

Shakuntala

**IN THE HIGH COURT OF BOMBAY AT GOA
WRIT PETITION NO.262 OF 2016**

BALAJI MINES AND
MINERALS PVT. LTD., THR.
ITS DIRECTOR MUKESH
MATHURADAS SAGLANI. ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.264 OF 2016

SALITHO ORES PVT. LTD. THR. ITS
DIRECTOR MUKESH MATHURADAS
SAGLANI. ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.265 OF 2016

TUNGABHADRA MINERALS PVT. LTD.,
THR. ITS DIRECTOR MUKESH
MATHURADAS SAGLANI. ... PETITIONER

Versus

THE ASSISTANT COMMISSIONER OF
INCOME TAX, CIRCLE-1 AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.271 OF 2016

SALGAONCAR MINING INDUSTRIES PVT
LTD., THR. ITS DIRECTOR MUKESH
MATHURADAS SAGLANI. ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.272 OF 2016

SALGAONCAR MINING INDUSTRIES PVT
LTD., THR. ITS DIRECTOR MUKESH
MATHURADAS SAGLANI. ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.880 OF 2016

BALAJI MINES AND
MINERALS PVT. LTD., THR.
ITS DIRECTOR MUKESH
MATHURADAS SAGLANI. ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.881 OF 2016

TUNGABHADRA
MINERALS PVT. LTD., THR.
ITS DIRECTOR, MUKESH
MATHURADAS SAGLANI., ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

WITH

WRIT PETITION NO.882 OF 2016

TUNGABHADRA MINERALS PVT. LTD.,
THR. ITS DIRECTOR MUKESH
MATHURADAS SAGLANI., ... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS., ... RESPONDENTS

**WITH
WRIT PETITION NO.879 OF 2016**

BALAJI MINES AND
MINERALS PVT. LTD., THR.
ITS DIRECTOR MUKESH
MATHURADAS SAGLANI.

... PETITIONER

Versus

THE ASSISTANT
COMMISSIONER OF
INCOME TAX, CIRCLE-1
AND 3 ORS.,

... RESPONDENTS

Mr. Percy Pardiwala, Senior Advocate with Mr. Ashwin D. Bhobe, Ms. Farnaz Shah, Ms. Shaizeen Shaikh, Ms. Sonam Dessai and Ms. C. Mashelkar (through V.C.) Advocates for the Petitioner.

Ms. S. Linhares, Additional Government Advocate for the Respondents in WP. 262/2016; WP.879/2016; WP.880/2016.

Ms. Amira Razaq, Government Advocate for the Respondent in WP.265/2016; WP.881/2016; WP.264/2016; WP.882/2016; WP.271/2016 & WP.272/2016.

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

RESERVED ON: 05th April, 2024

PRONOUNCED ON: 26th APRIL, 2024

JUDGEMENT

1. Heard learned counsel Mr. Percy Pardiwala, Senior Advocate with Mr. A. D. Bhobe, Ms. Farnaz Shah, Ms. Shaizeen Shaikh, Ms. Sonam Dessai and Ms. C. Mashelkar (through V.C.) Advocates for the Petitioners and Ms. S. Linhares, standing counsel for the Respondent Nos. 1 to 3 in WP. 262/2016;

WP.879/2016; WP.880/2016 and Ms. Amira Razaq, standing counsel for the Respondent Nos. 1 to 3 in WP.881/2016; WP.264/2016; WP.265/2016; WP.882/2016; WP.271/2016 & WP.272/2016.

2. These group of petitions were earlier connected to Writ Petition No.141/2015, however, the same were de-tagged vide order dated 09.07.2019 passed in Writ Petition No.141/2015.

3. Similarly, Writ Petition No.233/2015 and Writ Petition No.883/2016 were disposed of vide Judgment dated 19.01.2024, are in respect of the dispute which is raised in the present petitions, except few grounds challenging re-opening of the assessment. In most of the above petitions, the issue involved is in connection with Justice M.B. Shah Commission Report and therefore, these petitions are taken together with consent.

4. In order to appreciate the facts of each matter, we would like to narrate in nutshell, the facts as under:

FACTS IN WRIT PETITION NO.262/2016.

