आयकर अपीलीय अधीकरण, न्यायपीठ – "C" कोलकाता,
IN THE INCOME TAX APPELLATE TRIBUNAL "C" BENCH: KOLKATA
(समक्ष)Before **श्री जे. सुधाकर रेड्डी**, लेखा सदस्य **एवं/and श्री ऐ. टी. वर्की,** न्यायीक सदस्य)
[Before Shri J. Sudhakar Reddy, AM & Shri A. T. Varkey, JM]

I.T.A. No. 2178/Kol/2017
Assessment Year: 2010-11

M/s. Devansh Exports (PAN: AACFD1870B)	Vs.	Assistant Commissioner of Income-tax, Circle-32, Kolkata.
Appellant		Respondent

Date of Hearing	07.08.2018
Date of Pronouncement	15.10.2018
For the Appellant	Shri Ketan K. Ved, AR
For the Respondent	Shri Sanjay Paul, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This appeal preferred by the assessee is against the order of the DRP-2, New Delhi, dated 07.08.2017 for AY 2010-11.

2. The main grievance of the assessee company is against the action of the AO to reopen the regular assessment completed u/s. 143(3) of the Income-tax Act, 1961 (hereinafter referred to as the "Act") on 15.03.2013.

3. Brief facts are that the assessee filed its return of income on 21.09.2010 thereafter; the AO after issuing statutory notices u/s. 142(1) and 143(2) of the Act completed the regular scrutiny assessment u/s. 143(3) of the Act on 15.03.2013. Thereafter on 08.09.2014 notice was issued u/s. 148 of the Act proposing to reopen the regular assessment framed on 15.03.2013. On the request of the assessee, the AO gave a copy of the reasons recorded for reopening of the assessment, which is kept at page 40 and 41 of the paper book.

4. Thereafter the assessee filed its objection before the AO to the proposed reopening of the assessment vide letter dated 13.08.2015 which is found placed at pages 42 to 46 of the paper book. However, it was brought to our notice that the AO did not dispose of the objection as per the mandatory direction of the Hon'ble Supreme Court in GKN Driveshaft (India) Ltd. Vs. ITO & Ors. (2003) 259 ITR 19 (SC) which he is bound by law to obey and according to ld AR, the AO ought to have disposed off the objection raised by the assessee, which omission on the part of the AO itself makes the order fragile in the eyes of law. Despite this illegal omission, we note that thereafter the AO framed the reassessment vide order dated 18.09.2017 after the DRP direction on 29.08.2017 wherein the ld DRP did not adjudicate the legal issue raised before it on the reasoning that the ld DRP does not have the power to annul the assessment. Aggrieved by the aforesaid decision of ld DRP and assailing the action of the AO in assuming jurisdiction to reopen the regular-assessment u/s. 143(3) of the Act, the assessee is before us.

5. We have heard rival submissions and gone through the facts and circumstances of the case. The main grievance of the assessee is against the action of the AO in reopening regular assessment completed u/s. 143(3) of the Act on 15.03.2013. According to Ld. Counsel for the assessee, the AO without application of mind after receipt of letter from DIT(Inv.), Kolkata has simply reopened the assessment. According to Ld. Counsel, before the AO decides to reopen the assessment, he has to satisfy the condition precedent to assume jurisdiction and for that he took our attention to the expression used in sec. 147 of the Act which states that AO should have '*reason to believe'* escapement of income. According to ld Counsel, the expression "reason to believe" postulates a foundation based on information and belief based on reasoning. According to ld Counsel, even after there is a foundation based on information is there, still there must be some reasons warrant holding a belief that income chargeable to tax has escaped assessment, which expression used by Parliament is stronger than the expression '*satisfied*' and in the present case such requirement as contemplated by law has not been met in the 'reason recorded' by the AO before venturing to re-open the assessment which vitiates the re-opening itself. According to Ld. Counsel, even if the information given by the DIT (Inv.) is adverse against the

assessee, at the most it may trigger "*reason to suspect*"; then AO has to make reasonable enquiry and collect material which would make him believe that there is in fact an escapement of income. Without doing so, the jurisdictional fact necessary to usurp jurisdiction to reopen the regular assessment cannot be made by the AO. For the said proposition, the Ld. AR drew our attention to following case laws:

