IN THE INCOME TAX APPELLATE TRIBUNAL
JODHPUR BENCH, JODHPUR

BEFORE SHRI N.K.SAINI, VICE PRESIDENT AND
SHRI A. T. VARKEY, JUDICIAL MEMBER

S.A. No.07/Jodh/2019
In ITA No.135/Jodh/2019
(ASSESSMENT YEAR-2009-10)
&
ITA No.135/Jodh/2019
(ASSESSMENT YEAR-2009-10)

M/s. Vinod Commodities Ltd. (PAN:AAECS9380A) C/o, Rajendra Jain, Advocate, 106 Akshay Deep Complex, 5th B. Road, Sardarpura, Jodhpur	Vs	Assistant Commissioner of Income-tax, Circle-3, Jodhpur Rajasthan
(Appellant)		**(Respondent)**

Appellant By	Shri Rajendra Jain, Advocate
Respondent By	Sh. K. C. Badhok, CIT, DR
Date of hearing	07.05.2019
Date of Pronouncement	09.05.2019

O R D E R

PER A. T. Varkey, J.M.

Both this stay application as well as the appeal preferred by the assessee against the order of Ld. Commissioner of Income Tax (Appeals)-2, Jodhpur dated 30.11.2018 for AY 2010-11.

2. Both sides agreed to hear the appeal itself, so stay application is dismissed. Coming to appeal, at the outset itself, the Ld. AR of the assessee drew our attention to the legal issue that has been raised by the assessee as ground nos. 1 and 2 wherein the reopening u/s. 147/148 of the Income-tax Act, 1961 (hereinafter referred to as the "Act") of the AO has been challenged by the assessee, therefore, we are inclined to adjudicate first the legal issue

raised before us, because if there is merit on the legal issue then it goes to the root of the reassessment order framed pursuant to reopening itself.

3. The brief facts of the case necessary for adjudication of the legal issue are that the assessee had filed the original return of income on 03.07.2009 for AY 2009-10. Since the time period expired for issuance of notice u/s. 143(2) of the Act, therefore originally, no scrutiny assessment was framed. Therefore, the return of income filed by assessee stood accepted by the Department. Thereafter, the AO on 30.03.2016 issued notice u/s. 148 of the Act for reopening the assessment, and the reassessment order was passed on 28.12.2016. Since the legal challenge is in respect of the very action of the AO to invoke the jurisdiction to reopen the assessment, as stated above, we would like to first dispose of the said legal ground.

4. The Ld. AR assailed the decision of the AO to reopen the assessment based on letter from the ADIT (Inv.), Thane. According to Ld. Counsel, the AO without application of mind has proceeded to reopen the assessment only on the basis of a investigation report given by the ADIT (Inv.), Thane in respect of accommodation entries given in the form of share capital by companies floated by Shri Vikas Jain and family. According to Ld. Counsel, before the AO decides to reopen the assessment, he has to satisfy the condition precedent to assume jurisdiction and for that he took our attention to the expression used in sec. 147 of the Act which uses the expression that AO should have '*reason to believe'* escapement of income. According to ld Counsel, the expression "reason to believe" postulates a foundation based on information and belief based on reasoning. According to ld Counsel, even after there is a foundation based on information is there, still there must be some reasons warrant holding a belief that income chargeable to tax has escaped assessment. The Ld. AR reminded us that the expression used by Parliament is "Reason to believe" which is stronger than the expression '*satisfied*' and in the present case such requirement as contemplated by law has not been met in the 'reason recorded' by the AO before venturing to re-open the assessment which vitiates the assumption of jurisdiction by AO to reopen the assessment itself.

5. Further, the Ld. Counsel submitted that even if the information given by the ADIT (Inv.) Thane is adverse against the assessee, at the most it may trigger "*reason to suspect*"; then the AO has to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of income. Without doing so, the jurisdictional fact necessary to usurp jurisdiction to reopen the regular assessment cannot be invoked by the AO. For the said proposition, the Ld. AR drew our attention to following case laws:

a) Meta Plast Engineering P. Ltd. (ITAT Del.),
b) Balaji Health Care Pvt.Ltd. (ITAT,Jaipur),
c) Hadoti Punji Vikas Ltd. (ITAT,Jaipur),
d) KanchanIndia (P) Ltd. (ITAT, Jaipur)
e) SBS Realtors (P) Ltd. (ITAT, Del.)
f) Brijpal Singh Tomar (ITAT, Del.)
g) Nupower Renwables Pvt. Ltd. (Bom. High Court)
h) M/s. Kapis Impex Pvt. Ltd. in ITA No 4929/Del/2017 dated 15.03.2018
i) Smt.Neeru Mehra, ITA No. 467(Asr)/2017 dated 21.06.2018
j) M/s.Baba Bhootnath Trade & Commerce Ltd., ITA No. 1494/Kol/2017 dated 05.04.21019
k) M/s. S.B. Pigments Pvt. Ltd ITA No. 324/Kol/2014 dated 30.04.2019
l) Holy Faith International in ITA No. 181/Asr/2017 dated 15.01.2019
m) Khatri Projects Pvt. Ltd. in ITA No. 4353/Del/2016 dated 16.12.2016
n) Tarun International Ltd. in ITA No. 5136/Del/2012 dated 05.11.2015
o) PCIT Vs. Meenakshi Overseas Ltd. 395 ITR 677(Del.)
p) DCIT Vs. Greal Wall Marketing Pvt. Ltd. ITA No.660/Kol/2011
q) Shri Raj Kumar Goel Vs. ITO ITA No.1028/Kol/2017
r) Classic Flour & Food Processing Pvt. Ltd. Vs. CIT ITA Nos. 764 to 766/Kol/2014
s) PCIT Vs. Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bom)
t) KSS Petron Pvt. Ltd. Vs. ACIT ITA No. 224/Mum/2014
u) PCIT Vs. Tupperware India Pvt. Ltd. (2016) 236 Taxman 494
v) DCIT Vs. National Bank for Agriculture and Rural Development ITA No.4964/Mum/2014
w) CIT Vs. Insecticides (India) Ltd. (2013) 357 ITR 330 (Del.)
x) Hon'ble Calcutta High Court in the case of Pr. CIT Vs. G4G Pharma India Ltd. in ITA 545/2015 vide order dated 08.10.2015

6. The Ld. AR drew our attention to the decision of the Hon'ble High Court of Delhi in ACIT Vs. Meenakshi Overseas (P) Ltd. (2017) 82 taxmann.com 300 (Del) wherein it has been held as under:

"22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.

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 beli f 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.

25. At this stage it requires to be noted that since the original assessment was processed under Section 143 (1) of the Act, and not Section 143 (3) of the Act, the proviso to Section 147 will not apply. In other words, even though the reopening in the present case was after the expiry of four years from the end of the relevant AY, it was not necessary for the AO to show that there was any failure to disclose fully or truly all material facts necessary for the assessment.

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.

27. Each case obviously turns on its own facts and no two cases are identical. However, there have been a large number of cases explaining the legal requirement that requires to be satisfied by the AO for a valid assumption of jurisdiction under Section 147 of the Act to reopen a past assessment.

28.1 In Signature Hotels Pvt. Ltd. v. Income Tax Officer (supra), the reasons for reopening as recorded by the AO in a proforma and placed before the CIT for approval read thus:

"11. Reasons for the belief that income has escaped assessment.- Information is received from the DIT (Inv.-1), New Delhi that the assessee has introduced money amounting to Rs. 5 lakh during the F.Y. 2002-03 relating to A.Y. 2003-04. Details are contained in Annexure. As per information amount received is nothing but accommodation entry and assessee is a beneficiary."

28.2 The Annexure to the said proforma gave the Name of the Beneficiary, the value of entry taken, the number of the instrument by which entry was taken, the date on which the entry was taken, Name of the account holder of the bank from which the cheque was issued, the account number and so on.

28.3 Analysing the above reasons together with the annexure, the Court observed:

"14. The first sentence of the reasons states that information had been received from Director of Income-Tax (Investigation) that the petitioner had introduced money amounting to Rs. 5 lacs during financial year 2002-03 as per the details given in Annexure. The said Annexure, reproduced above, relates to a cheque received by the petitioner on 9th October, 2002 from Swetu Stone PV from the bank and the account number mentioned therein. The last sentence records that as per the information, the amount received was nothing but an accommodation entry and the assessee was the beneficiary.

15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information re eived from the Director of Income-Tax (Investigation) and arrive at a belief whether or not any income had escaped assessment."

28.4 The Court in Signature Hotels Pvt. Ltd. v. Income Tax Officer (supra) quashed the proceedings under Section 148 of the Act. The facts in the present case are more or less similar. The present case is therefore covered against the Revenue by the aforementioned decision.

29.1 The above decision can be contrasted with the decision in AGR Investment v. Additional Commissioner of Income Tax (supra), where the 'reasons to believe' read as under:

"Certain investigations were carried out by the Directorate of Investigation, Jhandewalan, New Delhi in respect of the bogus/accommodation entries provided by certain individuals/companies. The name of the assessee figures as one of the beneficiaries of these alleged bogus transactions given by the Directorate after making the necessary enquiries. In the said information, it has been inter-alia reported as under:
"Entries are broadly taken for two purposes:
1. To plough back unaccounted black money for the purpose of business or for personal needs such as purchase of assets etc., in the form of gifts, share application money, loans etc.
2. To inflate expense in the trading and profit and loss account so as to reduce the real profits and thereby pay less taxes.

It has been revealed that the following entries have been received by the assessee:...."

