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IN THE HIGH COURT OF BOMBAY AT GOA.

WRIT PETITION NO. 233 OF 2015.

Sociedade de Fomento Industrial Pvt. Ltd. Through its Deputy General Manager (Taxation), Mr. Sitaram P. Bhat, Vila Flores Da Silva, Erasmo Carvalho Street, Margao, Goa- 403601 ...Petitioners.

VERSUS

1. The Assistant Commissioner of Income tax, Circle - 1, 3rd Floor, Blessing Pioneer Complex, Opp. District & Session Court, Margao - Goa.

2. The Joint Commissioner of Income-tax, Margao Range, 3rd Floor, Blessing Pioneer Complex, Opp. District & Session Court, Margao - Goa.

3. The Commissioner of Income-tax, Aayakar Bhavan, EDC Commercial Complex, Patto Plaza, Panaji – Goa.

4. The Union of India, Through the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi-110 001. ...Respondents.

Mr S. S. Kantak, Senior Advocate with Mr P. Rao, Mr P. Talaulikar,

Mr. K. Ceasar Simoes, Mr. R. Vazarkar, Ms N. Kholkar and Mr A. Parrikar, Advocate for the petitioners.

Ms S Linhare, Standing Counsel with Ms. E. Fernandes for the Respondents.

WITH

WRIT PETITION NO. 883 OF 2016

SHANTILAL KHUSHALDAS & BROTHERS PVT. LTD A Pvt Ltd Company Incorporated under the Indian Companies Act with its office at Salgaocar Bhavan Altinho, Panaji – Goa Through its Director Mr Mukesh Mathuradas Saglani major of age, Indian National, resident of Margao, Salcete -Goa. ..... Petitioner.

Versus

1. The Assistant Commissioner of Income-Tax, Circle-1, Blessings Pioneer Complex, Opp. District & Sessions Court, Margao, Goa.

2. Jt. Commissioner of Income-tax, Margao Range, Blessings Pioneer Complex, Opp. District & Sessions Court, Margao, Goa.

3. The Commissioner of Income-tax, Aayakar Bhavan, Plot No.5, EDC Complex, Patto Plaza, Panaji, Goa.

4. Union of India,
Through the Secretary, Department of Revenue, Ministry of Finance, Government of India, North Block, New Delhi-110 001. ..... Respondents.

Mr P. Pardiwala, Senior Counsel with Mr A. D. Bhobe, Ms S Shaikh and Mr S. Sayal, Advocate for the petitioners.

Ms. A. Razaq, Standing Counsel for the respondents.

CORAM: BHARAT P. DESHPANDE, &
VALMIKI SA MENEZES, JJ.

Reserved on : 15th December 2023
Pronounced on: 19th January 2024.

JUDGMENT : (Per BHARAT P. DESHPANDE,J)

1. Both these petitions were earlier part of the group of matters in which leading matter was Writ Petition No.141 of 2015. Said group along with present petitions were heard by the Coordinate Bench of this Court. While disposing of some of the petitions, Coordinate Bench of this Court (S. C. Gupte and Nutan D. Sardessai, JJ) vide order dated 9.7.2019, detagged the present petitions since some additional grounds were involved than the one which were decided by order dated 19.7.2019. Paragraph 28 of the order dated 9.7.2019 while deciding the group of petitions reads thus:-

> *"28. The following petitions, Writ Petition Nos.141 and 233 of 2015, 198, 199, 262, 264, 265, 271, 272, 879, 880, 881, 882, 883 of 2016 are all petitions where reopening notices contained additional*

reasons involving issue under Section 10B of the Act or Section 14A of the Act or commission paid to foreign agents or other reasons. These petitions deserve to be detagged from the group of petitions to be disposed of by this order."

2. Accordingly, present petitions along with others were listed together. However, present two petitions were finally heard. Learned counsel for respective parties would submit that since additional grounds in other petitions are involved independently, present two petitions could be disposed of whereas remaining petitions be detagged.

3. Accordingly, Writ Petition Nos. 141 of 2015, 196, 199, 264, 265, 271, 272, 879, 880, 881 and 882 of 2016 are detagged.

4. We have heard learned Senior Counsel Mr S. S. Kantak along with learned Counsel Mr P. Rao, Mr P. Talaulikar, Mr. K. Ceasar Simoes, Mr. R. Vazarkar, Ms N. Kholkar and Mr A. Parrikar for the petitioners and Ms S Linhare, learned Standing Counsel along with learned Counsel Ms. E. Fernandes for the Revenue argued on behalf of the respondents in Writ Petition No.233/2015.

5. Learned Senior Counsel Mr P. Pardiwala along with learned Counsel Mr A. D. Bhobe, Ms S Shaikh and Mr S. Sayal for the

petitioners and Ms. A. Razaq, learned Standing Counsel for the Revenue advanced arguments on behalf of the respondents/revenue in Writ Petition No.883/2016.

Facts in Writ Petition No. 233 of 2015 (Sociedade de Fomento Industrial Pvt. Ltd.)

6. In the nutshell, it is the contention of the petitioner that they filed returns of their income for the Assessment Year 2008-2009 after claiming exemption under Section 10B towards profits derived from its export of iron ore produced in its 100% EOU known as Greater Ferro-met. Such iron order produce consist of ore from which raw material was purchased by the petitioner from other mine owners as also extracted from its own mine. Returns were processed by Revenue under Section 143(1) of the Income Tax Act (for short "the Act") on 16.2.2010. On 9.1.2012, petitioner's case for assessment for the Assessment Year 2008-09 was reopened by notice under Section 148 of the Act. On 6.2.2012, a survey was conducted at the premises of the petitioner under Section 133A of the said Act. On the same day petitioner addressed a letter to the Assessing Officer requesting that the returns already filed on 30.9.2008 may be treated as the returns filed in response to notice under Section 148

of the said Act and requested for the reasons for reopening of the Assessment. The reasons were furnished to the petitioner vide letter dated 8.2.2012.

