Mukesh Modi Vs Deputy Commissioner of Income Tax

Court: Rajasthan High Court

Date of Decision: April 11, 2014

Acts Referred: Constitution of India, 1950 â€" Article 226
Income Tax Act, 1922 â€" Section 34(1)(a)
Income Tax Act, 1961 â€" Section 132, 133(6), 133A, 139, 139(1)

Citation: (2014) 267 CTR 409 : (2014) 366 ITR 418 : (2014) 224 TAXMAN 362

Hon'ble Judges: Pratap Krishna Lohra, J

Bench: Single Bench

Advocate: Prakul Khurana, Sanjay Nahar and Manish Singh Lakhawat, Advocate for the Appellant; K.K. Bissa and Hargovind Chanda, Advocate for the Respondent

Judgement

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Pratap Krishna Lohra, J.
Challenge in the instant petition (Civil Writ Petn. No. 1140 of 2014) and 9 other conjoined petitions at the

threshold was laid by the assessees against the impugned action of the respondent Revenue in initiation of reassessment proceedings under s.

147/148 of the IT Act 1961 (for short, "Act"). In the original petition, the petitioners have also questioned the order passed by the first respondent

rejecting their preliminary objections against initiation of reassessment proceedings. During pendency of these petitions the petitioners made attempt

to bring changed fact scenario vis-a-vis all these assessees and placed on record the ex parte assessment orders passed by AO on 3rd Feb., 2014

for the asst. yr. 2010-11. Taking note of the ex parte reassessment orders passed by the AO, the petitioners made endeavour to implore

annulment of these orders by way of additional affidavit. In relation to the other writ petitions i.e. S.B. Civil Writ Petn. No. 1250 of 2014, 1248 of

2014 and 1496 of 2014 respectively which were laid subsequently, the ex parte reassessment orders were also questioned besides notice under s.

147/148 of the Act and rejection of preliminary objections in the original petition. The undisputed facts, necessary and germane to the matter, are

that a search under s. 132 of the Act and survey under s. 133A of the Act was simultaneously conducted by the investigation wing of the IT

Department at the business/residential premises of Sirohi based Modi alias Adarsh Group. The petitioners Mukesh Modi, Daksha Kumari Jain and

Bharat Das Vaishnav were eventually covered under the search action and vis-a-vis other assessees, viz., Prakash Beverages, Nakoda Land

Developers and Sambhav Energy, a survey was conducted wherein certain documents/loose papers were seized/impounded. The IT Department

carried out this entire exercise on 10th of Feb., 2010. Subsequent to that, on 6th Jan., 2011 notice under s. 153A of the Act was issued in case of

Mukesh Modi, Daksha Kumari Jain and Bharat Das Vaishnav whereas notice under s. 153C of the Act was issued in case of Krishna Dairy by

relying on certain documents found during the course of search. While undertaking proceedings under s. 153A of the Act, the AO scrutinized the

seized/impounded material during the course of search/survey dt. 10th of February, 2010 and after consideration and analyzing the same issued a

consolidated questionnaire to the concerned assessees. Be that as it may, no proceeding for framing regular assessment under s. 143(3) of the Act

was initiated in case of Prakash Beverages, Nakoda Land Developers and Sambhav Energy. This exercise was completed on 21st of Oct., 2011.

Proceedings initiated in case of Krishna Dairy, under s. 132 was also dropped on 24th of Nov., 2011. Finally, on 23rd of Dec, 2011 assessment

under s. 153A r/w s. 143(3) of the Act was completed on the strength of seized record/impounded documents, thereby making various additions

of income tax in the hands of Mukesh Modi, Diksha Jain and Bharat Das Vaishnav. The subject matter of these additions are related to the very

same transactions/orders in relation to which the first respondent has initiated the impugned reassessment proceedings. It is also clearly discernible

that these additions are subject-matter of respective appeals preferred by the petitioners-assessees before the CIT(A) and are still pending

adjudication. The sequence of events took abrupt turn in the month of March 2013 and on 22nd March, 2013 the first respondent while recording

reasons to reopen the assessment under s. 147 of the Act issued the impugned notices under s. 148 of the Act for initiation of proceedings under s.

147 vis-a-vis to the petitioners-assessees. The petitioners in the writ petition have pleaded that the first respondent has not recorded cogent

reasons and per se the reasons recorded suggest that the AO has assumed jurisdiction to initiate reassessment proceedings on its mere ipse dixit to

clear suspicions and for verification.

2. Joining the issue with the Department, petitioners Mukesh Modi, Daksha Kumari Jain and Bharat Das Vaishnav, submitted reply to the

impugned notice dt. 22nd March, 2013 with the request to the first respondent to treat the return of income filed under s. 153A of the Act, as

return filed in response to the aforesaid notice. With the same breath, Prakash Beverages, Nakoda Land Developers and Sambhav Energy also

submitted reply with the request to treat original returns filed under s. 139(1) of the Act as returns filed in response to notice under s. 148 of the

Act.

3. On 31st May, 2013, the petitioners submitted detailed preliminary objections to resist the proceedings under s. 147 of the Act and put stiff

resistance against the issuance of the impugned notice. The main edifice of the preliminary objections remained the basis of the reasons recorded

for issuance of such a notice by categorizing it to be de hors the procedure mandated by Hon''ble apex Court. The assessing authority after

considering the preliminary objections rejected the same by passing order dt. 15th of Oct., 2013.

4. The petitioners have very specifically pleaded in the writ petitions that the third respondent, who was quite conscious about the power of judicial

review of this Court under Art. 226 of the Constitution to examine the legality and propriety of order on the objections cleverly and mala fide

resorted to a novel procedure. Elaborating the procedure, it is specifically averred in the writ petitions that the same was adopted with the solemn

object to thwart such efforts of the assessees. With a view to substantiate this assertion, the petitioners have pleaded that the third respondent by a

sheer ingenuity floated a proposal to all the petitioners that instead of deciding these preliminary objections separately by passing an order he shall

deal with those objections at the threshold in the opening paras of the reassessment order so that same will form a part of the reassessment order.

The proposal, so mooted at the instance of the third respondent, did not find favour from the assessees, and therefore, on 23rd Oct., 2013, the

same was objected on the anvil of mandate of Hon''ble apex Court. Be that as it may, on 17th Jan., 2014, the first respondent disposed of all the

objections submitted by the assessees and concluded that the proceedings under s. 147 of the Act are perfectly valid and legal. While disposing of

the objections submitted by the assessees, the first respondent has issued impugned notice to the petitioners under s. 143(2) of the Act calling upon

them to produce any documents, accounts and any other evidence on which they may rely to support the return filed by them. According to the

petitioners, the intent of first respondent for issuing the impugned notice is clear and explicit in as much as its intent is to make roving and fishing

inquiries in the guise of the reassessment proceedings. The petitioners have also averred that on 27th Jan., 2014, the first respondent called upon

them to furnish the requisite details while hurling threats to make additions of income in the form of passing reassessment orders without further

notice. Highlighting the conduct of the first respondent in showing haste for passing reassessment order, the petitioners have also submitted that the

attempt made by them for deferment of the proceedings was not even acknowledged, and the first respondent refused to entertain the adjournment

applications, thereby made it imperative for the assessees to send them by speed post on the same day i.e. 3rd Feb., 2014. The adjournment

applications were also sent through e-mail, Fax etc. The petitioners have very specifically pleaded in the writ petitions that the first respondent

knowing it fully well that the petitioners are approaching this Court for assailing the impugned order dt. 17th Jan., 2014, with intent to brow beat

the assessees hurriedly passed the ex parte assessment orders. The petitioners have set out a specific case in the additional affidavit that the

reassessment orders have been passed to frustrate the cause of the petitioners, which is a subject-matter of these petitions. On passing the

reassessment orders, notices were also issued to the petitioners calling upon them as to why penalty should not be levied from them. Referring

specifically to the cases of Mukesh Modi, Bharat Das Vaishnav, Sambhav Energy and Krishna Dairy, which were scheduled to be heard on 4th

Feb., 2014, the petitioners have pleaded that the reassessment orders were passed on a day anterior to the scheduled date i.e., 3rd Feb., 2014,

despite availability of statutory time for passing these orders upto 31st March, 2014.