29.2 The details of six entries were then set out in the above 'reasons'. These included name of the beneficiary, the beneficiary's bank, value of the entry taken, instrument number, date, name of the account in which entry was taken and the account from where the entry was given the details of those banks. The reasons then recorded:

"The transactions involving Rs. 27,00,000/-, mentioned in the manner above, constitutes fresh information in respect of the assessee as a beneficiary of bogus accommodation entries provided to it and represents the undisclosed income/income from other sources of the assessee company, which has not been offered to tax by the assessee till its return filed.
On the basis of this new information, I have reason to believe that the income of Rs. 27,00,000/- has escaped assessment as defined by section 147 of the Income Tax Act. Therefore, this is a fit case for the issuance of the notice under section 148."

29.3 The Court was not inclined to interfere in the above circumstan es in exercise of its writ jurisdiction to quash the proceedings. A careful perusal of th above reasons reveals that the AO does not merely reproduce the information but takes the effort of revealing what is contained in the investigation report specific to the Assess e. Importantly he notes that the information obtained was 'fresh' and had not been offered by the Assessee till its return pursuant to the notice issued to it was filed. This is a crucial factor that went into the formation of the belief. In the present case, however the AO has made no effort to set out the portion of the investigation report which contains the information specific to the Assessee. He does not also examine the return already fil d to ascertain if the entry has been disclosed therein.

30.1 In Commissioner of Income Tax, New Delhi v. Highgain Finvest (P) Limited (2007) 164 Taxman 142 (Del) relied upon by Mr. Chaudhary, the reasons to believe read as under:

"It has been informed by the Additional Director of Income Tax (Investigation), Unit VII, New Delhi vide letter No. 138 dated 8 th April 2003 that this company was involved in the giving and taking bogus entries/ transactions during the financial year 1996-97, as per the deposition made before them by Shri Sanjay Rastogi, CA during a survey operation conducted at his office premises by the Investigation Wing. The particulars of some of the transaction of this nature are as under:

Date	*Particulars of cheque*	*Debit Amt.*	*Credit Amt*
18.11.96	*305002*	*5,00,000*	

Through the Bank Account No. CA 4266 of M/s. Mehram Exports Pvt. Ltd. in the PNB, New Rohtak Road, New Delhi.
Note: It is noted that there might be more such entries apart from the above.
The return of income for the assessment year 1997-98 was filed by the Assessee on 4th March 1998 which was accepted under Section 143 (1) at the declared income of Rs. 4,200. In view of these facts, I have reason to believe that the amount of such transactions particularly that of Rs. 5,00,000 (as mentioned above) has escaped the assessment within the meaning of the proviso to Section 147 and clause (b) to the Explanation 2 of this section.
Submitted to the Additional CIT, Range -12, New Delhi for approval to issue notice under Section 148 for the assessment year 1997-98, if approved."

30.2 The AO was not merely reproducing the information received from the investigation but took the effort of referring to the deposition made during the survey by the Chartered

Accountant that the Assessee company was involved in the giving and taking of bogus entries. The AO thus indicated what the tangible material was which enabled him to form the reasons to believe that income has escaped assessment. It was in those circumstances that in the case, the Court came to the conclusion that there was prima facie material for the AO to come to the conclusion that the Assessee had not made a full and true disclosure of all the material facts relevant for the assessment.

31. In Commissioner of Income Tax v. G&G Pharma (supra) there was a similar instance of reopening of assessment by the AO based on the information received from the DIT (I). There again the details of the entry provided were set out in the 'reasons to believe'. However, the Court found that the AO had not made any effort to discuss the material on the basis of which he formed prima facie view that income had escaped assessment. The Court held that the basic requirement of Section 147 of the Act that the AO should apply his mind in order to form reasons to believe that income had escaped assessment had not been fulfilled. Likewise in CIT-4 v. Independent Media P. Limited (supra) the Court in similar circumstances invalidated the initiation of the proceedings to reopen the assessment under Section 147 of the Act.

32. In Oriental Insurance Company Limited v. Commissioner of Income Tax 378 ITR 421 (Del) it was held that "therefore, even if it is assumed that, in fact, the Assessee¨s income has escaped assessment, the AO would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under Section 147 of the Act would not arise."

33. In Rustagi Engineering Udyog (P) Limited (supra), it was held that "...the impugned notices must also be set aside as the AO had no reason to believe that the income of the Assessee for the relevant assessment years had escaped assessment. Concededly, the AO had no tangible material in rega d to any of the transactions pertaining to the relevant assessment years.

Although the AO may have entertained a suspicion that the Assessee¨s income has escaped assessment such suspicion could not form the basis of initiating proceedings under Section 147 of the Act. A reason to believe - not reason to suspect - is the precondition for exercise of jurisdiction underSection 147 of the Act. "

34. Recently in Agya Ram v. CIT (supra), it was emphasized that the reasons to believe "should have a link with an objective fact in the form of information or materials on record..." It was further emphasized that "mere allegation in reasons cannot be treated equivalent to material in eyes of law. Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessments."

35. In the decision of this Court dated 16th March 2016 in W.P. (C) No. 9659 of 2015 (Rajiv Agarwal v. CIT) it was emphasized that "even in cases where the AO comes across certain unverified information, it is necessary for him to take further steps, make inquiries and garner further material and if such material indicates that income of an Assessee has escaped assessment, form a belief that income of the Assessee has escaped assessment."

36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has

escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'.

The reasons fail to demonstrate the link between the tangible material and the formation of the reason to believe that income has escaped assessment.

37. For the aforementioned reasons, the Court is satisfied that in the facts and circumstances of the case, no error has been committed by the ITAT in the impugned order in concluding that the initiation of the proceedings under Section 147/148 of the Act to reopen the assessments for the AYs in question does not satisfy the requirement of law.

38. The question framed is answered in the negative, i.e., in favour of the Assessee and against the Revenue. The appeal is, accordingly, dismissed but with no orders as to costs."

7. The Ld. AR took our attention to the coordinate bench of this Tribunal of Kolkata in ITA No. 660/Kol/2011 for AY 2002-03 in the case of DCIT Vs. Great Wall Marketing (P) Ltd. vide order dated 03.02.2016 has held as under:

"9. We have given a careful consideration of the submissions made by the learned counsel for the assessee. It is clear from the reasons recorded by the AO that the AO acted only on the basis of a letter received from Inv stigation Wing, New Delhi. The reasons recorded does not give as to who has given the bogus ent ies to the assessee. The reasons recorded also does not mention as to on which dates and through which mode the bogus entries were made by the assessee. The reasons recorded which are extracted in the earlier part of the order does not show, what was the information given by DIT(Inv.),New Delhi. The date of the information received by the AO were not spelt out in the reasons recorded. The involvement of the assessee is also not spelt out, except mentioning the corporate bodies who had subscribed to the share capital of the assessee were non-existent and not creditworthy. On identical facts the Hon ble Delhi High Court in the case of CIT vs Insecticides (India) Ltd (supra) has taken a view that the reasons recorded were vague and uncertain and cannot be construed as satisfaction on the basis of the relevant material on the basis of which a reasonable person can form a belief that income has escaped assessment. The Hon'ble Delhi High Court has also come to the conclusion that the reasons recorded did not disclose the AO's mind regarding escapement of income. The Hon'ble Delhi High Court ultimately held that initiation of proceedings u/s 148 of the Act was not valid and justified in the eyes of law. The facts and circumstances in the present case are identical to the case decided by the Hon'ble Delhi High Court. Following the said decision we hold that initiation of re-assessment proceedings is not valid. On this ground, the assessment is liable to be annulled."

8. The Hon'ble Bombay High Court in Pr.CIT Vs. Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bom) it has been held as under:

"9. We find that at the time of re-opening of the Assessment, the Assessing Officer did not provide the reasons recorded in support of the re-opening notice in its entirety, to the Respondent-Assessee. This was contrary to and in defiance of the decision of the Apex Court in GKN Driveshafts v. ITO [2002] 125 Taxman 963/ [2003]259 ITR 19. The entire objects of reasons for re- opening notice as recorded being made available to an Assessee, is to enable

the Assessing Officer to have a second look at his reasons recorded before he proceeds to assess the income, which according to him, has escaped Assessment. In fact, non furnishing of reasons would make an Assessment Order bad as held by this Court in CIT v. Videsh Sanchar Nigam Ltd. [2012] 21 taxmann.com 53, 340 ITR 66. In fact, partial furnishing of reasons will also necessarily meet the same fate i.e. render the Assessment Order on re-opening notice bad. Therefore, on the aboveground itself, the question as proposed does not give rise to any substantial question of law as it is covered by the decision of this Court in Videsh Sanchar Nigam Ltd.'s case (supra) against the Revenue in the present facts.

10. Besides, the submissions made on behalf of the Revenue that in view of the decision of the Apex Court in Rajesh Jhaveri Stock Brokers (P) Ltd.'s, case (supra), the Assessing Officer is entitled to re-open the Assessment for whatever reasons and the same cannot be subjected to jurisdictional review, is preposterous. First of all, taking out a word or sentence from the entire judgment, divorced from the context and relying upon it, is not permissible (see CIT v. Sun Engg. Works (P) Ltd. [l992] 64 Taxman 442/198 ITR 297 (SC). It may be useful to reproduce the context in which the sentence in Rajesh Jhaveri Stock Brokers (P) Ltd. 's case (supra) being relied upon by the Revenue to support its case, was made. The context, is as under:

"The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitutions. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed to confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his asse sment of that year. Both these conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a) But under the substituted section 147 existence of only the first condition suffices." .