5. This petition is filed challenging the notice under Section 148 of the Income Tax Act dated 16.01.2015 issued by the concerned officer on the ground that there is reason to believe that the income of the Petitioner chargeable to tax for assessment year

2011-12 has escaped assessment within the meaning of section 147 of the Income Tax Act. The reasons for re-opening are found along with the letter dated 04.01.2016. There are total 5 reasons disclosed. The first reason is under invoicing of export wherein it is claimed that some new facts came to the light regarding illegal extraction and export of iron ore and under invoicing and export of iron ore extracted in the mines in Goa, in view of Justice M.B. Shah Commission's Inquiry Report.

6. The second reason is that the income arising from illegal activities is to be assessed as income from other sources. Again, this ground is raised on the basis of observation of the Apex Court holding that the mining leases in Goa expired on 22.11.2007 and consequently, activities beyond 22.11.2007 were illegal and thus income derived for the financial year 2010-11 relevant for assessing year 2011-12 cannot be considered as legitimate business income.

7. The third ground is that the income has escaped assessment on failure on the part of Assessee to disclose fully and truly all material facts necessary for his assessment. Again for this ground the report of Justice M.B. Shah Commission is referred claiming that several consignments of the assessee were found under

invoiced and this information has been suppressed. Further, it is observed that the activities beyond 22.11.2007, were illegal and since, such activities continued with impunity without disclosing that the assessee was indulged in illegal activities. The Fourth reason is again based on Shah Commission's Report and more particularly, the illegal activities beyond 2007. The fifth reason is regarding under invoicing and export of Iron ore to the extent of commission paid to the foreign agents.

8. The Petitioner filed objections to such reasons, however, by the impugned order dated 01.02.2016, the objections of the assessee were rejected and concerned authority was directed to assess the proceedings, which is challenged in the present petition.

FACTS IN WRIT PETITION NO.264/2016

9. The Petitioner received notice dated 24.12.2014 under Section 148 of the Income Tax Act disclosing that there is reason to believe that the income of the assessee chargeable to tax for the Assessment year 2011-12 has escaped assessment within the meaning of Section 147 of the Income Tax Act. The assessee was called upon to submit the returns for re-assessment. The Petitioner sought grounds on which the re-assessment was ordered and accordingly, the revenue department vide letter dated 04.01.2016,

furnished the reasons. In all there are five reasons disclosed for re-opening of the Assessment. The first reason is under invoicing of export. It is claimed that some new facts came to light regarding illegal extraction and export of iron ore together with under invoicing of export of iron ore extracted in the mines in Goa. Such new facts are only on the basis of the observations found in Justice M.B. Shah Commission's Report. Ground no. 2 is again based on the decision of the Apex Court in which it was observed that the mining leases in Goa expired on 22.11.2007 and further activities were held to be illegal. The Revenue, therefore, observed that the income accrued during financial year 2010-11 remained for assessing 2011-12 cannot be said to be legitimate business income. The third ground is that the income has escaped assessment because of failure on the part of assessee to disclose fully and truly all material facts necessary for the assessment. Again for this reason, the information in the Justice M.B. Shah Commission Report is considered as material. It is claimed that the assessee failed to disclose material facts truly and fully that the mining leases continued beyond 2007 were actually considered as illegal activities. The fourth as well as the fifth reason is again based on Justice Shah Commission Report as well as commission paid to

foreign agent.

10. The Petitioner filed objections to such reasons, however, impugned order passed on 01.02.2016, thereby rejecting such objections and permitting to re-open the assessment which is challenged in the present petition.