7. On 16.2.2012, the petitioner filed objections challenging the jurisdiction under Section 148 of the Act.

8. Revenue by its order dated 2.3.2012 rejected the objections filed by the petitioner. Vide order dated 23.3.2012 and after detailed scrutiny, the exception claimed by the petitioner under Section 10B of the Act was rejected by respondent no.2 mainly on the ground that petitioner has already availed such exemption for the Assessment Year 1990-91 to 1994-95 and thus, exhausted the entire tax holiday granted to it and secondly the activities of the petitioner did not amount to production or manufacture within the meaning of Section 10B of the Act. On 19.4.2012, petitioner challenged such order rejecting exemption under Section 10B, before the Commissioner of Income Tax (Appeals) (hereafter called as "CIT(A)" for short). On 20.12.2012, appeal of the petitioner was partly allowed in favour of the petitioner thereby holding that the petitioner is entitled to claim exemption under Section 10B of the Act, in connection with activities coming within the definition of production. Since appeal was partly

allowed, the petitioner challenged such order before the Income Tax Appellate Tribunal (for short "ITAT"). On 28.3.2014, the ITAT upheld the claim of the petitioner under Section 10B of the Act. The Revenue then challenged such order before this Court wherein appeal was admitted.

9. On 24.10.2014, the petitioner received another notice under Section 148 of the Act seeking to reopen the returns for the Assessment Year 2008-09. Petitioner requested reasons for such reopening, which were furnished on 29.12.2014. The petitioner also received notice under Section 142(1) of the Act from respondent no. 2 requesting the petitioner to submit details/information as contained in notice dated 7.1.2015. The petitioner immediately filed a detailed objections raising a question of jurisdiction of respondent no.1 to reopen the Assessment. However, on 30.1.2015, respondent no.2 passed an order dismissing the objections. Respondent no.2 on 11.3.2015 issued another notice under Section 142(1) calling upon the petitioner to appear before him on 13.3.2015 for submitting details as per notice dated 29.12.2014. No time was given to the petitioner to challenge such rejection of objections and he was coerced to participate in the proceedings. The petitioner filed his

reply on 17.3.2015. However, challenged such action on the part of the respondents by filing present petition.

10. By filing a reply/affidavit, Revenue objected to the prayer in the petition and claimed that action on the part of the concerned officer is justified in the given circumstances.

Facts in Writ Petition No. 883 of 2016 (Shantilal Khushaldas and Brothers Pvt. Ltd)

11. Petitioner's Company is engaged in the business of mining, trading and export of minerals and ores. The petitioner filed return of income tax for the Assessment Year 2011-12 declaring NIL income. The case of the petitioner was taken up for scrutiny/assessment vide notice dated 24.6.2013 and the petitioner was asked to furnish further details. Accordingly on 27.8.2013, the petitioner submitted details. On 14.3.2014, respondent no.2 passed an order under Section 143(3) of the Act making certain disallowances for the Assessment Year 2011-12. On 26.7.2014, the Director of Revenue Intelligence issued notice alleging that the petitioner has not paid custom duty to the extent of the reduction of the sale consideration on account of the commission directly paid to the agents by buyers. The petitioner then approached the Settlement Commission to settle the issue of payment of additional customs duty. On 24.6.2015,

Settlement Commission vide its order determined additional custom duty together with interest and penalty in respect of the exports made from 1.4.2008 to 31.3.2013 of more than five crores which have been duly paid by the petitioner.

12. Respondent no.1 issued notice dated 24.5.2015 (impugned notice) under Section 148 of the Act stating that he has reason to believe that income of the petitioner chargeable to tax for the Assessment Year 2011-12 has escaped assessment within the meaning of Section 147 of the Act. On 28.12.2015, the petitioner made a request that original returns filed under Section 139(1) of the Act be treated as returns filed in response to the impugned notice under Section 148 of the Act. On 8.1.2016, respondent no.1 furnished reasons for issuing notice under Section 148 of the Act. On 27.1.2016 objections were filed by the petitioner challenging validity of reassessment proceedings. Vide order dated 25.7.2016, respondent no.1 rejected the objections, which are impugned in the present proceedings.

13. Respondents by filing their reply/affidavit objected to the prayers in the petition on the ground that opening of reassessment has been properly carried out and there are reasons to believe which

have been recorded.

SUBMISSIONS OF THE PETITIONERS.

14. Learned Senior Counsel Mr Kantak and Mr Pardiwala would submit that first of all the Coordinate Bench of this Court in the earlier bunch of petitions have clearly held that reasons for reopening on the basis of the third report of Justice Shah Commission is not available to the Revenue. They specifically relied upon the finding on this aspect. Learned Senior Counsel would then submit that in both these matters another notices were issued on different counts by taking recourse to Section 10B of the Act and Section 50 of the said Act, which are not at all available for the purpose of reopening of the assessment which was already completed.

15. It is their submission that the Shah Commission's report is only the opinion of the said commission which has no binding effect and no independent inquiry was conducted before issuing notices for reopening.

16. Mr Kantak, would submit that the chart which was published in the third report of Shah Commission is lifted from the said report and pasted in the reasons which is not permissible at all. He would

then submit that grounds for reopening are not at all available and objections raised to such opening ought to have been accepted. According to him, there is no reason to believe, and thus notice must fail.

17. Mr Kantak would then submit that ground for reopening under Section 10B of the Act is also covered by the decision of the Coordinate Bench of this Court and other decisions and therefore, such ground is not at all available to the Revenue. He submits that there is absolutely no independent inquiry conducted to the satisfaction of the Assessing Officer for the purpose of reopening. He questioned as to what material and more specifically tangible material was available with the Assessing Officer for the purpose of issuing notice of reopening.

