आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES "A", JAIPUR

श्री संदीप गोसाई, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE SHRI SANDEEP GOSAIN, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 1388/JP/2019
निर्धारण वर्ष/Assessment Year :2008-09

M/s Bansiwala Iron & Steel Rolling Mills, 2nd Floor, Somani Building, S.C. Link Road, Loha Mandi, Jaipur.	बनाम Vs.	D.C.I.T., Circle-3, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AADFB 2375 A		
Appellant		Respondent

निर्धारिती की ओर से/ Assessee by: Shri Mahendra Gargieya &
Shri Dewang Gargieya (Advs)
राजस्व की ओर से/ Revenue by: Shri Rajendra Singh (CIT-DR)

सुनवाई की तारीख/ Date of Hearing : 06/09/2021
उदघोषणा की तारीख/ Date of Pronouncement : 15/09/2021

आदेश/ ORDER

PER: SANDEEP GOSAIN, J.M.

This is the appeal filed by the assessee against the order of the ld. CIT(A), Alwar dated 30/10/2019 for the A.Y. 2008-09. The grounds taken by the assessee are as under:

"1. The very action taken u/s 147 r/w 148 is bad in law, without jurisdiction and being void ab-initio, hence, the same kindly be quashed. Consequently, the impugned assessment framed u/s 143(3)/148 dated 30.03.2016 also kindly be quashed.

1.2 The Id. CIT(A) erred in law as well as on the facts of the case in confirming the reopening of the case u/s 148 despite the fact that the AO has not decided the objections filed by the appellant within a reasonable period of time and started proceeding to make the assessment through notices issued u/s 143(2) & 142 of the Act,

even there before, which was in a direct contravention of the binding directions of the Hon'ble Supreme Court given in the case of GKN Driveshafts (India) Ltd. vs. ITO & ORS 259 ITR 0019 (2002) and therefore, the impugned order so passed, deserves to be quested.

2. *The impugned addition and disallowances made in the order dated 30.03.2016 u/s 143(3) of the Act are bad in law and on facts of the case, for want of jurisdiction and for various other reasons and hence the same may kindly be deleted.*

3.1 ***Rs.1,12,256/-:*** *The ld. CIT(A) erred in law as well as on the facts of the case in confirming the addition of Rs.1,12,256/-made by the AO by applying estimated GP rate of 9.45% on the alleged suppressed sale of Rs.5,77,150/-, merely based on a search conducted by the Central Excise Department (even though the said Department itself has taken back their allegation) and merely on suspicion, surmises & conjectures, without arriving at an independent opinion/ satisfaction over the impugned addition. The allegation of suppressed sale being completely contrary to the provisions of law and facts and the consequent addition of the suspected gross profit thereon so made, also being completely contrary to the provisions of law and facts and contrary to the submissions and evidences placed on record hence, the impugned addition kindly be deleted in full.*

3.2 *The above impugned addition otherwise seriously lacks jurisdiction and hence, also the same kindly be deleted in full.*

4. ***Rs.2,32,447/-:*** *The ld. CIT(A) further erred in law as well as on the facts of the case in confirming the estimated addition of Rs.2,32,447/- made by the AO on account of alleged the unexplained investment in the initial unaccounted capital involved @50% of the suppressed sale (less the estimated addition of the gross profit), u/s 69/69C of the Act. The addition so made and confirmed by the ld. CIT(A), being completely contrary to the provisions of law and facts and rather being the result of suspicion, surmises and conjectures, hence, the same kindly be deleted in full.*

5. *The ld. AO further erred in law as well as on the facts of the case in charging interest u/s 234A, 234B & 234C of the Act. The appellant totally denies its liability of charging of any such interest. The interest so charged, being contrary to the provisions of law and facts, kindly be deleted in full.*

6. *The appellant prays your honour indulgences to add, amend or alter of or any of the grounds of the appeal on or before the date of hearing."*

2. The hearing of the appeal was concluded through video conference in view of the prevailing situation of Covid-19 Pandemic.

3. The brief facts of the case are that the assessee is engaged in the business of manufacturing of Iron & Steel. The return of income was filed on 29.08.2008 declaring total income at Rs.50,27,790/-. The assessment was completed u/s 143(1) of the Income Tax Act, 1961 (in short, the Act). Thereafter, on the basis of (some alleged) additional information available with the department in respect of search / verification conducted at the factory premises of the assessee by the Department of Customs & Central Excise, Jaipur and alleged evidences pertaining to clandestine removal of finished goods during the year under consideration [as stated in the reasons, notice u/s 148 of the Act was issued on 19.03.2015. In response, the assessee vide letter dated 06.04.2015 submitted that the original ROI filed u/s 139(1) dated 29.08.2008, declaring total income at Rs.50,27,790/- may be treated as ROI filed in response to notice u/s 148. Finally, the

assessment order was passed determining total income of the assessee at Rs. 53,72,500/-.

4. Being aggrieved by the order of the A.O., the assessee carried the matter before the ld. CIT(A), who after considering the submissions of both the parties and material placed on record, upheld the action of the A.O.

5. Against the order passed by the ld. CIT(A), the assessee has preferred the present appeal before the ITAT on the grounds mentioned above.

6. Ground Nos. 1 and 2 of the appeal raised by the assessee relates to challenging the order of the ld. CIT(A) in confirming the reopening of the assessee U/s 147 of the Act. In this regard, the ld. AR appearing on behalf of the assessee has reiterated the same arguments as were raised before the ld. CIT(A) and also relied on the written submissions filed before the Bench and the contents of the same are reproduced below:

> *"1.1 Reassessment invalid-without deciding the objections within stipulated time: At the outset it is submitted that the AO failed to dispose off the objections raised by the assessee against the reassessment u/s 148 within a reasonable period. The assesse filed objection vide letter dated 04.06.2015 (PB 58-60) and again vide letter dated 05.08.2015 (PB 61-63) however the same were disposed off by the AO only on 22.03.2016 (PB 65-66) i.e. just before the completion of the assessment (i.e. on 30.03.2016) and thereafter served on the assessee on the fag end.*
>
> *1.2 In this regard the Hon`ble Apex Court in the case of GKN Driveshafts (India) Ltd. vs. ITO & Ors. (2003) 259 ITR 19 (SC) has laid down the binding procedure, as under:*

"When a notice under s. 148 of the Income-tax Act is issued, the roper 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."

The said decision thereafter, has been explained by the different High Courts however, the revenue is not adhering to such binding guidance provided by the Apex court and often instances of the violation of the law of land is being seen, as evident from the above facts of this case itself. This has been taken a serious note by the High Courts.