FACTS IN WRIT PETITION NO.265/2016

11. The Petitioner received notice under Section 148 of Income Tax Act dated 30.01.2015 disclosing therein that the revenue is having reason to believe that the income chargeable to tax for the assessment year 2010-11 has escaped assessment within the meaning of Section 147 of the Income Tax Act. The Petitioner sought reasons for re-opening which were furnished vide letter dated 04.01.2016. There are total 5 reasons disclosed for re-opening. The first reason is under invoicing of export. It is claimed that from the report of Justice M.B. Shah Commission it is observed that there is prima facie under invoicing of export and therefore, there is reason to believe that the income has escaped assessment and needs to be assessed for assessing year 2010-11. The second reason is again on the decision of the Apex Court thereby declaring the mining leases in Goa expired on 22.11.2007 and subsequent activities considered to be illegal. The third ground

is that the income escaped assessment because of failure on the part of assessee to disclose fully and truly all the material facts. Here again the observations of justice Shah Commission report is the basis for considering failure on the part of assessee to disclose fully and truly all material facts. Reason No. 4 is based on the Justice M.B. Shah Commission Report claiming that activities beyond November 2007 were all illegal and cannot be considered as income. The fifth reason is under invoicing of export to the extent of commission paid to the foreign agents. This reason is based on the information received from the Directorate of Revenue Intelligence (DRI) Mumbai. The sixth reason is the deviation due to change in valuation method of stock and not giving effect in computation of income. The Petitioner filed detailed objections to the reasons for re-opening, however, an order is passed rejecting such objections and permitting to reopen the assessment vide order dated 01.02.2016 which is under challenge.

FACTS IN WRIT PETITION NO. 271/2016

12. The Petitioner received notice under Section 148 of Income Tax Act dated 24.12.2014 stating there in that the revenue is having reason to believe that the income of the assessee chargeable to tax for assessment year 2011-12 has escaped assessment within

the meaning of Section 147 of the said Act. The Petitioner sought grounds on which such notice was issued. Vide letter dated 04.01.2016, grounds for re-opening were furnished. In all there are 5 grounds. The first reason is under invoicing of export based on Justice M.B. Shah Commission's Report. The second ground is regarding the illegal activities to be assessed as income from other sources based on decision of the Apex Court holding that themining leases in Goa expired on 22.11.2007 in Goa. All further activities were considered to be illegal. The third ground is that income has escaped assessment because of failure on part of the assessee to disclose fully and truly all the material facts. This reason is again based on Justice M.B. Shah Commission's Report and the observations of the Apex Court. It is the contention of the Revenue that the assessee failed to disclose that from November 2007 all the activities regarding mining leases were illegal mining activities. The fourth reason is again based on Justice M.B. Shah Commission's Report regarding illegal mining activities. The fifth reason is under invoicing of export of Iron Ore to the extent of commission paid to the Foreign agents. It is based on the information received from Directorate of Revenue Intelligence (DRI), Mumbai.

13. The Petitioner filed objections to such reasons, however, vide impugned order dated 01.02.2016, such objections were rejected and the Petitioner was directed to file the returns for re-opening which is challenged in the present petition.

FACTS IN WRIT PETITION NO. 272/2016

14. The Petitioner received a notice under Section 148 of Income Tax Act dated 24.12.2014 claiming that there is reason to believe that the income of the assessee chargeable to tax for assessment year 2010-11 has escaped assessment within the meaning of Section 147 of the said Act. The Petitioner sought reasons for re-opening which were furnished to them vide letter dated 04.01.2016. In all there are 5 reasons for re-opening. The first reason is under invoicing of export based on Justice M.B. Shah Commission's report. The second ground is based on the decision of the Apex Court holding that mining leases in Goa expired on 22.11.2007 and consequently, all further activities including the financial year 2009-10 and assessment year 2010-11 were not to be considered as legitimate business income and to be treated as income from other sources. Ground no. 3 is that the income has escaped assessment because of failure on part of the assessee to disclose fully and truly all the material facts. This

reason is again based on Justice M.B. Shah Commission's Report claiming therein that the assessee failed to disclose fully and truly that the activities beyond 2007 were illegal activities. The fourth reason is again based on observations of the Apex Court about the legality of the mining leases. The fifth reason is under invoicing of export of Iron Ore to the extent of commission paid to the Foreign agents. This is based on the information received from Directorate of Revenue Intelligence (DRI), Mumbai.

15. The Petitioner filed detailed objections challenging/re-opening notices, however, the revenue by the impugned order dated 01.02.2016 rejected the objections of the Petitioner and directed them to file the returns for re-opening of assessment.

