits.

15. It was suggested, though not pleaded, that these modifications were carried out mala fide at the behest of a third party. We do not express any view in this regard. It is always open to the petitioner to disclose the name of the third party to the AO who would undoubtedly consider the same and the effect thereof.

16. The next question is whether the respondent considered this evidence himself or whether he initiated the proceedings for re-opening on the directions of the Principal Director of Income Tax (Investigation), Ahmedabad. A reading of the reasons as a whole indicate that the respondent applied his own mind to the information furnished to him and was satisfied himself that the material is sufficient to warrant initiation of proceedings under sections 147 and 148 of the Act. The reasons do record that information has been received. They also record the nature of the information, namely that it pertained to the modus operandi adopted by the share brokers during Modification of Client Code. The respondent however recorded that it had been revealed that the CCM has been used as a tool for tax evasion. The respondent also recorded that the information had revealed that the assessee had been engaged in trading of shares through his broker M/s Competent Finman Pvt. Ltd. and that during the relevant period had shifted-in losses amounting to about ₹ 46,56,820/- through his broker and thereby had reduced his profits. In other words, the respondent was satisfied that the information received revealed the said facts. It is important to note

that the said letter dated 08.03.2016 addressed by the Principal Director of Income-Tax (Investigation) Ahmedabad, does not refer to any particular client or broker. Nor did it refer to any particular transaction or transactions. It has supplied the material in a 128 GB pen drive. It is obviously from this material that the respondent tabulated the transactions regarding the petitioner. As we noted earlier, the table at Annexure R-2 contained 74 such alleged errors. The details of each of these have been tabulated. It is obvious, therefore, that the respondent himself analysed the material pertaining to the petitioner and pursuant thereto initiated proceedings under sections 147 and 148 of the Act.

17. Mrs. Suri relied upon a letter dated 27.10.2016, by which the respondent sought certain information from the broker of the petitioner, including the Client Code of the assessee during the Financial Year 2008-09, the number of times the Client Code had been changed, the total investment made and a complete copy of the contract notes and copy of the account of the assessee in the books of the broker. She contended that the information having been sought after the reasons indicated that the decision to re-open the assessment was not passed on any material.

18. This would be a narrow reading of the letter. As we have already indicated, the respondent had sufficient reasons for initiating proceedings for re-assessment. An AO seeking further information and all the material on the basis of which he formed the opinion that the income had escaped assessment does not nullify the decision to re-open the assessment. In fact, this indicates that the AO intends considering the case

on merits before passing the final assessment order.

19. It is evident that the AO before issuing the notice had applied his mind independently to the information received from the Investigation Wing. Although the information was derived from the Investigation Wing, the satisfaction to the effect that Client Code Modification (CCM) has been used for shifting losses and to manipulate the income by the petitioner is his. It is not a case where merely on receipt of information a notice had been issued. Thus although the information may be borrowed the satisfaction was not. The respondents with their reply have annexed the material chart on the basis of which the AO recorded his reasons. The merely receipt of information from another source would not be a ground to challenge the initiation of proceedings. The only requirement would be the satisfaction of the AO regarding and based on the said information. The issue of borrowed satisfaction and issuance of notice on the direction of a higher authority is not there. The data qua the petitioner was analysed by the AO and thereafter, notice was issued. The reliance on the concluding lines of the information received from Ahmedabad to contend that it contained a direction to initiate proceedings is ill founded. It was only a suggestion to the concerned AO.

20. From a perusal of the chart, it is evident that it was not a case of one or two CCMs. The CCM has been used 74 times between 19.12.2008 and 10.09.2009.

21. In *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income-Tax (Central), Calcutta and others*, (1971) 82 ITR 147 (SC), relied upon by Mrs. Suri, the Supreme Court held :-

“In our judgment, the law laid down by this court in the above case is fully applicable to the facts of the present case. There can be no manner of doubt that the words “reason to believe” suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the Income-tax Officer may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.”

It is important to note that the Supreme Court found in that case that there was no material or fact which had been stated in the reasons for starting the proceedings for re-opening the assessment. In the case before us, as already discussed, this is not so.

22. As we will now indicate it is not necessary that the AO must know or be certain that income has escaped assessment. The AO must have reason to believe it has. He may finally accept the assessee's case. That would make no difference to the validity of the invocation of sections 147 and 148.