18. Mr. Pardiwala would submit that findings of Shah Commission report are not at all sufficient for the Revenue to reopen and conduct fresh assessment. He submits that other than material of Shah Commission, no other inquiry was conducted to the satisfaction of the concerned authority.

19. Mr Pardiwala would submit that in his case allegations are in connection with under invoicing of the material. He submits that for

such ground, absolutely no material was collected and that in a commercial market, there are always ups and downs with regards to the price of the commodities even during the particular day's trade. Price of the particular commodities may not be same even during the course of the day's transaction. He would therefore submit that Revenue failed to consider any material and moreso, tangible material to issue notice by considering the aspect of under invoicing. He would submit that the Assessing Officer must record his reasons and reason to believe and such reasons to believe must be on the basis of tangible material. It cannot be only on the whims and fences of the concerned officer.

20. Learned Senior Counsel Mr S. S. Kantak for the petitioner-Sociedade De Fomento Industrial Pvt. Ltd. relied upon following decisions:-

1 *The Commissioner of Income Tax Vs M/s Sociedade de Fomento Industrial Pvt. Ltd.* [1]

2 *The Commissioner of Income Tax Vs M/s Sociedade de Fomento Industrial Pvt. Ltd.*[2]

3 *Fomento Resources Pvt. Limited and anr. Vs Union of India and others*[3]

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1 . Spl. Leave to Appeal (C) No(s).6730/2021 dated 25.1.2022

2 . Tax Appeal Nos. 23 and 25 of 2023 dated 22.10.2020

3. Writ Petition Nos.606 of 2014 and other connected matters decided on 2.7.2019

4 *Commissioner of Income Tax, Gujarat Vs A. Raman and Co.* [4]

5. *Aroni Commercials Ltd Vs Dy. Commissioner of Income Tax,* [5]

6. *M/s S. Ganga Saran and Sons Pvt. Ltd Vs Income tax Officer and others.*[6]

7. *Mr. Teofilo Frenando Antonio Pinto Vs Union of India and others,*[7]

21. Learned Senior Counsel Mr. Pardiwala for the petitioner– Shantilal Khushaldas & Brothers Pvt. Ltd. relied upon following decisions:-

1. *Principal Commissioner of Income Tax-5 Vs Shodiman Investment (P) Ltd.* [8]
2. *Commissioner of Income-Ta Vs. A. Raman & Co.* [9]
3. *Reynolds Shirting Ltd. Vs Assistant Commissioner of Income-Tax, Central Circle6(3) Mumbai*[10]
4. *Prashant S. Joshi Vs Income Tax Officer & anr.*[11]
5. *N. D. Byat, Inspecting Assistant Commissioner and anr Vs I. B. M. World Trade Corporation,* [12]

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4. 1967 SCC online SC 49

5. 2014 SCC Online

6. (1981) 3 SCC 143

7. Writ Petition No. 1099 of 2023(filing) decided on 6.9.2023.

8 . (2018) 93 Taxman.com 153(Bombay)

9 . (1968) 67 ITR 11 (SC)

10 . (2022) 135 Taxmann.Com 78(Bombay)

11 . (2010) 324 ITR 0154

12. (1995) 216 IR 0811

6. Patel Stationers Private Limited Vs R. Andiappan[13]

SUBMISSIONS OF RESPONDENTS.

22. Per contra Ms S. Linhares and Ms A. Razaq, learned standing Counsel for the Revenue would submit that the reasons for reopening clearly discloses tangible material which was considered by the Assessing Officer before issuing notice. It is their contention that Assessing Officer is not required to give all detailed reasons and that petitioner would be having an opportunity to contest the matter once the assessment is reopened and inquiry is conducted. Ms Razaq would submit that in Writ Petition No.883/2016, there are subsequent developments wherein a suit filed in the Singapore High Court clearly revealed admission on the part of the assessee of under invoicing. She, therefore, submits that such material is sufficient enough for the purpose for reopening of the assessment.

23. Ms Razaq would then submit that information was received from the Government department upon which analysis were carried out by the Assessing Officer. She would submit that there should not be any disbelief with regard to information received from the Government department. According to her, there are sufficient

13. Writ Petition No. 142 of 2005 decided on 3.12.2021.

reasons disclosed for the purpose of reopening. It depends upon subjective satisfaction of the concerned officer which has been reflected in the reasons.

24. Ms A. Razaq, learned Standing Counsel for the respondents relied upon following decisions:-

1. *Income Tax Offier Vs Selected Dalurband Coal Co. (P) Ltd.*[14]
2. *Assistant Commissioner of Income Tax Vs Rajesh Jhveri Stock Brokers(P) Ltd.*[15]
3. *Income Tax Officer Vs Lakhmani Mewal Das*[16]

DISCUSSIONS AND CONCLUSIONS

25. Various decisions have been cited, which we would like to discussed at the relevant stage.

26. Before considering the facts of each case, it is clear that the common ground in both these petitions is the third report of Shah Commission by which it was observed that there were illegal export particularly by means of under invoicing on the part of mining lessees and the exporters.

27. In Sociedade De Fomento Industrial Pvt. Ltd.(Writ Petition

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14. (1978) 113 ITR 489(Calcutta)

15. (2007) 161 Taxman 316(SC)

16. (1976) 103 ITR 437(SC)

No.233 of 2015), notice under Section 148 of the Act is dated 20.10.2014. The concerned officer claimed that he has reason to believe that the income of the petitioner chargeable to tax for the Assessment Year 2008-09 has escaped assessment within the meaning of Section 147 of the said Act. He, therefore, proposed to reassess the income and called upon the petitioner to deliver the returns in prescribed form within a period of 30 days. The petitioner vide their letter dated 20.11.2014 called upon the concerned officer to furnished reasons for reopening. Vide letter dated 29.12.2014, the copy of the reasons for reopening is furnished to the petitioner.