1.3 The Hon'ble Mumbai High Court recently in the case of Capgemini India Pvt. Ltd. vs. ACIT (2015) 120 DTR 1(Mum), has expressed their unhappiness and writ filed by the assessee was held maintainable despite the AO already having passed the assessment order. The observation of Hon'ble court are one noting and reproduced as under:

"Notice under section 148 of the IT Act was dated 27th March, 2014. That was served on the Petitioner, but the reasons which were said to be recorded, annexed to this notice, came to be furnished to the Petitioner on 29th October, 2014. Thereafter, the Petitioner raised the objections on 12th December, 2014. The order passed by the Respondents, rejecting these objections, was dated 12th February, 2015. The Respondents were obliged to abide by the above directions and not passed an order of assessment for a period of 4 weeks from the date of service of this order rejecting the objections. In the instant case, if that order itself was served on 10th March, 2015, then, this haste in passing an assessment order within four weeks cannot be justified. If the notice is dated 27th March, 2014, then, the period till 27th March, 2015 was enough to conclude the steps and in accordance with law. The Respondents having delayed the proceedings at their own end, it would not be open for them to justify their conduct and have complete disregard to the orders and directions which were binding on them. In such circumstances, Court was not in agreement with the contention that the assessment order having now been passed, the Writ Petition should not be entertained and the Petitioner must be relegated to the statutory remedies. Having regard to the factual statements in para 12 of the Writ Petition and there being absolutely no reply thereto in the affidavit in reply, this contention of the Respondents cannot be accepted."

1.4 In Bharat Jayantilal Patel vs. Union of India (2015] 378 ITR 596 (Bom.) it was held that:

"Where Assessing Officer passed assessment order within period of four weeks from date of rejection of assessee's objections to reopening of assessment, order so passed being invalid, deserved to be set aside"

1.5 In some other cases i.e. Jayanti Natarajan (Ms.) vs. ACIT (2018) 401 ITR 215 (Mad.) & Mayer Material Science Pvt. Ltd. vs. DCIT (2016) 382 ITR 333 (Bom.)

the Hon`ble Courts observed that the law laid down by the Supreme Court is of binding nature and is a source of law unto itself is binding on all authorities. In view of this legal position, the AO could not have violated the directions given by the Supreme Court.

In view of the above facts and judicial guideline, the impugned re-assessment order deserves to be quashed at this stage itself.

2. Reason to believe and not reason to suspect:

2.1 It is submitted that even under the amended law the bedrock condition or words, which continue right since inception till date, are "reason to believe" and not "reason to suspect". The word "believe" has to be understood in contradistinction of suspicion or opinion. Belief indicates something concrete or reliable. Kindly refer Gangasharan & Sons Pvt. Ltd. v/s ITO & Anr. (1981) 130 ITR 1 (SC). The Hon'ble Supreme Court in the case of ITO v/s Lakhmani Mewal Das (1976) 103 ITR 437 (SC) has held that

"12. The powers of the ITO to reopen assessment, though wide, are not plenary. The words of the statute are "reason to believe" and not "reason to suspect". The reopening to the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment……The provisions of the Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied.

2.2 The belief of the officer should be as to escapement of income and the belief should not be a product of imagination or speculation as further discussed in the ensuing paras.

2.3 Further, the belief must be of an honest and reasonable person based upon reasonable grounds. The officer may act on direct or circumstantial evidence, but his/her belief must not be based on mere suspicion, gossip or rumor. The AO would be acting without jurisdiction if the reason for his/her belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the provision of law. The Court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court Sheo Nath Singh v/s AAC (1971) 82 ITR 147 (SC).

2.4 On the facts it is proved that above judicial guideline has not been followed by the AO in this case, if the following facts, which were undisputedly available on record, on the date of recording of the reasons, are considered.

3. Complete non application of mind- Borrowed Satisfaction:

3.1 Because to assume a valid jurisdiction u/s 147 of the Act, the AO must form a reason to believe on his own and such a satisfaction or belief should not / cannot be borrowed from someone else.

3.2 A bare perusal of the impugned reasons (PB 54-57) clearly shows that the information relied upon being the SCN is based on a search conducted by the Central Excise Authorities and not by the Income Tax Department and that too at the premises of the Transporters and/or Dealers but not at the place of the assessee (which is a wrong fact stated in the reasons). Thus, the impugned reasons are based upon wrong facts and a third-party information that too unreliable and misinterpreted.

3.3 No material was found (and/ or referred in the reasons) showing that the assessee was indulged in a clandestine clearance/ suppressed sale from its factory without paying excise duty and notices issued by the Excise Department is only on the basis of statement of third party or some information gathered from third party because no direct material or evidence was found or seized from the premises of the assessee. Neither any stock was seized nor was it found that it was the case of lesser stock or excess stock of finished goods or of raw materials found. No evidence was recovered nor has been placed on record to prove illicit transaction of money, involved in the alleged transactions. The Excise Department though alleges huge clandestine clearance of goods yet not an iota of evidence to prove procurement of huge quantities of raw materials has been placed on record, though the list of raw material suppliers was with the investigation. Without showing receipt of the raw material clandestinely, manufacture of such huge quantities of excisable goods and clandestine clearance thereof is impossible. Therefore, consequent suppressed sale and again undeclared income there from, is too remote even to be suspected.

In other words, the AO has merely borrowed satisfaction (as to escapement) from someone else, which is not sufficient to confer valid power upon the AO to initiate reassessment proceedings.

He relied on the following case laws:

(i) CIT Vs. SFIL Stock Broking Ltd. (2010) 325 ITR 285 (Del.)

(ii) Surbhi Minchem P. Ltd vs. ITO in ITA No. 102 & 103/Jodh/2014 vide order dated 16.05.2014.

(iii) Maple Hotels and Resorts Pvt. Ltd., Jaipur vs. ITO 58 Tax world 273 Part V-VI (JP) and Nirmala Agarwal, Jaipur vs. ACIT 58 Tax world 280 Part V-VI (JP)

(iv) Decision in case of Pr. CIT v/s Meenakshi Overseas (P.) Ltd. (2017) 154 ITR 100 (Del) followed in Pr. CIT v/s RMG Ply (2017) 156 DTR 79 (Del).