23. In *Income-Tax Officer Vs. Purushottam Das Bangur and another*, (1997) 224 ITR 362 (SC), relied upon by Mr. Putney, the Supreme

Court rejected the contention of the assessee that the information received from the Deputy Director, Directorate of Inspector (Investigation) was not a definite information and should not be acted upon by the Income Tax Officer for taking action under Section 147 of the Act. It was held that the information contained in the letter could form the basis for forming an opinion that there was reason to believe that income had escaped assessment without any further verification. In that case, the assessee claimed to have suffered a long term capital loss. The AO accepted the case and made the assessment order. What happened thereafter and the decision of the Supreme Court in respect thereof is as follows :-

“Subsequently, the Income Tax Officer received a letter dated March 21, 1974 from Shri S.M. Bagai, Deputy Director, Directorate of Inspector (Investigation), Special Cell, New Delhi, wherein it was stated that on information obtained from the Bombay Stock Exchange Directory the book value per equity share of Maharaja Shree Umaid Mills Ltd, rose from Rs. 318.55 for the year ending December 21, 1965, to Rs. 401 for the year ending December 31, 1970, and the earning per share rose from Rs. 8.37 per share to Rs. 44 per share during the abovementioned period and that the dividend percentage also rose from 2 per cent to 10 per cent, for the same period, but the quotations of the shares in Calcutta Stock Exchange fell from Rs. 168 to Rs. 85 per share during this period. In the said letter of Shri Bagai it was stated that it was clear from these facts

that the quotations appearing are as a result of certain manipulated transactions between the group and in cannot be said that to reflect the fair market value of the company. Alongwith the said letter Shri Bagai had annexed the information which was gathered by him on the basis of the Bombay Stock Exchange Directory and other information. The said letter of Shri Bagai was received by the Income Tax Officer on March 26, 1974. On March 27, 1974, he issued a notice under Section 147 (b) of the Act whereby the assessee was informed that the Income Tax Officer had the reason to believe that assessee's income chargeable to tax for the assessment year 1969-70 had escaped assessment and, therefore, the assessing authority proposed to reassess the income for the said assessment year and the assessee was required to deliver to him a return in the prescribed form of his income for the said year. Feeling aggrieved by the said notice, the assessee filed Writ Petition No. 1177 of 1974 in the Rajasthan High Court.

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On the basis of the information contained in the letter of Shri Bagai and the documents annexed to it, the Income Tax Officer could have had reason to believe that the fair market value of the shares was far more than the sale price and the market quotations from Calcutta Stock Association shown by the assessee at the time of original assessment were manipulated ones and as a result income chargeable to tax had escaped

assessment. It could not be said that the information that was contained in paragraph 2 of the letter of Shri Bagai was not definite information and it could not be acted upon by the Income Tax Officer for taking action under Section 147 (b) of the Act.

Ms. Gauri Rasgotra, the learned counsel appearing for the respondents, has urged that the letter of Shri Bagai was received by the Income-tax Officer on March 26, 1974 and on the very next day, that is, on March 27, 1974, he issued the impugned notice under Section 147 (b) of the Act and that he did not have conducted any inquiry or investigation into the information sent by Shri Bagai. Merely because the impugned notice was sent on the next day after receipt of the letter of Shri Bagai does not mean that the Income Tax Officer did not apply his mind to the information contained in the said letter of Shri Bagai. On the basis of the said facts and information contained in the said letter, the Income Tax officer, without any further investigation, could have formed the opinion that there was reason to believe that the income of the assessee chargeable to tax had escaped assessment. The High Court, in our opinion, was in error in proceeding on the basis that it could not be said that the Income Tax Officer had in his possession information on the basis of which he could have reasons to believe that income of the assessee chargeable to tax had escaped assessment for the relevant assessment years. For

the reasons aforementioned, we are unable to uphold the impugned judgment of the High Court. The appeal is, therefore, allowed, the impugned judgment of the High Court is set aside and the Writ Petitions filed by the respondents are dismissed. No order as to costs.” (emphasis supplied)

The judgment clearly applies to the case before us. The reliance upon the information supplied by the ADIT was justified. There is nothing to indicate that the information collected did not pertain to or was not concerned with the persons referred to. The respondent made his own inferences on the basis thereof.

