Draft objection 1: (illustrative only Please note: before using please make appropriate correlation with facts and applicable law)

To

The Jurisdictional AO

_____

Subject: preliminary objection on validity of notice u/s 148 of the Act issued in case of _____ dated _____

Respected Sir,

We humbly put forth our preliminary objections on assumption of jurisdiction u/s 148 of the Act vide captioned notice issued on _____, under un-amended/old law applicable prior to 1.4.2021 (extended by some notifications as issued in march and april to 30.06.2021), as follows:

1. Since already new law u/s 148 and sec.148A etc as enacted by Finance Act, 2021 which is made operative with effect from 1.4.2021 is in force as on date, so any reopening notice u/s 148 on/after 1.4.2021 has to obey and meet with stipulated jurisdictional pre-conditions under new sections 148 and sec.148A which are apparently not fulfilled in extant case, accordingly we request for immediate dropping of the reopening proceedings in old law which can't be applied after 1.4.2021 . For this we rely on memorandum to finance bill 2021 as explaining mew provisions of section 148, 148A which supports our contention here. We request for personal/oral hearing in this regard to explain our point of view. We rely on one recent Bombay high

court interim decision in case of Armada D1 Pvt. Ltd in WPL No. 11766/2021 order dated 3.06.2021 and request for keeping instant proceedings in abeyance till this seminal and primordial jurisdictional issue gets adjudicated finally.

Without prejudice alternate contention

2. That assessee has serious objection on use of extended time limitation u/s 149 after 31.03.2021 for which there is no legitimate justification for arbitrary use of extended time limit which action is unconstitutional as per article 14 of Indian constitution which guarantees equality before law and eschews scope of any arbitrariness in any action of any statutory authority. Further we rely on Hon'ble Apex court leading case law in Parsuram Potteries case 106 ITR 1 to support our instant contention.

Without prejudice alternate contention

3. That We further draw your attention to latest CBDT instruction issued u/s 119 of the Act dated 4th March 2021 reproduced below , on subject of reopening , applicable to extant cases, we do not find any where anything as to under what category case of assessee is reopened and relevant background reasons /supporting material for the same. So we request for clarification on the same at the outset.

F. No.225/40/2021/ITA-II
Government of India
Ministry of Finance
Department of Revenue
Central Board of Direct Taxes
New Delhi

Dated: 4th March,2021

To

All Pr. Chief-Commissioners of Income-tax/ Chief-Commissioners of Income-Tax

Madam/Sir.

Subject: Instructions regarding selection of cases for issue of notice u/s 148 of the *Income-tax Act, 1961 – regarding.*

1. The Central Board of Direct Taxes (Board), in exercise of its powers u/s 119 of the Income-tax Act,1961 (Act), with an objective of streamlining the process of selection of cases for issue of notices u/s 148 of the Act, hereby directs that the following categories of cases be considered as 'potential cases' for taking action u/s 148 of the Act by 31.03.2021 for the A.Y 2013-14 to A.Y 2017-18 by the Jurisdictional Assessing Officer (JAO):

i. Cases where there are Audit Objections (Revenue/Internal) which require action u/s 148 of the Act;

ii. Cases of information from any other Government Agency/Law Enforcement Agency which require action u/s 148 of the Act;

iii. Potential cases including:-

(a) Reports of Directorate of Income-tax (Investigation),

(b) Reports of Directorate of Intelligence & Criminal Investigation,

(c) Cases from Non-Filer Management System (NMS) & other cases as flagged by the Directorate of Income-tax (Systems) as per risk profiling;

iv. Cases where information arising out of field survey action, requiring action u/s 148 of the Act.

v. Cases of information received from any Income-tax authority requiring action u/s 148 of the Act with the approval of Chief Commissioner of Income Tax concerned.

2. No other category of cases, except the above, shall be considered for taking action u/s 148 of the Act by the JAO.

3. It is clarified that action u/s 148 of the Act shall be taken by the Assessing Officer in respect of the above categories of cases after forming a reasonable belief that income chargeable to tax has escaped assessment and 'reasons to believe' shall be recorded and required sanction as per section 151 of the Act shall be obtained before issuing notice u/s 148 of the Act.

4. These instructions shall not be applicable to the Central charges and International Taxation charges for which separate instructions are being issued.

5. Issues with the approval of the Chairman, CBDT.

(Rajarajeswari R.)

Under Secretary-ITA-II, CBDT

Without prejudice alternate contention

4. That since assessee has only got extract of so called reasons recorded u/s 148(2) we humbly request for supply of compete reasons with relevant background material used to reopen assessee's case and sanction if any taken from competent authority u/s 151, as per spirit of Hon'ble Apex court decisions in 259 ITR 19, 424 ITR 607, 398 ITR 198 , sans which it is not possible for file comprehensive objections on validity of reasons recorded which is a sacred right of assessee and cannot be diluted light heartedly. Sans this exercise done in letter and spirit, any further proceedings u/s 143(2) etc. are not tenable in eyes of law.

Further submission on preliminary point

5. As per peculiar design of scheme of reopening under income tax act, we humbly submit that due to special nature of these proceedings, same may please be conducted at jurisdictional AO level only who has initiated the same till its finalization so that assessee can explain its case to the very person who has recorded satisfaction for escapement of income u/s 148(2) of the Act. That is no faceless proceeding s should be conducted in such cases. We rely on Famous book on administrative law by Wade, which is widely followed in various Hon'ble SC/HC decisions to argue that exclusive discretion of JAO who recorded reasons u/s 148(2) to finalize said /follow up assessment cannot be transferred to faceless mode in between of the proceedings as apprehended from practice adopted by revenue in such matters.

Our final submission

6. We further request for proper oral /personal hearing before any further step are taken in extant reopening proceedings so that we can explain our attendant and background facts in clear and better way, which oral hearing right is acknowledged in following decisions:

i) 1978 1 SCC 405 Mohinde Singh Gill case constitution bench apex court ruling

ii) 211 ITR 472 Patna high court full bench order

iii) 316 ITR 1 DHC Moser baer case decision

We reserve our right to file detailed objections on reasons recorded u/s 148(2) of the Act and on other jurisdictional issues.

Submitted

Assessee

Draft reply2 (illustrative rely please use with appropriate factual and legal reference)

To

The Jurisdictional AO

_____

Subject: filing of return u/s 148 of the Act – compliance made

Respected sir,

This is to bring to your kind notice that assessee has complied with the statutory obligation of return filing u/s 148 (refer our enclosure) and further we humbly submit that our earlier return may please be treated as return u/s 148 of the Act which letter format return is judicially acknowledged in series of decisions from Hon'ble High court and ITAT across country . Further we make humble request to supply us complete set of reasons in specified /proper format as per Hon'ble apex court ruling in case of GKN Drive shaft case 259 ITR 19 along with approval copy from competent authority if any and along with all the relevant underlying material if any relied and referred in reasons recorded u/s 148(2) so that assessee can file its detailed objections on the same as per spirit of Hon'ble apex court decisions. We request for oral /personal hearing before any adverse inference is drawn at any stage of the extant proceedings.

Submitted

Assessee

Draft reply 3 (illustrative rely please use with appropriate factual and legal reference) – drafted by Kapil Goel and Sandeep Goel Adv 9910272804 advocatekapilgoel@gmail.com

To

The Jurisdictional AO

Subject: detailed objections on reasons recorded u/s 148(2) of the Act

Respected sir,

1. reproduce reasons recorded u/s 148(2) as supplied to assessee

2. refer point by point allegations and inference in reasons recorded /supplied

3. Factual and legal errors if any in reasons recorded to be highlighted

4. Show weakness in reasons by referring to following to following illustrative checklist

4.1 Whether reasons are recorded for mere verification/scrutiny /examination /inquiry purpose etc? If Yes then u may object that reopening cant be made for mere verification and scrutiny spl. In cases where assessee filed regular return u/s 139 and same was not scrutinized as per reasons not attributable to assessee. Refer:

103 ITR 437 SC Lakhmani mewal dass case& further allude to:

S.No	Particulars	Remarks
1.	**Delhi ITAT Huron Builders Pvt Ltd ITA 6251/Del/2019 order dated 03.10.2019 C bench (identical/similar facts)**	Para 14,15,18,24,25
2.	**Ahmedabad ITAT Vipul Patel ITA 770/Ahd /2018 C Bench Order dated 03/09/2020 (identical/similar facts)**	Para 5,6,6.1,6.2
3.	**Agra ITAT Shri Raj Singh ITA 408/AGRA/2018 order dated 22.03.2019 (identical/similar facts)** - **Lucknow ITAT Chunnilal Prajapati case para 22/23** - **Delhi ITAT Anil Singhal – Para 24** - **Bombay high court Maniben Shah 283 ITR 453** - **Gujarat high court Bakulbhai Patel 56 DTR 212** - **Delhi high court Indo Arab Air Services 283 CTR 0092- para 29 referred**	Para 21 to 30
4.	Delhi ITAT Vipin Kumar Khanna ITA 1733, 1734 of 2012 D bench	Para 6,6.1 &7
5.	Karnataka high court C.M.Mahadeva 404 ITR 747	Reopening not allowed to verify source of property investment
6.	Bombay high court in Sesa Sterlite 417 ITR 334	Ingredients of reasons to believe analysed in detail
7.	**Delhi ITAT Bir Bahadur Singh Sijalwi reported at 68 SOT 197- followed in series of orders including delhi itat division bench order in case of Sanjeev Jain ITA 3812/Del/2013 ORDER dated 16.10.2017 G bench order**	Reopening on basis of cash deposit information not valid
8.	refer leading decision of Bombay high court in Hindustan lever **268**	it is well settled that validity of reopening has to be strictly