Therefor the sentence being relied upon was made in the context of the change in law that under the amended provision 'reason to believe' that in case of escaped assessment, is sufficient to re-open the assessment. This unlike the earlier provision of Section 147(a) of the Act which required two conditions i.e. failure to disclose fully and truly all facts necessary for assessment and reason to believe that income has escaped assessment Thus, the observations being relied upon must be read in the context in which it rendered. On so reading the submission, will not survive.

11. Further, a reading of the entire decision, it is clear that the reasonable belief on the basis of tangible material could be, prima facie, formed to conclude that income chargeable to tax has escaped assessment. Mr. Mohanty, learned counsel is ignoring the fact that 6the words 'whatever reasons' is qualified by the words 'having reasons to believe that income has escaped assessment'. The words whatever reasons only means any tangible material which would on application of the facts on record lead to reasonable belief that income chargeable, to tax has escaped, assessment This material which, forms the basis, is not restricted, but the material must lead to the formation of reason to believe that income chargeable to tax has escaped Assessment Mere obtaining, of material by itself does not result in reason to believe that income has escaped assessment. In fact, this would be evident from the fact that in para 16 of the decision in Rajesh Jhaveri Stock Brokers (P) Ltd. 's, case

(supra), it is observed that the word 'reason' in the 'reason to believe' would mean cause or justification. Therefore, it can only be the basis of forming the belief. However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. Otherwise, no meaning is being given to the words 'to believe' as found in Section 147 of the Act. Therefore, the words 'whatever reasons' in Rajesh Jhaveri Stock Brokers (P) Ltd.'s, case (supra), only means whatever the material, the reasons recorded must indicate the reasons to believe that income has, escaped assessment. This is so as reasons as recorded alone give the Assessing Officer power to re-open an assessment, if it reveals/indicate, reasons to believe that income chargeable to tax has escaped assessment.

12. The re-opening of an Assessment is an exercise of extra-ordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the mat rial (whatever reasons) which form the basis of re-opening . Assessment and its reasons wh ch would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped Assessment This is a settled position as observed by the Supreme Court In S. Narayanappa v. CIT [1967] 63 ITR 219, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in ITO v. Lakhmani Merwal Das [1976] 103 ITR 437 had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.

13. In this case, the reasons as made available to the Respondent- Assessee as produced before the Tribunal me ely indicates information received from the DIT (Investigation) about a particular entity, ente ing into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does- not indicate the amount which according to the Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.

14. Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a re-opening notice on the basis of intimation regarding re-opening notice from the DDIT (Inv.) This is clearly in breach of the settled position in law that re- opening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.

15. Therefore, in the above facts, the view taken by the impugned order of the Tribunal cannot be found fault with. This view of the Tribunal is in accordance with the settled position in law. '

16. Therefore, the question; as framed does not give rise to any substantial question of law. Thus, not entertained."

9. The Coordinate Bench of this Tribunal of Kolkata in ITA Nos. 764 to 766/Kol/2014 in M/s. Classic Flour & Food Processing Pvt. Ltd. Vs. CIT for AY 2009-10, 2007-08 and 2008-09 vide order dated 05.04.2017 has held as under:

"7. As far as the additional grounds of appeal raised by the assessee are concerned, it can be seen from the additional grounds that the assessee wants to contend that the very initiation of proceedings u/s 147 of the Act was bad in law and therefore proceedings u/s 263 of the Act cannot be initiated on an order which is invalid in law. It is the further contention of the assessee that in the reasons recorded for reopening of the assessments u/s 147 of the Act, the AO has mentioned that there was unexplained investment in construction of hotel and resorts at Mandarmoni, Purba Midnapore and such unexplained investment in the construction which ought to have been brought to tax as income of the assessee has escaped the assessment. It is the case of the assessee that in the assessment order passed u/s 147 of the Act, the AO did not make any addition on account of unexplained investment in construction. It is the plea of the assessee that when no addition is made on the grounds on which re-assessment proceedings are initiated then no other addition can be made in such reassessment proceedings.

8. The first aspect which needs to be examined is as to whether the assessee is entitled to challenge the validity of initiation of procee ings u/s 147 of the Act in the present appeals in which he has challenged the validity of order passed u/s 263 of the Act. The ld. Counsel for the assessee submitted before us that it is pen to an assessee in an appeal against the order u/.s 263 of the Act which seeks to revise an order passed u/s 147 of the Act, to challenge the validity of the order passed u/s.147 of the Act as well as initiation of proceedings u/.s 147 of the Act. In this regard the Ld Counsel for the assessee placed before us two decisions one rendered by Lucknow Bench of ITAT in the case of Inder Kumar Bachani (HUF) vs ITO 99 ITD 621 (Luck) and ITAT Mumba 'G' Bench in the case of M/s. Westlife Development Ltd. Vs Principal C.I.T. in ITA NO 688/Mum/2016. In both the decisions a view has been taken by the Tribunal that when an A sessment order passed u/s 147 of the Act was illegal the CIT cannot invoke the jurisdicti n u/s 263 of the Act against such void or non-est order. In the second decision cited the Hon'ble Mumbai bench of the Tribunal has specifically framed the following questions :-

" 1.Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?

2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?

3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order?"

9. On question no. 1 and 3 which is relevant to the present case the Hon'ble Mumbai bench of the Tribunal has taken the view that when the original assessment proceedings are null and void in the eyes of law for want of proper assumption of jurisdiction then such validity can be challenged even in collateral proceedings. The Mumbai bench took the view that the proceedings u/s 147 of the Act are primary proceedings and proceedings u/s 263 of the Act are collateral proceedings and in such collateral proceedings, the validity of initiation of the original proceedings u/s 147 of the Act can be challenged. The Mumbai bench of the Tribunal

in this regard has placed reliance on several decisions, the principal decision being that of the Hon'ble Supreme Court in the case of Kiran Singh & Ors. V. Chaman Paswan & Ors. [1955] 1 SCR 117 wherein the Hon'ble Supreme Court observed as follows :-

> *" It is a fundamental principle well-established that a decree passed by a Court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction, whether it is pecuniary or territorial, or whether it is in respect of the subject-matter of the action, strikes at the very authority of the Court to pass any decree and such a defect cannot be cured even by consent of parties."*

10. The ITAT Mumbai bench made a reference to another decision of the Hon'ble Supreme Court in the case of Sushil Kumar Mehta vs Gobind Ram Bohra (1990) 1 SCC 193 and the decisions in the case of Indian Bank vs Manilal Govindji Khona (2015) 3 SCC 712. The ITAT Mumbai bench also held that if order of assessment passed u/s 147 o the Act was illegal and nullity in the eyes of law then that order cannot be revised by invoking powers u/s 263 of the Act by CIT. The Mumbai Bench has in this regard plac d reliance on the decision of Hon'ble Delhi bench of the Tribunal in the case of Krishna Kumar Saraf vs CIT in ITA NO.4562/Del/2007 order dated 24.09.2015 wherein it was held as follows :-

> *" 17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.*
>
> *18. However, u/s 263 the Id. Comm ssioner cannot revise a non est order in the eye of law. Since the assessme t order was passed in pursuance to the notice U/S 143(2), which was beyond time therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.*
>
> *19 While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended. Because the provisions of limitation are provided in the same.*
>
> *20. In view of above discussion ground no.3 is allowed and revision order passed u/s 263 is quashed.*

11. The learned DR relied on the order of the CIT(A). We have considered the rival submissions. We are of the view that the validity of the order u/s 147 of the Act depends upon the AO assuming jurisdiction to make an order of assessment u/s 147 of the Act after fulfilling the conditions laid down in the said section namely reason to believe the income chargeable to tax for that assessment year has escaped assessment. If this condition is not satisfied then it cannot be said the AO has validly assumed jurisdiction u/s 147 of the Act. If the validity of proceedings u/s 147 of the Act has not been challenged by the assessee by filing appeal against the order u/s.147 of the Act, can it be challenged in the appeal against an order u/s

263 of the Act revising the invalid order u/s 147 of the Act. This issue has been analysed by the Hon'ble Mumbai Bench of the tribunal in the case of M/s. Westlife Development Ltd. (supra) and 147 proceedings has been equated to primary proceedings and the proceedings u/s 263 passed equated to collateral proceedings. It has further been held based on various judicial pronouncements of the Hon'ble Supreme Court that if the primary proceedings are non-est in law or void on the ground of lack of jurisdiction then the validity of such proceedings can be challenged even in an appeal arising out of collateral proceedings. We have already set out the ratio laid down in these decisions and we do not wish to repeat the same. Suffice it to say the law is well settled that invalidity of the primary proceedings for want of proper jurisdiction can be challenged even in appellate proceedings arising out of a collateral proceeding. In view of the aforesaid legal position we admit the additional grounds for adjudication.

12. As far as the merits of the validity of initiation of proceedings u/s 147 of the Act for A.Y.2007-08 and 2008-09 are concerned the question for consideration is as to whether on the basis of the reasons recorded it can be said that there can arise any belief on the part of the AO that income chargeable to tax for the relevant assessmen years has escaped assessment. In this regard the reasons recorded by the AO for initiating proceedings u/.s 147 of the Act for A.Y.2007-08 and 2008-09 has already been set out by an order in the earlier part of this order. The gist of the reasons recorded by the AO is that the assessee had made investments of about Rs.4 crore in construction of hotel/resort at Mandarmoni, Purba Midnapore. It is the further allegation in the reasons recorded that to a notice u/s 133(6) of the Act, the Assessee had in reply admitted investment of only Rs 3.38 crores in construction of hotel and that source of funds for such construction was out of share capital and secured loan. It is also not disputed that the value of investments as stated by the assessee in its reply to the notice u/s 133(6) of the Act, was duly shown as the investment in construction of hotel with the balance sheet of the assessee. The AO has however inferred that there is a difference in the value of investment in construction of hotel as shown in the books of account and as per the information in possess on of the AO which is a sum of Rs.4 crores. Another reason given by the AO is that the difference in the amount of investment in construction might have been met by the Assessee out of income not disclosed. It has also been mentioned that the source of investment with regard to the actual cost of construction requires investigation.