24. In ***AGR Investment Ltd. Vs. Additional Commissioner of Income-Tax and another***, (2011) 333 ITR 146 (Delhi), relied upon by Mr. Putney, in a challenge to the initiation of proceedings under Section 147 of the Act, the Delhi High Court held that specific information received from the office of Director of Income Tax (Investigation) regarding transactions entered into by the assessee Company for accommodation entries is not a change of opinion and is material for the AO having reason to believe that income had escaped assessment. We respectfully agree with this view.

25. The AO had in his possession information collected by a Wing of the department, specially constituted for the purpose of collecting information. The data concerning the assessee was part of the information received. The information was specific and not vague. In challenge to

initiation of proceedings the Court has to prima facie satisfy itself regarding existence of reasons to believe. It is not for this Court to go into the sufficiency of the reasons. Even the final outcome of the proceedings is not relevant. Reliance was rightly placed on the following decisions of the Hon'ble Apex Court to justify the proceedings under Sections 147/148 in view thereof.

26. In *M/s Kantamani Venkata Narayana and Sons Vs. First Additional Income Tax Officer, Rajahmundry*, 1967 AIR (SC) 587, the Supreme Court held as under :-

“The High Court has pointed out that no final decision about failure to disclose fully and truly all material facts bearing on the assessment of income and consequent escapement of income from assessment and tax could be recorded in the proceedings before them. It certainly was not within the province of the High Court to finally determine that question. The High Court was only concerned to decide whether the conditions which invested the Income Tax Officer with power to re-open the assessment did exist, and there is nothing in the Judgment of the High Court which indicates that they disagreed with the view of the Trial Court that the conditions did exist.”

27. In *Central Provinces Manganese Ore Co. Ltd. Vs. I.T.O. Nagpur*, 1991 (4) SCC 166, the Supreme Court held as under :-

“11. So far as the first condition is concerned, the Income-tax Officer, in his recorded reasons,

has relied upon the fact as found by the Custom Authorities that the appellant under-invoiced the goods he exported. It is no doubt correct that the said finding may not be binding upon the Income-tax authorities but it can be a valid reason to believe that the chargeable income has been under-assessed. The final outcome of the proceedings is not relevant. What is relevant is the existence of reasons to make the Income-tax Officer believe that there has been under-assessment of the assessee's income for a particular year. We are satisfied that the first condition to invoke the jurisdiction of the Income-tax Officer under Section 147 (a) of the Act was satisfied.”

28. In ***Raymond Woollen Mills Ltd. Vs. Income-Tax Officer and others***, (1999) 236 ITR 34 (SC), relied upon by Mr. Putney, the Supreme Court held :-

“In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee

may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.”

29. In ***Assistant Commissioner of Income-Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd.***, (2007) 291 ITR 500 (SC), relied upon by Mr. Putney, the Supreme Court held :-

*“16 Section 147 authorises and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court in *Central Provinces Manganese Ore Co. Ltd. v.**

ITO [1991] 191 ITR 662, for initiation of action under section 147 (a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. P. Ltd. [1996] 217 ITR 597 (SC) ; Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 (SC).”

30. Mrs. Suri's reliance upon an interim order passed by the Bombay High Court in ***Coronation Agro Industries Ltd. Vs. Deputy Commissioner of Income Tax***, reported as (2017) 390 ITR 464 (Bombay), wherein it was recorded that the reason mentioned prima facie appeared to be a reason to suspect and not to believe is not well founded. It is only an interim order. No final order has been produced.

31. Mrs. Suri's reliance upon the decision of this Court in ***Commissioner of Income Tax Vs. Smt. Paramjit Kaur***, (2009) 311 ITR 38 (P&H) is not well founded. In that case, the Court found that there was no reason to believe and that re-opening was merely on suspicion.

32. Mrs. Suri relied upon a decision of the Delhi High Court in ***Commissioner of Income-Tax Vs. Gupta Abhushan P. Ltd.***, (2009) 312 ITR 166 (Delhi). In that case, the re-opening of an assessment was set aside as the material found in the survey conducted for the assessment year 2002-03 was being used in the assessment year 1999-2000 without there being any basis that the material pertained to the relevant assessment years. It was observed that the reason recorded was that the AO had a mere suspicion that there was a likelihood of there being a discrepancy in the stocks in the earlier years also based on the fact that there was a discrepancy in the stock when the survey was conducted on 07.03.2002. There Court, therefore, held that this was merely a reason to suspect and not a reason to believe. In the case before us, the material pertained to the assessment year in question itself.