3.4 At the outset, it is submitted that in the present case, the AO has completely violated the principal of audi alteram partem. He completed assessment hastily and evidently without application of mind. He blindly relied upon the findings taken from order of some other authority merely to complete the assessment. The following details are relevant:

Particulars	*A.Y. 2008-09*	*A.Y. 2009-10*	*A.Y. 2010-11*	*A.Y. 2011-12*
Notice u/s 148 issued	*19.03.2015*	*19.03.2015*	*19.03.2015*	*19.03.2015*
ROI relied vide letter	*06.04.2015*	*06.04.2015*	*06.04.2015*	*06.04.2015*
Reason supplied on	*10.04.2015*	*10.04.2015*	*10.04.2015*	*10.04.2015*
Objection filed by the assessee	*04.06.2015*	*04.06.2015*	*04.06.2015*	*04.06.2015*
Again objection filed on	*04.08.2015*	*05.08.2015*	*05.08.2015*	*05.08.2015*
Request for early disposal	*22.07.2015*	*22.07.2015*	*22.07.2015*	*22.07.2015*
Objections disposed off	*22.03.2016*	*22.03.2016*	*22.03.2016*	*22.03.2016*
Written submission along with number of documents filed on	*28.03.2016 (PB 1-51)*	*28.03.2016 (PB 1-173)*	*28.03.2016 (PB 1-198)*	*28.03.2016 (PB 1-155)*
Asst. Order Passed	*30.03.2016*	*30.03.2016*	*30.03.2016*	*30.03.2016*

A bare reading of the above chart and impugned order shall reveal that the AO passed the order to penalize the assessee in as much as Firstly, it is beyond imagination that the AO carefully read and considered more than 763 pages of paper books in one day and passed the impugned orders in five assessment years. Secondly, the AO disposed off the objection on 22.03.2016 (PB 65-66) i.e. just before the completion of the assessment i.e on 30.03.2016 and thereafter served on the assessee on the fag end. He has not bothered to raise his doubt, if any regarding the submission filed by the assessee. He without giving any opportunity to the assessee to explain the doubts, passed the impugned order. The law is well settled that in a case where there is a violation of Principles of natural justice and a party has been deprived of its valuable rights of being heard effectively yet, an order has been passed containing huge additions, such an action has to be considered as having been done without jurisdiction and vitiating the entire order which, results into as nullity and is not case of mere irregularity. He relied on the decision in the case of Colonisers vs. ACIT 11992] 41 ITD 57 (Hyderabad) (SB)/11993] 45 TTJ 114 (Hyderabad) (SB)

3.5 Complete non application of mind by the AO:

3.6 As per settled law, the assessing officer is a quasi-judicial authority, who has to collect the evidences, material and then to adjudicate the matter after due and complete application of mind. He must record his own satisfaction before reaching to any conclusion He cannot merely borrow his satisfaction by blindly relying upon material or the result of the other reports of other investigation agency unless he himself has examined the issue in hand by due and full application of his own mind.

In the present case, however, the admitted facts, loud and clear, are that the AO blindly relied upon, whatever finding were recorded in the order of the Commissioner Central Excise, Jaipur No.2643 dated 24.07.2015. The AO in the present case was solely guided by the pointwise observation and finding contained in the order of the CCE, Jaipur and he even reproduced the relevant extracts from such order starting from Pg 4 to 10 of the impugned assessment order.

The AO, though admitted that the assessee filed a detailed reply on dated 18.03.2016 (Para 7-8 Pg. 10-11 of the AO), which included one common submission and the other one dealing with factual aspects of each and every transaction however, held that such factual explanation dealing with each and every case was not relevant in as much as the CCE has already examined the issue and recorded his finding. This fact, he repeatedly stated. Kindly refer Para-C Pg-18 of the AO wherein replies to the contention of assesse have been summarized but rejected summarily?????? Thus, without examining the issue in hand, huge addition has been made. Needless to say that the CCE passed the order under the provision of Central Excise Act, 1944 in that peculiar context and requirement of that law. Such findings cannot be bodily lifted, relied and applied blindly in a different and legal factual context of Income Tax Law. This is against the settled principal of Jurisprudence. He relied on the decision in the case of Zirconia Cera Tech Glazes vs. DCIT in ITA No. 376 & 377/Ahd/2016 dated 30.11.2017 and CIT vs. Bharat Poetries Pvt. Ltd. in DBITA No. 493/2008 order dated 12.09.2017.

Since, the impugned assessment order is seriously lacking due application of mind and satisfaction of the AO, the same suffers from illegality, vitiating the entire order which, results into as nullity and is not case of mere irregularity, hence deserves to be quashed.

The ld. AR has further filed another written submission and the contents of the same are reproduced as under:

"2. Reason to believe and not reason to suspect: In addition, it is further submitted:

2.5 The information, vaguely referred and relied in the reasons to believe of escaping income, was otherwise premature being in the shape of a SCN only issued by a third party (CCE) and at that time even CCE was not sure of the correctness of the fact of allegation of the clandestine sale or the correctness of the amount thereof. The AO himself referred it as initial SCN issued (Pg 3 of AO). S. 147 requires the AO and AO alone to reason to believe and not reason to suspicion. When the information relied upon itself is at initial stage and yet to be tested after hearing the noticee, that too by a third party, the AO could not form an honest belief even Prima Facie.

3.4 supporting case laws in addition to w.r.f para 3.4 supporting case laws, the following further cases are also relied upon:

3.4.5 I n PCIT v/s Meenakshi Overseas Pvt. Ltd. (2017) 395 ITR 677 (Delhi), it was held that (DPB 20-32)

"Where reassessment was resorted to on basis of information from DIT (Investigation) that assessee had received accommodation entry but and there was no independent application of mind by Assessing Officer to tangible material and reasons failed to demonstrate link between tangible material and formation of reason to believe that income had escaped assessment, reassessment was not justified. [Para 22 to 24] "

3.4.6 In PCIT vs Shodiman Investments (P.) Ltd. [2018] 93 taxmann.com 153 (Bombay)/[2020] 422 ITR 337, it was held that: (DPB 33-38)

" In this case, the reasons 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.

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 inlaw that re-opening notice has to be issued by the Assessing

Office on his own satisfaction and not on borrowed satisfaction. [Para 13 & 14]
"

4. Impugned additions u/s 147- without jurisdiction as escapement of income of Rs. 7.69 Cr recorded in the reasons, not made:

It is submitted that in the present case, in the reasons recorded (PB 54), the reasons to believe refer to some information with regard to searches conducted on 20.07.2012. Such information although not detailed in the reasons to believe but is a SCN no. DZU/INV/G/CE/GRU/152/2012/ dated 02.01.2013 issued by the DGCEI, Department of Custom & Central Excise, Jaipur through the Commissioner Central Excise, Jaipur (CCE) being the Assessing authority (II PB 136-138). He also refers to the documents seized from the premises of transporters /dealers, which are bunched in separate annexures and marked as Annexure A to Annexure G. Based thereon it is alleged that the appellant was involved in clandestine clearance of goods without payment of excise duty (Suppressed Sales). In the impugned reasons, a table is appended showing the figures of the suppressed sale for the period starting from 01.12.2007 to 28.01.2010 i.e. for 4 assessment years A.Y. 2008-09 to A.Y. 2011-12, totaling to Rs. 49,39,94,027/- towards the quantity of 16043.50 MT relating to Annexure A. This annexure is a booking register 2/1-2/6 recovered from New Vikas Transport Company Ajmer and referred by the department and the CCE as RUD-24. Kindly refer Pg 73 of the order (II PB 147)(infra).