FACTS IN WRIT PETITION NO. 879/2016.

16. The Petitioner received notice under Section 148 of Income Tax Act dated 10.08.2015 claiming there in that there is reason to believe that the income of the assessee chargeable to tax for assessment year 2010-11 has escaped assessment within the meaning of Section 147 of the said Act. The Petitioner sought reasons for re-opening which were provided vide letter dated 08.01.2016. In this case, the reasons for re-opening is that new facts came to light regarding under invoicing of export of Iron Ore

on the basis of information received from the Directorate of Revenue Intelligence (DIR), Mumbai. The Petitioner filed detailed objections to such reasons for re-opening, however, vide order dated 25.07.2016, such objections were rejected and the Petitioner was directed to file the returns for re-assessment which is challenged in the present petition.

FACTS IN WRIT PETITION NO. 880/2016

17. The Petitioner received notice under Section 148 of Income Tax Act dated 18.08.2015 claiming therein that there is reason to believe that the income of the assessee chargeable to tax for assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the Income Tax Act. The Petitioner sought reasons for re-opening which were furnished vide letter dated 08.01.2016. In the said reasons, the revenue claimed that some new facts came to light regarding under invoicing of export of Iron Ore, on the basis of information received from the Directorate of Revenue Intelligence (DIR), Mumbai. The Petitioner filed objections to such reasons, however, vide order dated 25.07.2016, such objections were rejected, which are challenged in the present petition.

FACTS IN WRIT PETITION NO.881/16

18. The Petitioner received notice dated 28.07.2015 under Section 148 of Income Tax Act stating there in that there is reason to believe that the income of the petitioner chargeable to tax for assessment year 2011-12 has escaped assessment within the meaning of Section 147 of the said Act. The Petitioner sought reasons which were provided vide letter dated 08.01.2016. The reason for re-opening is the information received from Directorate of Revenue Intelligence(DRI), Mumbai, and some new facts came into light regarding under invoicing of export of Iron Ore. The Petitioner filed objections to such reasons, however, order dated 25.07.2016. Such objections were rejected which is challenged in the present petition.

FACTS IN WRIT PETITION NO. 882/2016

19. The Petitioner received notice dated 10.08.2015 under Section 148 of Income Tax Act stating that there is reason to believe that the income of the petitioner chargeable to tax for assessment year 2009-10 has escaped assessment within the meaning of Section 147 of the said Act. The Petitioner sought reasons which were provided vide letter dated 08.01.2016. The reason for re-opening is that due to new facts that came to light regarding under invoicing of export of Iron Ore, on basis of

information received from the Directorate of Revenue Intelligence (DRI), Mumbai. The Petitioner filed objections to such reasons, however, letter dated 25.07.2016, such objections were rejected which is challenged in the present petition.

SUBMISSIONS OF PETITIONERS

20. Mr. Pardiwala, learned senior counsel submits that Writ Petition No. 265/2016 could be considered as lead petition as in this matter all the grounds which are raised in respective petitions are covered.

21. Mr. Pardiwala, while relying upon the decision of this Court in Writ Petition No.141/2015 (Coram: S.C. Gupte and Nutan D. Sardesai, JJ.) decided vide order dated 09.07.2019 and the decision of this Court in Writ Petition No.233/2015 with Writ Petition No. 883/2016 decided on 19.01.2024, would submit that the points raised in the present petition are fully covered.

22. Besides this, Mr. Pardiwala would submit that change in valuation shows the proof of increased income which has been disclosed truly and fully by the assessee in the returns and therefore, there is no reason to believe that the income has escaped assessment. He submits that while adopting the regular accounting method which has been done on a higher side, the Petitioner has

not claimed any deductions. He submits that the reason for re-opening clearly goes to show that there is no independent application of mind by the Assessing Officer and such reasons are only based either on Shah Commission Report or on the information received from the Directorate of Revenue Intelligence (DRI), Mumbai. He would submit that there is no failure to disclose truly and fully on the part of the assessee as for the first time in the year 2014 while deciding the Writ Petition of ***Goa Foundation Vs. Union of India***, the Apex Court observed that infact leases in Goa expired in the year 1997 and the extension of such leases expired in November 2007. The Apex Court observed that beyond the extension upto 2007, there was no authority with the concerned State to grant further lease or extension. He submits that till the date of such finding, even the Assessing Officer or the assessee were having no knowledge that such leases beyond 2007 were illegal.