	ITR 332	decided on basis of reasons recorded u/s 148(2) of the Act and same cant be altered/modified/reincarnated by post mortem events ; followed across country in series of orders on subject of reopening u/s 148 of the Act
9.	Apex court in Lakmani Mewal dass case **103 ITR 437**	tests to examine recording of valid reasons to believe
10.	Hon'ble Delhi high court in case of Krown Agro **375 ITR 460**	Para 11 to 14
11.	***Most recent Bang ITAT in case of Tata Advanced Materials Limited in ITA 2181/Bang/2018 order of C bench dated 28.09.2020***	**Detailed principles on sec. 148 culled out in para 6 from pages 9 to 16**
12.	***Hon'ble Bombay high court Ingram Micro Limited 178 taxmann.com 140 (2017)***	**Aspect of non filing of return of income vis a vis reopening u/s 148**
13.	Hon'ble Bombay High **Court in the case of Nivi Trading Ltd. vs. Union of India reported in 375 ITR 308,**	**Reopening for mere verification/inquiry/examination not permissible**
14.	Delhi High Court in the case of Oriental Insurance Company Ltd Vs. CIT reported in 378 ITR 421 [Del],	**Mere suspect cant be basis to reopen the case u/s 148 of the Act**
15.	*Rajiv Agarwal v. ACIT (2017) 395 ITR 255 (Delhi) (HC*	**S.147 Reassessment – After expiry of four years – Notice on the basis of mere suspicion was held to be bad in law**

4.2 Whether reasons recorded rely on certain other information from investigation wing etc? If Yes try to check when said information was recd. by JAO and whether complete information was available to JAO prior to reasons recorded u/s 148(2)- use RTI or file inspection etc ; Further check whether stated /said information as referred is really actionable? and triggers valid formation of belief for escapement of income u/s 148(2) of the Act? Further check whether said information is accurate , authentic and correct and complete so as to record valid reasons u/s 148(2)? Refer

Kolkata bench of ITAT in GRD Commodities case (4/12/2020) Relevant extract answer to above poser:

"....19. On examination of the entries made by the AO in the order sheet [Page 63 of the Paper book], it is noted that the AO had received the appraisal report of the search and survey cases of Commodity Traders Group of Ahmedabad only on 05-04-2016. However, the notice for reopening, which is placed at Page 40 of the paper book, is dated 31-03-2016 (last date for issue of notice in respect of AY 2009-10). These events show that the AO had received the appraisal report five days after the issuance of notice on 31-03-2016. In this context, it has to be kept in mind the Hon'ble Apex Court has held in 258 ITR 317 and 253 ITR 86; the condition precedent for re-opening u/s 147 of the Act is that the AO should have 'reason to believe' escapement of income, and the 'reason to believe' postulate a foundation based on information and a belief based on reason. So we note that it is a legal necessity that a foundation based on information is a must before the AO has reason to believe escapement of income. So, here the appraisal report on which the AO builds the reason to belief was absent when he recorded the reason before invoking the reopening jurisdiction u/s. 147 by issuing notice u/s. 148 of the Act on 31.03.2016. Therefore, on these facts we discussed, we are inclined to uphold the contention of the Ld. AR that the foundation on which the AO based his belief that income chargeable to tax had escaped assessment was absent at the material time when he issued notice u/s. 148 of the Act on 31- 03-2016, and therefore, the basic legal requirement of reopening u/s. 148 of the Act i.e. AO's formation of reasons to believe escapement of income prior to reopening of assessment was absent in the given facts of the present case..."

4.3 Whether reasons recorded are based on independent application of mind on part of JAO who recorded instant reasons ? check whether it is a case of borrowed satisfaction or not? Refer : 395 ITR 677, 396 ITR 5, 384 ITR 147 etc

Most recent decision is:

IN THE INCOME TAX APPELLATE TRIBUNAL AHMEDABAD – BENCH 'A'

118 to 123/Ahd/2019 Asstt.Years : 2009-10 to 2014-15

Shri Hitesh Ashok Vaswani

Date of Pronouncement: 12/11/2020

"93. In the present case the search information received from the investigation wing was used to form the reason to believe by the AO but without applying the mind. Thus the reasons were merely recorded on the borrowed satisfaction by the AO. The source for all the conclusions was of the investigation report. The tangible material which formed the basis for the belief that income had escaped assessment must be evident from a reading of the reasons. The reasons failed to demonstrate the link between the tangible material and the formation of the reason to believe that income had escaped assessment. The Assessing Officer had not independently considered the tangible material which formed the basis for the reasons to believe that income had escaped assessment. 94. The Hon'ble High Court of Bombay in the case Principal Commissioner of Income-tax-5 v. Shodiman Investments (P.) Ltd. reported in 422 ITR 337 holding that reopening notice on the basis of intimation from DDIT (Investigation) about a particular entity entering into suspicious transactions, was clearly in breach of the settled position of law that reopening notice has to be issued by the Assessing Officer on his own satisfaction and not on borrowed satisfaction. The Hon'ble Court has pronounced as under: "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 material (whatever reasons) which form the basis of reopening Assessment and its reasons which 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 merely indicates information received from the DIT (Investigation) about a particular entity, entering

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 reopening 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." 95. The power to reopen a completed assessment under Section 147 of the Act has been bestowed on the Assessing Officer, if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. However, this belief that income has escaped assessment has to be the reasonable belief of the Assessing Officer himself and cannot be an opinion and/or belief of some other authority. On the basis of the information by itself received from another agency, there cannot be any reassessment proceedings. However, after considering the information/material received from other source, the Assessing Officer is required to consider the material on record in case of the assessee by applying his mind and thereafter is required to form an independent opinion on the basis of the material on record that the information has bearing on the income of the assessee and such income has escaped assessment. Without forming such an opinion, solely and mechanically relying upon the information received from other source, there cannot be any reassessment. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be Shri Dilipkumar Lalwani and 'independent' and not 'borrowed' or 'dictated' satisfaction. Law in this regard is now well-settled. 96. The Hon'ble Supreme Court in the case of Anirudh Sinhji Karan Sinhji Jadeja v. State of Gujarat reported in [1995] 5 SCC 302 as well has held 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 instruction, then it will be a case of failure to exercise discretion altogether. The cases reopened on the basis of information received from the other Departments are also governed by the aforesaid principle of making an independent inquiry and recording of satisfaction by the Assessing Officer issuing notice under Section 148 of the Act. 97. Third party information is only an information and does not constitute 'reason to believe' until and unless the third party information is subjected to investigation and on the basis thereof independent reasons are recorded by the Assessing Officer before issuance of notice under Section 148 of the Act. In other words, mentioning by the AO that the assessee has failed to disclose all material facts in the reasons recorded is not sufficient enough. Rather the AO is under the obligation to arrive at such conclusion that the assessee

failed to disclose all material facts necessary for the assessment after applying his mind and verification of the facts. But the AO has not done so. In holding so we draw support and guidance from the judgment of Hon'ble Bombay High court in case of Gateway Leasing (P.) Ltd vs. ACIT reported in 117 taxmann.com 442 where it was held as under: 35. Having discussed the above, we may once again revert back to the reasons furnished by Respondent No. 2 for re-opening of assessment under Section 147 of the Act. After referring to the information received following search and seizure action carried out in the premises of Shri Naresh Jain, it was stated that information showed that Petitioner had traded in the shares of M/s. Scan Steels Ltd., and was in receipt of Rs. 23,98,014.00 and therefore, Respondent No. 2 concluded that he had reasons to believe that this amount had escaped assessment within the meaning of Section 147 of the Act. 36. First of all it would be evident from the materials on record that Petitioner had disclosed the above information to the Assessing Officer in the course of the assessment proceedings. All related details and information sought for by the Assessing Officer were furnished by the petitioner. Several hearings took place in this regard where-after the Assessing Officer had concluded the assessment proceedings by passing assessment order under Section 143 (3) of the Act. Thus it would appear that Petitioner had disclosed the primary facts at its disposal to the Assessing Officer for the purpose of assessment. He had also explained whatever queries were put by the Assessing Officer with regard to the primary facts during the hearings. 37. In such circumstances, it cannot be said that Petitioner did not disclose fully and truly all material facts necessary for the assessment. Consequently, Respondent No. 2 could not have arrived at the satisfaction that he had reasons to believe that income chargeable to tax had escaped assessment. In the absence of the same, Respondent No. 2 could not have assumed jurisdiction and issued the impugned notice under Section 148 of the Act In view of the above, we hold that the initiation of proceedings under Section 147/148 of the Act are not valid in the eyes of law and liable to be quashed for the reason that the AO failed to apply his mind. Thus the reasons were merely recorded on the borrowed satisfaction by the AO. The source for all the conclusions was of the investigation report. Accordingly, we quash the same."

The Hon'ble Punjab & Haryana High Court in the case of CIT vs., Atlas Cycle Industries [1989] 180 ITR 319 (P&H) held as under :

"Held, (i) that the Tribunal was right in cancelling the reassessment as both the grounds on which the reassessment notice was issued were not found to exist, and, therefore, the Income-tax Officer did not get jurisdiction to make the reassessment."

The Hon'ble Delhi High Court in the case of Pr. CIT vs., SNG Developers Ltd., [2018] 404 ITR 312 (Del.) in which it was held as under :

"Held, dismissing the appeal, that the reasons recorded by the Assessing Officer for reopening the assessment under section 147, issuing a notice

under section 148 did not meet the statutory conditions. As already held by the Appellate Tribunal, there was a repetition of at least five accommodation entries and the total amount constituting the so-called accommodation entries would therefore, not work out to Rs.95,65,510. It was unacceptable that the Assessing Officer persisted with his "belief" that the amount had escaped assessment not only at the stage of rejecting the assessee's objections but also in the reassessment proceedings, where he proceeded to add the entire amount to the income of the assessee. Therefore there was non-application of mind on the part of the Assessing Officer. The Appellate Tribunal was justified in confirming the order of the Commissioner (Appeals) and holding that the reopening of the assessment was bad in law."

The Hon'ble Bombay High Court in the case of Siemens Information Systems Ltd., vs., ACIT & Others [2007] 293 ITR 548 (Bom.) held as under :

"The petitioner had several EOU/STP units engaged in the business of export of software. In response to the notice for reopening the assessment for the assessment year 1999-2000, the petitioner, objecting to the issuance of the notice, stated that the reasons furnished by the authority had quoted the provisions of section 10A as amended by the Finance Act, 2000, with effect from the assessment year 2001-02 and as such could not have been made applicable to the assessment year 1999-2000 and the notice had been issued under the mistaken belief about the correct position of law. However, opportunity to show cause was given to the petitioner as to why the loss claimed should not be disallowed to be carried forward. On a writ petition : Held, allowing the petition, (i) that it would be clear from the reasons given that the authority proceeded on the presumption that the law applicable was the law after the amendment and not the law in respect of which the petitioner had filed the return for the year 1999-2000. This by itself clearly demonstrated that there was total non-application of mind on the part of the authority and consequently, the notice based on that reason would amount to non-application of mind. (ii) That the income derived by the assessee from an industrial undertaking to which section 10A applies could not be included in the total income of the assessee. Therefore, the petitioner was right in filing the return by excluding the income in terms of section 10A."