A part of such alleged suppressed sale being of Rs 7,69,00,267/- pertained to the subjected year A.Y. 2008-09, hence the AO formed a reason to believe that the income to the extent of suppressed sale of Rs. 7.69 Cr has escaped assessment u/s 147. Hence, based on the said SCN dated 02.01.2013, the present AO formed a reason to believe as to the escapement of total Rs. 49.39 Cr for 4 years and Rs. 7.69 Cr for this year. It is pertinent to note that the impugned reasons do not speak of/ refers to any transaction/ income emanating from annexures B to G.

4.2.1 Interestingly however, the allegation of such suppressed sale was withdrawn/quashed by the Assessing Officer being the CCE, Jaipur vide adjudication order (order in original) no. JAI-EXCUS-000-COM-21-15-16 (ADJ/JPR-2/12/2013/2646) dated 30.06.2015 / 24 July 2015 vide internal Pg 85 & 86 Pr 130 &131 (II PB 145-149).

4.2.2 The extract of relevant finding contained in Pr 131 & 32 of the CCE order dated 24.07.2015 is reproduced hereunder:

"Hence, upon analysis of above said contention and based on the documentary evidences available on record, a situation emerges that RUD-24 was simply a booking register maintained by staff of Shri Moni Khan, on one side of the said register prospective parties who require trucks were entered mostly on their telephonic request and on the other side available truck and truck drivers' number were maintained. Only after confirmation of the order, GR challans were issued in two copies with name of the client and destination which was given to the truck driver and for this purpose entries in the G.R register were maintained. In consideration of the same commission was realized from truck driver and service tax was duly paid upon the same by Shri Moni Khan. In the present case the demand is based upon booking register and statement of Moni Khan RUD-3 out of which 3/1 and 3/2 were recorded during the investigation proceeding of M/s. Raghuvir metals in which Shri Moin Khan was not impleaded as co-notice ever for the purpose of penalty U/r. 26 of the Rules. Further during the course of cross examination and relying upon Section 9D Shri Moin Khan has categorically stated that he had tendered the statement and they are not stated in a correct manner of clandestine removal I hold the demand cannot sustain merely on presumption and assumption as the same has to be supported by tangible evidences which are not available or perhaps have not been investigated upon appropriately, in the present matter, the truck driver who are named along mobile number should have been investigated, inspite of search and investigation no discrepancy in stock for the given period could be noticed in the factory of notice by DGCEI, further huge amount in crores alleged to be involved in purchase and sale of clandestine excisable goods has not been brought on record having a nexus with buyers/sellers of final goods and raw materials. Since the investigation has not alleged or issued show cause notice for short payment of service tax to Shri Moin Khan for his alleged collusion in the said activities and for rendering unaccounted goods transport services rather the GR register, challan book and ledger accounts have not been disputed. Also, demand based on booking register and statements of third party without backward and forward consolidations as already discussed does not sustain. Hence, I hold that demand on account of serial no. A, based on booking register does not sustain.

<u>DISCUSSION ON POINTS NO. B TO G OF SCN</u>

The investigation for raising the demand under Serial No. B-G in Para No. 68 of the Show Cause Notice has primarily relied upon loose attendance sheet of employees and workers RUD-10, 11, 12, 13, 17, statement U/s. 14 of various buyers and survey reports of commercial taxes department carried out on 19.1.2010 wherein there is admission on the part of notice on short quantity during the course of physical verification of stocks and clearance without bills i.e., RUD-59."

4.2.3 Since the very formation of the belief as to escaped assessment (of suppress sale of Rs. 7.69 Cr in this year) remained no more alive hence, detailed objection letters dated 02.06.2015 (PB 58-60) & thereafter

again on 04.08.2015 (PB 61-63) was filed. The contents of later are reproduced hereunder:

"As submitted in our detailed objection also that the action by the Income Tax Department u/s 147, merely based on the SCN, was a premature entertaining of reason to believe as to escapement of income without even considering the detailed replies submitted thereto to the excise authorities. For this very reason therefore, copies of detailed submission dated 05.10.2013 and 07.06.2014 were also filed along with the objections.

However, now recently an order no. JAI-EXCUS-000-COM-21-15-16 dated 30.06.2015 / 24 July 2015 (ADJ/JPR-2/12/2013/2646) (Full Copy enclosed) has been received by the assessee, wherein the ld. CCE has categorized the issues starting from A to G. The matter of the alleged clandestine / suppressed sale of Rs.49,39,94,028/- relate to serial no. A. This relates to the alleged clandestine sale for the period 01.12.2007 to 28.01.2010 for the quantity of 16043.50 MT valuing Rs.49,39,94,028/-. Kindly refer Pg 73 of the said order. After a detailed discussion, finding appears in Prs 130 and 131 at Pgs 85 and 86 of the said order. It is pertinent to note the Hon`ble CCE has completely quashed the demand based on the booking register RUD-24 and based on the statement of the third parties for the detailed reasons given in the said order.

Thus, the vary basis and starting point on which your good-self had entertained a reason to believe doesn't exist anymore. It is therefore, requested to please drop the proceedings u/s 147/ 148 of the Act here itself."

4.3.1 Surprisingly however, the AO didn't whisper a single word on this aspect while disposing of the objections so filed before him in the rejection (disposal) order dated 22.03.2016 (PB 65-66) which is passed in a summary manner, on the face of it.

Thus, the very purpose of giving the assessee an opportunity of filing objection as mandated by the directions of the Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. vs. ITO & Ors. (2003) 259 ITR 19 (SC), has lost its purpose and non-consideration of the objection as rather violated the said decision. Interestingly, even the legislature has also taken note of such SC directives and made amendment vide the Finance Act 2021 by inserting new S. 148A for mandatorily considering objections.

4.3.2 New income considered: Surprisingly, the AO when found that the escaped income stated in the reason to believe stands deleted fully, he immediately changed his stand in as much as he did not make any addition of the escaped income of Rs. 7.69 Cr based on the seized documents RUD-24- Annexure A, instead made a reference to the other Annexures B to G (being loosed attendance sheet, report of Commercial

Tax Department etc.) totaling to Rs.3.81 Cr as per the chart reproduced at Pg 2 Pr 3 of the AO finding place in the same said adjudication order no. 2646 dated 24.07.2015 and alleged clandestine sale under other categories. Accordingly, the addition for current year based on Annexure B came only to Rs. 5,77,150/-.

4.4 Thus, the very alleged escapement of income (i.e. Rs. 7.69 Cr) which found part of the reason recorded, was not made by the AO, hence he cannot make any other addition now as per the law settled.

5. Supporting case laws:

The Hon'ble Courts have been taking a consistent view that in such a case, the AO cannot make additions of new items of income when even the addition of the original alleged escaped income was not made. This is for the reason that for taking new item, the AO was supposed to start all the proceedings afresh by recording reasons and issuing notice u/s 148 within the limitation might have gone. Even the Explanation 3 to S.147 will not help the AO because it only explains the law which is already contained in the main provision of S.147. The main provision of S. 147 uses the phrase "and also" therefore, there must exist the originally escaped income then only. The other alleged escaped income could be considered. In other words, existence of the escaped income in the reasons, is sin quo non for valid jurisdiction to consider a new item of income not stated in the reasons.