23. Mr. Pardiwala would submit that at the most the lease could be considered as illegal beyond November 2007, however, the activities continued till the decision passed by the Supreme Court on the premise that there is provision for renewal of lease, cannot be termed as illegal activities. He submits that such activities were

carried out in normal course of business and even the Petitioners paid royalty towards the extracted minerals.

24. Mr. Pardiwala would submit that in respect of the information received from the Directorate of Revenue Intelligence (DRI), Mumbai, the same was in different context and with regard to the customs duty. The contention of the Assessing Officer that such information was received to re-open, could not have been accepted for the simple reason that there was no independent inquiry conducted by the Assessing Officer to come to the conclusion, which is the mandate.

25. Mr. Pardiwala would submit that the findings of this Court and the earlier Bench would clearly cover the present petitions and accordingly, the notices and the impugned orders required to be quashed and set aside.

SUBMISSIONS OF RESPONDENTS

26. Per Contra, the learned standing counsel Ms. A. Razaq and Ms. S. Linhares appearing for the revenue would submit that apart from the reasons for re-opening which clearly discloses tangible material are properly considered by the Assessing Officer, no interference is warranted. Learned standing counsel would submit that the Petitioner would get opportunity to produce the relevant

material once the assessment is re-opened.

27. Ms. Razaq and Ms. Linhares appearing for the Revenue would then submit that there are subsequent developments in this proceedings wherein the suit was filed in the Singapore High Court clearly revealing such under invoicing as well as commission paid to the agents and such additional information filed by way of additional affidavit is sufficient for reopening of assessment.

28. The learned standing counsel further submits that information received from Directorate of Revenue Intelligence (DRI), Mumbai cannot be faulted with as the information is received from another Government Department and therefore, there was no need for the Assessing Officer to conduct any further inquiry as such information from the Government Department could be sufficient to hold that the income escaped assessment.

29. We have gone through the reply/affidavit filed on behalf of Revenue which basically deals with information received from the report of Justice M.B. Shah Commission and also from Directorate of Revenue Intelligence (DRI), Mumbai which have been considered as material for the purpose of reopening of the assessment.

30. When the matters were taken up for the final disposal,

additional affidavit regarding the subsequent development were filed on behalf of the revenue. Along with such additional affidavit, certain documents are placed on record. In the said additional affidavit, it is the contention of the revenue that recently, the office of Principle Commissioner of Income Tax, Panaji, had access to certain documents and more specifically, the suit filed in Singapore High Court by Laxmi Anil Salgaonkar against others wherein certain admissions are made with regard to under invoicing of sale of Iron Ore in connection with group of companies in which Anil Salgaonkar was involved in. It is the contention of revenue that this subsequent material shall also be taken into consideration.

31. We have made it very clear to the learned counsel for the revenue that no such material could be looked into by this Court and that too in a petition filed by Petitioner challenging the order of re-opening assessment which was passed in the year 2016 itself. Besides, it is well settled proposition of law that the re-opening of assessment must be based on the reasons given by the Assessing Officer so as to form his opinion that the income has escaped assessment. Admittedly, the reasons provided to the Petitioner in all these matters, no where reflects the material which the revenue

is now trying to bring on record by way of additional affidavit.

32. It is now well settled proposition of law that even the Assessing Officer cannot add or explain reasons for re-opening apart from the reasons disclosed along with notices and by way of filing affidavit in the Court of law. Thus we are unable to look into any material which the revenue is now trying to place on record by way of additional affidavit. The Revenue is entitled to deal with such aspect independently and in accordance of the provisions of Income tax act. However, we at this stage and in the present proceedings cannot look into such material. Such additional affidavits are filed in Writ Petition Nos.262/2016,264/2016, 265/2016,271/2016,272/2016,881/2016 and 882/2016. Thus, the additional affidavits cannot be looked into in support of the grounds for re-opening of assessment.