In the case of Pr. CIT vs., RMG Polyvinyl (I) Ltd.,

396 ITR 5 (Del.) the Hon'ble Delhi High Court held as under:
"In the present case too, the information received from the Inv. Wing cannot be said to be tangible material per se without a further enquiry being undertaken by the learned assessing officer"

In the case of Pr. CIT vs., Meenakshi Overseas (P) Ltd., 395 ITR 677 (Del.), the Hon'ble Delhi High Court held as under :
"Reassessment notice condition precedent recording of reasons to believe that income has escaped assessment mere reproduction of investigation report in reasons recorded absence of link between tangible material and formation of opinion illegal Income Tax Act, 1961, Sec.147, 148"

In the case of Pr. CIT vs., G And G Pharma India Ltd., [2016] 384 ITR 147 (Del.), the Hon'ble Delhi High Court held as under :
"Reassessment condition precedent application of mind by assessing officer to materials prior to forming reason to believe income has escaped assessment - No independent application of mind to information received from Directorate of Investigation and no prima facie opinion formedreassessment order invalid".

In the case of Sarthak Securities Co. (P) Ltd., 329 ITR 110 (Del.), the Hon'ble Delhi High Court held as under :
"No independent application of mind by the Assessing officer but acting under information from Inv. Wing - Notice U/s. 147 to be quashed".

The Hon'ble Bombay High Court in the case of Ankita A. Choksey vs. Income Tax Officer And Others (2019) 411 ITR 207 (Bon.) held that "Condition precedent for issue of notice for reassessment is that the reason to believe that income has escaped assessment must be based on correct facts. Notice based on wrong facts is without jurisdiction and is to be quashed."

The Bombay High Court in the case of **M/s.Shodiman Investments Pvt. Ltd.** has held as under (422 ITR 437) :-
"11. ..... 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 the 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 to 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 Pvt. Ltd. [291 ITR 500], (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 Pvt. Ltd., (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 material (whatever reasons) which form the basis of reopening Assessment and its reasons which 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/s. CIT 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/s. Lakhmani Merwal Bus 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 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 merely indicates information received from

the DIT (investigation) about a particular entity, entering into suspicious transactions However, that maternal is not further linked by any reason to come to the conclusion that the Respondent- Assessee has indulged in any activity which could give use 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 DDFT (Inv.). The Assessing Officer has merely issued a reopening notice on the basis of intimation regarding reopening notice from the DDIT (Inv.) This is clearly in breach of the settled position m law that reopening notice has to be issued by the Assessing Office on its own satisfaction and not on borrowed satisfaction."

Above decisions have been applied by Hon'ble Delhi benches of ITAT in following decisions:

i) Shri Sanjay Singhal (HUF) IN THE INCOME TAX APPELLATE TRIBUNAL, CHANDIGARH BENCH "A", CHANDIGARH ITA No. 702 to 704/Chd/2018 /Date of Pronouncement : 19/06/2020

15.1. On the issue relating to the reopening under section 148 of the Act on the basis of information received from the Investigation Wing, the Hon'ble Delhi High Court in the case of Principle Commissioner of Income Tax Vs. G And G Pharma India Ltd. (supra) held as under:

"The basic requirement of law for reopening an assessment is application of mind by the Assessing Officer, to the materials produced prior to reopening the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied a post mortem exercise of analysing materials produced subsequent to the reopening will not make an inherently defective reassessment order valid." It has further been held as under: " that once the date on which the so-called accommodation entries were provided was known, it would not have been difficult for the Assessing Officer, 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 November 14,2004 and was processed under section 143(3) of the Act. Without forming a prima facie opinion, on the basis of such material, it was not possible for him to have simply concluded that it was evident that the assessee company has introduced its own unaccounted money in its bank by way of accommodation entries. The basic jurisdictional requirement was application of mind by the Assessing Officer to the material produced before issuing the notice for reassessment. Without analysing and, forming a prima facie opinion on the basis of material produced, it

was not possible for the Assessing Officer to conclude that he had reason to believe that income had escaped assessment."

15.2 On a similar issue the Hon'ble Jurisdictional High Court in the case of CIT Vs. Smt. Paramjit Kaur (supra) has held as under:

"that the Assessing Officer had not examined the information received from the survey circle before recording his own satisfaction of escaped income and initiating reassessment proceedings. The Assessing Officer had thus acted only on the basis of suspicion and it could not be said that it was based on belief that the income chargeable to tax had escaped income. The Assessing Officer had to act on the basis of "reasons to believe" and not on "reasons to suspect". The Tribunal rightly concluded that the Assessing Officer had failed to incorporate the material and his satisfaction for reopening the assessment and erefore the issuance of notice under section 148 of the Act for reassessment proceedings was not valid".

15.3 Similarly, the Hon'ble Delhi High Court in case of Sarthak Securities Co. P. Ltd. Vs. ITO (supra) held as under:
"that the formation of belief was a condition precedent as regards the escapement of the tax pertaining to the assessment year by the Assessing Officer. The Assessing Officer was required to form an opinion before he proceeded to issue a notice. The validity of reasons, which were supposed to sustain the formation of an opinion, was challengeable. The reasons to believe were required to be recorded by the Assessing Officer. Once the ingredients of section 147 were fulfilled, the Assessing Officer was competent in law to initiate the proceedings under section 147. The Assessing Officer was aware of the existence of the four companies with whom the assessee had entered into transaction. Both the orders showed that the Assessing Officer was made aware of the situation by the investigation wing and was no mention that these companies were fictitious companies. Neither the reasons in the initial notice nor the communication providing reasons remotely indicated independent application of mind. Though conclusive proof was not germane at this stage the formation of belief must be on the base or foundation or platform of prudence which a reasonable person was required to apply. From the perusal of the reasons recorded and the order of rejection objections, the names of the companies were available with the authority their existence was not disputed. The assessee in its objections had stated that the companies had bank accounts and payments were made to the assessee through banking channel. The identity of the companies was not disputed. Under these circumstances, the initiation of proceedings under section 147 and issuance of notice under section 148 of the Act were to be quashed.'

16 In the present case also the A.O. acted on the basis of information received from the investigation wings of the Department and had not independently verified from the record available to him in the form of return of income filed by the assessee. So there was only suspicion that some income having escaped assessment which cannot by itself be sufficient to sustain the action under section 147 r.w.s 148 of the Act.

ii) Ishwar Chand Mittal Vs. ACIT ITA No.8706/DEL/2019 INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI Date of Pronouncement : 25.08.2020

3. In our considered view while assuming jurisdiction u/s. 147 of the Act the AO merely acted on suspicion and we cannot say that he had "reasons to believe". 8. In our considered view the proceedings has been initiated on the basis of no material less any tangible and relevant material and as such reasons recorded do not constitute valid reasons. Moreover the reopening is only on the basis of borrowed satisfaction and as mentioned elsewhere reasons are factually incorrect and the conclusion drawn by the AO in the assessment is contradictory

iii) ITAT Delhi B bench in case of Shri Devki Nandan Bindal, ITA ITA.No.4271/Del./2019 Date of Pronouncement : 18.12.2019 (paragraph 7.1 relied Held:

7.1. In the aforesaid reasons the A.O. has reduced the crux of the Investigation report and statement of Shri Kishori Sharan Goel and came to the conclusion that assessee has entered into transaction on 4th March, 2010 for a sum of Rs.15 lacs with M/s. JMD International. The A.O, thereafter, recorded reasons for reopening of the assessment that assessee has taken accommodation entry through M/s. JMD International and, therefore, amount of Rs.15 lacs has escaped assessment. The A.O, however, while passing the assessment order has noted that assesse has made payment of Rs.15 lacs to M/s. JMD International. The A.O. in his findings has recorded inconsistent, wrong and incorrect findings that payment of Rs.15 lakh was made to M/s. JMD International and in the same line it is stated that it is nothing but an accommodation entry taken by the assessee. Again he has held in the assessment order that assessee has taken accommodation entry of Rs.15 lacs from M/s. JMD International which has to be added in his hand. However, while concluding the issue, he has made addition of Rs.15 lacs on account of unexplained expenditure. All these facts clearly show that A.O. has not applied his mind to the information received from Investigation Wing. It is only a borrowed satisfaction. The A.O. without any justification has recorded in the reasons that assessee has taken accommodation entry from M/s. JMD International. Further it is not a denying fact that assessee has made payment to M/s. JMD International. Therefore, it can never be unexplained expenditure of the assessee. The A.O, therefore, recorded in correct and wrong facts in the reasons for reopening of assessment as well as in the assessment order. In the case of DCIT, Rohtak Circle, Rohtak vs., M/s. KLA Foods (India) Ltd., New Delhi in ITA.No.2846/Del./ 2015 & .O.No.333/Del./2015 in ITA.No.2846/Del./2015, for the A.Y. 2007-2008, the ITAT, Delhi D-Bench, Delhi, while deciding the issue of reopening of the assessment under section 148 of the Income Tax Act, 1961 vide Order Dated 8th April, 2019 considered the issue in detail by following several decisions of different High Courts and came to the finding that if

the A.O. has recorded non- existing reasons and incorrect facts, then reopening of the assessment would not be valid.)

iv) Delhi ITAT SMC Bench Shri S.N. Arora/Sapra ITA.Nos.4251 & 4252/Del./2018 Date of Pronouncement : 30.01.2020
Held :

9.5. The crux of the above Judgments had been that, in case, incorrect, wrong and non-existing reasons are recorded by the A.O. for reopening of the assessment and that A.O. failed to verify the information received from Investigation Wing, the reopening of the assessment would be unjustified and is liable to be quashed.

v) **Delhi ITAT A.K.Lumbers Limited (ITA 8761/DEL/2019 Date of Pronouncement : 10.07.2020 A Bench) Held**

13. Had the Assessing Officer applied his mind before issuing notice u/s 148 of the Act, he would have known that this is not a case of some unsecured loan/cash credits taken by the assessee. The information was that the assessee has provided accommodation bills to two parties namely, Sai Kripa Enterprises and Balaji Enterprises and, that too, information was only in respect of sales made of Rs. 10 lakhs each. As mentioned elsewhere, total sales to these two parties was around Rs. 94.28 lakhs. 14. On several occasions, the assessee asked the Assessing Officer to give opportunity to cross examine Shri Kishore Sharan Goyal but that was denied by the Assessing Officer who relied upon some decisions of the Hon'ble Allahabad High Court in the case of Prem Casting Ltd and Moti Lal Padampat Udyog Limited. Both these decisions of the Hon'ble High Court are totally on different set of facts and do not lay down any ratio in so far as the opportunity of cross examination is concerned. 15. The Hon'ble Supreme Court in the case of Andaman Timber Vs. CIT in Civil Appeal No. 4228 of 2006 has categorically laid down the ratio that denial of natural justice would make an assessment void. 16. The Hon'ble Delhi High Court in the case of Pradeep Kumar Gupta 203 ITR 95 had the occasion to consider the situation where assessment was framed on statement of a third party and the assessee requested for cross examination which was denied.