5.1 In CIT v/s Shri Ram Singh (2008) 8 DTR 118/306 ITR 343(Raj HC) (DPB 39-47), which was based on the law prior to the availability of Explanation 3, it was held:

"Reassessment - Scope - Addition in respect of items other than the one on which notice is given -It is only when, in proceedings u/s 147 the AO assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had "reason to believe" to be so, then only, in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings u/s 147 - Once the AO came to the conclusion, that the income, with respect to which he had entertained "reason to believe" to have escaped assessment, was found to have been explained, his jurisdiction came to a stop at that, and he did not continue to possess jurisdiction, to put to tax, any other income, which subsequently came to his notice, in the course of reassessment proceedings, which were found by him, to have escaped assessment."

5.2 In Hotel Regal International & Anr. Vs. ITO (2010) 320 ITR 573 (CAL), it was held:

"Section 148 of the Income-tax Act, 1961 - Income escaping assessment - Issue of notice for - Assessment year 2006-07 - Where petitioners were called upon to file objection to notice under section 148 proposing to reopen assessment on ground that a sum of Rs. 73,219 had 'escaped assessment', revenue could not shift its stand and pass an order on ground of 'concealment of investment'; further where petitioner had disclosed its income fully and truly and return was accepted, notice under section 148 could not be issued on ground that valuation report was received subsequent to passing of order [In favour of assessee]

Original assessment of the assessee was made under section 143(3). Later the reassessment notice was issued and the recorded reasons stated that sum of Rs. 73,219 had "escaped income" for the said assessment year. Thereafter, notices under sections 142(1) and 143(2) were issued. The petitioners filed the written objections to the recorded reasons. After the objections were filed the matter was considered and order was passed by the ITO holding that there was "concealment of investment of Rs. 73,219" and the "case fell under the ambit of section 148". It had been recorded in the said order that the petitioner did not produce the valuation report before the valuation cell.

Held that, the ITO had held that the petitioner did not produce report before the valuation cell. The ITO had ignored the provisions contained in section 142A which postulate that the Assessing Officer may require the Valuation Officer to make an estimate of such value and report the same to him. Therefore, the assessee was under no obligation to file a report before the Valuation Officer. During the assessment the petitioner had filed a valuation report. Further, relevant documents were examined and while passing the order under section 143(3) the returned figure was accepted. As the petitioner had disclosed its income fully and truly and the return was accepted, notice under section 148 could not be issued on the ground that the valuation report was received subsequent to the passing of the order. Thus, the notice under section 148 was not valid."

5.3 In the case of CIT v/s Jet Airways (I) Limited (2011) 52 DTR 71/331 ITR 236 (Mum HC) (DPB 48-57), the High Court interpreted the phrase "and also" as being conjunctive and cumulative and not being in the alternative. Thus, having held that the scope of S.148 includes not only such income for which the assessment was reopened but also any other income which comes to the notice of the AO subsequently in the course of reassessment proceedings. But the Hon'ble High Court held that if the original reason for which the assessment was reopened does not survive, then the AO cannot assess the income related to the other

issues that came to notice during the reassessment proceedings. For better appreciation relevant part is reproduced here under:

"22. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in s. 147(1) and on the basis of the precedent on the subject. We agree with the submissions which has been urged on behalf of the assessee that s. 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the AO may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Expln. 3 to S. 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of s. 147(1) as they stood after the amendment of 1st April, 1989 continue to hold the field."

5.4 Ranbaxy Laboratories Ltd. v/s CIT (2011) 336 ITR 136/57 DTR 281 (Del HC)

5.5 The other decisions taking the same view are CIT v/s Adhunik Niryat Ispat Ltd. (2011) 63 DTR 212 (DeI HC) and ACIT v/s Major Deepak Mehta (2012) 65 DTR 237/ 344 ITR 641 (Chhattisgarh HC).

5.6 CIT v/s Mohmed Juned Dadani (2013) 85 DTR 12/355 ITR 172 (Guj HC) (DPB 58-70)

" Headnote: Reopening of Assessment - Jurisdiction of AO - Reasons for reopening - Notice was issued u/s 148 on grounds of wrong computation by assessee u/s 80HHC - Subsequently, no additions was made by AO on ground based upon which the assessment was reopened but rather additions were made on some other grounds which did not form part of the reasons recorded by AO - Assessee claimed that the AO had no jurisdiction to travel beyond the reasons for reopening the assessment - CIT(A) rejected claim of assessee - ITAT allowed assessee's appeal holding the action of AO without jurisdiction –

Held: S. 147 gives vide power to the AO for reopening an assessment subject to fulfillment of certain conditions - For assuming jurisdiction to frame an assessment u/s 147 what is essential is a valid reopening of a previously closed assessment - Once foundation of the reopening is removed ,any further proceeding in respect to such assessment was not permissible - Thus dropping of ground on which the notice for reopening was issued by AO shows that he

had no "reason to believe" that income had escaped assessment and thus he has no jurisdiction to assess the other escaped income - If the reason on which the assessment is reopened fails, it was not open for AO still proceed to assess some other income which according to him had escaped assessment and which came to his light during the course of the assessment by virtue of Explanation (3) to S. 147 - Revenue's appeal dismissed "

5.7 Also please refer DCIT v/s Takshila Educational Society (2016) 284 CTR 306 (Pat HC) wherein it was held that AO having made no addition on issues which were subject matter of reason to believe for purpose of reopening, addition on other issues was without jurisdiction.

6. Even the Explanation 3 to S.147 will not come in the way because what all the Explanation provide is that for the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and also such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under S.148(2).

In this case in Pr 68 of the SCN dated 02.01.2013 issued by the DGCEI (II PB 136-138) the allegation of the clandestine sale for various items categorized under head A to G totaling to Rs. 53,21,78,463/- was given by way of a table (Also kindly refer internal Pg 73 of the adjudication order dated 24.07.2015). However, the AO in its wisdom, while recording the reasons to believe as to escaped income by way of suppress sale, chose the 1st entry at serial no. A only in the said table, which is related to the alleged clandestine sale for the period 01.12.2007 to 28.01.2010 for the quantity of 16043.50 MT valuing Rs.49,39,94,028/-. The AO formed reason to believe as to the escapement of Rs. 49.39 only for 4 years A.Y. 2008-09 to A.Y. 2011-12 including Rs. 7.69 Cr for this year A.Y. 2008-09.

Thus, the AO, despite having the information of the alleged suppress sale relating to item no. B to G also, consciously decided and did not form any reason to believe as to escapement of the alleged income relating to other items no. B to G. Hence, it cannot be said that something new item of income was noticed by the AO escaping assessment during the reassessment proceedings in as much as the related information was already available before the AO when he recorded the reason prior to the issuance of the notice u/s 148 dated 19.03.2015.