i) PCIT Vs. Meenakshi Overseas Ltd. 395 ITR 677(Del.) (referred to para 19 till para 37).
ii) DCIT Vs. Greal Wall Marketing Pvt. Ltd. ITA No.660/Kol/2011 (referred to page 10 para 11)
iii) Shri Raj Kumar Goel Vs. ITO ITA No.1028/Kol/2017 (referred to page 5-8 para 11)
(iv) Classic Flour & Food Processing Pvt. Ltd. Vs. CIT ITA Nos. 764 to 766/Kol/2014 (page 7 para 12 to 16)
v) PCIT Vs. Shodiman Investments (P) Ltd. (2018) 93 taxmann.com 153 (Bom) page 4 para 12 to 14)
vi) KSS Petron Pvt. Ltd. Vs. ACIT ITA No. 224/Mum/2014 (referred to page 3 para 8-11)
vii) PCIT Vs. Tupperware India Pvt. Ltd. (2016) 236 Taxman 494 (referred to page 3 para 6 and 9)
viii) DCIT Vs. National Bank for Agriculture and Rural Development ITA No.4964/Mum/2014 (referred to page 10- 13 para 12)

6. It has been brought to our notice that since the objection raised by the assessee against the reopening has not been disposed of as per the direction of the Hon'ble Supreme Court in GKN Driveshaft (India) Ltd., supra, which omission to do so by AO also makes the order of the AO bad in law The Ld. AR drew our attention to the decision of the Hon'ble High Court of Delhi in ACIT Vs. Meenakshi Overseas (P) Ltd. (2017) 82 taxmann.com 300 (Del) wherein it has been held as under:

> *"22. As rightly pointed out by the ITAT, the 'reasons to believe' are not in fact reasons but only conclusions, one after the other. The expression 'accommodation entry' is used to describe the information set out without explaining the basis for arriving at such a conclusion. The statement that the said entry was given to the Assessee on his paying "unaccounted cash" is another conclusion the basis for which is not disclosed. Who is the accommodation entry giver is not mentioned. How he can be said to be "a known entry operator" is even more mysterious. Clearly the source for all these conclusions, one after the other, is the Investigation report of the DIT. Nothing from that report is set out to enable the reader to appreciate how the conclusions flow therefrom.*
>
> *23. Thus, the crucial link between the information made available to the AO and the formation of belief is absent. The reasons must be self evident, they must speak for themselves. The*

tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. However, something therein which is critical to the formation of the belief must be referred to. Otherwise the link goes missing.

24. The reopening of assessment under Section 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the AO that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of Section 147 (1) of the Act.

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

26. The first part of Section 147 (1) of the Act requires the AO to have "reasons to believe" that any income chargeable to tax has escaped assessment. It is thus formation of reason to believe that is subject matter of examination. The AO being a quasi judicial authority is expected to arrive at a subjective satisfaction independently on an objective criteria. While the report of the Investigation Wing might constitute the material on the basis of which he forms the reasons to believe the process of arriving at such satisfaction cannot be a mere repetition of the report of investigation. The recording of reasons to believe and not reasons to suspect is the pre- condition to the assumption of jurisdiction under Section 147 of the Act. The reasons to believe must demonstrate link between the tangible material and the formation of the belief or the reason to believe that income has escaped assessment.

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

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

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

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

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

"14. The first sentence of the reasons states that information had been received from Director of Income-Tax (Investigation) that the petitioner had introduced money amounting to Rs. 5 lacs during financial year 2002-03 as per the details given in Annexure. The said Annexure, reproduced above, relates to a cheque received by the petitioner on 9th October, 2002 from Swetu Stone PV from the bank and the account number mentioned therein. The last sentence records that as per the information, the amount received was nothing but an accommodation entry and the assessee was the beneficiary.
15. The aforesaid reasons do not satisfy the requirements of Section 147 of the Act. The reasons and the information referred to is extremely scanty and vague. There is no reference to any document or statement, except Annexure, which has been quoted above. Annexure cannot be regarded as a material or evidence that prima facie shows or establishes nexus or link which discloses escapement of income. Annexure is not a pointer and does not indicate escapement of income. Further, it is apparent that the Assessing Officer did not apply his own mind to the information and examine the basis and material of the information. The Assessing Officer accepted the plea on the basis of vague information in a mechanical manner. The Commissioner also acted on the same basis by mechanically giving his approval. The reasons recorded reflect that the Assessing Officer did not independently apply his mind to the information received from the Director of Income-Tax (Investigation) and arrive at a belief whether or not any income had escaped assessment."