33. Decision of the Allahabad High Court in ***Dass Friends Builders P. Ltd. Vs. Deputy Commissioner of Income-Tax***, (2006) 280 ITR 77 (Allahabad) does not support the petitioner's case. The Allahabad High Court set aside the re-opening as rejection of the account books for the assessment year 1996-97 was being made a basis to determine the profit percentage for the assessment year 1995-96 without there being any material for the relevant assessment year.

34. Mrs. Suri relied upon the following observations of the Supreme Court in ***Income Tax Officer, Calcutta and Ors. Vs. Lakhmani Mewal Das***, (1976) 3 SCC 757 = (1976) 103 ITR 437 (SC) :

“11. As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words “definite information” which were there in Section 34 of the Act of 1922 at one time before its amendment in 1948 are there in Section 147 of the Act of 1961 would not lead to the conclusion that action can now be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

12. *The powers of the Income-tax Officer to reopen assessment though wide are not plenary. The words of the statute are “reason to believe” and not “reason to suspect.” The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the income-tax authorities after the assessment has been completed. The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about Orders made in judicial and quasi judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income-tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led*

to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs.”

Mr. Putney did not and indeed could not dispute any of the observations. He however rightly contended that they do not apply to the present case. In the case before us, there is a direct nexus or live link between the material coming to the notice of the AO, namely the said material submitted by the Investigation Wing, and the formation of the AO's belief that there has been escapement of income. We have already referred to this aspect of the matter. Suffice it to recollect that details of the CCM were furnished in the information. The information was in respect of several brokers. The information pertaining to the petitioner's broker was culled out and tabulated. There were 74 cases of the petitioner's broker having modified the petitioner's transactions. The information was directly on the issue of the transactions. It cannot by any stretch of imagination be said to be vague, indefinite or distant. For the reasons we have already stated, this was not a case where the AO merely had reason to support that income had escaped assessment.

35. The judgment of the Delhi High Court in ***CIT Vs. SFIL Stock Broking Ltd.***, (2010) 325 ITR 285 (Delhi) is clearly distinguishable. In that case, the reasons themselves recorded that the AO had been directed to get notices issued under Section 148 by the Deputy Director (Investigation) and

subsequently by the Additional CIT. The judgment was based on the finding that the proceedings had been initiated only on the basis of these directions and without any independent application of mind by the AO.

36. In *CIT Vs. Atul Jain*, (2008) 299 ITR 383 (Delhi), the Delhi High Court upheld the decision of the Tribunal setting aside the proceedings under Sections 147 and 148. The Delhi High Court, however, found that the information did not include the source of the capital gains; the court was not told which shares had been transacted and with whom the transaction had taken place; there were absolutely no details available and the information supplied was scanty and vague and even the basis for the reasons was absent. It was further observed that the AO had not recorded his satisfaction about the correctness or otherwise of the information or his satisfaction that a case had been made out for issuing a notice under Section 148. This is not the case before us. The AO has not recorded such satisfaction.

37. The judgment of the Delhi High Court in *Principal Commissioner of Income Tax-6 Vs. Meenakshi Overseas Pvt. Ltd.*, (2017) 395 ITR 677 (Delhi) does not support the petitioner's case either. The judgment turned on the finding that there were only conclusions and no reasons to believe those conclusions were recorded by the AO and that the crucial link between the information made available to the AO and the formation of belief was absent. That is not so in the case before us. There is a clear link between the information analysed by the AO and the relevant transactions.

For the same reasons, the decision of the Delhi High Court in

Principal Commissioner of Income Tax Vs. RMG Polyvinyl (I) Ltd.,
(2017) 396 ITR 5 (Delhi) does not carry the petitioner's case further.

38. In ***Chhugamal Rajpal Vs. S.P. Chaliha and Ors.,*** (1971) 79 ITR 603 (SC), the Supreme Court allowed the assessee's appeal on the finding that the ITO had not set out any reasons for coming to the conclusion that it was a fit case to issue notice under section 148. The material on the basis of which the proceedings had been initiated was not mentioned in the record. The reasons only referred to certain communications without adverting to the facts contained therein. The ITO had not even come to a prima facie conclusion that the transactions were not genuine. It was also observed that the ITO had only a vague feeling that the transactions may be bogus. It is in these circumstances that the Supreme Court held that the ITO could not have reason to believe that by reason of the omission to disclose fully and truly all the material facts necessary for assessment for the year in question, income chargeable to tax had escaped assessment. This decision, therefore, is distinguishable and does not support the petitioner's case.