13. In th s regard it can be seen that in its reply dated 26.07.2010 to the notice u/s 133(6) of the Act the assessee has given the following details :-

> *" Kindly refer to your above letter dated 18.06.2010 calling for information u/s. 133(6) of the Income Tax Act, 1961 Regarding investment in Hotel Ajoy Minar situated in Mandarmoni, Dist. - Purba Medinipur.*

As asked for, we are furnishing the information along with enclosures for your kind perusal.-

I. Total Amount invested up to 31.03.2010 is Rs. 3,38,43,644.00 and source of fund is given hereunder: -

Share Capital	*Rs. 1,88,30,000.00*
Unsecured Loan .	*Rs. 1.65.16,005.00*
	Total Rs. 3,53,46,005.00

We are enclosing herewith the list of share holders and loaners up to 31.03.2010 showing names, address and PAN of the respective parties for your ready reference. The figures relating to 2009-10 included with the above are subject to audit.

The above two lists are the clear evidence in support of credit worthiness of our company,

2. A separate year wise list of Investment in Hotel Ajoy Minar is enclosed as asked for.

3 We are enclosing herewith photo copy of Audited Balance Sheet for the years 2006-07, 2007-08 & 2008-09. The Audit of Accounts for the year ending 31st• March2010 is under progress. The same, if required, will be furnished when the same will be signed by the auditor.

4 The photo copies of two bank accounts are enclosed for your kind perusal."

14. In the light of the aforesaid reply the question that needs to be answered is as to how did the AO get information that the assessee had invested Rs.4 crores in hotel at Mandarmoni, Purba Medinipur. Apparently there appears to be no basis for this conclusion arrived at by the AO in the reasons recorded. The ld. DR however sought to defend the action of the AO by submitting that there was a survey in the business premises of the assessee and in such survey there was evidence to show that the assessee had invested a sum of Rs 4 crores in construction of a hotel at Mandarmoni. We are of the view that this submission of the ld. DR cannot be accepted. The law is well settled that the reasons recorded by the AO have to be tested on the basis of specific wordings of the reasons so recorded. No external material can be shown to justify the conclusion arrived at in the reasons recorded unless these materials are specifically referred to or incorporated in the reasons re orded. In the reasons recorded the AO has not disclosed the basis of this conclusion that the assessee made an investment of Rs. 4 crores in the construction of a hotel at Mandarmoni. We find that in this regard that Hon'ble Bombay High Court in the case of Hindustan Lever Ltd., Vs. R.B.Wadkar (2004) 268 ITR 0332 the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The r asons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

15. We are also of the view that as rightly contended by the ld. Counsel for the assessee that the reasons recorded are vague and belief regarding escapement of income is on mere pretence. In this regard the decision of ITAT Kolkata bench in ITA No.671/Kol/2015 dated 18.09.2015 in the case of Dr.Papiya Dutta vs ITO is relevant and it has been held in the aforesaid decision as follows :-

> *" It is clearly evident from the reasons recorded by the Assessing Officer that there was actually no reason for him to have formed a belief about the escapement of any*

income of the assessee from the assessment, but the assessment was reopened by him to verify or examine certain particulars furnished by the assessee in the return of income, which according to the Assessing Officer, might have possibly involved introduction of her un accounted money by the assessee. It is thus clear that the assessment was reopened by the Assessing Officer on the basis of suspicion and in order to make fishing and roaming enquiries, which, in my opinion, is not permissible. It is a settled position of law that the assessment can be reopened under section 147/148 on the basis of 'reason to believe' and not 'reason to suspect'. As held by the Coordinate Bench of this Tribunal in the case of Deputy Director of inc me Tax (International Taxation)-21, Mumbai -vs.- Societe International De Telecommunication (supra) cited by the Id. counsel for the assessee, unless the reasons to believe about the escapement of income exist, no recourse can be taken to the provisions of section 147. It was held that where an Assessing Officer ventures to initiate reassessment proceedings with an object of finding some material about the escapement of income, such reassessment cannot legal y stand and the law doe s not permit the Assessing Officer to conduct inquiries after the initiation of reassessment ITA No. 671 / KOL/2015 Assessment year: 2008 2009 proceedings, to find if there is an escapement of income. It was held that the scope of section 147 cannot encompass such an action under which certain examination is to be conducted for forming a reason to believe as to the escapement of income. If the facts of the present case including especially the reasons recorded by the Assessing Officer for reopening the assessment a reconsidered in the light of the decision of the Coordinate Bench of this Tribunal in the case of Deputy Director of income Tax (International Taxation)-21, Mumbai - vs.- Societe International De Telecommunication (supra), I am of the view that the initiation of reassessment p oceeding itself was bad in law and the assessment completed by the Assess ng Officer under section 143(3) read with section 147 in pursuance of such invalid initiation is liable to be cancelled. I order accordingly."

16. In the present case also the re-assessment proceedings have been initiated only for the purpose of verification and examination which is not the scope of reassessment proceedings. It would be the case of rather reasons to suspect rather than reasons to belief that there was escapement of income. It is a case of the AO seeking to make fishing and roving inquiry without any bas s We have no hesitation in concluding that initiation of reassessment proceedi gs in the present case was not valid as the mandatory requirement of such 147 has not been satisfied. We therefore hold that reassessments orders for A.Y.2007-08 and 2008-09 dated 30.12.2011 were invalid. Consequently order passed u/s 263 of the Act dated 21.03.2014 for A.Y.2007- 08 and 2008-09 are also held to be invalid and quashed. Thus the appeals being ITA No.765 and 766/Kol/2014 are allowed."

10. The Hon'ble Delhi High Court in the case of Commissioner of Income-tax, IV v. Insecticides (India) Ltd[2013] 357 ITR 330 (Delhi) upheld the order of the ITAT Delhi Bench in ITA Nos. 2332-2333/Del/2010, holding as follows:-

"7. We may point out at this juncture itself that the Tribunal did not go into the question of merits. It only examined the question of the validity of the proceedings under Section 147 of the said Act. The Tribunal, in essence, held that the purported reasons for reopening the assessments were entirely vague and devoid of any material. As such, on the available material, no reasonable person could have any reason to believe that income had escaped assessment. Consequently, the Tribunal held that the proceedings under Section 147 of the said Act were invalid.

8. The Tribunal gave detailed reasons for concluding that the proceedings under Section 147 were invalid. Instead of adding anything to the said reasons, we think it would be appropriate if the same are reproduced:—

"In the case at hand, as is seen from the reasons recorded by the AO, we find that the AO has merely stated that it has been informed by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 that the above named company was involved in giving and taking bogus entries/transactions during the relevant year, which is actually unexplained income of the assessee company. The AO has further stated that the assessee company has failed to disclose fully and truly all material facts and source of these funds routed through bank account of the assessee company. In the reasons recorded, it is nowhere mentioned as to who had given bogus entries/transactions to the assessee or to whom the assessee had given bogus entries or transactions. It is also nowhere mentioned as to on which dates and through which mode the bogus entries and transactions were made by the assessee. What was the information given by the Director of Income-tax (Inv.), New Delhi, vide letter dated 16.06.2006 has also not been mentioned. In other words, the contents of the letter dated 16.06.2006 of the Director of Income-tax (Inv.), New Delhi have not been given. The AO has vaguely referred to certain communications that he had received from the DIT(Inv.), New Delhi; the AO did not mention the facts mentioned in the said communication except that from the informations gathered by the DIT (Inv.), New Delhi that the assessee was involved in giving and taking accommodation entries only and represented unsecured money of the assessee company is actually unexplained income of the assessee company or that it has been informed by the Director of Income-tax (Inv.), New Delhi vide letter dated 16.06.2006 that the assessee company was involved in giving and taking bogus entries/transactions during the relevant financial year. The AO did not mention the details of transactions that represented unexplained income of the assessee company. The information on the basis of which the AO has initiated proceedings u/s 147 of the Act are undoubtedly vague and uncertain and cannot be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. In other words, the reasons recorded by the AO are totally vague, scanty and ambiguous. They are not clear and unambiguous but suffer from vagueness. The reasons recorded by the AO do not disclose the AO's mind as to what was the nature and amount of transaction or entries, which had been given or taken by the assessee in the relevant year. The reasons recorded by the AO also do not disclose his mind as to when and in what mode or way the bogus entries or transactions were given or taken by the assessee. From the reasons recorded, nobody can know what was the amount and nature of bogus entries or transactions given and taken by the assessee in the relevant year and with whom the transaction had taken place. As already noted above, it is well settled that only the reasons recorded by the AO for initiating proceedings u/s 147 of the Act are to be looked at or examined for sustaining or setting aside a notice issued u/s 148 of the Act. The reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No addition can be made to those reasons. Therefore, the details of entries or amount mentioned in the assessment order and in respect of which ultimate addition has been made by the AO, cannot be made a basis to say that the reasons recorded by the AO were with reference to those amounts mentioned in the assessment order. The reasons recorded by the AO are totally silent with regard to the amount and nature of bogus entries and transactions and the persons with whom the transactions had taken place. In this respect, we may rely upon the decision of Hon'ble jurisdictional Delhi High Court in the case of CIT v. Atul Jain [2000] 299 ITR 383, in which case the information relied upon by the AO for initiating proceedings u/s 147 of the Act did indicate the source of the capital gain and nobody knew which shares were transacted and with whom the transaction has taken place and in that case there were absolutely no details available and the information supplied was extremely scanty and vague and in that light of those facts, the Hon'ble Jurisdictional Delhi High Court held that initiation of proceedings u/s 147 of the Act by the AO was not valid and justified in the eyes of law. The recent decision of Hon'ble jurisdictional High Court of Delhi in the case of Signature Hotels (P.) Ltd. (supra) also supports the view we have taken above."