19. We are not into the information received from the INV Wing, but, on application of mind of the Assessing Officer before issuing such notice. As explained elsewhere, the entire assessment based upon the information received is devoid of any application of mind."

Delhi E bench of ITAT decision in case of Marble Art ITA No. 2478/Del/2013 order dated 08.03.2021 (**Section 148 concept of borrowed satisfaction and section 151- approval of competent authority analysed in detail)**

"15.1 It is seen that in the case of the assessee, proceedings had been initiated for the three assessment years i.e. AY 2002-03, 2003-04 and 2004-05 and except for the AY 2002-03, in remaining two years, assessment was also originally framed u/s 143(3) of the Act. In all the three assessment years, notice had been issued beyond a period of four years from the relevant assessment years. At this stage, it is relevant

to refer the provisions of section 151 of the Act, which reads as under: "Sanction for issue of notice. 151. (1) In a case where an assessment under subsection (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice: Provided that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice. (2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice." 15.2 Ergo, provisions of sub section (1) of section 151 of the Act deals with the cases wherein assessment was earlier framed u/s 143(3) or section 147 of the Act, whereas subsection (2) provides for the cases, wherein no assessment was framed earlier. Under sub section (1) of section 151, if the proceedings are initiated within four years, no notice shall be issued under section 148 , unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice. However, the proviso to the sub-section (1) provides for the approval in the cases where notice is issued after the expiry of four years from the end of the relevant assessment year. The proviso provides that if the notice is issued beyond four years, such notice shall be issued after taking approval from the Chief Commissioner or Commissioner on the reasons recorded by the Assessing Officer. Further under sub-section (2), it was provided that if no assessment was framed earlier u/s 143(3)(147, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice. 15.3 Therefore, under the statutory provision, the Act provide for the safeguards for issuing notice u/s 148 of the Act. It is the intent of the legislature that superior authority should apply his mind and give his satisfaction before issuance of notice. In such circumstances, the approval should not be mechanical but should be objective satisfaction and satisfaction recorded should reflect that there is application of mind. In fact, the issue is no more res integra. The Apex Court in the case of Chhugamal Rajpal vs. S.P. Chaliha & Ors reported in 79 ITR 603 (SC) has held that important safeguards are provided in sections 147 and 151 of the Act and same cannot be lightly treated by the Commissioner. It was held that while granting the approval, the Commissioner should give reason for coming to the conclusion that it is a fit case for the issue of a notice under section 148 of the Act. The jurisdictional High Court in the case of United Electrical Company Pvt. Ltd. vs. CIT reported in[2002] 258 ITR 317 (Delhi) has held that the Legislature has provided certain safeguards to prevent arbitrary exercise of powers by an Assessing Officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. In fact, in the case of CIT v. S. Goyanka Lime & Chemical Ltd. reported in 231 Taxman 73 (MP) it was held that sanction granted by merely recording "Yes, I am satisfied" is mechanical and same is unsustainable. In fact, SLP filed against the aforesaid judgment of Madhya Pradesh High Court is also dismissed and same is reported in 237

Taxman 378 (SC). In fact, in the case of Pr. CIT vs M/s N.C. Cables Ltd. reported in [2017] 391 ITR 11 (Delhi) jurisdictional High Court has held as under:……. 15.4 When the facts of this case are seen in the light of the aforesaid binding precedents, it is found that in this case also while according approval, the ld. Addl. CIT while granting approval has merely recorded "approved" and has not given any reason at all the reason for granting approval. In fact, this shows that while granting approval, he has not even examined whether the material referred in the reasons to believe is available with the AO and had he applied his mind, he would have found that even the material referred in the reasons to believe is not available with the AO. Now be that as may be, in the A.Y. 2002-03 even the reasons recorded do not clothe the AO with the jurisdiction to reopen the assessment, as he did not had the relevant material.

15.8 From the contents of aforesaid communication it is seen that ADIT (Inv.), Meerut had recommended the case of the assessee to be reopened without providing the AO any supporting material. It can thus be safely concluded and inferred that reopening proceedings had been initiated not on the basis of satisfaction of the AO, albeit on the basis of mere recommendation of ADIT (Inv.), Meerut. The 'reason to believe' has to be that of the AO who is initiating the proceedings and in absence of any independent application of mind and satisfaction of the AO the reason to believe falls in the realm of conjectures. The AO has to have tangible material with him and even if the information has come from Investigation wing, the AO must perused the material which has been referred in the said information and examine what is the income which has escaped assessment. Recommendation may come from any person or authority but it is the AO who has to entertain reason to believe based on material before him that income chargeable to tax has escaped assessment. The most crucial material here in this case is that assessee has removed goods without payment of duty and there were invoices which were later shown to be cancelled but nowhere there is any whisper about the invoices nor they have been produced. AO simply appears to have reopened to examine the claim of section 10B and what was the basis and premise before him as to how the claim on examine u/s 10B has incorrect is not coming fore. Mere intimation received from any authority cannot lead to immediate presumption but it needs to be verified by the AO and to apply his mind. Here in this case, even the documents pertaining to Custom & Central Excise Authorities was not available with the AO at the time of initiation of proceedings which fact has been surfaced before us. Thus, we hold that the reasons recorded by the AO do not give jurisdiction to reopen the assessment u/s 147 read with section 148.

17. Since we have already quashed the assessment being without jurisdiction under section 147 on the ground that approval granted is mechanical and also for the AY 2003-04 and 2004-05, even the so called approval is not from the competent authority, therefore, other grounds raised by the assessee challenging the assumption of jurisdiction as well as the merits of additions have become purely academic

4.4 Whether reasons recorded come in category of reason to suspect or it gives rise to valid belief formation on part of JAO? Refer DHC Syfonia case 26.03.2021

Hon'ble Delhi high court in Synfonia Tradelinks Pvt Ltd vs ITO Ward 22(4) New Delhi order dated 26.03.2021

- **Section 148 applicable principles culled out (reopening of assessment)**

- valid approval /sanction ingredients

- validity of reopening to be seen only with reference to reasons recorded

- writ scope under article 226 of indian constitution

Revenue's case

"To demonstrate that the formation of the belief, as discernible from the order recording reasons, was neither arbitrary nor irrational, a reference was made to the following portion of the said order : "Further, on perusal of return of income filed by the assessee for A.Y 2010-11 and A.Y 201l-12 it has been observed that the assessee has shown unsecured loans of Rs. 38,071/- and Rs. 25,57,206/- respectively. Thus there is substantial increase in the unsecured loans during A.Y. 2011-12. A careful scrutiny of information received from the investigation wing and reportreceived from Investigation Wing. New Delhi subsequent analysis of report of investigation wing, data of transactions and verification of ITR lead to an irresistible conclusion that the assessee company has taken accommodation entry at least up to the amount of Rs.26,93 ,500/- Considering the above referred credible information, and enquiries and analysis subsequent to the information. I have reason to believe that an amount at least of Rs.26,93,500/- & Commission @ 2.5% amounting to Rs 67,338/- (Total Rs.27,60,838/-) has escaped assessment in case the of M/s SYNFONIA TRADELINKS PVT. LTD for the A. Y 2011-12 within the meaning of Section 14 7/148 of Income-tax Act, 1961." 7.2. The submission advanced was that the assessee had taken accommodation entries from, one, Mr. Pradeep Kumar Jindal in lieu of cash via dummy companies/entities which was reflected in the balance sheets of the assessees as unsecured loans. It was contended that this fact was discovered upon search being conducted at the premises of Mr. Pradeep Kumar Jindal on 18.11.2015. 7.3. Mr. Singh attempted to explain away the assertion made in the order recording reasons "Thus the assessee company has taken bogus share capital/share premium account from the above said entry providers amounting to Rs.26,93,500/-" by submitting that the reference to share capital/share premium account was an inadvertent error. 7.4. According to Mr. Singh, the accommodation entries were reflected in the return of the assessee which is accompanied by its balance sheets in the form of unsecured loans. It was, thus, the contention of Mr. Singh that at the stage of initiation of reassessment proceedings, all that one is required to enquire is hether or not prima facie material was available, which could form the basis for reassessment. Mr. Singh emphasized the fact that, at this stage, the court was not required to examine the sufficiency or correctness of the material, which formed the edifice for the formation of the belief that the assessee's taxable income had escaped assessment. In support of this plea, reliance was placed by Mr. Singh on the judgment of the Supreme Court rendered in Raymond Wooden Mills Limited v. Income Tax Officer, Central Circle XI, Range Bombay and Ors., (2008) 14 SCC 218 7.5. Mr. Singh drew our attention, as noted above, to that part of the order recording reasons which bore the heading "analysis of information" to emphasize the fact that reassessment proceedings had been initiated as respondent no.1 suspected the genuineness of the loans received during the subject AY. 7.6. In sum, Mr. Singh argued that there was cogent material available for respondent no.1 to form a belief that the assessee's taxable income had escaped assessment. This

information, according to Mr. Singh, which was received from the office of the ADIT and the report generated thereafter and its analysis formed the basis of respondent no.1's belief that the assessee's income chargeable to tax had escaped assessment. 7.7. Mr. Singh went on to state that respondent no.2 had given his approval to initiation of proceedings against the assessee only after satisfying himself that a case was made out for initiation of proceedings under the provisions of Section 147 of the Act"