39. Mrs. Suri's contention that information from the broker was sought after issuance of the notice shows that there was no enquiry prior to the issuance of the notice and hence, the proceedings are bad is not well founded. Once it is held that the proceedings under Sections 147 and 148 have been validly initiated, the AO is not prevented from looking into the matter further, including by gathering further information. He in fact is bound to do so.

40. Mrs. Suri placed strong reliance upon the judgment of a Division Bench of the Gujarat High Court in ***Harikishan Sunderlal Virmani Vs. Deputy Commissioner of Income Tax***, (2017) 394 ITR 146 (Guj). Firstly, in that case, the assessment was under Section 143 (3) whereas in the case before us, it was under Section 143 (1). The reasons furnished in that case and the finding of the court were referred to and relied upon by Mrs. Suri in extenso. It is only fair, therefore, that we set out both :-

“3.1 At the outset, it is required to be noted that the impugned notice under section 148 of the Act to reopen the assessment in exercise of the power under section 147 of the Act, has been issued beyond the period of four years. Therefore, considering the proviso to section 147 of the act, unless and until it is found that there was a failure on the part of the assessee in not disclosing truly and fully relevant material for assessment, reopening beyond four years is not permissible. It also cannot be disputed that even to reopen the proceedings, there must be satisfaction of the Assessing Officer and the Assessing Officer himself, on the basis of the material before him is required to form an opinion that the income has escaped assessment due to failure on the part of the assessee in not disclosing truly and fully material necessary for the assessment.

3.2. The reasons recorded to reopen the assessment are as under :-

“2. Reasons for reopening of the assessment – Assessment year 2009 reg.

The assessee had e-filed his return of income for the assessment year 2009-10 on September 30, 2010 declaring therein total income of Rs.2,09,39,600/-. Subsequently, the case was selected in CASS within the meaning of section 143(3) of the Act. The assessment proceedings was completed under section 143(3) of the Act on November 30, 2010 determining the assessed income at Rs.2,09,60,910/-.

2. Thereafter, information has been received from the Principal Director of Income Tax (Investigation), Ahmedabad vide confidential letter No. PDIT (Inv)/AHD/CCM/Dissemination/15-16 dated March 8, 2016.

On perusal of the data supplied by the office of the Principal Director of Income-tax (Investigation), Ahmedabad it is noticed that assessee carried out share trading through the broker, Guinness Securities Limited. And as per the guidelines of the SEBI the client code of the assessee with the aforesaid broker was WW/2647. In order to verify the genuineness of the modification of client code in the case of the assessee, by applying Levenshtein distance analysis or digit edit analysis utility, in those cases where the assessee is original client and

transactions were carried out from assessee's client code then subsequently client code was modified to other client the details of such case are as under :-

<i>OC</i>	<i>OCC</i>	<i>MC</i>	<i>MCC</i>	<i>Distance as per Levenshte in distanced analysis</i>	<i>Net reduction in income due to CCM</i>
<i>Harikishan Sunderlal Virmani</i>	<i>WW/2647</i>	<i>Nomau R. Chaturvedi</i>	<i>WW/2108</i>	<i>3</i>	<i>Rs. 1,19,848</i>

In order to verify the genuineness of the error, the Levenshtein distance analysis or digit edit analysis utility is also provided by the investigation Wing. This utility gives a clear indication as to whether the code is wrongly typed or is completely replaced. If the number of digits changed from original code to modified code is 1, then it can be reasonably argued that the OCC (Original Client Code) may have been typed wrongly by mistake. Similarly, if the number of digits changed is more say 4 or 5, it cannot be genuine mistake but a deliberate change. To this extent, Levenshtein distance analysis or digit edit analysis act as a clear indicator for genuineness in client code modification. In short, the longer the distance (i.e. number of digits changed), the lesser the chance of genuineness.

3. Hence, the editing of client code above it is termed as deliberate change and establishes the non-genuineness and contrived nature of the code change.

4. In view of the above facts, I have reason to believe that the income to the extent of Rs.1,19,848/- has escaped assessment, which required to brought under tax. Therefore, this case is a fit case for initiating the proceeding under section 147 of the Act.”