9. *We do not see any reason to differ with the view expressed by the Tribunal. No substantial question of law arises for our consideration. The appeals are dismissed. There shall be no order as to costs.*

11. The Hon'ble Calcutta High Court in the case of Principal CIT vs G&G Pharma India Ltd. in ITA 545/2015 vide order dt. 08.10.2015 at paras 12 and 13 was held as follows:

"12. In the present case, after setting out four entries, stated to have been received by the assessee on a single date i.e. 10th Feb. 2003, from four entries which were received by the assessee on a single date i.e. 10th Feb. 2003, from four entries which were termed as accommodation entries, which information was given to him by the Director Investigation, the A.O. stated: 'I have also perused various materials and report from Investigation Wing and on that basis it is evident that the assessee company has, introduced its own unaccounted money in its bank account by way of above accommodation entries'. The above conclusion is unhelpful in understanding whether the A.O. applied his mind to the materials that he talks about particularly since he did not describe what those materials were. Once the date on which the so called accommodation entries were provided is known, it would not have been difficult for the A.O., if he had in fact undertaken the exercise, to make a reference to the manner in which those very entries were provided in the accounts of the assessee, which must have been tendered along with the return, which was filed on 14th November, 2004 and was processed u/s 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for the A.O. to have simply concluded: 'it is evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries'. In the considered view of the Court, in light of the law explained with sufficient clarity by the Supreme Court in the decision discussed, the basic requirement that the A.O. must apply his mind to the materials in order to have reasons to believe that the income of the assessee escaped assessment is missing in the present case.

13. A perusal of the reasons recorded demonstrate total non application of mind by the A.O. Thus applying the proposition laid down by the Jurisdictional High Court in G&G Pharma India (supra) we hold that the reopening of assessment is bad in law"

12. Per contra, the Ld. DR supporting the order of the authorities below submitted that the ADIT, (Inv.), Thane has conducted detailed investigation into the activities of ShriVikas Jain and family, who were engaged in floating paper companies and bringing in funds from Kolkata Companies and thereafter systematically laundering the unaccounted money of persons like assessee. According to the Ld. DR, when the AO was in receipt of the information from the ADIT, Thane, he noted that the assessee had obtained accommodation entry in the form of share capital from the companies named in the report which was nothing but the infusion of the unaccounted money of the assessee. So, when he understood that assessee had indulged in obtaining accommodation entry from paper companies floated by Shri Vikas Jain who had admitted also in sec. 131 statement these facts, the AO believed that there was escapement of income. Therefore, he rightly reopened the assessment that too which was not originally done under scrutiny. Therefore, according to the Ld. DR, we should not interfere in the impugned order of the Ld. CIT(A) and also relied upon the following decisions :

13. PCIT vs. NRA Iron & Steel (P.) Ltd. [103 taxmann.com 48 (SC)]
Issue of Cash credit (Share application money) was raised as to whether assessee is under a legal obligation to prove receipt of share capital/premium to satisfaction of Assessing Officer, failure of which, would justify addition of said amount to income of assessee. Hon'ble

Apex Court held the answer in affirmative as yes. Another issue was that the assessee company, in its return of income for relevant year showed that money aggregating to Rs. 17.60 crores had been received through share capital premium. Assessing Officer added back Rs. 17.60 crores to total income of assessee on ground that assessee had failed to discharge onus by cogent evidence either of creditworthiness of so-called investor-companies, or genuineness of transaction. On appeal, Commissioner (Appeals), deleted the addition on ground that assessee having filed confirmations from investor companies to show that entire amount had been paid through normal banking channels, and hence discharged initial onus under section 68 for establishing credibility and identity of shareholders. Tribunal as well as High court confirmed order passed by Commissioner (Appeals). However, it was found that Authorities below did not even advert to field enquiry conducted by Assessing officer which revealed that in several cases investor companies were found to be non-existent, and onus to establish identity of investor companies, was not discharged by assessee. Thus, entire transaction seemed bogus' and lacked credibility. Merely because assessee company had filed all primary evidence, it could not be said that onus on assessee to establish creditworthiness of investor companies stood discharged. Accordingly, question arose as to whether, Assessing officer was justified in passing assessment order making additions under section 68 for share capital/premium received by assessee company. Hon'ble Supreme Court held the action of the AO valid and the question was answered in affirmative as Yes.

14. Purviben Snehalbhai Panchhigar vs. ACIT [101 taxmann.com 393 (Gujarat)

Assessee filed his return claiming capital gain arising from sale of shares of company 'T' as exempt under section 10(38), in view of fact that said return was accepted under section 143(1) without scrutiny, AO was justified in initiating reassessment proceedings on basis of information received from Investigation Wing that company 'T' was a shell company and shares of the said company were basically used for providing bogus claim of long-term or short-term capital gain. Assessing Officer thus taking a view that assessee had raised a false claim for exemption of capital gain, initiated reassessment proceedings. Question was, whether since there was no scrutiny assessment, Assessing officer had no occasion to form any opinion on any of issue arising out of return filed by assessee – Held, yes. Another issue was whether, therefore, concept of change of opinion would have no application and, as a consequence, validity of impugned reassessment proceedings was to be upheld - Held, yes.

15. In the case of Anip Rastogi vs. ITO, in ITA No. 3809/Del/2018 dt.8.1.2019 TS-5007- ITAT-2019 (Delhi)-O)

Hon'ble ITAT, Delhi has upheld addition u/s 68 on account of credits arising on sale of penny stock on the ground that assessee had generated bogus entries of Long term capital gains on sale of penny stocks (copy of order attached).

16. M/s. Pankaj Agarwal & Sons (HUF); I.T.A.No.1413/CHNY/2018 dt.6.12.201 8 (and others).

In this case AO treated sale and purchase of shares as sham transaction denying the claim u/s.10(38) and treating the same u/s. 68. Findings of the SEBI were corroborated by the Investigation wing of the department viz. equity shares with no credibility were purchased. Trading participants were part of syndicated brokers indulging in price rigging. For facilitating such bogus entries, traders were paid commission. Motive of price rigging was to convert black money as legitimately earned Long Term Capital Gain u/s. 10(38). Before the Hon'ble ITAT plea was taken by the assessee for the first time that opportunity for cross-examination was not provided. Hon'ble ITAT denied the stand taken by the assessee and confirmed the addition (copy of order attached).

17. Vidya Reddy v . ITO ITA No. 2016/Chny/2017 dt.15.5.2018

In this case assessee had made claim of Long Term capital Gain u/s 10(38) whereas, Investigation wing of the department revealed that such rigged claims were being filed by the assessees and the case of the assessee was one of such cases. It was noted that assessee had manipulated sales within short span of time with collusion of brokers to claim LTCG u/s10(38). Thus, the same was added u/s 68. Hon'ble ITAT observed that the assessee failed to produce any convincing evidence thus appeal of the appellant was dismissed (copy of order attached).

18. Chandan Gupta Vs CIT P&H High Court 2015 [2015] 54 taxmann.com 10 (Punjab & Haryana)/[2015] 229 Taxman 173

Issue was whether, once transaction of purchase and sale of shares was found to be bogus then sale proceeds had to be added as income of assessee under section 68 as money received on basis of bogus transaction had been credited by assessee in his books of account which remained unexplained. Held, yes.

19. Balbir Chand Maini vs CIT P&H High court 2011] 12 taxmann. com 276 (Punjab & Haryana)/[2011] 201 Taxman 94 (Punjab & Haryana (MAG.)/2012] 340 ITR 161 (Punjab & Haryana)/ [2012] 247 CTR 468 (Punjab & Haryana)

Assessee had purchased certain shares of a company at rate between Rs.2.50 and Rs. 3.40 per share in month of April, 1997 and part of those shares were sold through a broker at Rs. 55 per share. AO recorded statement of broker who admitted to have purchased shares in question but failed to produce books of account and other relevant documents. The alleged sale of shares had not taken place through any stock exchange. Broker could not give detai s of purchaser of shares. Addition held to be justified.

20. Abhimanyu Soin Vs ACIT ITAT Chandigarh 2018 2018 TIOL-733-ITAT-CHD

Unnatural LTCG @ 3072% over a period of 1.5 years from scrip of the unlisted company whose even net worth was not known to the assessee, without expert advice was beyond the business logics and was valid reason to make addition for undisclosed income. When assessee fails to prove through evidences that purchase and sale transactions of shares are genuine, claim of exempted LTCG can be disallowed and addition for undisclosed income can be made. When facts indicates that whole process of trading in shares is depicted just to avoid tax liability, the addition for undisclosed income should be upheld.

21. Smt. M. K. Rajeshwari Vs ITO ITAT Bangalore 2018 [2018] 99 taxmann.com 339 (Bangalore - Trib.)

Where assessee claimed exemption under section 10(38) in respect of capital gain arising from sale of shares, in view of fact that financial worth of said company was meagre and, moreover, there was abnormal rise in price of shares, it could be concluded that assessee introduced her own unaccounted money in garb of long term capital gain and, thus, claim raised by her was to be rejected.