28. Reasons for reopening contains in all five grounds. Ground no.1 is under invoicing of export. In the said ground it is claimed by the Revenue that some new facts came to the light regarding illegal extraction and export of iron ore and under invoicing OFan export of iron ore extracted from the mines in Goa. Such new facts emerged from the third report of Justice M. V. Shah Commission of inquiry which was submitted to the Government wherein Commission has observed that there is *prima facie* under invoicing of the exports as the average price of iron ore per metric ton for the corresponding period and the grade was higher. A chart is appended to such

grounds no.1. Finally it is claimed that *prima facie* there is total under invoicing to the extent of Rs.72,36,65,086/- as seen in the above chart. These are some instances of the petitioner which were not noticed till report of Commission was made public. A statement is made thereafter in the reasons, which is assailed by the petitioner and which reads thus:-

> *"This office afterward, independently, made inquiry and sent the Assessee notices to collect connected information, after acquiring permission from Commissioner of Income Tax, Panaji and found out that, for the same period, for the same FE content, assessee has under invoiced, his export for certain consignment when compared to average market rate or rates at which one parties have exported on the same day. Therefore, I have reason to believe that income to the tune of Rs. 72, 36,65,086/- has escaped assessment and need to be taxed for the Assessment Year 2008-09."*

29. Mr Kantak would submit that the chart and the figures mentioned therein are identical as compared to the figures mentioned in the Shah Commission Report. He would submit that no independent inquiry was made by the concerned officer whatsoever before issuing notice for reopening. Thus, he would

submit that only on the basis of conclusions drawn by the Commission, Revenue is not entitled to rely and to reopen specifically when there is no other material available with the concerned authority to arrive at a conclusion that there exist a reason to believe that the income has escaped assessment for the said particular year.

30. Ms A. Razaq would submit that the figures mentioned in the said chart though adopted from the Shah Commission Report, the officer clearly disclosed that thereafter independently he made inquiries and thus such statement is sufficient to conclude that the material *prima facie* shows that income escaped assessment for the said year. She would submit that no detailed reasons or material collected during the inquiry is required to be given to the petitioner at that stage.

31. In Shantilal Khushaldas and Brothers Pvt. Ltd, (Writ Petition No 883 of 2016),the petitioner received notice under Section 148 of the Act dated 24.7.2015 wherein authority claimed that it had reason to believe that the income of the petitioner chargeable to tax for the Assessment Year 2011-12 has escaped assessment within the meaning of Section 147 of the Act. Accordingly, the petitioner was

called upon to deliver returns within a period of 30 days. Petitioner then asked for the reasons, which were supplied vide revenue letter dated 8.1.2016. There are basically two reasons for reopening of the assessment for the Assessment Year 2011-12.

32. The first reason discloses that some new facts came to the light regarding under invoicing of exports of iron ore. Such information was received from the Directorate of Revenue, Intelligence(DRI), Mumbai through the office of the Principal Commissioner of Income Tax, Panaji. The details were obtained from the local office DRI. As per these information of DRI, the issue of under invoicing related to number of exporters of iron ore from the State of Goa came to the light. Out of such exporters, the petitioner is one of them who also resorted to this *modus operandi* for various reasons.

33. Reasons in ground no.1 further shows the details about investigation carried out by DRI Mumbai. The DRI Mumbai during the investigation observed that assessee were evading export customs duty by under valuing iron ore shipment exported to various overseas buyers from different ports in India. It was further gathered by DRI, Mumbai that the assessee were declaring lower FOB price to Customs Authorities than the price that was actually finalized

between them and the overseas buyers. The difference between the declared and the actual FOB price was paid by their overseas buyers, on behalf of the assessee, directly to the overseas agent appointed by the assessee. Since the customs duty on the export of iron ore is levied as a percentage of FOB value of the export consignment, the intelligence pointed to evasion of appropriate export duty of customs by the assessee by resorting to mis-declaration of the actual FOB price of the export. It was further revealed by DRI Mumbai that the buyer himself suggested and on acquiescence of the seller, appointed and paid part of the price payable for the export goods to the agent on account of seller and deducted the same from the finally agreed price. As such seller directly paid charges to the agent and such charges would be includable in the FOB value for the purposes of assessment of the export customs duty on iron ore, in terms of Section 14 of the Customs Act 1952. Thus, it was apparent that fees paid to the protective agents were part of the value of the goods exported. Had there been no protective agents, the fees paid to them would have been received by the seller and thus, it is apparent that the fees paid to the protective agents are indeed part of normal value of the good as finalized between seller and the buyer by mutual

agreement and not been disclosed to the Customs Authority in India at the time of export.

34. Mr Pardiwala would therefore submit that all the reasons in ground no.1 are from the investigation carried out by the DRI which in facts relates to the customs duty. The Income Tax Officer only lifted such material from DRI and pasted it in its reasons without making any independent inquiry so as to arrive at *prima facie* conclusion that there was any under invoicing as far as income tax is concerned.

35. Ms S. Linhares, appearing for the Revenue would submit that the material was received from the DRI which is also a Government department and an agency authorized to conduct investigation. There was no doubt with regards to such investigation as the petitioner paid additional custom charges and therefore, it is clear that the petitioner was involved in under invoicing. According to her, such reason is sufficient for the officer to believe that there was under invoicing and that such material was not available at the time of assessment of the returns. The reopening on this ground is, therefore justified.

36. Both the learned Senior Counsel would submit that the

Assessing Officer practically relied upon the report of different authorities and failed to independently assess and therefore, such action on the part of the concerned officer is in fact illegal.