Significantly Hon'ble Delhi high court after taking pains has succinctly culled out following important principles on section 148 of the Act:

"Analysis and Reasons: - 9. We have heard the learned counsel for the parties and perused the record. Before we proceed further, it would be helpful if we were to set forth certain well-established principles enunciated by the courts over the years vis-à-vis initiation of proceedings under Section 147 of the Act. (i) The reasons which lead to the formation of opinion or belief that the assessee's income chargeable to tax has escaped assessment should be inextricably connected. In other words, the reasons for the formation of opinion should have a rational connection with the formation of the belief that there has been an escapement of income chargeable to tax (See: ITO v. Lakhmani Mewal Das, 1976 3 SCC 757] (ii) The expression "reason to believe" is stronger than the word "satisfied". The belief should be based on material that is relevant and cogent. (See: Ganga Saran & Sons Pvt. Ltd. v. ITO, 1981 3 SCC 143]. (ii) (a) The assessing officer should have reasons to believe that the taxable income has escaped assessment. The process of reassessment cannot be triggered based on a mere suspicion. The expression "reason to believe" which is found in Section 147 of the Act does not have the same connotation as "reason to suspect". The order recording reasons should fill this chasm. The material brought to the knowledge of the assessing officer should have nexus with the formation of belief that the taxable income of the assessee escaped assessment; the link being the reasons recorded, in that behalf, by the assessing (iii) The AO is mandatorily obliged to record reasons before issuing notice to the assessee under Section 148(1) of the Act. This is evident from the bare perusal of sub-section (2) of Section 148 of the Act. (iv) No notice can be issued under Section 148 of the Act by the A.O. after the expiry of four years from the end of the relevant AY unless the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner arrives at a satisfaction based on the reasons recorded by the A.O. that it is a fit case for issuance of a notice under Section 148 of the Act. [See: Section151(1) of the Act]. (v) The limitation for issuance of notice under Section 148 as prescribed under Section 149 of the Act commences from the date of its issuance while the time limit for passing the order of assessment, reassessment, computation and re-computation as prescribed under Section 153 of the Act commences from the date of service [See: R.K. Upadhyay v. Shanab Bhai P. Patel, (1987) 3 SCC 96]. (vi) A jurisdictional error would occur, which can be corrected by a writ court, if reasons to believe are based on grounds that are either arbitrary and/or irrational. (See: Sheo Nath Singh v. Appellate ACIT, Calcutta (1972) 3 SCC 234]. 9.1. Thus, if one were to apply the aforestated principles, it would be clear as daylight that the order recording reasons

discloses complete non-application of mind. The reason we say so is discernible from the following:…"

Important inferences on basis of above principles:

"9.5. *Mr. Singh, in a desperate attempt to salvage the situation, drew our attention to the unsecured loans shown in the income tax returns of the assessee for AYs 2010-2011 and 2011-2012 amounting to Rs.38,071/- and Rs.25,57,206/- respectively. Apart from anything else, simple math would show that the cumulative total of these figures is Rs.25,95,277/- and not Rs.26,93,500/- which, according to respondent no. 1, is the unexplained credit in the books of accounts of the assessee and, hence, required to be added under Section 68 of the Act. Therefore, for Mr. Singh to say that these are inadvertent errors and hence should be ignored, in our opinion, is an argument that is completely misconceived. As indicated above, if the information received (from the investigation wing) was that the accommodation entries, in lieu of cash, were taken in the form of share capital and share premium they could certainly not be linked to unsecured loans received in AYs 2010-2011 and 2011-2012,*

9.6. It is pertinent to note that in the objections filed by the assessee, an attempt has been made to explain the purported accommodation entries by stating therein that the advances had been given to the 5 companies adverted to in the order recording reasons which were received back on the dates given in the said order. The assessee also went on to state, in its objections, that the opening balance (as on 01.04.2010) and closing balance (as on 31.03.2011) of the share premium account (Rs. 3,66,16,800/-) and the share capital account (Rs. 24,15,200/-) remained unchanged. In other words, the emphasis was that there was no increase in the share capital or the share premium account, as alleged, or at all. In the order passed by the assessing officer dated 08.10.2018, whereby, the objections of the assessee were rejected; none of this has been dealt with. Therefore, in our view, while the assessing officer may suspect that the taxable income of the assessee escaped assessment, he could not have formed a belief qua the same based on the material which is, presently, on record.

9.7. Therefore, in our opinion, the formation of belief by respondent no.1 that income of the assessee chargeable to tax had escaped assessment, was unreasonable and irrational, as it could not be related to the underlining information; something which is discernible from a bare reading of the order recording reasons.

9.8. This apart, what is even more disconcerting is the fact that respondent no.2, who accorded sanction for triggering the process under Section 147 of the Act, simply rubber-stamped the reasons furnished by respondent no.1 for issuance of notice under Section 148 of the Act. 9.9. The provisions of Section 151(1) of the Act required respondent no.2 to satisfy himself as to whether it was a fit case in which sanction should be accorded for issuance of notice under Section 148 of the Act and, thus, triggering the process of reassessment under Section 147. The sanction-order passed by respondent no.2 simply contains the endorsement 'approved'. 10. In our view, the sanction-order passed by respondent no.2 presents,

metaphorically speaking 'the inscrutable face of sphinx' (See: Breen v. Amalgamated Engineering Union [1971] 2 QB 17500; Also see: State of H.P. v. Sardara Singh, (2008) 9 SCC 392). In our view, the satisfaction arrived at by the concerned officer should be discernible from the sanction-order passed under Section 151 of the Act.

Even if we were to assume for the moment that the approval of the ACIT was rightly taken, a bare perusal of the endorsement would show that there is no application of mind as to whether the information received by the AO had any nexus with the formation of honest belief that the assessee's taxable income had escaped. What is glaring is that the ACIT notes that income to the tune of Rs.27,60,838/- had escaped taxation whereas, in the order recording reasons, the taxable income has been quantified as Rs.26,93,500/-. As noted above, based on the arguments of Mr. Singh that the escaped income should be related to unsecured loans, there is in play a third figure which is Rs.25,95,277/

10.5. As noted above, in the instant case, because of the failure on the part of respondent no.1 to correlate the information received with the ostensible formation of belief by him, respondent no.2 attempted to connect, via her counter-affidavit, that the escaped income with the "suspicious" unsecured loan entries reflected in the assessee's returns for AY 2010-2011 and 2011-2012. As correctly argued by Mr. Kochar, the counter-affidavit and the submissions made across the bar cannot be used to sustain the impugned actions. The order recording reasons and the order granting sanction should speak for themselves. (See observations made Commissioner Of Police, Bombay vs Gordhandas Bhanji AIR 1952 SC 16 and Mohinder Singh Gill and Ors. vs. The Chief Election Commissioner, New Delhi and Ors. (1978) 1 SCC 405)

10.8. This brings us to another ground raised in the writ petition, which is, that there was a huge time lag between the issuance of the impugned notice under Section 148 of the Act and the date when the order recoding reasons was furnished to the authorized representatives of the petitioner. While the assessee is, in our view, right in contending that if the time lag is huge, it does point in the direction that the order was ante-dated, a final view on this aspect could have only been taken if the original record was examined by us. Since the revenue has denied the allegation levelled against it and Mr. Kochar did not press this issue during the hearing, we can't reach a definitive view on this aspect of the matter based on the record available before us Therefore, this submission, made on behalf of the assessee, cannot be accepted. 11. Given the aforesaid, we are also of the view that since respondent no.1 was unable to link the information received with the formation of belief, a jurisdictional error did occur, which, this Court, is empowered to correct, by exercising its powers under Article 226 of the Constitution of India (See: Calcutta Discount Co. Ltd. vs. Income Tax Officer, Companies District I Calcutta and Another, (1961) 2 SCR 241). 11.1. Although Mr. Singh did argue that the assessee should be relegated to statutory remedies, in our view, a case is made out for interference at this stage itself. According to us, relegating a party to an alternative remedy is a selfimposed limitation which, however, does not denude the court of its powers under Article 226. The Court is duty-bound to exercise its powers under Article 226 where ever it finds that a statutory authority has exercised its jurisdiction either irregularly or acted in a matter in which it had no jurisdiction or committed a breach of the principles of natural justice.

11.2. Before we conclude, we must also indicate that the order recording reasons neither discusses the contents of the report received from the investigation wing or the statements made by Mr. Pradeep Kumar Jindal and his associates. The order recording reasons, merely, indicates that the formation of belief is

based on these sources. Furthermore, although, there is a reference to Shri Laxman Singh Satyapal and Ms. Meera Mishra in paragraph 3.14 of the counter-affidavit, as persons, whose statements were also recorded during the search, which formed the basis of initiation of proceedings under Section 147 of the Act, there is no reference to them in the order recording reasons. 11.3. Besides this, the revenue has taken the position that not only the report of the investigation wing but also the statements of Mr. Pradeep Kumar Jindal and his aforementioned associates were furnished to the authorized representative of the assessee in the proceedings held before respondent no.1 on 12.10.2018 (See para 3.6 of the counter-affidavit). The proceedings sheet of 12.10.2018 [which is appended with the counter-affidavit] does not refer to this fact. Therefore, apart from anything else, a case could have been made out also of breach of principles of natural justice. For the reasons best known, Mr. Kochar did not press this issue. We need not elaborate any further on this aspect of the matter as our decision does not turn on whether or not there has been a breach of principles of natural justice.

Conclusion: - 12. Thus, for the foregoing reasons, we are inclined to quash the impugned notice dated 31.03.2018 issued under Section 148 of the Act as well as the order granting sanction issued by respondent no.2. It is ordered accordingly. Parties will bear their own cost"

4.5 Whether reasons recorded are based on mere change of opinion and review sought to be made? Refer SC decisions in 320 ITR 561, 404 ITR 10, 424 ITR 607 etc (applicable where already 143(3) regular assessment done- also check fresh tangible material there or not?)?

4.6 Whether reopening made after end of four years from end of relevant asst. year is marred by first proviso to sec. 147 of the Act? Refer DHC 308 ITR 38 Haryana acrylic case and 424 ITR 607 etc? Check first proviso to sec. 147 complied in such cases reopened after end of four years ?