22. Sanjay Bimalchand Jain L/J Shantidevi Bimalchand Jain Vs PCIT Bombay High Court (Nagpur Bench) 2017 ITA No. 18/2017L:

The assessee had purchased shares of two penny stocks of Kolkata based companies i.e., 8000 shares at the rate of Rs.5.50 per share on 08.08.2003 and 4000 shares at the rate of Rs.4lper share on 05.08.2003.

> The assessee sold 2200 shares at an exorbitant rate of Rs.486.55 per share on 07.06.2005 and 800 shares on 20.06.2005 at the rate of is.a85.65. the authorities held that the assessee had not tendered cogent evidence to explain as to how the shares in an unknown worth Rs.5/had jumped to Rs.485/ in no time. Addition confirmed.

23. Usha Chandresh Shah Vs ITO ITAT Mumbai 2014 2014 TIOL-1459-ITAT-MUM.

> In this case the assessee could not produce the copies of share certificates and copies of share transfer forms. The transaction of purchase of shares could not be cross verified. The shares of the company were declared as 'penny Stock' by SEBI and the broker Sanju Kabra through whom the shares were sold by the assessee was indicted for manipulating the prices of penny stock shares. The tax authorities have rightly applied the test of human probabilities to examine the claim of purchase and sale of shares made by the assessee. The CIT(A) was justified in confirming the order of the AO by applying the test of human probabilities.

And therefore Ld DR does not want us to interfere with the order of Ld. CIT(A).

24. Having taken into considerat on the aforesaid judicial precedents and other case laws cited before us by both the parties, in order to appreciate the legal ground raised before us, we need to look into the reasons recorded by the AO before proposing to reopen the assessment which we find placed at page 1194 - 1195 of the paper book no. 3, which is reproduced as under:

25. The legal issue that has been raised by the assessee in this appeal is against the jurisdiction to reopen the assessment by the AO u/s. 147 of the Income-tax Act, 1961 (hereinafter referred to as the "Act"). In order to adjudicate the same, we need to look into the reasons recorded by the AO which is seen at pages 1194 and 1195 of the assessee's paper book which is reproduced as under:

26.

1194

REASONS FOR INITIATING PROCEEDING U/S 147 READ WITH SECTION 148 OF THE I.T ACT, 1961

Name of the assessee	:	M/S S.D. FINSTOCKS PVT. LTD. NOW KNOWN AS M/S VINOD COMMODITES LTD, 401, LIGH 401, LIGH VINOD TOWERS MAIN CHOPASANI ROAD JODHPUR RAJASTHAN
PAN	:	AAECS9380A
AY	:	2009-10

In this case, the return of income was filed on 03.07.2009 declaring a total income of Rs. 2,16,750/-.

Information were received by this office from ADIT (Inv.) Iv(2), Thane in the case of above named assessee. During the course of investigations carried out, by ADIT (Inv.) Iv(2), Thane it came out that one Mr. Vikas Kushalchand Sanklecha (Jain) along with his father/brother Mr.Vinod Sanklecha and Mr. Vipin Sanklecha had floated the following companies with his family members/loyal employees as directors.

1. *M/s Acro Export Trade Pvt Ltd*
2. *M/s Desert Pharma Pvt Ltd*
3. *M/s Flawless Spinners Pvt Ltd*
4. *M/s Dhanvarsha Fabrication Pvt Ltd*
5. *M/s Patel Fashion Pvt Ltd*
6. *M/s Jai Bhairav Metal Pvt Ltd*
7. *M/s Nakoda Exploration Pvt Ltd*
8. *M/s Jodhpur Ispat Pvt Ltd*
9. *M/s Bell Fabrics Pvt Ltd*
10. *M/s Gandhar Weaving Pvt Ltd*
11. *M/s S.N. Cotton Pvt Ltd*
12. *M/s Sahani Dychem Pvt Ltd*
13. *M/s Padam Glass Ware Pvt Ltd*
14. *M/s Sahani Infra Developments Pvt Ltd*
15. *M/s Chin Infotech Pvt Ltd*
16. *M/s Gandhar Yarn Pvt Ltd*
17. *M/s Pali Fabrics Pvt Ltd*
18. *M/s Dhanshree Oil Trade Pvt Ltd*
19. *M/s Dhariwal Trade Pvt Ltd*
20. *M/s Benko Iron and Steel Pvt Ltd*
21. *M/s Gandhar Spinning Mills Pvt Ltd*
22. *M/s Prog Dyechem Pvt Ltd*
23. *M/s Amazon Metal Pvt Ltd*

All the companies were floated at around the same time viz. month, year and their bank accounts opened in the same bank viz. Bank of Rajasthan, Bhiwandi Branch.

27.

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Sh. Vikas Jain, in his statement u/s 131 of the Income Tax Act recorded by ADIT (Inv.) Iv(2), Thane stated that his companies M/s Gandhar Gautam Fabtex Pvt Ltd, M/s Sagartex Creation Pvt Ltd and M/s Sahani Infra Developments Pvt Ltd were in need of funds and the funds were not coming from the banks, so he floated these companies for generating funds and for backward integration. He brought a total fund of Rs. 14.50 Crores in these companies from Kolkata based companies.

Assessee M/s S D Finstocks Pvt Ltd now known as M/s Vinod Commodities Ltd (PAN: AAACM7130L) has received funds to the tune of Rs.1,22,00,000/- from M/s Dhanvarshe Fabrication Pvt Ltd and M/s Prag Dye-Chem Pvt Ltd which is a Vikas Jain's company, which form part of the funds shown to have been received by the assessee.

Analysis of return of the assessee shows infusion of funds through share capital during A.Ys. 2009-10 in the following manner:

NAME OF THE COMPANY	PAN	AY	AUTHORISED CAPITAL	ISSUED CAPITAL	SHARE APPLICATION	SECURITY PREMIUM	UNSECURED LOAN
S.D. FINSTOCKS PRIVATE LIMITED (Now known as Vinod Commodities Ltd)	AAECS0130A	2009-10	20000000	660000	11500000	0	0

As mentioned by ADIT (Inv.) Iv(2), Thane, investigations proved that the companies were created Mr. Vikas Jain & his associates just to give accommodation entries and the investments of funds are not genuine investments. These companies were not having any proper funds of their own but received funds from Kolkata based and apparently operators run companies. The companies of Shri. Vikas Jain are mere layers in the chain to launder unaccounted funds for the beneficiaries. Since, assessee has shown investments from the companies mentioned in list it is quite clear that assessee has taken above benefit of accommodation entries from companies found to be of no worth. The sources of funds are not genuine and the infusion of funds through share capital is just a façade to regularize unaccounted money. Assessee has taken accommodation entries from companies operated by Mr. Vikas Jain to the tune of Rs. 1,22,00,000/-. But total share application money received by the assessee during the A.Y. 2009-10 is Rs. 11,50,00,000/-.

In view of above, I have reason to believe that income of Rs. 1,50,00,000/- or more has escaped to assessment. Accordingly, the notice u/s 148 of the IT Act will be issued after prior approval of competent authority.

Dated: 29.3.14

(P. R. Mirdha)
Dy. Commissioner of Income Tax
Circle-3, Jodhpur

15. Having perused the ***reasons recorded by the AO*** before reopening and when the validity of the order u/s. 147 of the Act depends upon the AO rightly assuming jurisdiction as contemplated by law to make an order of assessment u/s. 147 of the Act, let us understand the settled position of law on the legal issue at hand. We note that before the AO assumes jurisdiction to re-open it is necessary that the conditions laid down in the said section 147 has to be satisfied viz., AO should record "reason to believe" that ***the income chargeable to tax for that assessment year has escaped assessment.*** If this condition is not satisfied at the first place, then it cannot be said the AO has validly assumed jurisdiction u/s. 147 of the Act. Therefore, the question for consideration is whether on the basis of the reasons recorded by the AO, he could have validly reopened the assessment. For that it has to be seen as to whether the AO on the basis of whatever material before him, [which he had indicated in his "reasons recorded"] had reasons warrant holding a belief that income chargeable to tax has escaped assessment. It is important to remember that the reasons recorded by AO to reopen has to be ***evaluated on a stand-alone basis*** and no addition/extrapolation can be made or a sumed, while adjudicating the legal issue of AO's usurpation of jurisdiction u/s. 147 of the Act. Moreover, the Parliament has given power to AO to reopen the assessment, if the condition precedent as discussed above are satisfied, and not otherwise. It should be kept in mind that the concept of assessment is governed by the time-barring rule and the assessee acquires a right as to the finality of proceedings. Queitus of the completed assessment is the Fundamental Rule and exception to this rule is Re-opening of assessment by AO under section 147 or exercise of Revisional jurisdiction by CIT under section 263 of the Act. Therefore, the Parliament in its wisdom has provided safeguards for exercise of the reopening of assessment jurisdiction to AO; and revisional jurisdiction of CIT by providing condition precedent which is sine qua non for assumption/usurpation of jurisdiction. In the case of reopening of assessment, the reason to believe escapement of income is the jurisdictional fact and law (mixed question of fact and law) and for revisional jurisdiction the order of the AO should be erroneous as well as prejudicial to the revenue. Unless the condition precedent is not satisfied, the AO or the CIT can exercise their reopening jurisdiction or revisional jurisdiction respectively. The legislative history is that in respect to the reopening u/s. 147 of the Act, the Parliament by

Direct Tax Laws (Amendment) Act 1987 w.e.f. 01.04.1989 had substituted "for reason to believe escapement of income" to '*for reasons to be recorded by him in writing, is of the opinion''* which gave unbridled subjective satisfaction to the AO was later substituted back to '*reason to believe escapement of income''*, by the Direct Tax Laws (Amendment) Act, 1989. The Hon'ble Apex Court as well as the Hon'ble High Courts have already held in plethora of cases the test of a prudent person instructed in law in understanding jurisdictional fact and law (mixed question of fact and law) the *reason to believe escapement of income* (supra).