37. As far as Shah Commission Report is concerned, both the learned Senior Counsel placed reliance on the findings of the Coordinate Bench of this Court wherein (S. C. Gupte, J) discussed in detail the third report of Shah Commission and observed that findings/observations of the Commission are merely the expression of its opinion and it lacks finality as well as authoritativeness. Only on the basis of such expression of the Commission, there cannot be any *prima facie* belief which could be recorded by the Assessing Officer without any independent material for reopening of assessment.

38. We are clear in our mind that jurisdiction of this Court about the judicial scrutiny is limited and to the extent whether or not there was material on the basis of which belief could have been formed about escapement of income from assessment, but not whether the material was actually adequate or sufficient for formation of such belief. Thus, we are concerned with whether or not such belief could have been formed on the basis of such material as was available with

the Assessing Officer. Action of the Assessing Officer has to be scrutinized and has to pass the test of judicial scrutiny and more specifically point of view of unreasonableness. Scrutiny is whether authority has kept itself within the four corners of law and consequently even if it is so kept itself, whether it has come to the conclusion so unreasonable that no reasonable authority could ever have come to it. Notice under Section 148 of the Income Tax Act has to pass master of unreasonableness and whether material placed before the Assessing Officer is actually sufficient to hold that income escaped from assessment.

39. It has been held consistently that the belief under Section 147 of the Act is not a matter of mere opinion of the Assessing officer. A change of opinion in this regard, is not at all sufficient for reopening of the assessment. The reasons must demonstrate that the material used by the Assessing Officer to reopen, is reasonably capable of formation of his belief that income has escaped assessment. The belief does not mean purely subjective satisfaction on the part of the concerned officer, it must be held in good faith. It is open to the Court to examine whether the reason has a rational connection with

or relevant bearing on the formation of the belief and it must not be extraneous or irrelevant for the purpose.

40. In both these matters, we have already recorded the reasons specifically in ground no.1 and it shows that the Assessing Officer in Sociedade de Fomento Industrial Pvt. Ltd. (Writ Petition No. 233 of 2015) practically believed on the third report of Shah Commission and the figures mentioned therein. We say so for the reasons that Mr. Kantak placed before us report of Shah Commission wherein figures mentioned in the ground no.1 of the reasons are found at different places against different assesees. What the officer did is only compiling it in one format and pasted it in ground no.1 of the reasons.

41. We also found that apart from the statements below chart as quoted earlier, there is only a bare statement that the office independently made inquiries. The word "this office", nowhere specifies as to whether the concerned officer who issued notice, himself carried out any independent inquiry. Similarly the details of such inquiry and material collected during such inquiry is not part and parcel of the reasons. The purpose of disclosing reasons is to give an opportunity to the assessee to meet such reasons effectively or to

accept it for the purpose of reopening. If the assessee is unable to accept such reasons, he is entitled to file objections. Thus merely saying that the office conducted independent inquiry apart from the material found in the Shah Commission report, would not be sufficient, in our opinion, to come to the conclusion that there is reason to believe about the income being escaped from assessment.

42. In the said matter, we have noted that the reasons disclosed by the Assessing Officer specifically in ground no.1, are purely speculative and based on the observations of the Shah Commission report. Barely mentioning that independent inquiry was conducted by the office, is too dangerous to accept that the officer has reason to believe. If such contention is accepted for reopening, the Assessing Officer, without giving proper reasons and by just saying that office conducted independent inquiry, would be able to reopen each and every case. This is not the purpose which has been laid down in various decisions of the Apex Court. There must be rational connection or relevant bearing disclosed in the reasons for formation of the belief. It must not be extraneous or irrelevant for such purpose. Reasons demonstrated in the notice (ground no.1) are therefore, considered to be imported from the Shah Commission's

Report and there is no any independent material collected by the Assessing Officer to form his own opinion or reason to believe.

43. In Shantilal Khushaldas and Brothers Pvt. Ltd (Writ Petition No.883 of 2016), ground no.1 shows that the material was received from the office of the DRI Mumbai. The gist of the DRI Mumbai investigation or inquiry into the matter regarding customs acts has been reproduced including the chart. There is absolutely no statement of the Assessing Officer that apart from material received from DRI Mumbai office, he applied his mind or conducted any further inquiry into the matter of under invoicing.

44. Mr Pardiwala would submit that DRI investigation was in connection with the price and commission paid to the overseas agents, which is not at all connected with the returns filed by the petitioner. He explained that the price for which the iron ore was sold is the same however, only some commission was given to the overseas agent. He submits that valuation of the ore sold by the petitioner is properly disclosed in the account and in returns and there is no under valuation. The petitioner has shown the exact price in the returns however, since there is no independent assessment or inquiry conducted by the Assessing Officer and placing reliance only

on the information received from DRI Mumbai, the Assessing Officer has no jurisdiction to reopen the assessment.

45. We clearly observed that apart from material received from the office of DRI Mumbai and quoting some part of it in the reasons, the Assessing Officer nowhere disclosed about any independent inquiry conducted by him or his office to arrive at the opinion. There is no other tangible material except report from DRI Mumbai which could have been considered as reason to believe of the income escaped from assessment.

46. The main contention of the petitioner/assessee is that there is no belief on the part of the Assessing Officer that the income escaped and that there is no reason of any failure on the part of the assessee to make such disclosure fully and truly. It is claimed that the Assessing Officer cannot simply make a bald assertion that escapement of the income is due to the result of failure on the part of the Assessee to fully and truly disclose all the material facts. He must indicate though briefly what is it that was not disclosed and which gives the Assessing Officer reason to believe that such income has escaped assessment.

47. In both these matters ground no.1 deals with the foundation that assessee showed under invoicing of the exports. In other words it is case of the Revenue that the assessee failed to fully and truly disclose all material facts and suppressed by under invoicing export.