3.3. Thus from the reasons recorded, the reopening of the assessment is on the information/data supplied by the office of the Principal Director of Income-tax (Investigation), Ahmedabad and the information received from the Principal Director of Income-tax (Investigation), Ahmedabad vide his confidential letter dated March 8, 2016. From the information received, it appears that though the client code of the assessee with the broker-Guinness Securities Limited was WW/2647, modified client code was found to be WW/2108 and therefore, to verify the genuineness of the modification of the client code, by applying Levenshtein distance analysis or digit edit analysis utility, distance was found to be 3 and therefore, it is believed that the code is not wrongly typed and it is termed as deliberate change and establishing non-genuineness and contrived nature of the code change. From the reasons recorded, it does not appear that verification of the material on record

there is independent formation of opinion by the Assessing Officer and that any income has escaped assessment due to any failure on the part of the assessee in not disclosing truly and correct facts/material necessary for assessment. From the reasons recorded, it appears that the impugned reopening proceedings are on the borrowed satisfaction. No independent opinion is formed. On the plain reading of the reasons recorded what emerges is that the Assessing Officer on considering the information received from the Principal Director of Income-tax (Investigation), Ahmedabad, reassessment proceedings have been initiated on the ground that the income escaped assessment. However, there is no assertion regarding the basis on which material on record, he has come to such conclusion. Therefore, the material on the basis of which the Assessing Officer seeks to assume the jurisdiction under section 147 of the Act is the information received from the external source viz. the Principal Director of Income-tax (Investigation), Ahmedabad. It cannot be disputed that on the basis of the information received from another agency, there cannot be any reassessment proceedings. However, after considering the information/material received from other source, the Assessing Officer is required to consider the material on record in case of the assessee and thereafter is required to form an independent opinion on the basis of the material on record that the income has escaped

assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment for the verification.

3.4. At this stage it is required to be noted that even in the reasons recorded, there is no allegation that there was any failure on the part of the assessee in not disclosing truly and fully material facts necessary for assessment. Under the circumstances, the assumption of the jurisdiction to reopen the assessment beyond the period of four years in exercise of powers under section 147 of the Act is bad in law and contrary to the provisions of section 147 of the Act. Under the circumstances, on the aforesaid ground alone, the impugned reassessment proceedings deserve to be quashed and set aside.”

41. Firstly, there is a significant difference between that case which involved only one CCM and the case before us which involves 74 CMMs. Further, in our view, the reasons furnished in that case were sufficient to justify proceedings under Sections 147 and 148. The Assessing Officer had received information from the Principal Director of Income-tax (Investigation), Ahmedabad. As is evident from the reasons itself, the Assessing Officer perused the data and noticed the nature of the transactions carried out through his brokers. He also noted that the Levenshtein distance analysis had been provided by the Investigation Wing. What is important is that he considered the Levenshtein method as giving a clear indication as to whether the code is wrongly typed or is completely replaced. In other words, he accepted the method as an appropriate aid for determining

whether there were inadvertent errors or deliberate shifts of the transactions. Having done so he applied this method and came to the prima-facie conclusion that it was not a case of an inadvertent error but was a deliberate change. The reasons clearly indicate an application of mind by the AO to the material received by him. They do not by any stretch of imagination constitute borrowed satisfaction. It is his personal satisfaction on an analysis of information received, which with respect is perfectly in accordance with law. In our view, the AO in that case had reason to believe that the income had escaped assessment. Whether this prima-facie view would have been finally endorsed or not, especially in view of the fact that the matter involved only one CMM, is irrelevant. We are, with respect, unable to agree with the finding of the Gujarat High Court that the reopening was on borrowed satisfaction and that no independent opinion had been formed. Nor do we subscribe to the view that there was no assessment regarding the material on record on the basis of which the AO had come to the conclusion. The material, the information received was analysed and the decision was based thereon pursuant to an independent application of mind. The AO had considered the material on record and formed an independent opinion on the basis thereof.

In the circumstances, we are, with respect, unable to agree with the decision of the Gujarat High Court.

42. Even if in the case before us, the AO had to establish that the income had escaped assessment on account of the failure on the part of the assessee in disclosing truly and fully the material facts necessary for

assessment, the test would be met. Admittedly, there was no analysis or application of mind in respect thereof. The assessment was under Section 143 (1) in any event. Thus, in any view of the matter, the decision to reopen the assessment is valid and well founded.