5. On behalf of the respondents, replies to the writ petitions are submitted. In the reply, it is pleaded that the proceedings under s. 147/148 of the

Act have been initiated with due process of law and the AO has recorded plausible reasons for the said action. The petitions are also contested on

the anvil that grievance of the petitioners is against the show-cause notice and petition against the show-cause notice is not maintainable. While

referring to search undertaken by the Department under s. 132 of the Act by its investigation wing, the respondents have pleaded in the reply that

the search was conducted at the business/residential premises of Sirohi based Modi alias Adarsh group consisting of Adarsh Credit Co-operative

Society Ltd., Mukesh Modi, Bharat Modi, Virendra Modi, Mahendra Tak, Bharat Vaishnav and their family members and business associates

etc., and most of them residing at Sirohi have revealed several incriminating documents along with cash, jewellery and other valuables. During

survey under s. 133A of the Act, inventories of various items/books of accounts/vouchers/documents were prepared and taken. During survey, it

was also revealed that regular books of accounts/copies of returns of income for various years were not available, and therefore, it was not

possible to verify the details of books/documents. It is also submitted in the return that besides non-availability of the requisite books of

accounts/documents and financial statements and in absence of responsible/answerable/qualified persons to handle the job of verification, it was

not possible to undertake the job of verification. The respondents have also submitted in the reply that survey under s. 133A of the Act was also

carried out at the corporate offices of Krishna Dairy, Virendra Enterprises, Prakash Beverages, Mukesh Modi and Balaji Securities on 10th Feb.,

2010. According to the respondents, the transactions, which were shown in these orders/impounded documents, remained unexplained, and

therefore, while passing the reassessment orders, at the threshold in the opening paras, reasons have been recorded for treating the above

transactions as unexplained. Adverting to the objections submitted by the assessees, the respondents have pleaded in the reply that the assessees

have not clarified the details about the transactions with due verification of books of accounts. Defending the reasons recorded in the assessment

orders, the respondents have also submitted in the reply that the amount in question has escaped assessment for assessment year in question. The

respondents have very specifically pleaded in the return that the assessees have not availed the chance before the AO to explain the case on merits,

which clearly establishes escapement of income on their part. While referring to the words "reason to believe" the respondents have submitted in

the return that expression ''reason to believe'' cannot be equated with final ascertainment of the fact by legal evidence or conclusion. For

substantiating this proposition, the respondent-Revenue has also placed reliance in the pleadings on a verdict of Hon"ble apex Court in Assistant

Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd., .

6. Joining issue with the petitioners for their objections, the respondent-Revenue has submitted in the reply that, while invoking the provisions of ss.

147/148 of the Act, the AO was abreast with the definite and specific information and same cannot be categorized as roving and fishing inquiries.

A specific preliminary objection is raised in the return that after passing of the reassessment orders, alternative statutory remedy is available to the

petitioners by way of an appeal under s. 246 and 246A of the Act and as such the writ petitions are not maintainable. Buttressing its submissions,

in this behalf, the respondent-Revenue has specifically pleaded that the notice under s. 147/148 of the Act has finally culminated into reassessment

orders, therefore, now the assessees are well advised to avail the remedy of appeal under ss. 246/246A of the Act and the writ petitions are liable

to be thrown away merely on that count. The respondents have also submitted in the alternative that the reassessment orders are not subject-

matter of judicial scrutiny in these petitions and as such after passing of the reassessment orders, nothing survives for adjudication in these petitions.

The attempt made by the petitioners to assail the reassessment orders is also resisted by the respondents on the ground that no requisite

amendments have been made in the writ petitions for challenging the same.

7. Highlighting the conduct of the assessees, more particularly their litigating perseverance, the respondent-Revenue has relied on the assessments

of all the assessees completed under s. 144 of the Act ex parte. The respondents also relied upon the observations of AO on the issue of TDS

categorizing the conduct of the assessees as evasive. The respondent-Revenue has asserted that the petitioners were not interested in getting the

things verified on merits. Defending the action of the AO for floating the proposal of deciding the objections at the threshold while passing the

reassessment orders, the Revenue has pleaded that there is nothing unusual in the said proposal and the petitioners are unnecessarily making

mountain out of molehill. Making specific averment in the return that the assessees have always adopted defiant posture and have not cooperated

with the AO and thus, the AO was left with no option but to pass reassessment orders ex parte. According to the respondents, the whole object of

the assessees was to prolong the assessment so that it may reach to dead end, i.e., the end of the assessment year, which may facilitate

assessments without verification/proper examination of the relevant materials and even leading to a situation that other assessees may suffer for

delay in their assessment cases.

8. On merits, the respondent-Revenue has defended its action with full emphasis at its command and submitted that the entire exercise undertaken

by the Revenue is in strict adherence of the Act and, as such, the cause of grievance of the petitioners is wholly unfounded and cannot be

sustained. Reiterating the preliminary objections and also countering the grounds urged on merits of the case, the respondent-Revenue has

specifically pleaded for rejection of the writ petitions.

9. Mr. Prakul Khurana has strenuously urged that the very foundation/basis for issuance of the impugned notice under s. 148 of the Act to initiate

reassessment proceedings is de hors the law falling short of requirements envisaged by the legislature. Elaborating his submissions, learned counsel

for the petitioners would contend that for issuing the notice the first respondent has not recorded reasons to fulfil and satisfy statutory precondition

of ""reason to believe"" mandated under s. 147 of the Act. Mr. Khurana has submitted that it is ex facie clear from the reasons recorded that the

very purpose of initiation of reassessment proceedings is to verify certain documents and transactions and to make rowing and fishing enquiries

which is nothing but an attempt by the AO to transgress its powers under s. 147 of the Act. Buttressing his submissions with full eloquence, Mr.

Khurana has argued that while assuming jurisdiction under s. 147 of the Act the AO has acted on mere suspicion and the said action of the

respondent cannot withstand the test of ""reason to believe"" insisted under s. 147 of the Act. Learned counsel, Mr. Khurana has contended with full

emphasis that endeavor of the first respondent in the garb of reassessment proceedings is to verify some of the details on the strength of material

which was already available on record, impounded/seized in the year 2010 duly considered and verified in the course of reassessment proceedings

under s. 153A of the Act vis-a-vis various members of Adarsh Group including the petitioners Mukesh Modi, Daksha Kumari Jain and Bharat

Das Vaishnav and on proper appreciation of these materials proceedings were dropped in case of Krishna Dairy. Making scathing attack on the

reasons recorded, Mr. Khurana would urge that verification of details found during surveys already examined and scrutinized earlier by the AO,

cannot furnish a plausible ground for initiating action against the assessees under s. 147/148 of the Act as the same is on the face of it outside the

scope of these provisions much less satisfying the requirement of ""reason to believe"". Learned counsel for the petitioners has also submitted that on

the face of it the reasons recorded are absolutely vague, cryptic and ex facie contrary to the intent of legislation. For substantiating this argument,

learned counsel contended that the first respondent through reassessment proceedings seeks to verify the nexus and proximity of the material

seized/impounded with the books of accounts of the assessees while simultaneously expressing doubts that such details are not reflected from the

regular books/returns furnished by the assessees. According to Mr. Khurana, if the reasons recorded by the AO for initiating reassessment

proceedings are critically examined, then there remains no doubt that the authority has assumed the jurisdiction for reinitiating assessment

proceedings on its mere ipse dixit and suspicion instead of the requisites i.e. the reason to believe that any income chargeable to tax has escaped

assessment. Learned counsel for the petitioners has urged that legal position is no more res Integra that for issuance of a valid notice under s. 148

of the Act the concerned AO is under an obligation to keep himself abreast with definite information/material in possession on the basis of which he

forms opinion of reason to believe that some income has escaped assessment in the year in question and in want of the same initiation of impugned

reassessment proceedings are wholly without jurisdiction. Mr. Khurana, while elaborating on this issue would urge that if the reasons recorded per

se reflect that the matter requires detail investigation and further verification was at the most can be categorized that AO has reasons to suspect and

not ""reason to believe"" that income chargeable to tax has escaped assessment rendering the reinitiation proceedings all the more vulnerable. With

these submissions, Mr. Khurana has urged that the impugned reassessment proceedings are wholly non est in the eye of law and are liable to be

annulled. In support of his contention, learned counsel for the petitioners has placed reliance on following judgments:

(i) Bakulbhai Romanlal Patel vs. ITO (2011) 56 DTR (Guj) 212

(ii) Agrawal J.V. Vs. Income Tax Officer and Another,

(iii) Commissioner of Income Tax Vs. Bigabass Maheshwari Sewa Samiti, .

10. In Bakulbhai''s case (supra), the Division Bench of Gujarat High Court, while examining true purport of the words ""reason to believe"" has held

that where the reasons recorded reflect that the matter requires detailed investigation and further verification, the AO has reason to suspect and not

reason to believe that income chargeable to tax has escaped assessment and therefore the assumption of jurisdiction by AO is invalid and as such

the impugned notice under s. 148 is not sustainable and liable to be quashed. The relevant paras of the judgment are 19, 20, 23 and 30, which are

reproduced as infra:

19. For the purpose of invoking the provisions of s. 147 of the Act, formation of requisite belief precedes the initiation of the proceedings. In the

circumstances, in the light of the provisions of sub-s. (2) of s. 148, before issuing notice under s. 148 of the Act, the AO is required to record

reasons for the formation of belief that income chargeable to tax has escaped assessment. In the present case, on a plain reading of the reasons

recorded, as noted hereinabove no such belief appears to have been recorded by the AO. However, in the penultimate para of the reasons

recorded, the AO has recorded thus: "In view of the Expln. 2 to s. 147 of the IT Act, the case of the assessee is that where cash transaction made

is verified. Therefore, I have reason to believe that deemed income has escaped assessment by not disclosing the true income relating to asst. yr.

2003-04. Hence, it is a fit case for issuance of notice under s. 148 of the IT Act." This in effect and substance is the only satisfaction recorded by

the AO as regards income having escaped assessment. A bare reading of Expln. 2 to s. 147 of the Act shows that the same merely lays down the

categories of cases which shall be deemed to be cases where income chargeable to tax has escaped assessment. The said Explanation nowhere

speaks of verification of transactions or of deemed income.

20. Reading the reasons recorded in their entirety, there is nothing whatsoever to indicate as to which is the income that has not been disclosed by

the petitioner or that any income chargeable to tax has in fact escaped assessment. The entire tenor of the reasons recorded indicates that on the

basis of some unsubstantiated and vague information, the AO has reopened the assessment for the purpose of making a roving and fishing inquiry

to verify as to whether any income has in fact escaped assessment which fact is borne out from the reasons recorded, wherein the AO has

categorically recorded thus: "In view of the above facts and circumstances of the case, detailed investigation/verification is required and it is also

required to bring the assessee in tax net." Insofar as bringing the assessee in the tax net is concerned, the petitioner admittedly has filed return of

income and has been assessed in respect thereof, the petitioner is, therefore, already within the tax net. Since the reasons recorded do not reflect

the requisite belief that income chargeable to tax has escaped assessment, the basic requirements of s. 147 of the Act have not been satisfied.

23. In the facts of the present case, it is not the case of the AO that any income chargeable to tax has escaped assessment. The case of the AO is

that in case the petitioner is a defaulter, under the provisions of the Act, in relation to ground No. 2 either under s. 269SS or s. 271B of the Act

and in relation to ground No. 3 either under s. 269T or s. 40A(3) of the Act. In case of default under the provisions of s. 269SS, s. 269T and s.

271B of the Act, penalty is leviable under ss. 271D, 271E and 271B of the Act respectively. The aforesaid provisions are penalty provisions and

even if the petitioner were liable to pay penalty under the said provisions, the same would not give rise to a conclusion that income has escaped

assessment.

30. In the present case, as noticed hereinabove, from the reasons recorded, it is apparent that the AO did not have any material before him so as

to satisfy the requirements of s. 147 of the Act in as much as, there is no material Whatsoever before the AO on the basis of which a reasonable

man would come to the conclusion that any income chargeable to tax has escaped assessment. The reasons recorded reflect that the AO feels that

the matter requires detailed investigation and further verification. Thus, it appears that the AO has reason to suspect and not reason to believe that

income chargeable to tax has escaped assessment. This, however, is not a valid ground for invoking the provisions of s. 147 of the Act. The reason

to believe that income chargeable to tax has escaped assessment must be based upon material on record. In the facts of the present case, there is

no such material. In the circumstances, in the absence of basic requirements of s. 147 of the Act being satisfied, the assumption of jurisdiction by

the AO is invalid and as such, the impugned notice under s. 148 of the Act cannot be sustained.

11. In Agrawal J.V."s case (supra), Division Bench of Gujarat High Court has reiterated the same principles.

12. Learned counsel for the petitioners Mr. Khurana has impeached the impugned reassessment proceedings on the ground that the very edifice of

the said action of the AO is mere change of opinion and such proceedings merely on strength of so called changed opinion is forbidden by law. For

authenticating these submissions, Mr. Khurana has submitted that during proceedings under s. 153A of the Act, the AO analyzed and considered

the seized material and thereupon issued a consolidated questionnaire to all concerned vide notice dt. 21st of Oct., 2011 which was duly replied

by petitioner Mukesh Modi and after receiving reply, the AO formed an opinion and thereafter passed the order under s. 153A r/w s. 143(3)/144

on 23rd of December 2011 thereby making an addition of Rs. 21,89,880 in the hands of the petitioners. Mr. Khurana while quoting this example

has highlighted the pitfalls in the initiation of reassessment proceedings and submitted with full emphasis that mere change of opinion cannot validate

initiation of proceedings which was illegal at the very inception.

13. Laying stress on the term specifically used by the AO for reopening of the assessment which are ""verifying"" or ""verification"", learned counsel for

the petitioners would urge that connotation of these words is to reexamine the existing material and therefore the action initiated by the AO is per

se founded on mere change of opinion. Mr. Khurana submits that the reasons which are forthcoming in reopening assessment are falling short of

the requisites prescribed by the statute under s. 147 of the Act. In order to authenticate this submission, the learned counsel for the petitioners has

placed reliance on the following judgments:

(i) Satnam Overseas Ltd. and Another Vs. Additional Commissioner of Income Tax,

(ii) Pardesi Developers and Infrastructure Pvt. Ltd. Vs. Commissioner Income Tax Delhi-IV and Others,

14. In Satnam Overseas (supra), Delhi High Court while examining the powers of the AO under s. 147 and 148 of the Act, made following

observations:

6. We feel that the writ petitions have to succeed because the contentions as raised on behalf of the counsel for the petitioner are well founded.

The only reason which has been given seeking reopening of the assessment for the years 1997-98 and 1998-99 is that suppression of sales have

taken place on account of the fact that when average price of the closing stock is multiplied with the quantity of the sales in the year then the value

of the sales would be at a higher figure than that as declared by the assessee. Clearly, there is no new material which is alleged to have come to the

notice of the AO which has caused him to seek reopening of the assessment. Admittedly, the reasons given for seeking reopening of the

assessment contains the expression "perusal of the case record reveals" clearly showing that it is on the basis of the same assessment record as

was filed by the assessee, during the relevant assessment years and also scrutinized by the AO before passing the orders under s. 143(3) is the

basis for seeking reopening of the assessment. Further the new logic, rationale and opinion which has been formed by the AO for seeking

reopening of the assessment is nothing but a change of opinion and a new approach to the existing facts and material which the AO could well have

done during the regular assessment proceedings of the relevant assessment years. Not only this, the rationale/logic/reasons given that sale price of

stocks during the entire assessment year would remain constant is something which indeed confounds us. It cannot stand to reason that the price of

sale of paddy/rice/pulses remained constant throughout the year so that on the basis of an average price of the closing stock the sale price for the

entire year comprising of 12 months, 48 weeks and 365 days can be ascertained in that the same would have remained fixed throughout this

period. Even assuming that this logic is correct, it was surely an exercise which the AO could have done on the basis of materials which he is now

presently seeking to do because the same very materials were available to him in the relevant assessment years and merely because the AO feels

that he has failed to do what he ought to have done cannot be a valid ground for seeking initiation of reassessment under ss. 147/148 of the Act.

15. While reiterating the said view in Pardesi Developers & Infrastructure (supra), Division Bench of Delhi High Court has held as under:

There is nothing to show that the AO did not receive the said information and, there is nothing to show that the AO had not applied his mind to the

information received by him. On the contrary, it is apparently because he was mindful of the said information that he issued notices under s. 133(6)

of the said Act directly to the parties to confirm the factum of application of shares and the source of funds of such shares. Therefore, the very

foundation of the notice under s. 148 of the said Act is not established even ex facie. Consequently, it cannot be said that the AO had the requisite

belief under s. 147 of the said Act and, as a consequence, the impugned notice were quashed. The writ petition was allowed.

16. Mr. Prakul Khurana, while articulating his submissions, has urged that the impugned proceedings are bad and illegal as these proceedings are

barred by third proviso to s. 147 of the Act. Mr. Khurana has argued that after completing assessment in case of Mukesh Modi, Daksha Kumari

Jain and Bharat Das Vaishnav under s. 143(3)/144 r/w s. 153A of the Act which was founded on thorough scanning of seized/impounded material

unearthed during the course of search/survey operations in case of Modi/Adarsh Group, which is clearly discernible from the reasons recorded

while assessing the total income of the petitioners, how and in what manner AO can reopen the assessment proceedings when these assessments

under s. 153A of the Act are sub judice before the CIT(A) in the form of appeals laid by the assessees. Taking shelter of third proviso to s. 147 of

the Act, Mr. Khurana would contend that by virtue of the said proviso initiation of reassessment proceedings is barred by law and cannot be

sustained. In support of this argument, learned counsel has placed reliance on following judgment:

(i) National Dairy Development Board Vs. Dy. CIT,

17. In this verdict, Division Bench of Gujarat High Court, while examining the true purport of third proviso to s. 147 of the Act, which at the

relevant point of time was second proviso to s. 147 of the Act, held as under:

Moreover, insofar as the second ground for reopening of assessment is concerned, it may be noted that the second proviso to s. 147 of the Act

expressly provides that the AO may assess or reassess such income, other than the income involving matters which are subject-matter of any

appeal, reference or revision, which is chargeable to tax and has escaped assessment. Thus by virtue of the second proviso to s. 147 of the Act,

income involving matters which are subject-matter of any appeal, reference or revision has expressly been taken out of the purview of the said

section. In the circumstances, insofar as the income stated to have escaped assessment under the second ground is concerned, the same having

been subject-matter of appeal would not fall within the ambit of s. 147 of the Act and as such the AO lacks jurisdiction to reopen the assessment

on the said ground.

18. Lastly, learned counsel for the petitioners has urged with full emphasis that the impugned reassessment proceedings conducted by the AO are

nothing but an eye wash and the approach of the AO is biased and he is acting to the detriment of assessees with predetermined mind. For

authenticating this submission, learned counsel has laid emphasis on letter dt. 15th Oct., 2013 whereby a proposal was mooted and conveyed to

the assessees that the objections submitted on their behalf shall be decided in the reassessment order itself. Mr. Khurana would urge that this sort

of proposal by the AO speaks volume about the fact that he has acted mechanically and has made an affirmative attempt to shirk from its

responsibility to dispose of the objections by a speaking order mandated by Hon"ble apex Court in GKN Driveshafts (India) Ltd. Vs. Income Tax

Officer and Others, . Mr. Khurana has also questioned the proactive role of the AO in passing the reassessment orders with undue haste. Mr.

Khurana has submitted that the whole endeavour of AO while passing the reassessment orders hurriedly was intended to frustrate the cause of the

petitioners to seek judicial review of the impugned action under Art. 226 of the Constitution.

19. Per contra, learned senior standing counsel for the Revenue Mr. K.K. Bissa has argued that there is no infirmity much less infirmity in initiation

of reassessment proceedings against the assessees under s. 147/148 of the Act. Mr. Bissa would contend that notices under s. 148 of the Act

were issued to assessees on noticing material discrepancies from the available material which was seized and impounded during surveys. Learned

counsel further submits that certain anomalies remained unexplained due to non-verification of the materials for which AO had reason to believe

that income of the assessees chargeable to tax has escaped assessment.

20. Learned counsel Mr. Bissa would contend that where prima facie lie hidden or embedded in the record including books of accounts, which are

filed along with the return, it may require deep exercise and deep study to uncover same and this kind of disclosure cannot be said to be a true and

full disclosure of primary facts. In exercise of power under s. 147 of the Act, the AO can very well invoke such powers for reopening the

assessment to unearth escapement of income chargeable to tax at the behest of the assessee. For this proposition, the learned counsel Mr. Bissa

has placed reliance on the Division Bench judgment of this Court in case of Assistant Commissioner of Income Tax Vs. Banswara Syntex Ltd., .

Division Bench in this case has held that sufficiency of reasons for forming the belief for reopening assessment is not for the Court to judge and in

the facts and circumstances of that case the Court has upheld the action of the AO. The Division Bench finally held as under:

10. The question, whether disclosure was made fully and truly depends upon the facts and circumstances of each case. Where primary facts lie

hidden or embedded in the record including the books of account, which are filed along with the return, it may require detailed exercise and deep

study to discern or uncover the same. This kind of disclosure cannot be said to be a true and full disclosure of primary facts.

11. In the instant case, the assessee had claimed lease-rent on accrual basis. The letter of the assessing authority dt. 5th Dec., 2003, records that

the lease-rent on that basis had been shown as Rs. 92,77,532. It also points out that in the amount of Rs. 92,77,532, at least Rs. 60 lakhs

represented the principal amount towards cost of machinery and that this could be unveiled only on examination of the accounts. According to the

aforesaid letter of the assessing authority, due to the filing of wrong claim by the assessee for the asst. yr. 1996-97, a sum of approximately Rs.

60,00,000, which was chargeable to income tax, had escaped assessment. Again, in the letter of the assessing authority dt. 12th Jan., 2004,

whereby the objections of the respondent in reply to the notice under s. 148 of the IT Act, were decided, it has been pointed out that the

respondent did not ""uncover the lease agreement"" and did not specify terms and conditions thereof, which had material bearing on the assessment.

In the letter dt. 12th Jan., 2004, the assessing authority has expressed the view that the respondent did not fully and truly disclose all the material

facts. The following observations of the assessing authority contained in the communication need to be quoted:

You did not bother to provide what were the transactions and conditions of lease rent, who were the lessor, what were the instalments, what was

interest element, when the interest was accruing and when interest payment was becoming due, what was the principal element, what was prepaid

lease rent and likewise. You did not come forward with sample copy of lease agreement by you with lessor. In this connection please refer similar

enquiry during the course of assessment proceedings for the asst. yr. 2000-01 in which you have provided 1 page of expressed explanation and as

many as 58 pages of supporting evidence which includes summary of lease payment for the relevant year and the summary to each lease agreement

in terms of monetary and periodicity of payment aspects. You have also enclosed copy of all the relevant lease agreement.

A reading of the letters dt. 5th Dec, 2003, and 12th Jan., 2004, reflect that the escapement of income according to the assessing authority is

attributable to wrong claim preferred by the assessee and its failure to disclose the material facts truly and fully. Thus, the reason recorded by the

assessing authority has nexus with the formation of belief by the assessing authority for taking action under s. 147 of the IT Act. Therefore, s.

149(1)(b) r/w s. 147 has been invoked by the assessing authority for reopening the assessment. It is well settled that the sufficiency of reasons for

forming the belief is not for the Court to judge. The final order which may be passed by the assessing authority under s. 147, if it goes against the

respondent, is appealable under s. 246 of the IT Act. The respondent cannot be allowed to short-circuit the procedures prescribed by law.

12. In GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, , the Supreme Court while declining to interfere with order passed by

the Delhi High Court dismissing as premature the writ petition filed by the noticee challenging the notice issued to it under ss. 148 and 143(1) of the

IT Act without filing reply thereto, held as follows:

We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under s. 148 of the IT Act is

issued, the proper course of action for the noticee is to file a return and if he so desires, to seek reasons for issuing notices. The AO is bound to

furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the AO is bound

to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the AO has to

dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment

years.

21. Learned counsel for the Revenue has meticulously urged that power of judicial review in such matters is confined to see whether there was

prima facie some material on the basis of which Department could reopen the case and sufficiency or correctness of material is not a thing to be

considered at this stage. In support of this argument, Mr. Bissa has placed reliance on a decision of Hon''ble Supreme Court in case of Raymond

Woollen Mills Ltd. Vs. Income Tax Officer and Others, and also referred to Rajesh Jhaveri Stock Brokers (P) Ltd. (supra).

22. In Raymond Woollen Mill''s case [supra], the Hon''ble apex Court without examining the case on merit has held as under:

In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see

whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the

material is not a thing to be considered at this stage. We are of the view that the Court cannot strike down the reopening of the case in the facts of

this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that

no new facts came to the knowledge of the ITO after completion of the assessment proceeding. We are not expressing any opinion on the merits

of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to

take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.

23. In Rajesh Jhaveri Stock Brokers (P) Ltd. (supra), Hon''ble apex Court has thoroughly examined the powers of AO under s. 147 and finally

held as under:

16. Sec. 147 authorises and permits the AO to assess or reassess income chargeable to tax if he has reason to believe that income for any

assessment year has escaped assessment. The word ''reason'' in the phrase ''reason to believe'' would mean cause or justification. If the AO has

cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had

escaped assessment. The expression cannot be read to mean that the AO should have finally ascertained the fact by legal evidence or conclusion.

The function of the AO is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed

by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. Vs. I.-T.O., Nagpur, , for initiation of action under s. 147(a) (as the

provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the

proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement

of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have

formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the

formation of belief by the AO is within the realm of subjective satisfaction.

17. The scope and effect of s. 147 as substituted w.e.f. 1st April, 1989, as also ss. 148 to 152 are substantially different from the provisions as

they stood prior to such substitution. Under the old provisions of s. 147, separate cls. (a) and (b) laid down the circumstances under which income

escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under s. 147(a) two conditions were

required to be satisfied firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment,

and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the

assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be

satisfied before the AO could have jurisdiction to issue notice under s. 148 r/w s. 147(a). But under the substituted s. 147 existence of only the

first condition suffices. In other words if the AO for whatever reason has reason to believe that income has escaped assessment it confers

jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the

proviso to s. 147. The case at hand is covered by the main provision and not the proviso.

18. So long as the ingredients of s. 147 are fulfilled, the AO is free to initiate proceeding under s. 147 and failure to take steps under s. 143(3) will

not render the AO powerless to initiate reassessment proceedings even when intimation under s. 143(1) had been issued.

24. Learned counsel for the Revenue would urge that the legislature has enacted the provisions under s. 147 of the Act with laudable objects

authorizing the AO to reopen the assessment when income chargeable to tax has escaped assessment and therefore for exercising such powers to

enrich the Revenue no motive can be attributed to AO. Repelling the contentions put forward on behalf of the petitioners that the AO has acted

mala fide in a biased manner, Mr. Bissa submits that there is no semblance of proof to this effect and as such this contention merits outright

rejection.

25. Placing heavy reliance on the assessment orders passed as a consequence of reopening of assessment, learned counsel for the respondent

Revenue has urged that against these reassessment orders alternative statutory remedy of appeal is available to the assessees; the writ petitions

cannot be entertained ignoring the statutory dispensation. Learned counsel for the Revenue submits that remedy of appeal under s. 246 and 246A

of the Act is very much available to the petitioner assessees and as such writs are not maintainable. Mr. Bissa has submitted that extraordinary

jurisdiction is not liable to be exercised when statutory remedy is available and this practice is being followed consistently by the Court and there is

no plausible reason available in these petitions to deviate from this practice. In support of his contentions Mr. Bissa has placed reliance on the

judgment of Hon''ble apex Court in case of Commissioner of Income Tax and Others Vs. Chhabil Dass Agarwal, and Rajesh Jhaveri Stock

Brokers (P) Ltd. (supra).

26. In Chhabil Dass Agarwal''s case (supra), Hon''ble apex Court has thoroughly analyzed the concept of alternative remedy and the self-imposed

restrictions for the High Court to exercise jurisdiction under Art. 226. The Court has held in para 15 and 16 as under:

15. Before discussing the fact proposition, we would notice the principle of law as laid down by this Court. It is settled law that non-entertainment

of petitions under writ jurisdiction by the High Court when an efficacious alternative remedy is available is a rule of self-imposed limitation. It is

essentially a rule of policy, convenience and discretion rather than a rule of law. Undoubtedly, it is within the discretion of the High Court to grant

relief under art. 226 despite the existence of an alternative remedy. However, the High Court must not interfere if there is an adequate efficacious

alternative remedy available to the petitioner and he has approached the High Court without availing the same unless he has made out an

exceptional case warranting such interference or there exist sufficient grounds to invoke the extraordinary jurisdiction under art. 226.

16. The Constitution Benches of this Court in K.S. Rashid and Son Vs. The Income Tax Investigation Commission etc., ; Sangram Singh Vs.

Election Tribunal, Kotah, Bhurey Lal Baya, ; Union of India (UOI) Vs. T.R. Varma, ; The State of Uttar Pradesh Vs. Mohammad Nooh, and

K.S. Venkataraman and Co. Vs. State of Madras, have held that though art. 226 confers a very wide power in the matter of issuing writs on the

High Court, the remedy of writ absolutely discretionary in character. If the High Court is satisfied that the aggrieved party can have an adequate or

suitable relief elsewhere, it can refuse to exercise its jurisdiction. The Court, in extraordinary circumstances, may exercise the power if it comes to

the conclusion that there has been a breach of principles of natural justice or procedure required for decision has not been adopted.

27. Again while examining the exceptions deviate from the general perception of not entertaining a writ petition in the event of availability of

alternative remedy, Hon''ble apex Court has held as under:

19. Thus, while it can be said that this Court has recognized some exceptions to the rule of alternative remedy, i.e., where the statutory authority

has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or

has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the

proposition laid down in Thansingh Nathmal and Others Vs. A. Mazid, Superintendent of Taxes, and other similar judgments that the High Court

will not entertain a petition under Art. 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute

under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a

statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.

20. In the instant case, the Act provides complete machinery for the assessment/reassessment of tax, imposition of penalty and for obtaining relief

in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to

invoke the jurisdiction of the High Court under Art. 226 of the Constitution when he had adequate remedy open to him by an appeal to the

CIT(A). The remedy under the statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam

Company Vs. State of Haryana and Others, this Court has noticed that if an appeal is from ""Caesar to Caesar''s wife"" the existence of alternative

remedy would be a mirage and an exercise in futility. In the instant case, neither has the assessee-writ petitioner described the available alternate

remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court nor has the High Court ascribed

cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case.

28. Learned counsel has further tried to authenticate his submissions in this behalf by placing reliance on the procedure to be adopted by the

noticee on receipt of notice under s. 148 of the Act and for that proposition laid stress on para 15 of the verdict of Division Bench in Banswara

Synthetics (supra), which reads as under:

15. It seems to us that when a notice under s. 148 of the IT Act is issued to a noticee, he is to adopt the following path paved and recognised by

the legislature and the judicial decisions:

(1) File return in response to the notice.

(2) He can ask the assessing authority to furnish reasons for issuance of the notice, which the assessing authority is bound to communicate to him

within a reasonable time.

(3) On receiving the reasons he may file objections thereto, which the assessing authority is bound to decide by a speaking order before

proceeding with reassessment of income chargeable to tax with regard to the relevant assessment year.

(4) After the passing of the order of reassessment under s. 147 of the IT Act by the assessing authority, the assessee, if not satisfied with the order,

can file an appeal before the appellate authority under s. 246 thereof.

29. Mr. Bissa, learned counsel for the Revenue has also placed reliance in this behalf on yet another Division Bench decision of this Court in case

of Rajan Products Vs. Union of India and Another, . In this verdict, although the Division Bench has not examined the matter thoroughly vis-a-vis

the issue of availability of alternative remedy on receipt of notice under s. 148 of the Act but has suggested the course of action to be adopted by

the assessee on receipt of notice. The Division Bench has held as under:

It is not the case of the appellant herein that no sanction has been obtained as contemplated under s. 151 of the Act. The ITO has reason to

believe that there is escaped assessment and we have reason to believe that he could exercise his jurisdiction under s. 147 of the Act. We are

unable to accept the arguments advanced by learned counsel for the appellant on ss. 147 and 148 of the Act. If such contention is accepted, then

reopening of the assessment will be impossible and the income which has escaped assessment cannot be taxed in any eventuality. In regard to the

request made by the assessee asking for reasons for issuance of notice under s. 147, we are of the opinion that the appellant has no legal right to

ask for reasons and the same in our opinion need not be communicated. The notice was issued under s. 148 of the Act and, therefore, the

appellant ought to have filed the reply immediately. In our opinion, the appellant has wrongly invoked the jurisdiction of this Court. As already

noticed, the writ petition is directed against the notice under s. 147 of the IT Act. This apart, the appellant has an alternative remedy of filing

appropriate appeal before the appropriate authority provided under the IT Act, 1961. In our view, there is no cause of action which has arisen for

the appellant-petitioner for filing a writ petition and further appeal.

Since the writ petition has been filed against the notice of reassessment, we have no other option except to dismiss the appeal as not maintainable.

However, the dismissal of the writ appeal will not stand in the way of the appellant''s raising of legal contention by way of reply to the notice under

s. 147 of the Act along with the return if the return has not already been filed. On receipt of reply to the show-cause notice issued under s. 147, the

ITO shall decide the objections filed legally and factually and then pass final orders in accordance with law after affording an opportunity of hearing

either to the appellants or to their authorised representative within three months from the date of filing objections regarding reassessment

proceedings.

30. I have heard the learned counsel for the parties and perused the materials available on record.

31. The pivotal issue, which falls for consideration in all these petitions relates to a taxing statute and therefore for thrashing out the same pragmatic

approach is desirable. Legislature in its wisdom has conferred powers on the AO to reopen the assessment proceedings for ensuring proper vigil

and check on unscrupulous assessees who are involved in evasion of tax. The intent of legislature is to vouchsafe the authority of the AO for

enriching the coffers of the Revenue under special circumstances. Thus, with this solemn object, s. 147 of the Act is couched with a very clear and

unambiguous language that assessing authority can resort to reopen the assessment if it has reason to believe that any income chargeable to tax has

escaped assessment for any assessment year. While inserting the words ""has reason to believe"", the legislature has made an affirmative attempt to

circumscribe these powers by making it amply clear that these powers are to be exercised bona fide to further interest of the Revenue and not to

transgress these powers in a casual and cavalier manner. Emphasis on the recitals ""has reason to believe"" presupposes that the AO on scrutinizing

the available materials for resorting to such powers may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The

belief must be held in good faith; it cannot be a mere pretence. The question came up before the Constitution Bench of Hon''ble apex Court in

Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, , wherein the subject matter of scrutiny was s.

34(1)(a) of the Indian IT Act, 1922 for reassessment which is almost peri materia to s. 147 of the Act. Speaking for the majority, Justice Das

Gupta held as follows:

The position, therefore, is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any

primary fact, which could have a material bearing on the question of ''underassessment'', that would be sufficient to give jurisdiction to the ITO to

issue the notices under s. 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non-disclosure of material

facts would not be open for the Court''s investigation. In other words, all that is necessary to give this special jurisdiction is that the ITO had when

he assumed jurisdiction some prima facie grounds for thinking that there had been some non-disclosure of material facts.

Justice Das Gupta has further held:

It must, therefore, be held that the ITO who issued the notices had not before him any non-disclosure of a material fact and so he could have no

material before him for believing that there had been any material nondisclosure by reason of which an underassessment had taken place.

We are, therefore, bound to hold that the conditions precedent to the exercise of jurisdiction under s. 34 of the IT Act did not exist and the ITO

had therefore no jurisdiction to issue the impugned notices under s. 34 in respect of the years 1942-43, 1943-44 and 1944-45 after the expiry of

four years.

Mr. Sastri argued that the question whether the ITO had reason to believe that underassessment had occurred ""by reason of non-disclosure of

material facts"" should not be investigated by the Courts in an application under art. 226. Learned counsel seems to suggest that as soon as the ITO

has reason to believe that there has been underassessment in any year he has jurisdiction to start proceedings under s. 34 by issuing a notice

provided 8 years have not elapsed from the end of the year in question, but whether the notices should have been issued within a period of 4 years

or not is only a question of limitation which could and should properly be raised in the assessment proceedings. It is wholly incorrect however to

suppose that this is a question of limitation only not touching the question of jurisdiction. The scheme of the law clearly is that where the ITO has

reason to believe that an underassessment has resulted from non-disclosure be shall have jurisdiction to start proceedings for reassessment within a

period of 8 years; and where he has reason to believe that an underassessment has resulted from other causes he shall have jurisdiction to start

proceedings for reassessment within 4 years. Both the conditions, (i) the ITO having reason to believe that there has been underassessment and (ii)

his having reason to believe that such underassessment has resulted from nondisclosure of material facts, must co-exist before the ITO has

jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these

conditions, viz., that the ITO has reason to believe that under-assessment has resulted from nondisclosure of material facts, cannot therefore be

accepted.

Per majority, the apex Court has also overruled the objection of the Revenue on the availability of alternative statutory remedy by holding as under:

We are informed that assessment orders were in fact made on 25th March, 1952, by the ITO in the proceedings started on the basis of these

impugned notices. This was done with the permission of the learned judge before whom the petition under art. 226 was pending, on the distinct

understanding that these orders would be without prejudice to the contentions of the parties on the several questions raised in the petition and

without prejudice to the orders that may ultimately be passed by the Court. The fact that the assessment orders have already been made does not

therefore affect the company''s right to obtain relief under art. 226. In view, however, of the fact that the assessment orders have already been

made we think it proper that in addition to an order directing the ITO not to take any action on the basis of the impugned notices a further order

quashing the assessment made be also issued.

32. The connotation of the words ""reason to believe"" appearing in s. 34(1)(a) of the Act of 1922 for reopening of the assessment once again came

up before Hon''ble apex Court in case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, , and the Court held

as under:

9. It is abundantly clear that the two reasons which have been given for the belief which was formed by the ITO hopelessly fail to satisfy the

requirements of the statute. In a recent case-- Chhugamal Rajpal Vs. S.P. Chaliha and Others, which came up before this Court, a similar situation

had arisen and under the directions of the Court, the Department produced the records to show that the ITO had complied with the conditions laid

down in the statute for issuing a notice relating to escapement of income. There also, the report submitted by the officer to the CIT and the latter''s

orders thereon were produced. In his report, the ITO referred to some communications received by him from the CIT, Bihar and Orissa from

which it appeared that certain creditors of the assessee were mere name lenders and the loan transactions were bogus and, therefore, proper

investigation regarding the loans was necessary. It was observed that the ITO had not set out any reason for coming to the conclusion that it was a

fit case for issuing a notice under s. 148 of the IT Act, 1961. The material that he had before him for issuing notice had not been mentioned. The

facts contained in the communications which had been received were only referred to vaguely and all that had been said was that from those

communications it appeared that the alleged creditors were name lenders and the transactions were bogus. It was held that from the report

submitted by the ITO to the CIT it was clear that he could not have had reasons to believe that on account of assessee''s omission to disclose fully

and truly all material facts, income chargeable to tax had escaped assessment''.

10. 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 ITO may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The ITO 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.

11. 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 s. 34(1A). The so-called reasons are stated to be beliefs thus leading to an obvious self-contradiction. We

are satisfied that the requirements of s. 34(1A) were not satisfied and, therefore, the notices which had been issued were wholly illegal and invalid.

33. In yet another judgment on which the learned counsel for the petitioners has placed reliance of Gujarat High Court in Agrawal JV''s case

(supra), has reiterated the same principles.

34. The Division Bench of this Court in Biggabas Maheshwari Seva Samiti''s case (supra), while upholding the judgment of Tribunal has reiterated

the same principle and held as under in para 11 and 12.

11. Coming to question No. 1, a look at the judgment of the Tribunal shows that the learned Tribunal has proceeded on two judgments of Hon''ble

the Supreme Court, being in Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , and Ganga Saran and Sons P. Ltd. Vs. Income

Tax Officer and Others, . In Lakhmani Mewaldas''s case (supra), it has been held, that the reasons, which led to the formation of the belief,

contemplated by s. 147(a), must have a material belief on the question of escapement of income of the assessee from assessment and does not

mean a purely subjective satisfaction on the part of the ITO. Where live link between the material before the ITO, and the belief he was to form

regarding escapement of income, is missing, such material was stated to be not sufficient for forming belief, and same view was taken in Ganga

Saran''s case (supra).

Then, applying these judgments, it has been found by the learned Tribunal that one of the conditions necessary for issuance of notice under s. 148,

being under-statement of income of the assessee, is not fulfilled. It has been held, that in order to bring an item within the purview of s. 147, it is of

utmost importance, that the AO should have reason to believe, based on relevant and cogent material, that such income has escaped assessment. It

has been found, that there was no material direct or indirect, available with the AO, which could show that the receipt of donations, amounting to

Rs. 30,16,598, was without any specific direction of corpus fund. The assessee has shown the receipts, as having been received in the corpus

fund, coupled with the report of the auditor. The AO had not inquired into the nature of the receipts, before issuing notice under s. 148, and in

earlier years also, the amount was held to be received in the corpus fund.

12. In our view, the learned Tribunal has rightly examined the controversy. It is significant to note that the learned Tribunal has further found that

AO cannot initiate reassessment proceedings, simply to verify the contents of the return, unlike before it was vested in him in making regular

assessment. It was found that the time-limit available for issuance of notice and making assessment under s. 143(3) had expired, but then, on that

count, he cannot assume the jurisdiction by venturing to make assessment under s. 148. Even after hearing learned counsel for the parties at length,

we are satisfied that the reasons given by the learned Tribunal are in accordance with law.

35. On this proposition, attempt can be made to test the scope of powers under s. 147 of the Act and true intent of the legislature"" for inserting

words ""reason to believe"" by considering precedents on which the learned counsel for the Revenue has relied. The Division Bench of this Court in

Banswara Synthetics case (supra) postulated certain guidelines for assessee on receipt of notice under s. 148 of the Act quoted hereinabove.

36. Other judgment, on which the learned counsel for the Revenue has placed reliance, is a judgment of Hon''ble apex Court in Raymond

Woolen''s case (supra) wherein the Hon''ble apex Court has held that while examining notice under s. 148 for reopening of assessment, the

sufficiency or correctness of the material is not a thing to be considered at this stage.

37. In Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) on which the learned counsel for the Revenue has placed heavy reliance, Hon''ble apex

Court has very specifically dealt with scope and effect of s. 147 as also ss. 148 to 152 (amended w.e.f. 1st April, 1989) and has postulated two

conditions for conferment of jurisdiction on AO to reopen the assessment under s. 147 of the Act. Para 17 of the verdict quoted supra elaborately

deals with this aspect of the matter.

38. Upon a close scrutiny of the legal position, which has emerged out for construing the term ""reason to believe"", the decks are clear for its

interpretation. The expression ""reason to believe"" means the existence of rational and intelligible nexus between the reasons and the belief, so that

on such reasons no one properly instructed on facts and the law could reasonably entertain the belief.

39. Now I propose to have a glance at the reasons which are forthcoming for issuance of notice under s. 147/148 of the Act by the AO and the

order whereby objections raised by the petitioner assessee were dealt with and rejected.

40. If the recitals contained in the notice under s. 148 of the Act are examined on the touchstone of the expression ""reason to believe"", I am afraid

the same is falling short of requisites prescribed by the legislature and the law laid down by various authoritative pronouncements referred to supra.

Well it is true that legislature has conferred power on the AO to unearth evasion of tax by an assessee and with this solemn object these powers

have been conferred on it, but for invoking such extraordinary powers, it is essential for the AO to examine the material objectively with due

application of mind for forming an opinion that certain income of the assessee has escaped assessment despite due diligence. In the instant case, the

assessment orders were passed by the AO during the proceedings under s. 153A of the Act after analyzing the seized/impounded material during

search and survey after issuing consolidated questionnaire to all concerned and in case of some of the assessees making addition of the income

under their heads while closing proceedings in some of the cases. Therefore, when the material which was available with the AO at the relevant

point of time while passing the assessment orders under s. 143(3)/144 r/w s. 153A of the Act, there remains no doubt that the said material was

examined and duly verified by the AO to assess the income of the individual assessee. The reasons which are spelt out in the notice, in my

considered opinion, is nothing but an attempt to clear the suspicion of the AO by simply changing its opinion, which per se cannot satisfy the test of

expression ""reason to believe"". Of course, evasion of tax is menace to society but at the same time an assessee who is contributing to the

exchequer in the form of tax cannot be allowed to suffer on mere pretence that it has evaded payment of tax. A rowing and fishing enquiry in the

hands of AO on mere suspicion or change of opinion cannot satisfy expression ""reason to believe"" exposing the assessee for reopening of

assessment. My view is fully fortified from the judgment of Hon''ble apex Court in Calcutta Discount Co. Ltd. (supra) and Shivnath Singh''s case

(supra) besides the legal precedents on which learned counsel for the petitioner has placed reliance. The decision of Hon''ble apex Court in Rajesh

Jhaveri Stock Brokers (P) Ltd. (supra), on which the learned counsel for the Revenue has placed reliance, has also reiterated the same principles

that for conferring jurisdiction under s. 147(a) of the Act twin conditions are required to be satisfied; firstly, the AO must have reason to believe

that income, profits or gains chargeable to income tax had escaped assessment, and secondly he must also have reason to believe that such

escapement had occurred by reason of either (i) omission or failure on the part of assessee to file a return under s. 139 for any assessment year

with the AO, or (ii) to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions

precedent to be satisfied before AO could have jurisdiction to issue notice under s. 148 r/w s. 147 of the Act. Applying these twin tests further

makes it crystal clear that notice for reopening the assessment is not in consonance and in conformity with which under s. 147 of the Act is

couched and consequently making the notice vulnerable.

41. Now switching on to the reasons which were recorded by the AO, while rejecting the objections submitted by the assessees pursuant to notice

under s. 147/148 of the Act, in my considered opinion, the reasons are not plausible and convincing. In fact, the order, whereby the objections

were rejected by AO, is not a self-contained speaking order. Upon perusal of the order, it is amply clear that the same contains conclusions and is

bereft of reasons. In G.K.N. Driveshafts (India) Ltd. (supra), while dilating on the course of action for the noticee on receipt of notice under s. 148

of the Act, the Hon''ble apex Court held as under:

When a notice under s. 148 is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing

notices. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of

notice and the AO is bound to dispose of the same by passing a speaking order.

42. My this view is fully fortified from a decision of Hon''ble apex Court in case of Union of India (UOI) Vs. Mohan Lal Capoor and Others, . In

this verdict, Hon''ble apex Court, has defined the true meaning of reasons as under:

Reasons are the links between the materials on which certain conclusions are based and the actual conclusions. They disclose how the mind is

applied to the subject-matter for a decision whether it is purely administrative or quasi judicial. They should reveal a rational nexus between the

facts considered and the conclusions reached. Only in this way can opinions or decisions recorded be shown to be manifestly just and reasonable.