DISCUSSIONS AND CONCLUSIONS

33. The facts of all the above matters are already disclosed in nutshell. In most of the matters re-opening notices were issued within four years except in Writ Petition Nos. 879/2016, 880/2016 and 882/2016 which are beyond four years. The reasons for re-opening within or beyond 4 years are having different effects. In the case of *N. D. Bhatt Vs. IBM World Trade Corporation, 1995, ITR Volume 216 page 811*, the Co-ordinate Bench of this Court

and while placing reliance in the case of *Indian Oil Corporation Vs. ITO(1986) 159 ITR 956*, observed thus:- “to confer jurisdiction under clause (a) of Section 147 of re-opening assessment beyond the period of four years but within the period of eight years from the end of 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 under-assessed or escaped assessment; and the second is that he must have reason to believe that such escapement or under-assessment 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.”

34. In *Calcutta Credit Corporation Ltd Vs ITO (1971) 79 ITR 483(Cal)* it 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 *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 when he had no knowledge of those facts, at the time of filing returns.

35. 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. Such section cannot apply to a case where the assessee was not aware of the facts which he was supposed to disclose.

36. In the matters for re-opening beyond four years that is Writ Petition Nos. 879/2016, 880/2016 and 882/2016, the Revenue/Assessing Officer claimed that the assessee suppressed or that failed to fully and truly disclose the facts while filing the returns, though he had knowledge about it.

37. In Writ Petition No. 882/2016, the notice was issued on 10.08.2015 for the Assessment year 2009-10. The reasons for re-opening was provided along with letter dated 08.01.2016 which show that the assessee filed its return for the assessment year 2009-10 on 29.09.2009 declaring the total income. Such returns were processed under Section 143 (1) of Income Tax Act. Later on, the case was selected for scrutiny and the assessment was completed under Section 143(3) on 30.12.2011. However, some new facts came to light regarding under invoicing of export of Iron Ore. These new facts/information was received from Directorate of

Revenue Intelligence (DRI), Mumbai through the Office of Principle Commissioner of Income Tax, Panaji about the under invoicing of export by the assessee during the year under consideration. Further, details were obtained from the local office of Directorate of Revenue Intelligence. As per this information, DRI investigated the issue of under invoicing related to number of exporters of Iron Ore from the State of Goa and the assessee is one of such Exporter who also resorted to this modus operandi for various reasons. It further shows that a show cause cum demand notice under the provision of 124 r/w section 18 of the Customs Act dated 08.08.2014 was issued by Directorate of Revenue Intelligence (DRI), Mumbai to the assessee.

38. The purpose of issuance of show cause notice was that intelligence was gathered by the officers of DRI Goa region that the assessee were evading export customs duty by under valuing and overshipments exported to various overseas buyers from different ports in India. The assessee were declaring lower FOB price to customs authorities then the price that was actually finalised 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

agents appointed by the assessee. As the customs duty on export of Iron Ore is levied as percentage of FOB value of the export consignments w.e.f 13.06.2008, the intelligence pointed to evasion of appropriate export duty of customs by the assessee by resorting to misdeclaration of the actual FOB price of the export goods.

39. The reasons further shows some chart with calculations as to the total escaped income on account of the under invoicing for the purpose of customs duty. The reasons then disclose that the issue of under invoicing of the export on account of the above issue was not disclosed by the assessee earlier and that it came to the notice only on the information received from the Directorate of Revenue Intelligence. It further shows that the assessee has duly paid the corresponding customs duty to the customs authorities on the export sale of Iron Ore on account of commission paid to foreign agents and thus, failure on the part of assessee to disclose fully and truly all material facts is made out.

40. In Writ Petition No. 880/2016 and 879/2016, the same reasons are disclosed about under invoicing of export of iron ore and the information received from DRI Mumbai.

41. Thus, in these three matters which are beyond four years, there is ground raised that the assessee failed to disclose truly and

fully the information though the same was within their knowledge.