To sum up, the AO cannot take even the help of the Explanation 3 to S. 147. Consequently, the AO wrongly made the impugned additions of Rs. 1,12,256/- & Rs. 2,32,447/- totaling to Rs.3,44,703/- w.r.t the alleged suppress sale of Rs. 5,77,150/- based on items no. B to G (AO Pg 2).

Hence the proceedings u/s 147 and the notice u/s 148 deserves to be quashed."

7. On the other hand, the ld CIT-DR has relied on the orders of the revenue authorities.

8. We have heard the ld. Counsels of both the parties and have perused the material placed on record. We have also deliberated upon the decisions cited in the orders passed by the authorities below as well as cited before us and we have also gone through the orders passed by the revenue authorities. From perusal of the record, we noticed that in the present case, the original return of income was filed on 29/08/2008 declaring total income at Rs. 50,27,790/-. The assessment was completed U/s 143(1) of the Act. Thereafter, on the basis of some additional information available with the department in respect of search / verification conducted at the factory premises of the assessee by the Department of Customs & Central Excise, Jaipur and evidences pertaining to clandestine removal of finished goods during the year under consideration, notice u/s 148 of the Act was issued on 19.03.2015 and in response thereof, the assessee vide its letter dated 06.04.2015 submitted that the original ROI filed u/s 139(1) dated 29.08.2008, declaring total income at Rs.50,27,790/-

may be treated as ROI filed in response to notice u/s 148 of the Act. Apart from this, the assessee also filed detailed objections vide letter dated 02.06.2015 & 04.08.2015, which were disposed off by the AO on 22.03.2016. Here at this stage, on these facts, the ld AR vehemently argued before us that the objections filed by the assessee to the notice U/s 148 of the Act were not disposed off within the reasonable time. Therefore, initiation of reassessment proceedings is bad in law. In order to appreciate the facts of the present case, we noticed that the chart filed by the assessee in its written submissions reiterated above and from the said chart, we noticed that initially notice U/s 148 of the Act for the year under consideration was issued on 19/03/2015 and the objections to the said reasons supplied to the assessee on 10/04/2015 wee filed on 04/6/2015. Since the objections of the assessee were not disposed off within the reasonable time, therefore, the assessee made a request to the A.O. to dispose off its objections but ultimately the objections of the assessee were disposed off after huge gap i.e. on 22/3/2016 and the orders U/s 147/148 of the Act was passed on 30/03/2016 immediately thereafter. The entire sequences and the dates mentioned by us above clearly shows that the objections filed by the assessee were not disposed off within the reasonable time and were disposed off in a hurriedly manner just before passing the final order i.e. on 30/03/2016 that too without providing opportunity to the

assessee which is in violation of principles of natural justice. In this respect, we draw strength from the decision of the Hon'ble Apex court in the case of **GKN Driveshafts (India) Ltd. vs. ITO & Ors. (2003) 259 ITR 19 (SC)** has held as under:

> *"When a notice under s. 148 of the Income-tax 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."*

We also draw strength from the decision of the Hon'ble Mumbai High Court in the case of **Capgemini India Pvt. Ltd. vs. ACIT (2015) 120 DTR 1(Mum)**, has expressed their unhappiness and writ filed by the assessee was held maintainable despite the AO already having passed the assessment order. The observation of Hon'ble court are one noting and reproduced as under:

> *"Notice under section 148 of the IT Act was dated 27th March, 2014. That was served on the Petitioner, but the reasons which were said to be recorded, annexed to this notice, came to be furnished to the Petitioner on 29th October, 2014. Thereafter, the Petitioner raised the objections on 12th December, 2014. The order passed by the Respondents, rejecting these objections, was dated 12th February, 2015. The Respondents were obliged to abide by the above directions and not passed an order of assessment for a period of 4 weeks from the date of service of this order rejecting the objections. In the instant case, if that order itself was served on 10th March, 2015, then, this haste in passing an assessment order within four weeks cannot be justified. If the notice is dated 27th March, 2014, then, the period till 27th March, 2015 was enough to conclude the steps and in accordance with law. The Respondents having delayed the proceedings at their own end, it would not be open for them to justify their conduct and have complete disregard to the orders and directions which were binding on them. In such circumstances, Court was not in agreement with the contention that the assessment order having now been passed, the Writ Petition should not be entertained and the Petitioner must be relegated to the statutory remedies. Having regard to the factual statements in para 12 of the Writ Petition and there being*

absolutely no reply thereto in the affidavit in reply, this contention of the Respondents cannot be accepted."

In the case of **Bharat Jayantilal Patel vs. Union of India (2015] 378 ITR 596 (Bom.)** it was held that:

"Where Assessing Officer passed assessment order within period of four weeks from date of rejection of assessee's objections to reopening of assessment, order so passed being invalid, deserved to be set aside"

We also draw strength from the decision in the case of **Colonisers vs. ACIT 11992] 41 ITD 57 (Hyderabad) (SB)/[1993] 45 TTJ 114** (Hyderabad) (SB) has held that:

In the preceding paragraphs it has been indicated why the assessee's version cannot be rejected as regards the credits appearing in his books. Perhaps the only justification, if at all it can be called a justification, for the ITO to reject the credits as not genuine is the failure of the assessee to produce the creditors when called upon to do so by the ITO. At this stage it is but necessary to state the circumstances in which the assessee was unable to produce the creditors. We are concerned with the asst. yr. 1985- 86. For the first time the ITO called upon the assessee to produce the creditors by his letter dt. 7th March, 1988 which was served on the assessee on 9th March, 1988.

The rules of natural justice operate as implied mandatory requirement, non-observance of which amounts to arbitrariness and discrimination. The principles of natural justice have been elevated to the status of fundamental rights guaranteed in the Constitution of India as is evident from the decision of the Full Bench of the Hon'ble Supreme Court in the case of Union of India vs. Tulsiram Patel & Ors. reported in AIR 1985 SC 1416 at 1469, holding that the principle of natural justice have thus come to be recognised as being a part of the guarantee contained in Article 14 of the Constitution of India because of the new and dynamic interpretation given by the Supreme Court to the concept of equality which is the subject-matter of that Article and that violation of principles of natural justice by a State action is a violation of Article 14. A quasi-judicial or administrative decision rendered or an order made in violation of the rule of audi alteram partem is null and void and the order made in such a case can be struck down as invalid on that score alone (Maneka Gandhi vs. Union of India AIR 1978 SC 597; Gangadharan Pillai vs. ACED: (1980) 126 ITR 356 (Ker) : (1978) 8 CTR (Ker) 352 at pp. 365 to 367). In other words, the order which infringes the fundamental principle, passed in violation of audi alteram partem rule, is a nullity. When a competent Court or authority holds such an order as invalid or sets it aside, the impugned order becomes null and void. (Nb. Khan Abbas Khan vs. State of Gujarat AIR 1974 SC 1471 at 1479). In the light of these decisions, we

do opine that the addition made by the Assessing Officer in violation of the principles of natural justice has to be set aside as void only in so far as the additions by way of cash credits alone are concerned, which are separable from the other additions in the order that are not challenged and consequently becoming thus non est in the eye of law."