43. This brings us to Mrs. Suri's contention that the satisfaction recorded by the Principal Commissioner of Income Tax, Panchkula, under Section 151 of the Act was mechanical. We do not agree. From a perusal of the record, it is evident that the section has been duly complied with and he has not signed on the dotted line. If he approves the reasons he is not bound to reiterate the same. That would be an empty formality. Mr. Putney's reliance upon the following observations of the Calcutta High Court in ***Income-Tax Officer and others Vs. Mahadeo Lal Tulsian and others***, (1977) 110 ITR 786 (Calcutta) is well founded :-

“... He has contended that there had been no due compliance with the provisions of section 151 (2) of the said Act since the Commissioner of Income-tax had failed to arrive at a bona fide satisfaction or record the same. Here again, the issue has to be considered from the point of view of what the facts establish in substance. Now, facts indicate that the proposal for reopening the assessment with reasons indicated hereinbefore was placed before the Commissioner of Income-tax. Obviously he applied his mind as is indicated by his endorsement : “Yes, I am satisfied.” If the Commissioner records his satisfaction in a positive manner, as aforesaid, and there being no

other material before us to show that notwithstanding such a record the Commissioner never applied his mind but merely signed on a dotted line without application of his mind, we are unable to accept the contention that the Commissioner never arrived at a bona fide satisfaction in recording the same. This objection raised by Mr. Banarjee, therefore, must fail and is overruled.”

We are in respectful agreement with the judgment.

44. Mrs. Suri relied upon judgment of the Supreme Court in ***Chhugamal Rajpal's case*** (supra) and in particular paragraph 9 thereof which reads as under :-

“9. In his report the Income-tax Officer does not set out any reason for coming to the conclusion that this is a fit case to issue notice under Section 148. The material that he had before him for issuing notice under Section 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from the C.I.T., Bihar and Orissa. He does not mention the facts contained in those communications. All that he says is that from those communications "it appears that these persons (alleged creditors) are name lenders and the transactions are bogus". He has not even come to a prima facie conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague feeling that they may be bogus

transactions. Such a conclusion does not fulfil the requirements of Section 151 (2). What that provision requires is that he must give reasons for issuing a notice under Section 148. In other words he must have some prima facie grounds before him for taking action under Section 148. Further his report mentions : "Hence proper investigation regarding these loans is necessary. In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice under Section 148. Before issuing a notice under Section 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of these assessee to make a return under Section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or (b) of Section 147 are satisfied, the Income-tax Officer has no jurisdiction to issue a notice under Section 148. From the report submitted by the Income-tax Officer to the

Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material' facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income-tax Officer had any material before him which could satisfy the requirements of either Clause (a) or Clause (b) of Section 147. Therefore he could not have issued a notice under Section 148. Further the report submitted by him under Section 151 (2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under Section 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under Section 148. To Question No. 8 in the report which reads "Whether the, Commissioner is satisfied that it is a case for the I issue of notice under Section 148", he just noted the word "yes" and affixed his signatures thereunder. We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under Section 148. The important safeguards provided in

Sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner. Both of them, appear to have taken the duty imposed on them under those provisions as of little importance. They have substituted the form for the substance.”
(emphasis supplied)

This judgment does not support the petitioner's case. It is clearly distinguishable. As noted in the earlier part of paragraph 9, the Supreme Court held that the reasons recorded by the ITO for initiating proceedings under Sections 147 and 148 were not in accordance with law. As in that case, the Commissioner merely accorded permission under Section 151 without stating any reason himself it is axiomatic that his order would also not be in accordance with Section 151. The case before us is entirely different. We have found that the reasons recorded by the AO justify the initiation of proceedings under Sections 147 and 148. As the Principal Commissioner agreed with these reasons, it was not necessary for him in his order according sanction to reiterate the reasons furnished by the AO. There is nothing that indicates that he did not apply his mind to the reasons furnished by the AO.

45. Reasons to believe are there. The reasons are based on tangible material. The return and account books of assessee had not undergone scrutiny at the time of assessment. The information is specific and not vague. A reasonable person can form an opinion on the basis of the material. The information received could form the basis of reason to believe that

income has escaped assessment and the re-opening is not on mere suspicion.
Hence, the assumption of jurisdiction is in accordance with law.

46. In this view of the matter it is not necessary to consider Mr.Putney's other submissions on behalf of the Revenue.
47. The writ petition is dismissed.

(S.J. VAZIFDAR)

CHIEF JUSTICE

April 27, 2018
ndj

(AVNEESH JHINGAN)
JUDGE

Whether speaking/reasoned	Yes
Whether Reportable	Yes