48. Mr. Kantak would then submit that in view of the findings of the Apex Court in the case of *A. Rehan Company* (Supra), this Court is entitled to test as to whether there are reasons to believe that income chargeable to tax has escaped assessment and that it is in consequence of information which officer has in its possession and that he has reason to believe that income escaped assessment. The Apex Court observed that High Court in exercising jurisdiction under Article 226 of the Constitution of India has power to set aside the notice issued under Section 147 of the Act if condition precedent to the exercise of jurisdiction does not exist. The Court may in exercise of its powers ascertain whether the Income Tax Officer had in its possession any information and the Court may also determine whether from that information officer may have reason to believe that the income chargeable to tax had escaped assessment.

49. In the case of *Aroni Commercial Limited* (supra), the Division Bench of this Court sitting at the Principal seat observed in

paragraph 13 that the common judicial requirement for reopening of the assessment both within and beyond the period of four years has to be on the basis of reason to believe that income chargeable to tax has escaped assessment and the reason for issuing a notice to reopen are recorded before issuing a notice. However, there is one additional judicial requirement to be satisfied while seeking to reopen the assessment beyond the period of four years from the end of the relevant Assessment Year which requires that there must have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings. Primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. The concept of reason to believe does not give arbitral power to reopen an assessment.

50. The concept of change of opinion is excluded/omitted from words reason to believe. Thus a change of opinion would not be reason to believe that income to tax has escaped assessment. Besides the power to reassess is not a power to review. Further reopening must be on the basis of tangible material. If all facts are available on record and particular opinion is formed, then merely

because there is change of opinion on the part of the Assessing Officer, notice under Sections 147/148 of the Act is not permissible. Such powers cannot be exercised to correct the errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on the order of assessment and the same can be disturbed by exercise of powers under Section 147/148 of the Act, only on the satisfaction of the jurisdictional requirements. At the time of issuance of notice under Section 148 of the Act to reopen a concluded assessment, satisfaction of the Assessing Officer is of primary importance. It must be *prima facie* satisfaction of having a reason to believe that the income chargeable to tax has escaped assessment. At this stage the officer is not required to establish beyond doubt that the income indeed had escaped assessment.

51. Various other decisions on the same propositions have been relied upon. However, we need not discuss each judgment since it is now a settled proposition of law.

52. In *Shodiman Investments Pvt. Ltd*, the Coordinate Bench of this Court sitting at the principal seat, while considering appeal under Section 260A of the Income Tax Act challenging the order

passed by ITAT, considered the question of law as to whether on facts and in the circumstance of the case and in law, the Tribunal was justified in holding that reopening of the assessment is not sustainable in law. In that matter Shodiman filed returns for the Assessment Year 2003-04 declaring loss. Such returns were proceeded under Section 143(1) of the Income Tax Act. Somewhere in March, 2010, the Assessing Officer issued notice under Section 148 of the Act seeking to re-open assessment for Assessment Year 2003-04 on the reason that it was intimated that search action was conducted under Section 132 of the IT Act on 25.11.2009. In case of *Mahasagar Securities Pvt. Ltd* where it is found suspicious transaction taken place in bank account of Shodiman and related companies. This was challenged before the Assessing Officer by filing objections which were rejected and the concerned officer proceeded to assess returns under Section 143(3) read with Section 147 of the said Act. An assessment order was passed thereby demanding income of Rs. 67.10 lakhs from Shodiman. Appeal preferred before CIT (Appeals) was rejected. Appeal preferred before the ITAT by Shodiman was allowed. Revenue challenged the order of ITAT by filing appeal before the High Court. While rejecting

the said appeal, the Court has observed 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. Words "whatever reasons" is qualified by the words "having reasons to believe that income has escaped assessment" the words "whatever reasons" only means any tangible material which would on application to the facts on record lead to reasonable belief that income chargeable to tax has escaped assessment. This material which forms basis, is not restricted but material must lead to formation of reasons 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. It can only be the basis of forming the belief. However, belief must be independently formed in the context of material obtained that there is an escapement of income. Otherwise no meaning is being given to words "to believe" as found in Section 147 of the Act. The words "whatever" reasons in *Rajesh Jhaveri Stock Borkers (P) Ltd's* case (supra), only means whatever the material, 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 reopen an assessment.

53. In Shodiman, the Assessing Officer in his reasons disclosed that it was intimated to him during the search action conducted under Section 132 of the IT Act that there were suspicious transactions in the bank account of the said company and related companies. The ITAT found that such reasons or material on the basis of which the Assessing Office recorded his reasons are borrowed from other department and no independent assessment has been carried out to the satisfaction of the Assessing Officer that he has reason to believe that the income had escaped assessment.

54. In *Shodiman Investment (P) Lt*d, the Cordinate Bench of this Court further observed in paragraph 12 which reads thus:-

> *"Paragraph 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 JTR 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 Vsv. 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."

55. The present petitions as far as ground no.1 are concerned clearly goes to show that except the report of the third Shah Commission and material collected from DRI Mumbai and quoting of certain observations of these authorities in the reasons, there is no any independent material or reason the basis on which, Assessing

Officer has reasoned to believe that the income chargeable to tax escaped from the assessment.

56. In Sociedade De Fomento Industrial Pvt. Ltd(Writ Petition No. 233 of 2015) the notice for reopening was issued on 20.10.2014 claiming that there is reason to believe that income chargeable to tax for the assessment Year 2008-09 escaped assessment. Thus, it is clear that such notice under Section 148 of the said Act was issued beyond four years and thus additional reasons that assessee though was aware, suppressed material facts while submitting the returns.

57. Observations of the Coordinate Bench in the case of *Shodiman Investments(P.) Ltd* (supra) are clearly applicable to the facts of these matters. We have absolutely no hesitation in our mind with regard to such observations which are settled propositions of law and thus such observations are clearly applicable to the matters in hand.