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

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

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

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

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

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

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

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

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

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

30.2 The AO was not merely reproducing the information received from the investigation but took the effort of referring to the deposition made during the survey by the Chartered Accountant that the Assessee company was involved in the giving and taking of bogus entries. The AO thus indicated what the tangible material was which enabled him to form the reasons to believe that income has escaped assessment. It was in those circumstances that in the case, the Court came to the conclusion that there was prima facie material for the AO to come to the conclusion that the Assessee had not made a full and true disclosure of all the material facts relevant for the assessment.

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

invalidated the initiation of the proceedings to reopen the assessment under Section 147 of the Act.

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

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

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

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

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

36. In the present case, as already noticed, the reasons to believe contain not the reasons but the conclusions of the AO one after the other. There is no independent application of mind by the AO to the tangible material which forms the basis of the reasons to believe that income has escaped assessment. The conclusions of the AO are at best a reproduction of the conclusion in the investigation report. Indeed it is a 'borrowed satisfaction'.

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

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

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

7. We also note that the coordinate bench of this Tribunal in ITA No. 660/Kol/2011 for AY 2002-03 in the case of DCIT Vs. Great Wall Marketing (P) Ltd. vide order dated 03.02.2016 has held as under:

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

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

> *"9. We find that at the time of re-opening of the Assessment, the Assessing Officer did not provide the reasons recorded in support of the re-opening notice in its entirety, to the Respondent-Assessee. This was contrary to and in defiance of the decision of the Apex Court in GKN Driveshafts v. ITO [2002] 125 Taxman 963/ [2003]259 ITR 19. The entire objects of reasons for re- opening notice as recorded being made available to an Assessee, is to enable the Assessing Officer to have a second look at his reasons recorded before he proceeds to assess the income, which according to him, has escaped Assessment. In fact, non furnishing of reasons would make an Assessment Order bad as held by this Court in CIT v. Videsh Sanchar Nigam Ltd. [2012] 21 taxmann.com 53, 340 ITR 66. In fact, partial furnishing of reasons will also necessarily meet the same fate i.e. render the Assessment Order on re-opening notice bad. Therefore, on the aboveground itself, the question as proposed does not give rise to any substantial question of law as it is covered by the decision of this Court in Videsh Sanchar Nigam Ltd.'s case (supra) against the Revenue in the present facts.*
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> *10. Besides, the submissions made on behalf of the Revenue that in view of the decision of the Apex Court in Rajesh Jhaveri Stock Brokers (P) Ltd.'s, case (supra), the Assessing Officer is entitled to re-open the Assessment for whatever reasons and the same cannot be subjected to jurisdictional review, is preposterous. First of all, taking out a word or sentence from the entire judgment, divorced from the context and relying upon it, is not permissible (see CIT v. Sun Engg. Works (P) Ltd. [l992] 64 Taxman 442/198 ITR 297 (SC). It may be useful to reproduce the context in which the sentence in Rajesh Jhaveri Stock Brokers (P)*

Ltd. 's case (supra) being relied upon by the Revenue to support its case, was made. The context, is as under:

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

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

11. Further, a reading of the entire decision, it is clear that the reasonable belief on the basis of tangible material could be, prima facie, formed to conclude that income chargeable to tax has escaped assessment. Mr. Mohanty, learned counsel is ignoring the fact that 6the words 'whatever reasons' is qualified by the words 'having reasons to believe that income has escaped assessment'. The words whatever reasons only means any tangible material which would on application of the facts on record lead to reasonable belief that income chargeable, to tax has escaped, assessment This material which, forms the basis, is not restricted, but the material must lead to the formation of reason to believe that income chargeable to tax has escaped Assessment Mere obtaining, of material by itself does not result in reason to believe that income has escaped assessment. In fact, this would be evident from the fact that in para 16 of the decision in Rajesh Jhaveri Stock Brokers (P) Ltd. 's, case (supra), it is observed that the word 'reason' in the 'reason to believe' would mean cause or justification. Therefore, it can only be the basis of forming the belief. However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. Otherwise, no meaning is being given to the words 'to believe' as found in Section 147 of the Act. Therefore, the words 'whatever reasons' in Rajesh Jhaveri Stock Brokers (P) Ltd.'s, case (supra), only means whatever the material, the reasons recorded must indicate the reasons to believe that income has, escaped assessment. This is so as reasons as recorded alone give the Assessing Officer power to re-open an assessment, if it reveals/indicate, reasons to believe that income chargeable to tax has escaped assessment.

12. The re-opening of an Assessment is an exercise of extra-ordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the material (whatever reasons) which form the basis of re-opening . Assessment and its reasons which would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped Assessment This

is a settled position as observed by the Supreme Court In S. Narayanappa v. CIT [1967] 63 ITR 219, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in ITO v. Lakhmani Merwal Das [1976] 103 ITR 437 had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.

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

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

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

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

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

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

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

> *" 1.Whether the assessee can challenge the validity of an assessment order during the appellate proceedings pertaining to examination of validity of order passed u/s 263?*
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> *2. Whether the impugned assessment order passed u/s 143(3) dated 24-10-2013 was valid in the eyes of law or a nullity as has been claimed by the assessee?*
>
> *3. If the impugned assessment order passed u/s 143(3) was illegal or nullity in the eyes of law, then, whether the CIT had a valid jurisdiction to pass the impugned order u/s 263 to revise the non est assessment order?"*

9. On question no. 1 and 3 which is relevant to the present case the Hon'ble Mumbai bench of the Tribunal has taken the view that when the original assessment proceedings are null and void in the eyes of law for want of proper assumption of jurisdiction then such validity can be challenged even in collateral proceedings. The Mumbai bench took the view that the proceedings u/s 147 of the Act are primary proceedings and proceedings u/s 263 of the Act are collateral proceedings and in such collateral proceedings, the validity of initiation of the original proceedings u/s 147 of the Act can be challenged. The Mumbai bench of the Tribunal in this regard has placed reliance on several decisions, the principal decision being that of the Hon'ble Supreme Court in the case of Kiran Singh & Ors. V. Chaman Paswan & Ors. [1955] 1 SCR 117 wherein the Hon'ble Supreme Court observed as follows :-

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

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

" 17. There is no quarrel with the proposition advanced by Id. DR that the proceedings u/s 263 are for the benefit of revenue and not for assessee.

18. However, u/s 263 the Id. Commissioner cannot revise a non est order in the eye of law. Since the assessment order was passed in pursuance to the notice U/S 143(2), which was beyond time, therefore, the assessment order passed in pursuance to the barred notice had no legs to stand as the same was non est in the eyes of law. All proceedings subsequent to the said notice are of no consequence. Further, the decision of Hon'ble Madras High Court in the case of CIT Vs. Gitsons Engineering Co. 370 ITR 87 (Mad) clearly holds that the objection in relation to non service of notice could be raised for the first time before the Tribunal as the same was legal, which went to the root of the matter.

19. While exercising powers u/s 263 Id. Commissioner cannot revise an assessment order which is non est in the eye of law because it would prejudice the right of assessee which has accrued in favour of assessee on account of its income being determined. If Id. Commissioner revises such an assessment order, then it would imply extending/ granting fresh limitation for passing fresh assessment order. It is settled law that by the action of the authorities the limitation cannot be extended. Because the provisions of limitation are provided in the same.