9. In order to further appreciate the facts of the present case, we are of the view that the word "reasons to believe" as is mentioned in Section 147/148 of the Act is to be understood in a way that the word "belief" indicates that something concrete or reliable and not merely a suspicion. As in the present case, at the time of initiation of reopening proceedings and while the service of notice U/s 148 of the Act, the A.O. was having merely an information and the said information vaguely referred and relied in the reasons to believe of escaping income which was based on the allegation of clandestine sale by the assessee as per statement issued by the third party i.e. CCE (Commissioner of Custom Excise) and at that time even the CCE was not sure about correctness of fact or the allegation of the clandestine amount thereof. Whereas as per the provisions of Section 147 of the Act, it is the basic requirement that the A.O. has reasons to believe and not mere reasons to suspicion. As per the record, once the information relied upon by the A.O. itself was at an initial stage and which was yet to be tested after hearing the notice, that too by a third party i.e. the CCE then in that eventuality the A.O. could not have formed an honest believe even prima facie because the demand raised by the Custom and Excise department was ultimately found not

sustainable by the competent authorities. Thus, in our view also the believe of the A.O. should have been honest and reasonable basis upon reasonable grounds. An officer may act on direct or circumstantial evidences but his belief must not base on mere suspicion, gossip or rumor. The AO 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 provision of law. Different higher courts at different point of time have examined these aspects though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court as has already been held in the case of **Sheo Nath Singh v/s AAC (1971) 82 ITR 147 (SC) and also in the case of PCIT v/s Meenakshi Overseas Pvt. Ltd. (2017) 395 ITR 677 (Delhi), wherein** it was held that

> *" Where reassessment was resorted to on basis of information from DIT (Investigation) that assessee had received accommodation entry but and there was no independent application of mind by Assessing Officer to tangible material and reasons failed to demonstrate link between tangible material and formation of reason to believe that income had escaped assessment, reassessment was not justified. [Para 22 to 24] "*

In the case of **PCIT vs Shodiman Investments (P.) Ltd. [2018] 93 taxmann.com 153 (Bombay)/[2020] 422 ITR 337,** wherein it was held that:

> *" In this case, the reasons 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.

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 inlaw that re-opening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction. [Para 13 & 14]"

10. From the record, we also noticed that the A.O. in the present case has not formed his own belief but has rather acted upon borrowed satisfaction. A bare perusal of the impugned reasons which are at page Nos. 54-57 of the paper book, clearly shows that the information relied upon being the SCN is based on a search conducted by the Central Excise Authorities and not by the Income Tax Department and that too at the premises of the Transporters and/or Dealers but not at the place of the assessee. Thus, the impugned reasons are clearly based upon wrong facts and are on the basis of third-party information which is unreliable. Apart from this, no material was found showing that the assessee was indulged in a clandestine clearance/ suppressed sale from its factory without paying excise duty and notices issued by the Excise Department is only on the basis of statement of third party or some information gathered from third party because no direct material or evidence was found or seized from the premises of the assessee. It is also important to mention here that neither any stock was seized nor was it found that it was the case of lesser stock or excess stock of

finished goods or of raw materials found. Absolutely, no evidence was recovered nor has been placed on record to prove illicit transaction of money involved in the alleged transactions. The Excise Department though alleged huge clandestine clearance of goods yet not an iota of evidence to prove procurement of huge quantities of raw materials has been placed on record, though the list of raw material suppliers was with the investigation. Without showing receipt of the raw material clandestinely, manufacture of such huge quantities of excisable goods and clandestine clearance thereof is impossible. Therefore, consequent suppressed sale and again undeclared income there from, is too remote even to be suspected. In other words, we could say that the AO had merely borrowed satisfaction in respect of escapement from someone else, which is not sufficient to confer valid jurisdiction or power upon the AO to initiate reassessment proceedings. IN support thereof, we rely upon the decision in the case of **CIT Vs. SFIL Stock Broking Ltd. (2010) 325 ITR 285 (Del.)** wherein it was held as under:

> *"The assessee in his original return of income had shown a long term capital gain of Rs. 40,953/-. The return was processed under section 143(1) of the Income Tax Act, 1961. Subsequently, on the basis of the information given by the Deputy Director of Income-tax (Investigation) that the assessee was allegedly the beneficiary of a bogus claim of long-term capital gain shown on sale/purchase of shares a notice under section 148 of the Act wasissued by the Assessing Officer to the assessee. In the reassessment proceedings, the Assessing Officer made an addition of Rs. 20,70,000/- holding that the assessee could not explain the source of the entries. The Commissioner (Appeals) confirmed the order passed by the Assessing Officer. The Tribunal quashed the entire reassessment proceeding.*

On appeal: Held, dismissing the appeal, that the first sentence of the reasons recorded by the Assessing Officer was mere information received from the Deputy Director of Income-tax (Investigation). The second sentence was a direction given by the same Deputy Director of Income-tax (Investigation) to issue a notice under section 148 and the third sentence again comprised a direction given by the Additional Commissioner of Income-tax to initiate proceedings under section 148 in respect of cases pertaining to the relevant ward. The Assessing Officer referred to the information and the two directions as reasons on the basis of which he was proceeding to issue notice under section 148. These could not be the reasons for proceeding under section 147/148 of the Act. As the first part was only an information and the second and the third parts of the reasons were mere directions, it was not at all discernible as to whether the Assessing Officer had applied his mind to the information and independently arrived at a belief that, on the basis of the material which he had before him, income had escaped assessment. There was no substantial question of law for consideration"

The Coordinate Bench of ITAT Jodhpur, has quashed the assessment made u/s 147 in the case of **Surbhi Minchem P. Ltd vs. ITO in ITA No. 102 & 103/Jodh/2014** vide order dated 16.05.2014 by holding as under:

"From the above provisions, it is clear that for taking action u/s 147 of the Act, the Assessing Officer must have reason to believe that an income chargeable to tax has escaped assessment for any assessment year. Therefore, the Assessing Officer must satisfy himself regarding the escapement of income. He should not act mechanically on the information supplied by any other person. In the present case, the Assessing Officer acted on the information supplied by the Directorate of the Income Tax (Inv.), Udaipur and Mumbai but he has not applied his independent mind and the reassessment proceedings were initiated only on the basis of information received from the investigation wing of the department. In the present case, the satisfaction regarding the escapement of income, was not of the Assessing Officer, therefore, without applying his mind, the Assessing Officer was not justified in invoking the provisions of Section 147 of the Act by issuing notice u/s 148 of the Act."