58. It is further well settled propositions of law whatever reasons the Assessing Officer, formed, must be disclosed in the reasons before reopening assessment, as per Section 148 of the said Act. Any clarification thereafter while deciding objections or before appellate authorities, cannot be looked into. This is precisely so, a contention raised by Ms Razaq while inviting our attention to the order dated

30.1.2015 passed while rejecting the objections raised by Sociedade de Fomento Industrial Pvt. Ltd. She unsuccessfully tried to claim that the reasoning found in the rejection of objections could be looked into as the reason to believe, which we are afraid to accept as it is well settled proposition that reasons must be disclosed and formed on the basis of tangible material before issuing notice of reopening and such reasons must be disclosed to the assessee before he is allowed to raise objection to such notice.

59. In the case of *A. Raman and Company* (supra), the Apex Court observed thus:-

> *"The condition which invests in the Income Tax Officer with jurisdiction of reassessment has two branches: (i) that the Income Tax Officer has reason to believe that income chargeable to tax has escaped assessment; and (ii) that it is in consequence of information which he has in his possession that he has reason so to believe. Since learned Judges of the High Court have concentrated their attention upon the second branch of the condition and have reached their conclusion in favour of the assessee of that branch, it would be appropriate to deal with correctness of that approach. The expression "information", in the context in which it occurs, must,*

in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. If, as a result of such information, in his possession, the Income Tax Officer has a reason to believe that income chargeable to tax had escaped assessment, the Income Tax Officer has the jurisdiction to assess or reassess the income under Section 147(b) of the Act. The information in his possession that income chargeable to tax has escaped assessment arrives a starting point for assessing or reassessing income. If he has information, the Income Tax Officer may commence proceeding for assessment or reassessment. To commence the proceeding or assessment, it is not necessary that on the material which comes to the notice of the Income Tax Officer, previous order of assessment was vitiated by some error of facts or law."

60. The next submission is that the High Court while exercising jurisdiction under Article 226 of the Constitution of India, has power to set aside a notice issued under Section 147 of the Act, 1961, if condition precedent to the exercise of jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income Tax Officer have in his possession any information; the Court may

also determine whether on that information Income Tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceedings for assessment or reassessment must be decided by the Income Tax Officer and not by the High Court. Income Tax Officer alone is entrusted with the powers to administer the Act; if he has information for which it may be said, *prima facie*, that he had reason to believe that income chargeable to tax has escaped assessment, it is not open to the High Court, exercising powers under Section 226 of the Constitution of India, to set aside or vacate the notice for reassessment on a reappraisal of evidence.

61. In the case of *Reynolds Shirting Ltd* (supra), the Coordinate Bench of this Court sitting at the Principal Seat had an occasion to consider the scope of Section 147 of the Act. In that case Reynolds received a notice under Section 148 of the Income Tax Act stating that the Assessing Officer has reason to believe that the income chargeable to tax for the Assessment Year 2012-13 has escaped assessment. Copy of the reasons annexed to the notice discloses that the Assessing Officer received information from DDIT

(Investigation) about certain entity entering into suspicious/ questionable transactions. The entire information received from DDIT was reproduced in the reasons. In such scenario, the Coordinate Bench observed that the information/material received is not further linked by any reason to come to the conclusion that the petitioner 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. The reasons recorded even does not indicate the amount which according to the Assessing Officer has escaped assessment. This is evident of conducting a fishing inquiry and not of reasonable belief that income chargeable to tax has escaped assessment.

62. In both these petitions and as we discussed earlier, the Assessing Officer except quoting few portions from the third Shah Commission Report and DRI (Mumbai), failed to link such material to believe on his part that income chargeable to tax has escaped assessment. It further shows that Assessing Officer did not apply his independent mind to the information received by him from third Shah Commission Report and information received from DRI Mumbai to independently assess his reasons to believe. He merely

issued a reopening notice on receiving the information from third Shah Commission Report and DRI report. This is clearly in breach of settled proposition of law that the reopening notice has to be issued by Assessing Officer on his own satisfaction and not on the borrowed satisfaction. Thus, entire foundation for the proposed reopening which could, even if considered to be a material, has scrambled. Besides, the material must be tangible material and the Assessing Officer must apply his independent mind on the information borrowed from the other sources and not merely to believe on such material borrowed from others sources, though source is from other Government department.

63. In Sociedade De Fomento Industrial Pvt. Ltd (Writ Petition 233 of 2015) other reasons are in connection with Section 10B which are again based on report of Shah Commission wherein all the mining activities in Goa were considered to be illegal from 22.11.2007. The main reason is that since the mining activities were held to be illegal, income accruing from 23.11.2007 cannot be said to be legitimate business income. Another ground is raised thereby claiming and again on the basis of Shah Commission Report that there was under invoicing of the export.

64. As we have already concluded that apart from borrowing some observations from third Shah Commission Report, there is no independent application of mind by the Assessing Officer for reopening of the settled assessment. While deciding bunch of petitions, the Coordinate Bench of this Court has already concluded that observations in the Shah Commission Report are merely opinion and same cannot formed the basis alone for the purpose of reopening of the assessment which were already finalised. We see no reason to take another/other view in the present matters.

65. It is also claimed that apart from reason to believe, the Assessing Officer must disclose that the material was available with the assessee however, he failed to disclose truly and fully. Mr. Pardiwala and Mr. Kantak would submit that the reason in the reopening notice is that since the Apex Court found that mining activities or leases were illegal from 2007, it was presumed by the Assessing Officer that after 23.11.2007, all activities becomes illegal and therefore, the assessee ought to have declared that such activities or income derived therein was from the illegal activities.