4.7 Whether reopening made within available time limit of scrutiny notice under section 143(2) of the Act? If Yes it is invalid as per various case laws

4.8 Whether reasons recorded properly considers assessee's past history and material on records like audited final accounts, ITR filed and regular assessment if any made earlier u/s 143(3)? Whether approval/sanction from competent authority given is as per law with due application of mind?

4.9 Whether reopening done on protective basis? If yes then it is not permissible as per various Bombay High Court decisions in UTI case etc

4.10 Whether reopening done just to overcome and overreach prior appellate authority decision in favor of assessee where earlier asst was quashed by said appellate authority? One may check for doctrine of partial merger as codified in provision of sec 147 of the Act etc

4.11 Whether reasons recorded are revenue/tax neutral that is whether it lacks positive and active escapement of income ? Referring to Leading commentary of Mr Arvind datar on sec. 148 one may refer to Civil procedure code Order 7 rule 11 and cr PC sec. 482 – theory of demurrer – and pray for dropping of proceedings

4.12 Whether reasons recorded are against consistency principle (that is whether past and subsequent tax assessment accepting assessee's tax position)? Refer SC 394 ITR 449, 358 ITR 295, 193 ITR 31 etc

4.13 Whether reopening made is effected by any multiplicity of proceedings that is already one proceedings going on, still reopening made? Refer SC 242 ITR 381 etc

4.14 Whether reopening made on basis of incorrect and non existing and erroneous facts?Whether reasons recorded are based on incorrect and incomplete facts? If Yes one may plead strongly for its dropping vide various HC decisions on the subject

Further refer to: **List of Hon'ble Delhi & Other Hon'ble high courts and ITAT decisions which covers aforesaid aspect of controversy (reopening made on basis of incorrect and wrong facts):**

S.No	Particulars and case tile /citation etc	Remarks in brief
1.	Chinitto Tomar Hon'ble Delhi high court ITA 790/2014 Order dated 23.12.2014 **(54**	PARA 3,4,5

	Taxmann.com 16)	
2.	Oriental Insurance Company Hon'ble Delhi high court ITA 174/2013 (Order dated 15.09.2015)	Para 8 to 12
3.	Hon'ble Delhi high court in case of Krown Agro **375 ITR 460**	Para 11 to 14
4.	Hon'ble Delhi High Court in the case of Pr. CIT vs., SNG Developers Ltd., [2018] **404 ITR 312 (Del.)**	
5.	The Hon'ble Punjab & Haryana High Court in the case of CIT vs., Atlas Cycle Industries [1989] **180 ITR 319** (P&H)	
6.	Hon'ble Bombay High Court in the case of Siemens Information Systems Ltd., vs., ACIT & Others [2007] **293 ITR 548** (Bom.)	
7.	Pr. CIT vs., RMG Polyvinyl (I) Ltd., **396 ITR 5** (Del.) the Hon'ble Delhi High Court	
8.	Pr. CIT vs., Meenakshi Overseas (P) Ltd., **395 ITR 677** (Del.), the Hon'ble Delhi High Court	
9.	Pr. CIT vs., G And G Pharma India Ltd., [2016] **384 ITR 147** (Del.), the Hon'ble Delhi HighCourt	
10.	Sarthak Securities Co. (P) Ltd., **329 ITR 110** (Del.),the Hon'ble Delhi High Court	
11.	**Hon'ble Bombay High Court in the case of Ankita A. Choksey vs. Income Tax Officer And Others (2019) 411 ITR 207 (Bom.)**	
12.	Bombay High Court in the case of **M/s.Shodiman Investments Pvt. Ltd.** has held as under (422 ITR 437)	
13.	**ITAT Delhi B bench in case of Shri Devki Nandan Bindal, ITA ITA.No.4271/Del./2019 Date of Pronouncement : 18.12.2019**	**paragraph 7.1**
14.	Delhi ITAT SMC Bench Shri S.N. Arora/Sapra ITA.Nos.4251 & 4252/Del./2018 Date of Pronouncement : **30.01.2020**	Para 9.5

15.	**Delhi ITAT A.K.Lumbers Limited (ITA 8761/DEL/2019 Date of Pronouncement : 10.07.2020 A Bench)**	Para 13 &19
16.	**Hon'ble Calcutta high court in its leading decision in case of** Sunrolling Mills (P) Ltd. vs. ITO (1986) **54 CTR (Cal) 268 : (1986) 160 ITR 412 (Cal),**	292B analysed
17.	Ahmedabad bench of ITAT decision in case of Deepak B Vaswani ITA No.: 161/Ahd/2018 Date of pronouncement **: June 17, 2019**	292B analysed
18.	Delhi ITAT Ishwar Chand Mittal ITA 8706/Del/2019 order dated **25.08.2020**	Para 13 &18
19	Delhi ITAT recent order in case of Strategem Portfolio P Ltd ITA 7878/Del/2019 (order dated **15.09.2020**)	Para 5.4/Page 17 &18
20.	Delhi ITAT ITA.No.2857/Del./2017 **M/s. SPJ Hotels Private Limited, Date of Pronouncement : 10.12.2018**	Para 13.1 & 13.2
21.	**Delhi High Court in Rainee Singh 330 ITR 417** The notice issued under s.148 was based on assumption of wrong facts. The notice issued was invalid. S.147 and s.148 of the Income Tax Act 1961	
22.	***Khem Singh Sankhla vs UOI and Ors.*** *High Court of Rajasthan 181 CTR 380, 133 TAXMAN 767, 266 ITR 485, 179 TAXATION 608* ***The re-opening being based on wrong assumption of facts was invalid. (same in*** **CIT vs Mahesh Gum and Oil Industries** 292 ITR 397)	
23.	***Most recent Bang ITAT in case of Tata Advanced Materials Limited in ITA 2181/Bang/2018 order of C bench dated 28.09.2020***	**Detailed principles on sec. 148 culled out in para 6 from pages 9 to 16**
24.	**Rajender Kumar Sehgal v. ITO (2019) 414 ITR 286 (Delhi)(HC)**	—Department attempting to correct error by changing name of entity in reasons to believe"—Not curable defects

		notice is invalid
25.	**Shodiman Investments Bombay high court** 422 ITR 437	
26.	**Smt. Meena Gupta ITA.No.7372/Del./2019 Assessment Year 2011-2012 Delhi ITAT**	**10th September, 2020** Para 8.1 etc
27.	Admach auto Limited Delhi ITAT ITA NO. 9543/DEL/2019 A bench 18.12.2020: *5.2 After going through the aforesaid order of the ITAT, Delhi Bench, we are of the view that there is force in the arguments advanced by the Ld. Counsel for the assessee on the issue of disposal of objections in the assessment order in not passing a separate order for disposing off the objections of the assessee, which is clear violation of the law laid down by the Hon'ble Apex Court in the case of GKN Driveshaft 259 ITR 19. Secondly, in the reasons, the AO has recorded that assessee has obtained the accommodation entry of Rs. 60 lacs in the name of 6 dummy / paper companies during the year under consideration, but finally made the addition of Rs. 50 lacs in the assessment order which also shows that AO has not applied his mind before recording the reasons in issuing the notice u/s. 148 of the Act. Therefore, the addition in dispute deserve to be cancelled*	
28.	Delhi ITAT G bench Sanjiv Malhotra case 23.10.2020 ITA 6723/Del/2018	Para 28
29.	Gangeshwari Metals Pvt Ltd ITAT Delhi bench ITA 9343/Del/2019 order dated 22.10.2020 **C bench**	Para 10 to 15

4.15 Whether reopening made on directions/dictates of any other authority ? If yes it is to be strongly objected.

4.16 If assessee is able to successfully establish its case that no positive escapement exist and remains on the very basis /foundation of reasons recorded u/s 148(2) like say cash deposit explained from sale of capital asset , source of investment established etc then further visit to checking of the genuineness of source of cash deposit and/or genuineness of source of investment or on capital gains tax position on sale of capital asset is probably prohibited in law as per sublato fundamento cadit opus principle.

: Surat bench of ITAT in case of Ashish Natvarlal Vashi in ITA 3522/AHD/2016 order dated 19.04.2021 (Reopening to verify source of cash deposit is held invalid after analyzing entire labyrinth of law)

"....12. In order to examine the validity of reopening the assessment under section 147/148 of the Act, let us, first of all, we should examine the reasons for reopening the assessment, which is placed at paper book page no.5, and the same is reproduced below:

"11. Reasons for the belief that income has escaped assessment: In this case the assessee has cash deposit Rs.22,77,550/- in ICICI Bank. A ***query letter was issued to the assessee on 03.01.2014 requesting the assessee to furnish copy of return of income filed for AY.2007-08 with necessary evidence of cash deposit. The letter was duly served upon the assessee. The assessee has not replied till this date. In this case the A.Y. for 2009-10, 2010- 11 & 2011-12 has been finalized and unexplained cash has been added in his total income. Considering the above facts, the assessee has no comments for reply. It is seen that assessee's cash-deposit is genuine or not since no evidence on records.*** *Therefore, I have reason to believe that income of the assessee exceeding Rs.1 lacs for the accounting period 2006-07 relevant to A.Y. 2007-08, has escaped assessment within the meaning of section 147 of the I.T. Act, 1961 Place: Navsari Date: 24.03.2014 (J.C. Dhorawala) Income –tax Officer, Ward-1 Navsari"*

13. Now, we shall analyze the above reasons recorded by the Assessing Officer. We note that in the reasons recorded by the Assessing Officer it is mentioned that assessee has deposited cash to the tune of Rs.22,77,550/- in ICICI Bank. ***The assessee did not file necessary evidence of cash deposit, therefore assessing officer presumed that income has escaped assessment to the extent of cash deposit of Rs. 22,77,550/-.***

We note that Assessing Officer has opined that an income of Rs. 22,77,550/- has escaped assessment of income because the assessee has Rs 22,77,550/- in his bank account but then such an opinion proceeds on the fallacious assumption that the bank deposits constitute undisclosed income, and overlooks the fact that the sources of deposit need not necessarily be income of the assessee. The amount deposited in the bank account may be out of sale proceeds of investments, property or agricultural income of the assessee which may be exempted under the Income Tax Act. Of course, it may be desirable, from the point of view of revenue authorities, to examine the matter in detail, but then reassessment proceedings cannot be resorted to only to examine the facts of a case, no matter how desirable that be, unless there is a reason to believe, rather than suspect, that an income has escaped assessment. Thus, just to reopen the assessment, based on the cash deposits would not make the Revenue's case strong, because mere fact that these cash deposits have been made in a bank account, which according to us do not indicate that these deposits constitute an income which has escaped assessment. Such cash deposit may be out of past savings. The above reasons recorded for reopening the assessment do not make out a case that the assessee was engaged in some business and has not been filed return of income. Therefore, the cash deposit in the bank account could not be basis for holding the view that income has escaped assessment. The assessee may have deposited the cash out of his sale of capital asset, sale of property and sale of investment etc. Therefore, reasons recorded by the Assessing Officer are not valid and hence the reassessment proceedings initiated based on the reasons recorded is bad in law. *We note that on the similar facts the Co-ordinate Bench of Surat in the case of Rinakumar A. Shah (in ITA No.172/AHD/2017 for AY.2007-08, order dated 30.04.2019, held the reassessment proceedings an invalid. On the similar facts, the reassessment proceedings was quashed by the Co-ordinate Bench in the case of Shri Hashmukhbhai B. Patel (in ITA No. 193/SRT/2019 for AY.2012-13) order dated 24.07.2019…* ***Besides, mere cash deposit in the bank account would not disclose escapement of income. The assessee might have deposited the cash out of his sale of capital asset, sale of property and sale of investment, agricultural income etc. Therefore, we are inclined to hold the reassessment proceedings under section 147 of the Act as bad in law and hence, we quash the reassessment proceedings."***

4.17 What is the latest judicial trend on scope of explanation iii to section 147 of the Act as far as authority to consider the other issues on which reasons are not recorded is concerned?

Refer:

INS Finance & Investment P. Ltd IN THE INCOME TAX APPELLATE TRIBUNAL DELHI BENCH "C" NEW DELH I.T.A. No.9266/DEL/2019 Assessment Year 2010-11 Date of pronouncement: 26 10 2020

30. In the present case, the reasons were recorded only with respect to issue of share of capital of Rs. 2.50 crores from M/s. Prraneta Industries Ltd. (now known as M/s. Aadhaar Ventures India Ltd.) and same having been deleted by us, the remaining addition of Rs. 5,12,40,000/- has no legs to stands and is hereby ordered to be deleted. 31. However, for sake of completeness and keeping in mind the gravity of issue, we feel appropriate to decide the legality of additions made over and above the reasons recorded in the light of scope of proceedings u/s 147 of the Act. As mentioned earlier, the provisions of section 147 are potent and its application is restricted to deserving cases having satisfied the defined criteria i.e. existence tangible material evidencing escapement of income and application of mind. Further, the act has inbuilt checks and balances to ensure proper exercise of power u/s 147 which included prior approval of superior authority. 32. It is the argument of the Ld. AR appearing for the appellant assessee that once the assessing officer records reason and obtains approval for issue of notice u/s 148, the scope of proceedings u/s 147 gets laid down and it is not open to assessing officer to make roving and fishing enquiry and arbitrarily enhance the scope of reassessment proceedings as per whims and fancies. It was further contended that Explanation 3 to section 147 does not provide unfettered power to assessing officer to go beyond the reasons and same has to be read in conjunction with principle provision of section 147, 148 and 151. The upshot of argument of Ld. AR is that for making any further enquiry or addition, the following conditions must be satisfied: i. There must be some tangible material coming to the notice of assessing officer during the course of assessment which shows escapement of income in respect of some other item (other than one referred in the reasons). ii. The assessing officer must record reasons for including such other item in the scope of ongoing reassessment proceedings u/s 147 iii. Fresh approval must be obtained u/s 151 and notice u/s 148 must also be issued. 33. In support of above proposition, the ld. AR has relied upon the decision of Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd. v. CIT[2011] 336 ITR 136 (Del) and coordinate bench in the case of Sh. Devki Nandan Bindal v. ITO (ITA No. 4271/D/19 dated 18/12/2019). 34. We have given careful thought to the argument of the Ld. Counsel and find ourselves in agreement with same. The ntention of legislature behind enacting provisions of section 147 is not to create a parallel assessment proceeding akin to regular assessment framed u/s 143(3) of the Act. The purpose of section 147 is to catch in the tax net income escaping assessment based on tangible material. The requirement of tangible material and approval u/s 151 is to keep check on arbitrary exercise of power u/s 147 which necessarily means that assessing officer cannot convert reassessment proceedings into regular scrutiny proceedings at his/her sweet will. It goes without saying that Explanation cannot defeat the intention and purpose of a section and as such the application of Explanation 3 will have to be in accordance with checks and balances which are applicable at the time of issuance of notice u/s 148. 35. In the present case, in respect of share capital of Rs. 5,12,40,000/- received from 18

parties, the assessing officer initiated fresh enquiry during the course of reassessment proceedings on the basis of books of account of the appellant. There is no dispute that very same material was in existence when assessing officer recorded reasons and it is neither the case of the assessing officer that there was any failure or omission on part of the appellant in disclosing any information nor any case of fresh information coming to the notice of the assessing officer. The original action u/s 148 was on the basis of some information which was has already been affirmed by us. However, in respect of other items, the assessing officer himself made random enquiry which is absolute misuse of power in the context of scope of section 147 as well as settled legal principle. 36. It is further noted that there is no iota of material or information with regard to share capital of Rs. 5,12,40,000/- received from 18 parties. In fact the assessing officer gathered the information after calling for bank statement from the bank as evident from para 10 of the assessment order. It is classic case of roving enquiry where the assessing officer is exceeding its jurisdiction in total disregard to scheme and intent of section 147 of the act. Such action of the assessing officer not only renders the purpose of approval u/s 151 otiose but also strikes at the root of section 147 of the Act. Accordingly, we are of the view that assessing officer was not justified in expanding the scope of reassessment proceedings u/s 147 without following the due course and as such the addition of Rs. 5,12,40,000/- is in the teeth of provisions of section 147 of the Act and liable to deleted. As a result, Ground No. 3 and 5 are allowed.

Also refer:

*Hon'ble Allahabad High Court (**380 ITR 257**) Dr. Shiva Kant* **Mishra vs Commissioner Of Income Tax on 9 July, 2015**

IN THE HIGH COURT OF JUDICATURE AT MADRAS Reserved on: 12.10.2015 & Pronounced on: 27.10.2015 CORAM THE HON'BLE MR.JUSTICE V.RAMASUBRAMANIAN and THE HON'BLE MR.JUSTICE T.MATHIVANAN W.A.Nos. 1171 and 1172 of 2015M/s. PVP Ventures Limited

IN THE INCOME TAX APPELLATE TRIBUNAL"G" BENCH, MUMBAII.T.A. No. 5452/Mum/2016Assessment Year: 2009-10Date of Pronouncement: 04/04/2018**Juliet Industries Limited**

4.18 Whether merely to call/ask for return of income in cases of non filers (to check source of investment/transaction etc) reopening provisions can be used automatically taking shelter of explanation to section 147 *(interplay with section 142(1)/section 133(6) etc)* ?

Shri Tyrone Patrick Lemos I.T.A. No. 2414/Ahd/2018 Date of Pronouncement 20/11/2020

Proposition 1:

10. At this juncture, we may add that Section 147 of the Act confers jurisdiction upon the Assessing Officer for carrying out assessment proceedings. The legal objection raised by the assessee on the validity of assumption of jurisdiction under s.147 r.w.s. 151 of the Act and consequent additions carried out under s.2(22)(e) of the Act within the framework of the provisions of Section 147 of the Act strikes to the root of the matter and therefore can be challenged before the Tribunal even if not raised or not argued diligently before the lower authorities. We, thus, do not concur with the objections of the Revenue on this score.

Proposition 2:

In the instant case, where the AO has not proceeded to make any additions on the ground initially raised that source of investment in the property remains unexplained, the AO is not entitled in law to supplement the reasons so recorded at the subsequent stage of re-assessment and make additions, albeit involving the same sum of money, on a different ground by invoking deeming fictions of Section 2(22)(e) of the Act de hors the cause of action manifested under s. 148(2) of the Act. This view finds support from plethora of decision including the decision of Hon'ble Supreme Court in Ram Bai v. CIT (1999) 236 ITR 696 (SC); Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom.), East Coast Commercial Co. Ltd. v. ITO (1981) 128 ITR 326 (Cal.). Hence, the additions made by the AO towards deemed income under s.2(22)(e) of the Act, being extraneous to reasons recorded, requires to be struck down on this score itself.

Proposition 3:

As noted, Section 147 of the Act confers upon the AO, a power to expose the assessee to an assessment where any chargeable income is believed to have escaped assessment. Explanation 2 to Section 147 of the Act inter alia also deems escapement of chargeable income where no ROI has been furnished by the assessee although the total income of the assessee in respect of which he is assessable under the Act exceeds the maximum amount which is not chargeable to income tax. Hence, the essential pre-requisite for invocation of sphere under s.147 of the Act is the plausibility of escapement of chargeable income on cogent grounds, both in the event of return having been filed or where no return has been filed. When read in conjunction with the main body of provision, The AO can compel the assessee to file return of income under s.147 of the Act only in the event of formation of belief towards escapement of income. Without having cogent reasons or material for belief towards escapement, even a non-filer of return of income cannot be forced to file a return with the aid of Section 147 of the Act. The remedy to revenue

probably lies in S. 142(1) to ask the non filers to file their return in appropriate cases with no stringent requirements similar to S. 147 attached.

Proposition 4:

9. Adverting further, there is yet another reason to impugn the action of AO. It is an admitted position that the assessment proceedings in the instant case came into motion owing to issuance of notice under s.148 of the Act for which certain reasons were recorded as noted earlier. The reasons so recorded were sent by AO for formation of 'satisfaction' and approval thereon by JCIT under s.151 of the Act. We notice from the approval memo dated 25.01.2016 given by the JCIT which notes the name of the assessee alongwith many other assessees and grants a consolidated approval for action under s.147 of the Act by stating 'your proposal for reopening the above cases under s.147 of the Act is hereby approved'. Hence, as can be seen, any reference to formation of 'satisfaction' of the JCIT prior to approval, even in brief, is sorely missing. It is a well settled proposition that the accord of approval without satisfaction is a nullity in the eyes of law. While a combined approval by designated authority is not a bar, ingredients of Section 151 of the Act is, however, required to be fulfilled qua each case. 9.1 At this juncture, it may be pertinent to note that 'satisfaction' means to be satisfied with state or things, meaning thereby to be satisfied in one's own mind. Satisfaction is essentially a conclusion of mind. The word 'satisfied' means 'make up its mind'. The act of satisfaction is not an independent act. It is associated with existence of cogent material. The condition precedent is 'satisfied'. It is not mere confirmation of the act of the AO but something more. It is statutory requirement and not a mere administrative act that the superior authorities viz. JCIT/ CIT etc. need to be 'satisfied' on the conclusion of the AO. The satisfaction of the competent authority on the reasons recorded for initiation of action under s.147/148 of the Act precedes an approval. The approval granted without expressly satisfying himself cannot be regarded as valid approval for the purposes of Section 151 of the Act. Hence, in the absence of any express satisfaction recorded by JCIT while granting approval under s.151 of the Act, the consequential action of the AO under s.147 of the Act cannot be upheld. 9.3 In this backdrop, a cardinal question that arises is whether the AO, in the facts of the case, would be ousted in law to initiate the impugned re-assessment proceedings under s.147 of the Act on the basis of consolidated approval granted by the superior authority under the umbrella of Section 151 of the Act for several assesses in a combined approval memo dated 25.01.2016 (i) when such memo is stoically silent on disseminating any 'satisfaction' whatsoever for the purposes of approval so granted and when (ii) no process for formation of purported satisfaction, if any, towards alleged 'reasons to believe' of AO qua the assessee was found discernible in such consolidated approval.

9.5 It is true that expression 'satisfied' provides greater latitude and obligation cast on Superior authority towards 'satisfaction' under S. 151 is on a relatively lower pedestal vis a vis obligation cast on AO towards 'reasons to believe' under S. 147 of the Act. Nevertheless, a process of reasoning for arriving at a satisfaction on " why approved" and " how income is alleged to be escaped in the light of material he is privy to" by the JCIT, howsoever, in brief, is expected by the Court/ appellate authority to gauge the application of mind on the reasons recorded. A mere finding towards purchase of property may not necessarily galvanise the satisfaction of involvement of unexplained money in all cases universally. For instance, the investment made can arguably be out of existing source or capital of earlier years or out of

other means which is not in the nature of chargeable income. The difference between connotations 'reasons to believe' and reason to suspect' are vital and substantial. The Supervisory Authority was under some duty to apply its mind to the relevancy of material before sanction of proceedings. In the light of judicial precedents noted above and many more, a summary approval by the JCIT without expressing any satisfaction on presence of underlying materials showing escapement while exercising the functions under s.151 of the Act cannot be countenanced in law. This apart, a consolidated approval memo of multiple assessee without recording satisfaction qua each individual case raises serious doubt on plausibility of implicit satisfaction for each case as contemplated in Section 151 of the Act. A nondescript approval under S. 151 without requisite satisfaction is a nullity. The issuance of notice under S. 147 itself is thus void where the sanction is not obtained in terms of S. 151 of the Act. Hence, on this ground also, the notice under s.147 of the Act itself gets vitiated.

Further refer:

IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH, AHMEDABAD I.T.A. No. 770/Ahd/2018 Vipul Virendrakumar Patel Date of Pronouncement 03/09/2020

"6.2 In this backdrop, we firstly observe that the salary income of the assessee is admittedly Rs.76,821/-, which is not chargeable to tax on standalone basis being lower than threshold limit. Secondly, there are allegations of cash deposits in bank account in excess of Rs.10Lakhs as per some non-descript and vague information as per AIR-001. Similarly a non-specific reference has been made by the AO to the CIB-32 regarding share transactions of Rs.20,000/- or more entered into by the assessee. Thus, entire gamut of information available with AO is vague and without any proper identification and quantification of alleged escaped income. Hence, what is essentially available before AO is that assessee has deposited cash above Rs.10 Lakhs and entered into certain share transactions giving rise to presumption of escapement of income. We now straightway notice the decision of the co-ordinate bench of Tribunal in the case of Shri Ravindrasinh N. Gohil vs. ITO ITA No. 3343 & 3344/Ahd/2015 order dated 04.09.2019 wherein it has been observed that mere cash deposits in the bank account cannot justify the belief or inference of escapement of income per se. Same logic would apply for indulging in share transactions in reference. Thus, the initial onus which lay upon the AO towards alleged escapement of chargeable income at the time of issuance of notice and Section 147 of the Act is not found to be discharged. In the absence of specific details of escaped income above the threshold limit shown to be in possession of AO, the notice under s.147 of the Act is extraneous and bad in law. 6.3 Since, the proceedings under s.147 of the Act is quashed for the reasons noted above, we do not consider it necessary to go into the other aspects of legality of the proceedings nor do we consider it necessary to look into the merits of the additions"

4.19 whether section 148 /reasons are based on any search after 1.6.2015 based information? if yes one may argue that sec. 153C is right provision refer cbdt circular 19/2015 and not section 148 refer 432 ITR 384 etc

4.20 whether sanction and approval etc is validly taken as per law with due application of mind? Refer inscrutable face of sphinx – phrase used in DHC synfonia case 26.03.2021 etc

Hon'ble Delhi high court Yum Restaurants case order dated 31.08.2017 W.P (C) 614/2014 (Non application of mind at various levels highlighted on facts where proforma of reasons recorded incorrectly mentioned that assessment has been already taken place u/s 143(3) where as correct fact was return filed was only processed u/s 143(1) of the Act) : "*11. The purpose of Section 151 of the Act is to introduce a supervisory check over the work of the AO, particularly, in the context of reopening of assessment. The law expects the AO to exercise the power under Section 147 of the Act to reopen an assessment only after due application of mind.* ***If for some reason, there is an error that creeps into this exercise by the AO, then the law expects the superior officer to be able to correct that error.*** *This explains why Section 151 (1) requires an officer of the rank of the Joint Commissioner to oversee the decision of the AO where the return originally filed was assessed under Section 143 (3) of the Act. Further, where the reopening of an assessment is sought to be made after the expiry of four years from the end of the relevant AY, a further check by the further superior officer is contemplated*.

Also refer Delhi ITAT recent decision in case of Eminent computers pvt ltd 24.11.2020 **ITA No.6372/Del./2019 (ASSESSMENT YEAR : 2010-11)**

"18. Even the AO has not applied his judicial mind independently while recording the reasons for initiating proceedings u/s 147/148 of the Act. Bare perusal of the reasons recorded shows that the entire emphasis is placed on the report of the Investigation Wing, which has otherwise been based upon the statements of Pradeep Kumar Jindal, Shri Subodh Kumar Khandelwal, Ms. Seema Khandelwal & Ms. Meera Mishra who have furnished the list of companies stated to be not doing any business but engaged in providing accommodation entries. Before issuing the notice, the AO has not examined the profile of the said companies to arrive at the logical conclusion so as to issue notice u/s 148 of the Act…… 20. Neither any reason has been recorded which is sufficient to believe that income to the tune of Rs.15,00,000/- received from M/s. Hajima Resorts Ltd. has escaped assessment nor any such notice has been given to the

assessee. All these facts goes to prove that the AO has not applied his judicial mind before recording the "reasons to believe" that such and such income has escaped assessment rather proceeded to initiate the proceedings u/s 147/148 of the Act by blindly following the report of the Investigation Wing. Before according approval, ld. Principal CIT has also not examined all these facts rather accorded the approval in a mechanical manner…. ***22. In view of what has been discussed above, we are of the considered view that according sanction is not a supervisory role rather it is a quasi-judicial function to be performed by the Principal CIT/CIT, as the case may be, as required u/s 151 of the Act. We fail to understand that when the Revenue Department is manned by highly qualified officers having experience of at least 20 years till reaching in the rank of Principal CIT, they are required to evolve legally sustainable "standard operating procedure" containing "self-speaking reasons" for according sanction while discharging such quasi-judicial function."***

Refer: three judge bench ruling of Hon'ble Apex court in income tax law reported with 88 ITR 439 (Johari lal HUF case) that :*"6. In the instant case, as seen earlier, the Income-tax Officer did not choose to proceed under Section 34(1)(a). Consequently, he may or may not have recorded the reasons as required by this Section nor do we know where those reasons were submitted to the required authority and his sanction obtained on the basis of those reasons. This Court also has Ruled that the Commissioner or the Board of Revenue, while granting sanction will have to examine the reasons given by the Income-tax Officer and come to an independent decision and the authority in question should not act mechanically. From the material on record there is no basis to hold that those requirements had been fulfilled…."*

What is the important guideline and impact of reasons ceasing to survive u/s 148?

Delhi high court in case of SWAROVSKI INDIA PVT. LTD. ..... W.P.(C) 5807/2014 Reserved on : 17th August, 2017 Decision on :30th August, 2017:

31. This Court, therefore, agrees with the submission of Mr. Syali that the basis for the reasons to believe do not survive any more, as held by this Court in A. T. Kearney (supra), Silver Oak (supra) and in Ultra Marine (supra), the reopening does not survive. The observation by this Court in Ultra Marine (supra) is apt and reads as under: "…As the notification- has been quashed and, the same has not been assailed by the Revenue Department, the reasons for reopening the assessment under section 147/148 of the Income Tax Act, 1961, do not survive. The very basis and foundation for issue of reassessment notice have ceased to exist. Consequently, the writ petition is allowed…" 32. In Silver Oak (supra), this Court has held as under:- "…We have heard the counsel for the parties. It is apparent that the reasons recorded do not contain any specific allegation with regard to the year in question, i.e., the assessment year 1999-2000. The sole and entire basis of re-opening the assessment is the additions made in respect of the assessment years 1998-99 and 2001-02 There is no other reason given by the Assessing Officer for re-opening the assessment. Since the tribunal has already deleted the additions in respect of the assessment years 1998-99 and 2001-02, the very basis for continuing any further with the re assessment proceedings does not

survive any more. We have also indicated above that there is no specific allegation with regard to the assessment year 1999-2000 regarding suppression of sale figures…."

Etc……

Finally pray for speaking separate order on assessee's detailed objections against reopening u/s 148 of the Act with oral hearing request also.