20. In view of above discussion ground no.3 is allowed and revision order passed u/s 263 is quashed.

11. The learned DR relied on the order of the CIT(A). We have considered the rival submissions. We are of the view that the validity of the order u/s 147 of the Act depends upon the AO assuming jurisdiction to make an order of assessment u/s 147 of the Act after fulfilling the conditions laid down in the said section namely reason to believe the income chargeable to tax for that assessment year has escaped assessment. If this condition is not satisfied then it cannot be said the AO has validly assumed jurisdiction u/s 147 of the Act. If the validity of proceedings u/s 147 of the Act has not been challenged by the assessee by filing appeal against the order u/s.147 of the Act, can it be challenged in the appeal against an order u/s 263 of the Act revising the invalid order u/s 147 of the Act. This issue has been analysed by the Hon'ble Mumbai Bench of the tribunal in the case of M/s. Westlife Development Ltd. (supra) and 147 proceedings has been equated to primary proceedings and the proceedings u/s 263 passed equated to collateral proceedings. It has further been held based on various judicial pronouncements of the Hon'ble Supreme Court that if the primary proceedings are non-est in law or void on the ground of lack of jurisdiction then the validity of such proceedings can be challenged even in an appeal arising out of collateral proceedings. We have already set out the ratio laid down in these decisions and we do not wish to repeat the same. Suffice it to say the law is well settled that invalidity of the primary proceedings for want of proper jurisdiction can be challenged even in appellate proceedings arising out of a collateral proceeding. In view of the aforesaid legal position we admit the additional grounds for adjudication.

12. As far as the merits of the validity of initiation of proceedings u/s 147 of the Act for A.Y.2007-08 and 2008-09 are concerned the question for consideration is as to whether on the basis of the reasons recorded it can be said that there can arise any belief on the part of the AO that income chargeable to tax for the relevant assessment years has escaped assessment. In this regard the reasons recorded by the AO for initiating proceedings u/.s 147 of the Act for A.Y.2007-08 and 2008-09 has already been set out by an order in the earlier part of this order. The gist of the reasons recorded by the AO is that the assessee had made investments of about Rs.4 crore in construction of hotel/resort at Mandarmoni, Purba Midnapore. It is the

further allegation in the reasons recorded that to a notice u/s 133(6) of the Act, the Assessee had in reply admitted investment of only Rs.3.38 crores in construction of hotel and that source of funds for such construction was out of share capital and secured loan. It is also not disputed that the value of investments as stated by the assessee in its reply to the notice u/s 133(6) of the Act, was duly shown as the investment in construction of hotel with the balance sheet of the assessee. The AO has however inferred that there is a difference in the value of investment in construction of hotel as shown in the books of account and as per the information in possession of the AO which is a sum of Rs.4 crores. Another reason given by the AO is that the difference in the amount of investment in construction might have been met by the Assessee out of income not disclosed. It has also been mentioned that the source of investment with regard to the actual cost of construction requires investigation.

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

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

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

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

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

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

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

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

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

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

14. In the light of the aforesaid reply the question that needs to be answered is as to how did the AO get information that the assessee had invested Rs.4 crores in hotel at Mandarmoni, Purba Medinipur. Apparently there appears to be no basis for this conclusion arrived at by the AO in the reasons recorded. The ld. DR however sought to defend the action of the AO by submitting that there was a survey in the business premises of the assessee and in such survey there was evidence to show that the assessee had invested a sum of Rs.4 crores in construction of a hotel at Mandarmoni. We are of the view that this submission of the ld. DR cannot be accepted. The law is well settled that the reasons recorded by the AO have to be tested on the basis of specific wordings of the reasons so recorded. No external material can be shown to justify the conclusion arrived at in the reasons recorded unless these materials are specifically referred to or incorporated in the reasons recorded. In the reasons recorded the AO has not disclosed the basis of this conclusion that the assessee made an investment of Rs. 4 crores in

the construction of a hotel at Mandarmoni. We find that in this regard that Hon'ble Bombay High Court in the case of Hindustan Lever Ltd., Vs. R.B.Wadkar (2004) 268 ITR 0332 the reasons are required to be read as they were recorded by the AO. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the AO to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the AO to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the AO to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the AO. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The AO, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the AO cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced.

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

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

Tribunal in the case of Deputy Director of income Tax (International Taxation)-21, Mumbai - vs.- Societe International De Telecommunication (supra), I am of the view that the initiation of reassessment proceeding itself was bad in law and the assessment completed by the Assessing Officer under section 143(3) read with section 147 in pursuance of such invalid initiation is liable to be cancelled. I order accordingly."

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

10. Having taken into consideration the aforesaid judicial precedents and other case laws cited before us by both the parties, in order to appreciate the legal ground raised before us, we need to look into the reasons recorded by the AO before proposing to reopen the assessment which we find placed at pages 40 to 41 of the paper book, which is reproduced as under.

"Your case for the A.Y.2010-11 has been reopened for assessment u/s.147 and notice u/s 148 has been issued. Against the same, vide your above referred letter you have stated that the return filed on 21.9.2009 u/s 139(1) may be treated as return filed in pursuance to notice u/s 148. In this regard, the reasons for reopening the assessment is given below:-

"An information has been received from DIT(Inv), Kolkata by his letter No.8/0E/2014-15/2023-25 dated 2.9.2014 in which it has been mentioned that the assessee-M/s. Devansh Exports had exported Iron ore to M/s. S.K Resources Ltd., Hong Kong. The assessee as well as the buyer i.e. m/S. S. K. Resources Ltd. are Associated Enterprises within the meaning contained in sec. 92A of the I. T. Act. It has also been mentioned in the said letter of DIT (Inv.) that assessee has exported the iron ore to various end users located in China and that these were routed through its sister concern M/s. SK Resources Ltd. The price at which the iron ore were exported to Mrs. SK Resources during the year was much less than the prevailing market price of China but the said M/s. SK Resources Ltd. would sell the goods to the end users of the prevailing market price. This entire arrangement thus resulted in profit being shifted from India to Hong Kong

It is seen from the audited accounts and other details available in assessment record of the assessee that during the financial year 2009-10, it exported 55,936 MT of iron ore to M/s. SK Resources Ltd. at a total consideration of Rs.13,90,97,755/-. As per DIT (Inv)'s above letter, the FOB rate of such sale were @ varying from $11 to $65 per MT depending on the date of shipment. However, the market price of the same goods prevailing in China during that period varied from $71.50 to $114.50 per MT. It is therefore clear that the transaction between the assessee and M/s. SK Resources Ltd. is in the nature of International Transaction within the meaning contained in sec. 92B of the Act and the rate of transaction as disclosed by assessee to its Associate Enterprise is Associate Enterprise is much less than the prevailing market price or below the arm's length price as defined in sec. 92 of the Act.

The assessee therefore violated the provisions of sec. 92 of the Act and I therefore have sufficient reason to believe that the assessment of assessee's case for the relevant year escaped assessment and is required to be reopened for assessment u/s. 147 of the Act."

11. After having perused reasons recorded by the AO before reopening and when the validity of the order u/s. 147 of the Act depends upon the AO assuming jurisdiction as contemplated by law to make an order of assessment u/s. 147 of the Act and for that it is necessary that the conditions laid down in the said section viz., AO should record "reason to believe" that *the income chargeable to tax for that assessment year has escaped assessment*. If this condition is not satisfied at the first place, then it cannot be said the AO has validly assumed jurisdiction u/s. 147 of the Act. Therefore, the question for consideration is whether on the basis of the reasons recorded by the AO to reopen the assessment it can be said that AO on the basis of whatever material before it, had reasons which he had indicated in his "reasons recorded" which warrant holding a belief that income chargeable to tax has escaped assessment. The reasons recorded by AO to reopen has to be evaluated on a stand-alone basis and no addition/extrapolation can be made or assumed while adjudicating the legal issue of AO's usurpation of jurisdiction u/s. 147 of the Act. From the reasons already set out above and from the gist of the reasons recorded by the AO, we understand that the AO received information from DIT (Inv.), Kolkata dated 02.09.2014 that the assessee company had exported iron ore to its sister concern M/s. S. K. Resources Ltd., Hongkong and through the said AE, the iron ore was exported to various end users located at China. As per the DIT (Inv) the price at which the iron ore were exported to its AE at Hongkong during the year was less than the prevailing market price at China, which resulted in profit being shifted from India to Hongkong. Thereafter, the AO notes that assessee has exported 55,936 MT of iron ore to its AE at Hongkong at a total consideration of Rs.13,90,97,755/-. However, the AO notes that the DIT (Inv.) says that the **FOB** rate of sale of iron ore were varying from 11$ to 65$ per MT depending on the date of shipment to its AE at Hongkong whereas the **market rate** of the said goods prevailing in China during that period varied from 71.50$ to 114.50$ per MT. From the aforesaid information of DIT(Inv.) the AO concluded that the transactions between the assessee and its AE at Hongkong was in the nature of international transaction within the meaning contained in sec. 92B of the Act and the rate of transaction as disclosed by the assessee to its AE is much less than the prevailing

market price or below the ALP as defined in sec. 92 of the Act. From these facts narrated the AO concluded that he had sufficient reason to believe that the assessment of the assessee's case in the relevant year escaped assessment and, therefore, requires reopening u/s. 147 of the Act. So from the aforesaid facts narrated by the AO based on the information given by the DIT (Inv.) clearly reveals that assessee had exported 55.936 MT iron ore to its sister concern M/s. S. K. Resources Ltd., Hongkong for a total consideration of Rs.13,90,97,755/-. This fact is not a new information since we note from the original assessment order dated 15.03.2013 passed u/s. 143(3) of the Act for the year under consideration which is placed at pages 30 to 36 of the paper-book, wherein these facts are discernible from para 3.2 wherein the AO has noted in his words *"the facts of this case are that the assessee firm deals in export of iron ore and other minerals. It has made total sales of Rs.13,90,97,755/-. This total sale is in respect of iron ore only and the whole of the sales have been made to the sister concern M/s. S. K. Resources Ltd., 2601, Metropoly Tower, Hongkong.''* Thereafter, the AO noted from the information given by the DIT(Inv) that the assessee had sold the iron ore through its associated enterprises to the end users at China for a higher price (prevailing price at China on the date of shipment) and thus, he concluded that there is profit shifting from India to China. This conclusion based on the aforesaid information is fundamentally flawed for the reason that DIT(Inv) has first of all given the **FOB** rate of iron ore prevailing in India which has been compared with the market rate prevailing at China. It should be taken note that FOB rate of goods cannot be equated by any stretch of imagination with the market price of that goods at China. Market Price at China would, inter alia, includes the FOB price in India, plus freight, plus terminal handling charges, plus demurrages at Indian Port, plus Insurance, plus terminal handling charge at Hongkong Port, plus Duties/taxes levied at Hongkong Port, plus demurrages, plus transportation, handling charge and storage at China plus import duties etc. which are the value added cost to make the iron ore marketable at China over and above the FOB rate at India. Therefore, the bench marking based on FOB rate at India with the market rate prevailing at China itself is per-se erroneous. If at least the AO had made enquires about the FOB rate of iron ore as taken by similar companies in India under uncontrolled conditions in India in relation to exports made to unrelated third parties, that would have at least gave

some credence or comparability of the export price of the assessee (Refer rule 10B). Therefore, the AO has simply gulped the information from DIT(Inv) to form a conclusion about escapement of income is itself flawed and cannot pass the test of 'reason to believe' as laid by judicial precedents as discussed above.

12. From the aforesaid reasons it is evident that other than the vague information given by DIT (inv) there is no other material the AO collected after preliminary enquiry which could have enabled him at the time of recording reasons to come to a conscious independent conclusion that "*income of the assessee has escaped assessment*". The information given by DIT(Inv) can only be a basis to ignite/trigger "reason to suspect" for which reopening cannot be made for further examination to be carried out by him in order to strengthen the suspicion to an extent which can form the belief in his mind that income chargeable to tax has escaped assessment. No quantification of income escaping assessment has been spelt out by the AO in the reasons recorded for justifying reopening u/s. 147 of the Act. It has to be kept in mind that merely on an allegations leveled by DIT (Inv.) can only raise suspicion in the mind of the AO which is not the sufficient/requirement of law for reopening of assessment. The '*reasons to believe'* is not synonymous to '*reason to suspect'*. 'Reason to suspect' based on an information can trigger an enquiry to find out whether there is any substance or material to substantiate that there is merit in the information adduced by the DIT(Inv.) and thereafter the AO has to take an independent decision to re-open or not. And the AO should not act on dictate of any other authority like in this case DIT(Inv.) because then it would be borrowed satisfaction. In this case, as discussed above, the AO after referring to the investigation report erroneously concludes that the iron ore exported by the assessee company to its AE in Hongkong and was ultimately routed to China where the prices of the iron ore was high compared to the prices of sale shown by the assessee company to its AE at Hongkong and by that process has shifted the profit from India to Hongkong. It has to be kept in mind that the variation of price of the iron ore varies from date of shipment and as discussed above FOB rates cannot be compared with the market rate and the prima facie view of profit shifting cannot be formed by the vague information given by the DIT (Inv.) and which required some exercise from the part of AO which he admittedly did not do and has blindly copied the contents of

the DIT(Inv) report and proceeded to reopen the original assessment completed u/s. 143(3) which action of AO cannot be countenanced. During the original assessment framed u/s. 143(3) on 15.03.2013,the AO himself has taken note that M/s. S. K. Resources, Hongkong was a sister concern of the assessee and that the assessee had exported iron ore to the said concern and the details of which were taken note by the AO during the original assessment proceeding. In such a scenario, when the AO was in receipt of the information from the DIT(Inv.) he ought to have made enquiries to unravel the truth. It has to be remembered that information is not synonymous to truth. The AO failed to quantify the escapement of income in the reasons recorded. As stated earlier, we note that AO simply on the basis of the investigation report has formed an erroneous conclusion that there is an escapement of income. The AO is a quasi judicial authority empowered to reopen the completed assessment only in a given case wherein there is reason to believe escapement of chargeable income to tax which is the jurisdictional fact and sine qua non to assume jurisdiction to reopen a completed assessment. It must be kept in mind that reasons to believe postulates foundation based on information and belief based on reason. Even if there is foundation based on information there must be some reason warrant holding the belief that income chargeable to tax has escaped assessment. It has to be kept in mind that the Hon'ble Supreme Court in Ganga Saran & Sons P. Ltd. Vs. ITO (1981) 130 ITR 1 (SC) held that the expression "reason to believe" occurring in sec. 147 "is stronger" than the expression "if satisfied" and such requirement has to be met by the AO in the reasons recorded before usurping the jurisdiction u/s. 147 of the Act. It must be kept in mind that information adverse against the assessee may trigger "reason to suspect" then the AO is duty bound to make reasonable enquiry to collect material which would make him belief that there is in fact an escapement of income which requirement of law has not been fulfilled in this case by the AO. The AO simply taking note of the DIT(Inv.) letter has borrowed the satisfaction without independent application of mind to form reason warrant holding a belief that income chargeable to tax has escaped assessment. Just because a letter has been received from the DIT(Inv.) the AO cannot reopen the completed assessment u/s. 143(3) of the Act. In this case, the original assessment has been u/s. 143(3) of the Act was completed on 15.03.2013. From a perusal of reason recorded by AO, we note that it is not the case of

the AO that the assessee has misled the AO during the original assessment proceedings or failed to produce any material necessary for assessment to the income of the assessee. In the light of the above, the AO based on the reasons recorded as set out above could not have initiated a fishing enquiry to find out the veracity of the information given by the DIT(Inv.). The reasons recorded by AO does not stand the test as laid by plethora of judicial precedence as discussed above which is necessary to assume jurisdiction u/s 147 of the Act, therefore, in the light of the aforesaid facts and circumstances of the case as discussed , we find that the reasons recorded by the AO to justify reopening the assessment u/s. 147 fails and, therefore, the very assumption of jurisdiction to reassess the assessee fails. Since the AO failed to do so as discussed, the assumption of jurisdiction by him to reopen itself is corum non judice and, therefore, all subsequent action is null in the eyes of law and therefore, we quash the reopening and consequent reassessment order framed by him.

13. In the result, the appeal of assessee is allowed.

Order is pronounced in the open court on 15/10/2018

Sd/- Sd/-
(J. Sudhakar Reddy) (A. T. Varkey)
Accountant Member Judicial Member

Dated: 15th October, 2018

Jd.(Sr.P.S.)

Copy of the order forwarded to:

1 Appellant – M/s. Devansh Exports, 1, Sarojini Naidu Sarani, Shubham, 5th floor, Kolkata-700 017.
2 Respondent – ACIT, Cir-32, Kolkata.
3 CIT(A)-, Kolkata. (sent through e-mail)
4 CIT , Kolkata
5 DR, Kolkata Benches, Kolkata (sent through e-mail)

/True Copy, By order,

Sr. Pvt. Secretary