66. First of all it is necessary to note here that the decision of the Supreme Court dated 21.4.2014 in case of Goa Foundation Vs. Union

of India in Writ Petition(C) No.435 of 2012 observed that mining leases in Goa expired in 1997 and thereafter renewal could have been granted only upto 2007. From 2007, all mining activities were considered as illegal. These observations of the Apex Court are in connection with mining leases however, it nowhere expressed that till the date of such decision, the mining activities carried out by the lease holders were considered to be illegal. The illegality of the lease is one thing and carrying out business activities on the assumption that such lease exist is another thing. Besides, activities were carried out as business and even iron ore was sold/exported till activities came to a grinding halt on the basis of order of the Apex Court. Lease holders paid their custom duties, royalties and other charges towards extraction, sale of iron ore till activities were stopped. Even thereafter, iron ore which was already extracted from the mines were exported and relevant charges were paid to the concerned departments.

67. The Assessment Officer claimed in his reasons that assessee failed to disclose fully and truly all material facts necessary for his assessment that the income derived was from illegal activities.

68. In Sociedade De Fomento Industrial Pvt. Ltd, the reopening was for the Assessment Year 2008-09. The decision of the Apex Court declaring that the leases were illegal was delivered on 21.4.2014. Thus, even prior to 21.4.2014, the Assessing Officer was not having the knowledge that such leases were illegal after 22.11.2007. Even the assessee were not aware of this fact till it was decided by the Apex Court in the year 2014. When the assessee was not aware of the leases being illegal, asking the assessee to disclose truly and fully in the returns for the year 2008-09 that the income derived from the business was on the basis of licence being illegal, is unacceptable.

69. In the case of *N. D. Bhatt Vs I. B. M World Trade Corporation (supra) 1995 ITR Vol 216 page 811*, the Coordinate Bench of this Court while placing reliance in the case of *Indian Oil Corporation Vs ITO (1986) 159 ITR 956*, quoted paragraph which reads thus:-

> *"To confer jurisdiction under clause (a) of section 147 to reopen an assessment beyond the period of four years but within a period of eight years from the end of the relevant year, two conditions are required to be fulfilled : the first is that the Income-tax Officer must have reason to believe that the income, profits or gains chargeable to tax*

had been underassessed or escaped assessment; the second is that he must have reason to believe that such escapement or underassessment was occasioned by reason of the assessee's failure to disclose fully and truly all material facts necessary for the assessment of that year. Both these conditions are conditions precedent to be satisfied."

70. Further by relying on decision of *Calcutta Credit Corporation Ltd Vs ITO (1971) 79 ITR 483(Cal)* was observed that the assessee must be aware of those facts which are not disclosed before it can be said that there is any omission or failure on his part to disclose the same. In the case of *CIT vs. Balvantrai S. Jain [1969] 72 ITR 59*, the Bombay High Court held that the assessee cannot be said to have failed to disclose the facts in question as he had no knowledge of those facts. It interpreted Section 34(1)(a) of the Indian Income Tax Act, 1922, which is in *pari materia* with the present Section 147(a) and held that Section 34(1)(a) covers only the cases where the assessee, knowing all the material facts, deliberately withholds information. The section cannot apply to a case where the assessee was not aware of the facts which he was supposed to disclose.

71. The above observation clearly applies to the matters in hand. The Assessing Officer claimed that assessee failed to disclose fully and truly all the material at the time of filing the returns that income derived was from the illegal mining activities. First of all such observations are incorrect as though the leases were declared as illegal from 22.11.2007, there is absolutely no finding or observation of the Apex Court that mining activities or business activities continued after 23.11.2007 till the same were stopped as per orders of the Supreme Court, were also illegal. Decision concerning leases was delivered in the year 2014. Till that time neither the assessee nor the Assessing Officer had knowledge that such leases were illegal after 22.11.2007. When assessee was not knowing, there was no occasion for him to make disclosure to that effect.

72. In *Mr. Teofilo Fernando Antonio Pinto Vs Union of India and anr.* (supra), the Coordinate Bench of this Court while considering all the earlier decisions including decisions in case of *Aroni Commercial Limited vs Dy. Commissioner of Income Tax, 2014 SCC Online Bom 221* and *CIT Vs Kelvinator India Limited 320 ITR 561* observed that twin conditions must be satisfied when the reopening is beyond the period of four years. Justification offered while

rejecting objections of the petitioner cannot be regarded as valid defence of the impugned notice. Such justification/reason given for the first time at the time of disposal of the objections filed by the assessee objecting to reopen the assessment. Such reasons must exist and recorded at the time of issue of notice under Section 147/148 of the Act. Only on the basis of such reasons disclosed while issuing notice the jurisdiction of the Assessing Officer could be considered when the same is challenged by way of petitions. It has been repeatedly observed that reasons cannot be supplemented or substituted belatedly either at the time of rejecting the objection or by filing an affidavits.

73. In the present matters, therefore, we are of the considered opinion that notices issued for reopening of the assessment failed to satisfy twin conditions and thus the Assessing Officer could not have exercised jurisdiction for reopening of the assessments which were concluded way back. First of all placing reliance only on opinion in the third Shah Commission Report without independently assessing or recording reasons by the Assessing Officer is itself considered to be jurisdictional error on the part of such officer. Secondly when the notice was issued beyond period of four years, conditions regarding

disclosure to be made fully and truly is also not established for the simple reason that the fact that such lease was illegal beyond 22.11.2007 was not to the knowledge of the assessee while submitting returns for the Year 2008-09 and also for the year 2011-12. The Apex Court in the year 2014 for the first time declared that the mining leases in Goa beyond 22.11.2007 were illegal. Thus prior to 2014 i.e. declaration by the Apex Court neither the assessee nor the Assessing Officer had knowledge that such leases were illegal, the question of making such declaration in the year 2008-09 or 2011-12 while submitting returns would not arise.

74. For the above reasons, we hold that notice for reopening failed to satisfy twin conditions and therefore, both these notices under Section 147 of the Act need to be quashed and set aside.

75. Rule is made absolute in the above terms.

76. Petitions stand disposed of.

VALMIKI SA MENEZES, J **BHARAT P. DESHPANDE, J**