16. The AO, who is a quasi judicial authority is empowered to reopen the completed assessment only in a given case wherein there is reason to believe escapement of chargeable income to tax which is the jurisdictional fact & law and sine qua non to assume jurisdiction to reopen a completed assessment u/s. 143(3) or 143(1) of the Act. Why we said even assessments wherein intimation u/s.143(1) of the Act has been done, requires the satisfaction of the condition precedent because the assessee has no control over the department in respect of assessment to be completed by scrutiny u/s. 143(3) or 143(1) of the Act and, therefore, if the return of income of an assessee is processed u/s. 143(1) and intimation he receives thereafter from the Department, he cannot be kept in a disadvantageous position vis-à-vis a case wherein the return of income of an assessee has been picked up for scrutiny u/s. 143(3) of the Act. In any case, for reopening the assessment by the AO the condition precedent of reason to believe escapement of income is sine qua non in both the cases wherein assessment is done under 143(1) or 143(3) of the Act. Thus, it must be kept in mind that reasons to believe postulates foundation based on information and belief based on reason. Even if there is foundation based on information there must be some reason warrant holding the belief that income chargeable to tax has escaped assessment. It has to be kept in mind that the Hon'ble Supreme Court in Ganga Saran & Sons P. Ltd. Vs. ITO (1981) 130 ITR 1 (SC) held that the expression "reason to believe" occurring in sec. 147 "is stronger" than the expression "if satisfied" and such requirement has to be met by the AO in the reasons recorded before usurping the jurisdiction u/s. 147 of the Act. It must be kept in mind that information adverse against the assessee may trigger

"reason to suspect" then the AO is duty bound to make reasonable enquiry to collect material which would make him belief that there is in fact an escapement of income.

28. So the condition precedent as discussed above is the jurisdictional fact & law, which is sine qua non for the AO to successfully usurp the jurisdiction u/s. 147 of the Act and it has to be also kept in mind that the jurisdictional fact (mixed question of fact and law) referred to in section 147 of the Act i.e *Reason to believe escapement of income* should be that of AO and not that of any other authority, because then it will be against one of the basic feature of the Constitution of India i.e, the Rule of Law, wherein the Parliament has empowered this reopening jurisdiction only to that of Assessing Officer and that is why if *the reason to believe escapement of income* is not that of AO, the assumption of jurisdiction to re-open, has been held to be vitiated and resultantly bad in law, since it will be on the basis of borrowed satisfaction. The Hon'ble Supreme Court has held in Aniruddha Singhaji Karansinghji Jadeja & Anr. Vs.State of Gujarat (1995) 5 SCC 302 that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If discretion is exercised under the direction or in compliance with some higher authorities, instructions etc then it will be a case of failure to exercise discretion altogether. The Hon'ble Supreme Court at para 13 has taken note of Wade & Forsyth in Administrative Law, 7th Edition at page 358 and 359 under the heading "SURRENDER, ABDICATION, DICTATION" and sub-heading "Power in the wrong hands" as below:

> "Closely akin to delegation, and scarcely distinguishable from it in some cases, is any arrangement by which a power conferred upon one authority is in substance exercised by another. The proper authority may share its power with someone else, or may allow someone else to dictate to it by declining to act without their consent or by submitting to their wishes or instructions. The effect then is that the discretion conferred by Parliament is exercised, at least inpart, by the wrong authority, and the resulting decision is ultra vires and void. So strict are the Courts in applying this principle that they condemn some administrative arrangements which must seem quite natural and proper to those who make them……". "Ministers and the Departments had several time fallen foul of the same rule, no doubt equally to their

surprise…….". The Hon'ble Supreme Court thereafter in para 14 in that case held "the present was thus a clear case of exercise of power on the basis of external dictation. That the dictation came on the prayer of DSP will not make any difference to the principle. The DSP did not exercise the jurisdiction vested in him by the statute and did not grant approval to the recording of information under TADA in exercise of his discretion. And thereafter the Hon'ble Supreme Court was pleased to hold that since the DSP did not exercise his discretion independently but referred the matter to the Additional Secretary, Home Department requesting permission to invoke the provisions of TADA was held to be an exercise of power on the basis of external dictation and the registration of case under TADA was held to be vitiated and was, therefore, quashed

29. From the aforesaid understanding of law governing the issue at hand, we have to examine the reasons recorded by AO for successfully assume jurisdiction to re-open u/s 147 of the Act, which is already set out above and test whether the condition precedent necessary to usurp the re-opening jurisdiction can be discerned from perusal of the reasons recorded by the AO in the instant case (supra). From the gist of the reasons recorded by the AO, we understand that the AO received information from ADIT, Thane conducted some investigations in the case of one Mr. Vikas Kushalchand Sanklecha (Jain) along with his father/brother and found that the companies listed from 1 to 23 in the reasons recorded have been floated with his family members/loyal employees as directors. According to information from Thane ADIT (Inv.), the AO noticed that Shri Vikas Kushalchand Sanklecha in the statement u/s. 131 of the Act it has been recorded by the Thane, ADIT (Inv.) wing stated that his companies M/s. Gandhar Gautam Fabtex Pvt. Ltd., M/s. Sagartex Creation Pvt. Ltd. and M/s. Sahani Infra Developments Pvt. Ltd. were in need of funds and the funds were not coming from the banks, so he floated these companies for generating funds and for backward integration. Accordingly, Shri Vikas Kushalchand Sanklecha Jain brought a total fund of Rs.14.50 cr. in these companies from Kolkata based companies. Thereafter, the AO records that the assessee M/s. S. D. Finstocks Pvt. Ltd. (now known as

M/s. Vinod Commodities Ltd.) had received funds to the tune of Rs.1.22 cr. from M/s. Dhanvarsha Fabrication Pvt. Ltd. and M/s. Prog Dye Chem Pvt. Ltd. which is a Vikas Jain's company, which forms part of the funds shown to have been received by the assessee. Thereafter, the AO concludes "*as mentioned by ADIT (Inv.), Thane investigation proved that the companies were created by Mr. Vikas Jain and his associates just to give accommodation entries and the investment of funds are not genuine investment. These companies were not having any proper funds of their own but received funds from Kolkata based and apparently operators run companies."* Thus, according to AO, the companies of Shri Vikas Jain are mere layers in the chain to launder unaccounted funds for the beneficiaries. Thereafter, the AO states that since the assessee has shown investments from the companies mentioned in the list (1 to 23) given in the first page, it is quite clear that the assessee has taken above benefit of accommodation entries from companies found to be of no worth. Thereafter, the AO says that source of funds are not genuine and the infusion of funds through share capital is just a façade to regularize unaccounted money. Then the AO concludes that the assessee has taken accommodation entries from companies operated by Shri Vikas Jain to the tune of Rs.1 22 cr. And then the AO again concludes that "but total share application money received by the assessee during the AY 2009-10 is Rs. 11,50,00,000/-". Therefore he has reasons to believe that income of Rs.11,50,00,000/- or more has escaped assessment. Accordingly, he has issued notice u/s. 148 of the Act.

30. An analysis of the reasons recorded by the AO to believe escapement of income, we note that he received an information from ADIT (Inv.), Thane that the investigation carried out revealed that one Shri Vikas Jain alongwith his family members and trusted employees have floated 23 companies for the purpose of funding his three companies namely, M/s. Gandhar Gautam Fabtex Ltd., M/s. Sagartex Creation Ltd. & M/s. Sahani Infra Development Pvt. Ltd. As per Shri Viash Jain (u/s. 131 of the /Act) since funds were not available from Banks, he floated the 23 companies and infused funds of Rs. 14.50 cr. from Kolkata based companies for backward integration. Thereafter, the AO notes that the assessee company received Rs. 1.22 cr. From two (2) companies of the Shri Vikas Jain. Thereafter, the AO comes to a conclusion in his own words "***as mentioned by ADIT (Inv.),***

Thane investigation proved that the companies were created by Mr. Vikas Jain and his associates just to give accommodation entries and the investment of funds are not genuine investment. These companies were not having any proper funds of their own but received funds from Kolkata based and apparently operators run companies." (So AO's conclusion that the companies floated by Shri Vikas Jain and his associates are to give accommodation entries and those companies did not have proper funds for doing genuine investment and are from operators run companies stands proved is based on the afore mentioned information given by ADIT (Inv.), Thane and not based on his preliminary enquiry). Since the AO has taken the information given by the ADIT (Inv.), Thane as gospel of truth and according to him this information proves that funds infused by the companies of Shri Vikas Jain from Kolkata based companies are tainted, the AO opines tha companies of Shri Vikas Jain are mere layer in the chain to launder unaccounted funds for the beneficiaries. (This the AO draws not based on any preliminary enquires made by him, but which is a fall out of the information given by ADIT (Inv.), Thane which according to AO, proves that companies of Shri Vikas Jain are accommodation entry provider and not genuine). Then the AO taking note that assessee had received Rs.1 22 cr. from two of the Shri Vikas Jain's companies, the said sum is accommodation entry. (This conclusion goes on to show that AO had made this finding based on the information which according to his own words (supra) has proved that Shri Vikas Jain's companies are accommodation entry providers and no preliminary enquiry was conducted by the AO to even call for the sec. 131 statement of Shri Vikas Jain statement which would show that Shri Vikas Jain was approached by the assessee or not, etc). Thereafter the AO says that since Rs. 1.22 cr. has been given by Shri Vikas Jain Companies to assessee it is accommodation entry and thereafter the final conclusion in his own words "*but total share application money received by the assessee during the AY 2009-10 is Rs.11,50,00,000/-".* Therefore, the AO states that he has reasons to believe that income of Rs.11,50,00,000/- or more has escaped assessment. This final conclusion of Rs. 11.50 cr. escaping assessment and Rs. 1.22 cr. discussed till the final conclusion above goes on to show that AO influenced by the information given by ADIT (Inv.) Thane by mere suspicion, in order to undertake a roving enquiry, without application of mind has finally jumped to the conclusion of Rs. 11.50 cr. escaping income, without making any preliminary

enquiry at all. Thus, from a reading of the reasons recorded by AO to justify re-opening of assessment, clearly show that the AO has taken note of the information from the ADIT(Inv.) and taken the contents of the information given by ADIT (inv) as gospel of truth against the assessee [without any verification or enquiry] to form a conclusion about escapement of income without independent application of mind by himself is nothing but an action taken by AO based on the strength of borrowed belief of ADIT (inv) and not that of AO, which vitiates the very assumption of jurisdiction by AO to re-open the assessment, which finding of us will be clear when we analyze the reasons recorded in detail infra.

31. From the aforesaid reasons recorded by AO it is evident that other than the information given by ADIT (inv) there is no other material the AO collected himself after undertaking at least a preliminary enquiry which could have enabled him at the time of recording reasons to come to a conscious independent conclusion that "***income of the assessee has escaped assessment***". According to us, the information given by ADIT(Inv) can only be a basis to ignite/trigger and be the starting point to enquire; and at that stage the information of ADIT (Inv.) can be termed as a foundation only to form "***reason to suspect***" and not reason to believe escapement of income which is the jurisdictional fact & law required to enable the AO to successfully assume jurisdiction to reopen as envisaged u/s. 147 of the Act. And the reason to suspect cannot be the basis for usurping jurisdiction to reopen u/s. 147 of the Act, for conducting roving/further examination to be resorted by him in order to strengthen the suspicion to an extent which can later transform the suspicion to create the belief in his mind that income chargeable to tax has escaped assessment. Merely on an allegations leveled by ADIT (Inv.), as in this case explaining the modus operandi carried out by Shri Vikas Jain who said about infusing funds to his three companies namely M/s Gandhar Gautam Fabtex Ltd., M/s. Sagartex Creation Ltd. & M/s. Sahani Infra Development Pvt. Ltd has taken funds to the tune of Rs 14.50 cr from Kolkata based companes since banks did not fund him, the AO taking note that assessee received Rs 1.22 cr from Shri Vikas Jain companies concluded that assessee has taken accommodation entry (that too without any incriminating statement by shri Vikas jain against assessee or any statement is referred to against the assessee or AO has taken the deposition of Shri Vikas

Jain). The information provided by ADIT Thane at best can only raise suspicion in the mind of the AO (which fact we have pointed out earlier) which is not sufficient/requirement of law for reopening of assessment. It has to be kept in mind that the '*reasons to believe'* is not synonymous to '*reason to suspect'*. 'Reason to suspect' based on an information can trigger an enquiry so that it can be found out whether there is any substance or material to substantiate that there is merit in the information adduced by the ADIT(Inv.) and after post enquiry the AO has to take an independent decision whether to re-open the assessment or not. And at the cost of repetition we say that the AO should not act on dictate of any other authority like in this case from ADIT (Inv.) because then it would be borrowed satisfaction of the jurisdictional fact & law which is not permitted by law and consequently vitiate the assumption of jurisdiction by AO to reopen u/s. 147 of the Act. In this case, as discussed above, we note that the AO after referring to the investigation report concludes that the information given by the ADIT (Inv.) proves that companies created by Shri Vikas Jain are for providing accommodation entries Thereafter, the AO says that he has reason to believe escapement of income of Rs. 11.50 cr, though AO admits that assessee has received only Rs. 1.22 cr. from companies run by Shri Vikas Jain. So it is clear from the aforesaid averments that AO based on ADIT Investigation's Report has taken a view that share capital of Rs.11.50 cr. have escaped assessment, and not as per his independent view after a preliminary enquiry. Because the AO himself records in the reasons to re-open that "*as mentioned by ADIT (Inv.), Thane investigation proved that the companies were created by Mr. Vikas Jain and his associates just to give accommodation entries and the investment of funds are not genuine investment. These companies were not having any proper funds of their own but received funds from Kolkata based and apparently operators run companies*", which admission of AO goes on to show that "AO's makes up his mind against the assessee based on the borrowed satisfaction of ADIT Tane only and not reason to believe independently.. So the AO admits that the information given by ADIT(Inv.) has proved that companies of shri Vikas are indulging in accommodation entry, which rendered him to make up his mind to believe that income chargeable to tax has escaped assessment. At the cost of repetition we say that an adverse information against an assessee may trigger "reason to suspect", as in this case was, and it was incumbent on his part pursuant to the

information reaching his hand (AO), to make reasonable enquiry and collect material which could make him believe, that there is in fact an escapement of income, which exercise AO admittedly did not do and has blindly copied the contents of the ADIT(Inv) report and proceeded to reopen the assessment/ intimation passed u/s. 143(1) which action of AO cannot be countenanced. In other words, when the AO was in receipt of the information from the ADIT(Inv.) he ought to have made reasonable enquiry and collect materials which would make him believe, that there is escapement of income. As stated earlier, it has to be remembered that information is not synonymous *to truth*. At the cost of repetitions, we note that AO simply on the basis of the investigation report of ADIT (Inv.) has jumped into conclusion that there is an escapement of income which is erroneous since it does not satisfy the jurisdictional fact and law for reopening as envisaged u/s. 147 of the Act. The AO simply taking note of the ADIT(Inv.) letter has borrowed the satisfaction without independent application of mind to form reason warrant holding a belief that income chargeable to tax has escaped assessment. Just because a letter has been received from the ADIT(Inv.) the AO cannot reopen the assessment even if original assessment was u/s. 143(1) of the Act. In the light of the above, the AO based on the reasons recorded as set out above could not have initiated a fishing enquiry to find out the veracity of the information given by the ADIT(Inv.). The reasons recorded by AO does not stand the test as laid by plethora of judicial precedence as discussed above which is sine qua non to assume jurisdiction u/s 147 of the Act, therefore, in the light of the aforesaid facts and circumstances of the case as discussed, we find that the reasons recorded by the AO to justify reopening the assessment u/s. 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee falls. Since the AO failed to validly assume jurisdiction u/s. 147 of the Act, the assumption of jurisdiction by him to re-open the assessment itself is qorum non judice and, therefore, all subsequent action is null in the eyes of law and therefore, we quash the reopening and consequent reassessment order framed by him.

32. Further, while challenging the legality of assumption of jurisdiction by the AO for reopening the assessment u/s. 147 of the Act, the assessee has also challenged the legality/validity of the approval granted by the Ld, Commissioner by only writing 'I am

satisfied', which according to the Ld. AR, does not satisfy the requirement of law as laid in plethora of decisions, and, therefore, the approval of Commissioner since vitiated, the AO could not legally usurp the jurisdiction to reopen the assessment. We find that on the format which has been reproduced, the Commissioner has simply written "Yes I am satisfied" [PB page 1224-1226] on the day, i.e. 29.03.2016 on which day itself the AO had issued the reason recorded which is seen placed at page 1195 (supra) which does not in any manner shed any light as to whether there was any application of mind at all by the aforesaid senior officer, who was duty bound to have looked in to carefully the reasons recorded by the AO to assume jurisdiction to reopen. When a Superior authority is given power by the Parliament, to grant sanction to do an act by an authority below him, then that power needs to be exercised with due care and circumspection and after due application of mind. Mechanical manner of giving sanction like in this case have not been approved by the Hon'ble Supreme Court in a similar case in Chhugamal Rajpal vs. S.P. Chaliha & Ors. – 79 ITR 603 (SC) and Hon'ble High Court of Madhya Pradesh in Arjun Singh vs Asstt. Director of Income Tax (M.P.) reported in (2000) 246 ITR 363 (MP). Since we are not satisfied with the reasons recorded by the AO to reopen because it does not satisfy the condition precedent required to usurp jurisdiction under section 147, the approval could not have been given by Commissioner We are of the opinion that the Commissioner has mechanically accorded permission which does not satisfy due care and circumspection and application of mind supposed to be exercised by a superior authority before according approval to AO. If only he had read the report and applied the mind on the reasons recorded by the AO justifying reopening, he would not have granted the permission. The safeguard against reopening u/s 151 of the Act has been done by the superior authority very lightly and as held by the Hon'ble Supreme court in Chugamal Rajpal (supra), the authority substituted form over substance. Thus, we hold that the sanction granted by the Commissioner u/s 151 is invalid and so, the notice of the AO for reopening u/s. 148 is bad in law and has to be necessarily struck down. Since the assessee succeeds on the legal issues raised by it before us, therefore, the merits of the case is not being looked into/adjudicated because it has become academic in nature.

33. Therefore, respectfully applying the propositions of law laid down in the judgments cited above to the facts of the case, we have no other alternative but to hold that the reopening of the assessments is bad in law and we quash the impugned reopening proceedings and consequential reassessment.

33. In the result, the appeal of assessee is allowed and the stay application of assessee is infructuous, so dismissed.

Order is pronounced in the open court on 09/05/2019

Sd/-
(N. K. Saini)
Vice President

Sd/-
(A. T. Varkey)
Judicial Member

Dated: 9th May, 2019

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1 Appellant –

2 Respondent –

3 CIT(A)-2, Jodhpur.

4 CIT , Jodhpur

5 DR, ITAT, Jodhpur Bench

/True Copy,

By order,
Assistant Registrar