43. Thus, applying the ratio decidendi of the decision of Hon''ble apex Court in G.K.N. Driveshafts (India) Ltd. (supra), and the true purport of

reasons spelt out in Mohanlal Capoor''s case (supra), the impugned order rejecting objections of the assessees is based on mere ipse dixit of the

AO. This sort of situation has really furnished a cause of grievance to the petitioner-assessees, thereby seeking shelter of great humanizing

principles, i.e. principles of natural justice. It is trite that any quasi judicial or administrative authority is required to pass a reasoned order when it

visits the recipient with civil consequences and it is one of the facets of the principles of audi alteram partem.

44. The issue relating to the embargo for reopening of the assessment as envisaged under third proviso to s. 147 of the Act vociferously canvassed

by the petitioners has not been examined for the simple reason that the Court felt persuaded on other counts to annul the reassessment

proceedings. Therefore, this question is left open.

45. The contention of the learned counsel for the petitioners that AO has acted with undue haste in a biased and mala fide manner appears to be

quite alluring but in want of cogent and convincing material for its substantiation the same is not tenable. True it is that the AO has proceeded

against the assessees with utmost promptitude for reopening the assessment proceedings but solely on that basis no inference can be drawn to

castigate the AO for biased or mala fide disposition vis-a-vis assessees.

46. Lastly, adverting to the objection of the Revenue about availability of alternative remedy under s. 246 and 246A of the Act, suffice it to state

that its availability to a suitor is not an absolute bar to the invocation of the writ jurisdiction of the High Court under Art. 226 of the Constitution

and that without exhausting such alternative remedy a writ petition would not be maintainable. Constitutional powers vested in the High Court or

the Supreme Court cannot be fettered by any alternative remedy available to the suitor. Injustice, whenever and wherever it takes place, has to be

struck down as an anathema to the rule of law and the provisions of the Constitution.

47. The legal precedents on which learned counsel for the Revenue has placed reliance in this behalf are required to be examined in the backdrop

of the facts of the instant case. In Chhabil Dass Agarwal''s case (supra), Hon''ble apex Court has opined with clarity and precision that it is a rule

of self-imposed limitation. It is essentially a rule of policy, convenience and discretion rather than rule of law. Similarly, in Rajesh Jhaveri Stock

Brokers (P) Ltd. (supra), Hon''ble apex Court has not dilated on this aspect and instead has issued a word of caution to the AO by observing that

the function of the AO is to administer the statute with solicitude for the public exchequer with an in-built idea of fairness to taxpayers"". So far as

the decisions rendered by Division Bench of this Court in Banswara Synthetics Ltd. (supra) and Rajan Products (supra), it is not mandated that

writ petition cannot be entertained in the event of availability of alternative remedy. The Division Bench in both these cases, while taking note of the

peculiar facts and circumstances of the cases, has relegated the assessee to alternative remedy.

48. In order to appreciate the concept of alternative remedy in the background of the facts of the instant case, more particularly the findings

recorded (supra), that notices issued to assessees under s. 147/148 of the Act are falling short of requisites prescribed under the statute and the

reason for reopening of assessment is for ""verifying"" or ""verification"" of the existing material. The action of the AO is therefore per se founded on

mere change of opinion and the same cannot satisfy the legislative intent that it has reason to believe that any income chargeable to tax has escaped

assessment. Hon''ble apex Court, in Calcutta Discount Co. Ltd. (supra), per majority, has overruled the objection of availability of alternative

remedy and while quashing the impugned notice has also quashed the assessment order. In case of Mariamma Roy Vs. Indian Bank and Others, ,

the Hon''ble apex Court while entertaining a writ petition against an order has overruled the objection of availability of alternative remedy on the

ground that the order has been passed in violation of principles of natural justice. In Whirlpool Corporation Vs. Registrar of Trade Marks, Mumbai

and Others, , while examining the issue relating to existence of alternative statutory remedies for maintainability of a writ petition, Hon''ble apex

Court held as under:

15. Under Art. 226 of the Constitution, the High Court, having regard to the facts of the case, has discretion to entertain or not to entertain a writ

petition. But the High Court has imposed upon itself certain restrictions one of which is that if an effective and efficacious remedy is available, the

High Court would not normally exercise its jurisdiction. But the alternative remedy has been consistently held by this Court not to operate as a bar

in at least three contingencies, namely, where the writ petition has been filed for the enforcement of any of the fundamental rights or where there has

been a violation of the principles of natural justice or where the order or proceedings are wholly without jurisdiction or the vires of an Act is

challenged. There is a plethora of case law on this point but to cut down this circle of forensic whirlpool we would rely on some old decisions of

the evolutionary era of the constitutional law as they still hold the field.

16. Rashid Ahmed Vs. The Municipal Board, Kairana, , laid down that existence of an adequate legal remedy was a factor to be taken into

consideration in the matter of granting writs. This was followed by another Rashid case, namely, K.S. Rashid and Son Vs. The Income Tax

Investigation Commission etc., which reiterated the above proposition and held that where alternative remedy existed, it would be a sound exercise

of discretion to refuse to interfere in a petition under Art. 226. This proposition was, however, qualified by the significant words, ""unless there are

good grounds therefor"", which indicated that alternative remedy would not operate as an absolute bar and that writ petition under Art. 226 could

still be entertained in exceptional circumstances.

49. Hon''ble apex Court in Harbanslal Sahnia and Another Vs. Indian Oil Corpn. Ltd. and Others, has reiterated the same principle.

50. Similarly, in Siemens Ltd. Vs. State of Maharashtra and Others, , Hon''ble apex Court while examining the provisions of the Bombay

Provincial Municipal Corporation Act, 1949, has held that a writ can be maintained against a show-cause notice when it is issued with

premeditation.

51. The Division Bench of Allahabad High Court, in case of Moriroku Ut India Pvt. Ltd. Vs. State of U.P. and Others, , overruled the objection of

maintainability of a writ petition against show-cause notice as well as availability of alternative remedy under certain circumstances. Speaking for

the Bench, Justice B.S. Chauhan has held as under:

Therefore, it is evident that where the notice itself makes it abundantly clear that the authority has already made up his mind and is likely to pass an

order in a particular manner, submission of reply or hearing would be an empty formality. Thus, party be not asked to avail alternative remedy.

52. Thus, in totality, in the peculiar facts and circumstances of the case, the objection of the respondent Revenue against maintainability of a writ

petition on the anvil of availability of alternative statutory remedy cannot be sustained and the same is hereby overruled.

53. While examining the matter in its entirety and on the basis of findings and conclusions recorded supra, in my considered opinion, notices issued

to the assessees by the AO under s. 147/148 of the Act are not satisfying the prerequisites for the same. There is no whisper in the notice, or iota

of proof that while issuing the same the AO had reason to believe that any income chargeable to tax has escaped assessment for the assessment

year. Thus, the notice has been issued by the AO simply for his own verification and to clear his doubts and suspicions to reexamine the material

which were already available on record at the time of passing of the earlier assessment orders. The legislature under s. 147 has not clothed AO

with such jurisdiction therefore the action cannot be upheld in the background of the facts of instant case. One more redeeming fact which has

direct nexus with the subsequent reassessment proceedings and ramification of the same has culminated into reassessment orders is the impugned

order whereby the AO has rejected the objections submitted by the assessees pursuant to notice under s. 147/148 of the Act. The order passed

by the AO in this behalf is not a speaking order which cannot be sustained. In view of legal infirmity in the notice under s. 147/148 of the Act and

laconic order of AO while rejecting the objections of the assessees the consequential assessment orders are also liable to be annulled. The upshot

of above discussion is that all these writ petitions are hereby allowed, impugned notice under s. 147/148 of the Act issued to the petitioner-

assessees and the order rejecting their objections in this behalf are quashed and set aside.

The consequential reassessment orders vis-a-vis all the petitioner-assessees are also hereby annulled.

Costs are made easy.