We also draw strength from the decision in case of **Pr. CIT v/s Meenakshi Overseas (P.) Ltd. (2017) 154 ITR 100 (Del)** followed in **Pr. CIT v/s RMG Ply (2017) 156 DTR 79 (Del),** wherein it was held that "reopening was bad in law wherein the reopening was done on the basis of information

received from DI (Inv.) alleging of accommodation entries received from the entry operator, however, such action was quashed as was a case of borrowed satisfaction in absence of independent enquiry and application of mind by the AO".

11. Since the A.O. is a quasi-judicial authority, who has to collect the evidences, material and then to adjudicate the matter after due and complete application of mind. The A.O. expected to record his own satisfaction before reaching to any conclusion. In our view, the A.O. cannot borrow his satisfaction by merely relying upon material or the result of the other reports of other investigation agency unless he himself has examined the issue in hand by due and full application of his own mind. From the facts we noticed that the A.O. solely relied upon the findings which were recorded in the order of the Commissioner Central Excise, Jaipur No.2643 dated 24.07.2015. The AO in the present case was solely guided by the pointwise observation and finding contained in the order of the CCE, Jaipur and he even reproduced the relevant extracts from such order starting from Pg 4 to 10 of the impugned assessment order. Although the A.O. categorically admitted that the assessee had filed a detailed reply on dated 18.03.2016, however, further held that such factual explanation dealing with each and every case was not relevant inasmuch as the CCE has already examined the issue and recorded his findings. This fact clearly

shows that the AO has summarily rejected the contention of the assessee without examining the issue in hand, huge additions were made. Merely relied upon the findings of the CCE, however, it is important to mention that the CCE had passed the order under the provision of Central Excise Act, 1944 in that peculiar context of the case. However, such findings cannot be lifted and relied upon by the A.O. in a different factual context of Income Tax Laws. In this respect, we draw strength from the decision in the case of **Zirconia Cera Tech Glazes vs. DCIT in ITA No. 376 & 377/Ahd/2016 dated 30.11.2017** wherein the Coordinate Bench has held as under:

> *"11. We find that the basis of addition is contents of show-cause notice issued by the Excise Department. An investigation was carried out by DGCEI at assessee premises on 25/08/2008, wherein it was alleged by the Excise Department that assessee has not declared actual assessable value of goods manufactured and cleared from factory. Based on above DGCEI issued show-cause notice dated 19/04/2010, Excise department concluded that assessee was engaged in under valuation of sales and clandestine removal of goods. Only on the basis of same Assessing officer reopened assessee's income tax assessment for the years under consideration and made addition of estimated Gross Profit on under valuation sales and clandestine removal of goods. The Revenue has brought nothing on record that it has applied it's mind over and above the contents of show-cause notice in question thus there is lack of independent application of mind on behalf of revenue in these matters."*

12. We further observed from perusal of the record that a part of such alleged suppressed sale being of Rs 7,69,00,267/- pertained to the subjected year A.Y. 2008-09, the AO formed a reason to believe that the income to the extent of suppressed sale of Rs. 7.69 Cr has escaped assessment u/s 147. Hence, based on the said SCN dated 02.01.2013, the AO formed a reason to believe as to the escapement of total Rs.

49.39 Cr for 4 years and Rs. 7.69 Cr for this year. It is pertinent to mention here that the impugned reasons do not speak of/ refers to any transaction/ income emanating from annexures B to G. However, the allegation of such suppressed sale was withdrawn/quashed by the Assessing Officer being the CCE, Jaipur vide adjudication order dated 30.06.2015 and the relevant finding of the CCE order dated 24.07.2015 are reproduced hereunder:

"Hence, upon analysis of above said contention and based on the documentary evidences available on record, a situation emerges that RUD-24 was simply a booking register maintained by staff of Shri Moni Khan, on one side of the said register prospective parties who require trucks were entered mostly on their telephonic request and on the other side available truck and truck drivers' number were maintained. Only after confirmation of the order, GR challans were issued in two copies with name of the client and destination which was given to the truck driver and for this purpose entries in the G.R register were maintained. In consideration of the same commission was realized from truck driver and service tax was duly paid upon the same by Shri Moni Khan. In the present case the demand is based upon booking register and statement of Moni Khan RUD-3 out of which 3/1 and 3/2 were recorded during the investigation proceeding of M/s. Raghuvir metals in which Shri Moin Khan was not impleaded as co-notice ever for the purpose of penalty U/r. 26 of the Rules. Further during the course of cross examination and relying upon Section 9D Shri Moin Khan has categorically stated that he had tendered the statement and they are not stated in a correct manner of clandestine removal I hold the demand cannot sustain merely on presumption and assumption as the same has to be supported by tangible evidences which are not available or perhaps have not been investigated upon appropriately, in the present matter, the truck driver who are named along mobile number should have been investigated, in spite of search and investigation no discrepancy in stock for the given period could be noticed in the factory of notice by DGCEI, further huge amount in crores alleged to be involved in purchase and sale of clandestine excisable goods has not been brought on record having a nexus with buyers/sellers of final goods and raw materials. Since the investigation has not alleged or issued show cause notice for short payment of service tax to Shri Moin Khan for his alleged collusion in the said activities and for rendering unaccounted goods transport services rather the GR register, challan book and ledger accounts have not been disputed. Also, demand based on booking register and statements of third party without backward and forward consolidations as

already discussed does not sustain. Hence, I hold that demand on account of serial no. A, based on booking register does not sustain.

DISCUSSION ON POINTS NO. B TO G OF SCN

The investigation for raising the demand under Serial No. B-G in Para No. 68 of the Show Cause Notice has primarily relied upon loose attendance sheet of employees and workers RUD-10, 11, 12, 13, 17, statement U/s. 14 of various buyers and survey reports of commercial taxes department carried out on 19.1.2010 wherein there is admission on the part of notice on short quantity during the course of physical verification of stocks and clearance without bills i.e., RUD-59."

Therefore, the very basis and the supporting point, the reasons to believe does not exist anymore, therefore, the proceedings initiated U/s 147/148 deserves to be quashed at this stage and we quash the proceedings initiated U/s 147/148 of the Act.

13. Since, we have quashed the proceedings initiated U/s 147 of the Act, therefore, there is no need to adjudicate the other grounds of appeal.

14. In the result, this appeal of the assessee is allowed.

Order pronounced in the open court on 15th September, 2021.

Sd/-	**Sd/-**
(विक्रम सिंह यादव)	(संदीप गोसाई)
(VIKRAM SINGH YADAV)	(SANDEEP GOSAIN)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 15/09/2021
*Ranjan
आदेश की प्रतिलिपि अग्रेषित / Copy of the order forwarded to:

1. अपीलार्थी / The Appellant- M/s Bansiwala Iron & Steel Rolling Mills, Jaipur.
2. प्रत्यर्थी / The Respondent- The D.C.I.T., Circle-3, Jaipur.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त(अपील) / The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
6. गार्ड फाईल / Guard File (ITA No. 1388/JP/2019)

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar