IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2836 OF 2022

Anwar Mohammed Shaikh
1601 Cosmic Height, Sector IV, Bhakti Park Wadala (E), Mumbai – 400 031.
PAN No.ANQPS2594G

... Petitioner

Versus

1. Asst. Commissioner of Income Tax Circle – 20 (1), Mumbai, R.No.113, 1st Floor, Piramal Chamber, Lalbaug, Parel, Mumbai – 400 012.

2. Pr. Commissioner of Income Tax – 20 R. No.418, 4th Floor, Piramal Chamber Lalbaug, Parel, Mumbai – 400 012.

3. Union of India, Through the Secretary, Ministry of Finance North Block, New Delhi – 110 001.

... Respondents

Mr. R.S. Padvekar, Advocate a/w Mr. Tanzil Padevekar, Advocate for petitioner.
Mr. Akhileshwar Sharma, Advocate with Mr. Vikas T. Khanchandani, Advocate for respondents.

CORAM : DHIRAJ SINGH THAKUR AND
VALMIKI SA MENEZES, JJ.

PRONOUNCED ON : 13.03.2023.

JUDGMENT : PER (Valmiki Sa Menezes, J)

Rule. Rule made returnable forthwith. Heard finally by consent of both the learned counsel for the parties.

(2) By this petition filed under Article 226 of the Constitution of India. The petitioner impugns notice dated 31.03.2021 issued by the Revenue under Section 148 of the Income Tax Act, 1961, (for short 'the Act'), for the Assessment Year 2013-14, by which reopening of the petitioner's assessment for the relevant years are sought.

(3) The facts as stated in the petition to substantiate the reliefs sought therein are as under :

a) That, the petitioner filed its return of income for the assessment year 2013-14 on 30.03.2014 declaring an income of Rs.30,90,670/-, which was accepted under Section 143(1) of the Act ; subsequently, a notice under Section 148 of the Act was issued by respondent No.1 on 22.09.2016 (first notice), seeking reopening of the assessment year of the petitioner. Thereafter, notice under Section 143(2) of the Act was issued to the petitioner on 04.09.2017, pursuant

to which the petitioner filed written objections to the reasons recorded by the Revenue for reopening by letter dated 21.11.2016, which objections were rejected by order dated 31.08.2017. On 27.11.2017, the petitioner received a summons under Section 131(1) of the Act directing him to file documents and information in respect of his investments in shares, to which the petitioner filed a reply on 28.11.2017 along with all the required material ; the material was considered along with the petitioner's submissions and assessment order under Section 143 read with Section 147 of the Act was passed on 28.12.2017, which was challenged in Appeal before the Commissioner of Income Tax (appeal) on 20.01.2018. The appeal is pending disposal.

b) The respondent No.1, then issued a second notice dated 31.03.2021 under Section 148 of the Act, which is impugned in the present petition, in response to which the petitioner filed his return of income and sought reasons recorded by the Revenue for issuing the second notice through reply dated 06.05.2021. The reasons were provided for the second reopening on 09.11.2021 to which the petitioner filed written objections on 30.11.2021.

(4) The two main grounds urged to lay a challenge to the issuance of second notice dated 31.03.2021 are that as per reason s recorded for issuance of the impugned notice, the same is stated to be income related to alleged transaction being "undisclosed income". The petitioner submits that the transactions referred to in the notice are added twice issuing a notice under Section 148 on incorrect facts is impermissible at law as it is issued without application of mind.

(5) The second ground was that the reopening of assessment has been done for the second time without there being a notice on some fresh and tangible material, nor is there any allegation made that there is non-furnishing of material under the earlier re-assessment proceeding. The issuance of the re-assessment notice is therefore, *ex facie*, barred by the provisions of Section 147 of the Act, there being no jurisdiction vested in the Assessing Officer to reopen a completed assessment beyond the period of four years from the end of the Assessment Year 2013-14.

In reply to the petition, the respondents have filed an affidavit in reply dated 22.04.2022, supporting the reasons stated in the notice issued under Section 148 of the Act, as being proper and

legal. The affidavit claims that the second notice under Section 148 was issued after analyzing the contents of the investigation report submitted by the Deputy Director of Investigation, Unit – 8(2), Mumbai, on 01.05.12019, which is a report submitted after passing of the first Assessment Order dated 28.12.2017, which is under challenge before the Appellate Forum. In short, that the reasons for reopening are different in the two proceedings.

(6) We have heard the learned counsel appearing for the petitioner and for respondents and have perused the record.

(7) In order to substantiate their case the two primary grounds taken in the petition, as recorded herein above, learned counsel for the petitioner contents two reasons are recorded by the Assessment Officer for reopening of the assessment. The reasons as stated in Communication dated 09.11.2021, are that, it was observed from the ITD, ITBA and Insight portals that the assessee has entered into high value suspicious transactions, which information was received on the Insight portal after investigation was carried out by the department. The reasons further cite that it was found from the

Verification module on the Insight portal for the financial year 2012-13, that the assessee has done high volume/value transactions with fictitious profits in Equity/Derivative Trading and Bogus long term and short term transactions in the script of M/s. Confidence Finance & Trading Ltd., in the value of Rs.12,73,78,478/- (Rs.6,36,89,239/- + Rs.6,36,89,239/-), while the petitioner in his returns for assessment year 2013-14 has claimed exemption for long term capital gains for Rs.6,40,84,146/-. Further information states that the script of M/s. Confidence Finance & Trading Ltd., has been used by broker and syndicate members for providing bogus long term capital gains and loss to the beneficiaries by inflating the share price through doctored transactions made between the syndicate members ; that the petitioner was one of the beneficiaries, who had claimed such long term capital gains exemption and had resorted to suspicious mode of obtaining gains. That based on the information, the Assessment Officer had reason to believe that the income chargeable to tax, of the petitioner to the tune of Rs.1,00,000/- (Rs.One Lakh Only) had escaped assessment by reasons of failure on his part to disclose fully and truly all material facts for the relevant assessment year.

(8) To buttress his arguments, the petitioner has relied upon the following judgments ;

A) *Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax (Central), Calcutta and Ors., 1971 (ITR) 147 (SC),*

B) *Commissioner of Income Tax Vs. Smt. Paramjit Kaur (2009) 311 ITR 38 (P & H).*

C) *Rehana Anwar Shaikh Vs. Income Tax Officer, Mumbai and Ors.*, judgment dated 18.01.2022 in Writ Petition No.1922/2021.

D) *Ankita A. Choksey Vs. Income-Tax Officer and Ors., (2019) 411 (ITR) 207 (Bom).*

E) *United Electrical Co. P. Ltd. Vs. Commissioner of Income-Tax and Ors., (2002) Delhi 317.*

F) *Commissioner of Income Tax, Jabalpur Vs. S. Goyanka Lime & Chemicals Ltd., (2015) 56 taxmann.com 390 (Madhya Pradesh).*

G) *Hindustan Lever Ltd. Vs. R.B. Wadkar, Assistant Commissioner of Income Tax and Ors., 332 (ITR) 268.*

H) *Commissioner of Income Tax Vs. Kelvinator of India Ltd., (2010) 320 ITR 561 (SC)*

I) *Yum Restaurant Asia Pte. Ltd. Vs. DIT (No.2), (2017) 397 ITR 665.*

(9) Before, we proceed to deal with the specific submissions made by the parties and the case law cited above, it would be advantages to note the reasons for reopening of the second assessment, which are cited in Communication dated 09.11.2021.

The reasons stated are that for the Assessment Year 2013-14, it was observed from the ITD, ITBA and Insight portals that the petitioner had entered into high value "suspicious" transactions. It was further stated that this information had been received on the Insight portal after investigation was carried out by the Office of the Investigation Wing of the Department and from the Verification module on the Insight, for the Financial Year 2012-13, the petitioner has done high volume/value transactions i.e. "Fictitious Profits in Equity/Derivative Trading" and bogus long term capital gain transactions under Section 10 (38) and short term capital loss cases in the script of M/s. Confidence Finance & Trading Ltd.

From these statements made in the reasons for the reopening, it appears that the revenue was of the opinion that the transactions referred to therein were of suspicious nature purely on the

basis of some information received by it, from the Insight portal. The conclusion is arrived at without actually examining the information and on the basis of pure suspicious.

(10) It is further stated in the reasons for reopening that it was found and proved by SEBI and from investigation, that the script of M/s. Confidence Finance & Trading Ltd., has been used by brokers and syndicate members for providing bogus long term capital gains and loss to beneficiaries by inflating the share price through doctored transactions of which the assessee is one of the beneficiaries. Further, it is stated that the petitioner has resorted to suspicious mode of obtaining gains and not offered those gains to tax by not showing the same as income. This statement also appears to be based on the surmise of the officer that the transaction is of suspicious nature without divulging specific details of the suppression of income that might have been indulged in by the petitioner.

(11) The figures claimed by Revenue in the reason for the re-opening are an amount of Rs.12,73,78,478/- (Rs.6,36,89,239/- + Rs.6,36,89,239/-), which is information lifted from the Insight portal alleged to be Fictitious Profit.

In reply to this notice the assessee, apart from taking the specific defence that the notice was devoid of disclosure of any fresh tangible material to proceed with re-assessment or that there was any failure on the part of the assessee to disclose fully and truly all material facts on record, has, without prejudice to these contentions, relied upon his return of income for Assessment Year 2013-14, wherein it has in Schedule E-1 disclosed the details of exempt income being long term capital gains from transactions of securities in the amount of Rs.6,40,84,146/-. As compared to this, the value of alleged fictitious transaction was Rs.6,36,89,239/-, though there is no explanation found in the affidavit-in-reply as to why the revenue has claimed this amount twice by adding together similar figures and coming to a figure of Rs.12,73,78,478/-.

(12) A further perusal of the reply dated 30.11.2021, given by the petitioner to the notice dated 31.03.2021 under Section 148 of the Act, questions the validity of the sanctioned granted, if any, of the higher authority, as required under Section 151 of the Act and specifically asked for providing a copy of the sanction obtained from the Principal Chief Commissioner of Income Tax. Along with the

affidavit-in-reply, the respondent has produced a copy of the approval under Section 151 dated 30.03.2021, in which, the reasons supplied to the petitioner, have been reproduced verbatim. The sanction under Section 151 does not demonstrate any independent application of mind to the facts stated in the impugned notice under Section 148 and appears to have been done in a mechanical fashion. This by itself would in normal course vitiate the entire process of issuance of a notice under Section 148 as the mandate of Section 151 of Act, has not been flouted by the respondent No.2.

(13) ***Sheo Nath Singh (supra)*** considers the true impact and meaning of the words "reason to believe" in the act, and what constitutes existence of material on which such belief of the Assessment Officer must be based for reopening assessment. The Supreme Court, in considering this position has held :

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

can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.

There is no material or fact which has been stated in, the reasons for starting proceedings in the present case on which any belief could be founded of the nature contemplated by Section 34 (1-A). The so-called reasons are stated to be beliefs thus leading to an obvious self-contradiction. We are satisfied that the requirements of Section 34 (1-A) were not satisfied and, therefore, the notices which had been issued were wholly illegal and invalid."

Thus, "reason to believe", suggest that the Income Tax Officer must act on direct or circumstantial evidence and cannot act upon mere suspicion ; if the basis on which he acts while issuing the notice is suspicion, the conditions for issuance of the notice are not satisfied and such a notice would lack the jurisdictional facts required to proceed in the matter.

(14) In ***Commissioner of Income Tax (supra)***, with Punjab and Harayana High Court, was considering a question of what constitute sufficient material before the Assessment Officer to proceed to re-open and assessment under Section 147 of the Act.

"Section 147 of the Act defines the power and jurisdiction of the Assessing Officer for making an assessment or reassessment of escaped income. Section 148 of the Act, on the other hand, provides for initiation of the reassessment proceedings with issuance of a notice on the assessee concerned. Section 147 empowers the Assessing Officer to

> *assess or reassess income chargeable to tax if he has reasons to believe that the income for any assessment year has escaped assessment. The power conferred under this section is very wide, but at the same time it cannot be stated to be a plenary power. The Assessing Officer can assume jurisdiction under the said provision provided there is sufficient material before him. He cannot act on the basis of his whim and fancy, and the existence of material must be real. Further, there must be nexus between the material and escapement of income. The Assessing Officer must record reasons showing due application of mind before taking recourse to reassessment proceedings. Still further the Assessing Officer can assume jurisdiction for reassessment proceedings provided he has reasons to believe but the same cannot be taken recourse to on the basis of reasons to suspect."*

Section 147, thus requires that there must be a direct nexus or live link between the material coming to the notice of the Officer and the formation of his belief that income of the assessee has escaped assessment due to his failure to disclose fully and truly all materiel facts.

(15) In ***Rehana Anwar Shaikh*** (supra), this Court was dealing with a case where reasons recorded for reopening by the Assessing Officer was that the petitioner was found to have entered into a transactions in a script of M/s. Confidence Finance & Trading Ltd., which is the very same allegation made in the reasons cited by the Revenue in the reopening notice in the present case.

(16) While considering whether such reasons could form the basis for reopening, the High Court held that if such disclosures had been made during the Assessment proceedings of that relevant year, the action of re-opening of assessment would amount to a change of opinion by the Assessment Officer, which was impermissible. Paragraph 4 of *Rehana Anwar Shaikh*, hold thus:

> *"4. Petitioner replied by its letter 30 November, 2015. This letter was exhaustive and contains every detail that the Assessing Officer had called for. Thereafter, the Assessment Order dated 29 January, 2016 has been passed, accepting the return of income declared by the Petitioner in the sum of Rs.12,45,910/-. It is true that in the Assessment Order dated 29 January 2016, there is no reference and/ or discussion to disclose the Assessing Officer's satisfaction in-respect of the query raised but as held in* ***Aroni Commercials Limited Vs. Deputy Commissioner of Income Tax-2(1),*** *once a query is raised during assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and / or discussion to disclose its satisfaction in respect of the query raised. As noted earlier, the very issue of Petitioner entering into transactions, relating to the scrip of Confidence Finance & Trading Ltd., was a subject of consideration by the Assessing Officer during the original assessment proceedings. It would, therefore, follow that re-opening of the assessment by the impugned notice is merely on the basis of change of opinion of the Assessing Officer from what held earlier during the course of the assessment proceedings, leading to the assessment order dated 29 January, 2016. This change of opinion does not constitute justification and/ or reason to believe that income chargeable to tax, has escaped assessment."*

(17) In ***Ankita A. Choksey (supra)***, this Court, dealing with a challenge to the re-opening notice under the Act, wherein the objection taken to re-opening was similar to the one in the present case has held as under :

> *"6. It is a settled position in law that the Assessing Officer acquires jurisdiction to issue a reopening notice only when he has reason to believe that income chargeable to tax has escaped Assessment. This basic condition precedent is applicable whether the return of income was processed under Section 143(1) of the Act by intimation or assessed by scrutiny under Section 143(3) of the Act. [See Asst. Commissioner of Income Tax v/s. Rajesh Jhaveri Stock Brokers (P) Ltd., (SC) 291 ITR 500 and PCIT v/s. M/s. Shodimen Investments (Bombay) 2018 (93) Taxman.Com 153]. Further, the reasons to believe that income chargeable to tax has escaped Assessment must be on correct facts. If the facts, as recorded in the reasons are not correct and the assessee points out the same in its objections, then the order on objection must deal with it and prima facie, establish that the facts stated by it in its reasons as recorded are correct. In the absence of the order of objections dealing with the assertion of the Assessee that the correct facts are not as recorded in the reason, it would be safe to draw an adverse inference against the Revenue.*
>
> *7. Thus, we are of the view that even in cases where the return of income has been accepted by processing under Section 143(1) of the Act, reopening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under Section 143(1) of the Act, does not give the Assessing Officer a carte blance to issue a reopening notice. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the reopening notice. In the present*

> *case, the Assessing Officer has proceeded on fundamentally wrong facts to come to the reasonable belief conclusion that income chargeable to tax has escaped assessment. Further, even when the same is pointed out by the Petitioner, the Assessing Officer in its order disposing off the objection does not deal with factual position asserted by the Petitioner. Thus, it would safe to conclude that the Revenue does not dispute the facts stated by the Petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment."*

(18) The judgment holds that re-opening of an assessment can be done only when the Assessing Officer has based his belief that income chargeable to tax has escaped assessment on correct facts after investigating into the information purportedly received by him. Thus, the condition precedent for proceeding for re-assessment would be only if the Assessing Officer has undertaken the exercise of *prima facie* dealing with the objections raised by the assessee and establishing that the facts stated by the assessee are incorrect.

(19) In ***United Electrical Co. P. Ltd (supra)***, the Delhi High Court considered the contention of what constitutes "information" for the purpose at arriving at the believe that income has escaped assessment. While considering this issue it has held as under :

> *"In Bawa Abhai Singh v. Dy. CIT (2002) 253 ITR 83 (Del), a Division Bench of this court, speaking through Chief Justice*

Arijit Pasayat (as his Lordship then was), has said that the crucial expression "reason to believe" predicates that the assessing officer must hold a belief ..... by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons, inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information.

In Ganga Saran & Sons (P) Ltd. v. ITO & Ors. (1981) 130 ITR 1 (SC), their Lordships of the Supreme Court inter alia observed that the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the assessing officer should not be irrational or arbitrary. Alternatively put, it must be reasonable and must be based on reasons which are material.

Thus, existence of tangible material, for the formation of opinion is a prerequisite for initiation of action under section 147 of the Act. Therefore, what section 147 of the Act postulates is that the assessing officer must have reason to believe that income has escaped assessment. There should be facts before him that reasonably give rise to the belief, but the facts on the basis of which he entertains the belief need not at this stage be rebuttably conclusive to support his tentative conclusion. In case of challenge, it is open to the court to examine whether there was material before the assessing officer, having rational connection or relevant bearing to the formation of the belief that is claimed to have been held at the time when he issued the notice. But the court cannot for the purpose of ascertaining validity of the notice examine the sufficiency of the reasons for the belief (See S. Narayanappa & Ors. v. CIT (1967) 63 ITR 219 (SC)).”

“It is, thus, trite, that when a challenge is made to the action under section 147 of the Act what the court is required to examine is whether some material exists on record for the assessing officer to form the requisite belief and the reasons for the belief have a rational nexus or a relevant bearing to the formation of such belief and are not extraneous or irrelevant for the purpose of the said section. But the sufficiency of the grounds, which induced the assessing officer to act under the said section is not a justiciable issue.”

(20) In ***Hindustan Lever Ltd. (supra)***, this Court allowed a petition challenging notice issued under Section 148 on the contention that once it is accepted during regular assessment that depreciation or the loss claimed by the assessee was correct, there have to be a strong reasons to believe that income has escaped assessment, which should be a reason for the failure on the part of assessee to disclose all material facts. The ratio laid down in the said judgment reads as under:

> *"Reading of the proviso to Section 147 makes it clear that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under Section 147, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the concerned assessment year. However, where an assessment under Sub-section (3) of Section 143 has been made for the relevant assessment year, no action can be taken under Section 147 after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year.*
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> *In the case in hand it is not in dispute that the assessment year involved is 1996-97. The last date of the said assessment year was March 31, 1997, and from that date if four years are counted, the period of four years expired on March 31, 2001. The notice issued is dated November 5, 2002, and received by the assessee on November 7, 2002. Under these circumstances, the notice is clearly beyond the period of four years.*

….. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced.

Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of the proviso to Section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under Section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside."

(21) In ***Commissioner of Income Tax Vs. Kelvinator of India Ltd. (supra)***, the Supreme Court has held as under:

"The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment,

> *review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."*

(22) In ***Yum Restautrant Asia Pvt. Ltd. (supra)***, the Delhi High Court was dealing with a question of sanction granted under Section 151 of the Act, by the higher authority and what the law expects the sanctioning authority to consider while exercising supervisory control of the Assessing Officer under Section 151 of the Act. The Delhi High Court has held thus:

> *"The purpose of Section 151 of the Act is to introduce a supervisory check over the work of the Assessing Officer, particularly, in the context of reopening of assessment. The law expects the Assessing Officer 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 Assessing Officer, 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 Assessing Officer 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 Assessment Year a further check by the further superior officer is contemplated.

In the present case, having started off on a wrong note that the original assessment was scrutinized and an order was passed under Section 143(3) of the Act, the Assessing Officer proceeded to put up the note to the Director of Income-Tax as is evident from the title of the note but, through the Additional Director of Income-Tax. Both the Additional Director of Income-Tax and the Director of Income-Tax appear to have concurred with the reasons for reopening the assessment but without applying their minds to the fact that the return originally filed was only processed under Section 143(1) of the Act and not under Section 143(3) of the Act. Had the Additional Director of Income-Tax realised this mistake, he would not have put up the file further for the approval of the Director of Income-Tax. Clearly, therefore, at the level of Additional Director of Income-Tax there was non- application of mind. Had the Additional Director of Income-Tax realized the mistake, he would have declined to make a noting and would have returned the file to the Additional Director of Income-Tax drawing his attention to Section 151 (2) of the Act which did not require any further approval by the Additional Director of Income-Tax where the return originally filed is only processed under Section 143 (1) of the Act. On the contrary, the Additional Director of Income-Tax again recorded his concurrence with the views of the Assessing Officer and the Additional Director of Income-Tax. Therefore, at the second level also plainly there was non-application of mind.

Mr. Rahul Chaudhary, the learned Senior Standing Counsel for the Department, sought to characterise this whole exercise as an 'over- application' of mind. According to him, it was out of anxiety that the reopening of the assessment might ultimately be invalidated, that these officers enthusiastically participated in the exercise by treating the return originally filed as having been subjected to scrutiny under Section 143 (3) of the Act.

> *What is evident to the Court is the non-application of mind by three officers of the Department - the Assessing Officer, Additional Director of Income-Tax and the Director of Income-Tax. Plainly they did not bother to examine the record themselves."*

(23) In ***Commissioner of Income-Tax, Jabalpur*** (supra), the Madhya Pradesh High Court, was also dealing with the manner in which the higher Officer under Section 151 of the Act was required to exercise supervision and grant of approval to the action of the Assessment Officer under Section 151 of the Act. The Madhya Pradesh High Court has noted as under :

> *"7. We have considered the rival contentions and we find that while according sanction, the Joint Commissioner, Income Tax has only recorded so "Yes, I am satisfied". In the case of Arjun Singh (supra), the same question has been considered by a Coordinate Bench of this Court and the following principles are laid down:-*
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> > *"The Commissioner acted, of course, mechanically in order to discharge his statutory obligation properly in the matter of recording sanction as he merely wrote on the format "Yes, I am satisfied" which indicates as if he was to sign only on the dotted line. Even otherwise also, the exercise is shown to have been performed in less than 24 hours of time which also goes to indicate that the Commissioner did not apply his mind at all while granting sanction. The satisfaction has to be with objectivity on objective material."*
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> *8. If the case in hand is analysed on the basis of the aforesaid principle, the mechanical way of recording satisfaction by the Joint Commissioner, which accords sanction for issuing notice under section 148, is clearly unsustainable and we find that on such consideration both the appellate authorities have interfered into*

the matter. In doing so, no error has been committed warranting reconsideration."

Commissioner of Income Tax Vs. S. Goyanka Lime Chemicals Ltd., was carried in appeal to the Supreme Court, which has affirmed the view taken by the Madhya Pradesh High Court by its order dated 08.07.2015 in Special Leave Appeal No.11916/2015.

(24) After considering all the above case law on the issues raised before us, we are clear in our mind that the impugned notice, other than merely quoting that the Insight portal contains information as stated by the Assessing Officer in his reasons for the re-opening, does not further investigate the information or come to an independent assessment connecting the petitioner to the particular transactions specified in the information. The entire notice proceeds on the basis of suspicion that the petitioner has entered into the fictitious transactions of the script M/s. Confidence Finance & Trading Ltd. The Assessing Officer has not even bothered to compare the information furnished by the petitioner in its reply or go through the income tax return of the petitioner, which was before the Assessment Officer, wherein long term capital gain transactions of securities were specifically disclosed.

(25) We further note that in its reply/objections, to the re-opening, the petitioner had in support of its contention made specific references to documents to support the genuineness of the concerned share transactions, some of which are, statements of long term capital gains claimed as exempt under Section 10 (38) of the Act, bills cum contract notes issued by the Bombay Stock Exchange to substantiate that the stock was traded on market, his Demat statements where the delivery of shares was reflected, the confirmation of SEBI that the stock was traded through recognized brokers and the fact that the entire sale consideration was received through regular banking channels. None of these documents were examined by the Assessing Officer while rejecting the objections of the petitioner, leading us to believe that the entire exercise of a re-opening of assessment was purely based upon suspicion in the face of all the material disclosed by the petitioner to the Assessing Officer.

(26) We do not find that any information of the petitioner has remained undisclosed in relation to the income offered by him to tax for the relevant assessment year. We also find that the material which the Assessment Officer has considered as

"information" for the purpose of arriving at a satisfaction and having reason to believe that income of the petitioner has escaped assessment is not based upon any tangible information in order to proceed with the notice under Section 148 of the Act, beyond the prescribed period of limitation.

(27) Under these circumstances, we are of the view that the impugned notice dated 31.03.2021, and the impugned order disposing the objections dated 30.12.2021 filed by the petitioner are arbitrary and issued without the requisite jurisdiction under Section 148 of the Act.

(28) Consequently, we quash and set aside the impugned notice dated 31.03.2021 and the impugned order dated 30.12.2021 disposing of the petitioners objections and make rule absolute in terms of prayer clause A & B of the petition. No costs.

[VALMIKI SA MENEZES, J.] **[DHIRAJ SINGH THAKUR, J.]**

Prity