42. The reason for re-opening given by the Revenue only refers to the information received from the Directorate of Revenue Intelligence (DRI), Mumbai which admittedly refers to the customs duty and the commission paid to overseas agents. The Assessing Officer nowhere disclosed as how, such information is material for the purpose of considering that there is failure to disclose truly and fully about the payment made to the commission agent. Besides, there is absolutely no record on the part of the Assessing Officer that he independently applied his mind to the material received from Directorate of Revenue Intelligence (DRI), Mumbai, so as to come to his independent conclusion that there was suppression of material and that there is need for re-opening of the assessment. The entire material and the chart prepared in the reasons is found copied from the report of the Directorate of Revenue Intelligence (DRI), Mumbai.

43. In case of *Principle Commissioner of Income Tax-5 Vs. Shodiman Investment (P) Ltd., 2018 93 Taxman.com 153 (Bombay)*, the Co-ordinate Bench of this Court in para 12 observed thus:

“The re-opening of an assessment is an exercise of

*extra ordinary power on the part of Assessing Officer, as it leads to unsettling the settled issue/Assessment. 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 the income chargeable to tax has escaped assessment. This is a settled proposition as observed by the Supreme Court in **S. Narayannappa Vs. 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 Vs Lakhmani Merwal Das [1976] 103 ITR 437** had laid down that the reasons to believe must have rational connection with a 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.”

44. In ***Shodiman Investments Pvt. Ltd.(surpa)***, the Co-ordinate 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.

45. 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.

46. The above observations of the Co-ordinate Bench of this Court as well as the Apex Court would clearly apply to the above three petitions wherein reason to believe is recorded only on the borrowed information from the Directorate of Revenue

Intelligence (DRI), Mumbai. There is absolutely no reasoning as to how such information is having a live link or considered as a tangible material for the purpose of opening of the Assessment. The Assessing Officer failed to record his own independent opinion and more specifically as to how, under invoicing and payment of agent's charges affected the actual income shown by the assessee in the original returns. These reason clearly demonstrates that simply the material was borrowed from the Directorate of Revenue Intelligence (DRI), Mumbai authorities and pasted in the reasons without any further reasoning.

47. There is no independent application of mind on the part of Assessing Officer to come to his own conclusion that the income escaped assessment. Unless, such reasons are disclosed, the reopening of assessment is not at all permissible. Accordingly, reopening notice issued to the Petitioner in Writ Petition No. 879/2016, 882/2016 and 880/2016 needs interference.

48. In the case of *Mr. Teofilo Fernando Antonio Pinto Vs Union of India in Writ Petition No. 1099 of 2023(filing) decided on 6.9.2023*, 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 Income Tax 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.

49. In the remaining matters and more particularly in the lead petition, in all, five reasons are disclosed for the purpose of re-opening but within four years. Such re-opening reasons are already discussed at the beginning of this judgment and therefore, not required to be stated again.

50. The basic contentions of the revenue for re-opening the assessment is that firstly under invoicing of export and failure on

the part of assessee to disclose fully and truly all material and commission paid to the foreign agents.

51. We have already dealt with the reasons for re-opening of the assessment on the basis of material borrowed from DRI authorities and how it cannot be considered as tangible material having a live link for the purpose of forming independent opinion of the Assessing Officer, which is infact not formed in all the matters. Thus, as far as the re-opening on the basis of borrowed material from DRI is concerned, we are firm on our opinion that such material without application of mind of the Assessing Officer could not have been directly borrowed and used.

52. Other reasons basically deals with the report from Justice M.B. Shah Commission as well as the observations of the Apex Court in the case of Goa Foundation, thereby holding that the mining leases beyond 22.11.2007 in Goa, were illegal.

53. As far as the report of Justice M.B. Shah Commission is concerned, the Co-ordinate Bench of this Court(S.C. Gupte & N.D. Sardesai, JJ.) clearly observed that the third report of Justice M.B. Shah Commission contains merely the expression of its opinion and it lacks finality as well as authoritativeness. Only on the basis of expression of such opinion by the commission, there cannot be

any prima facie belief which could be recorded by the Assessing Officer, without any independent material for the purpose of re-opening.

54. We are fully endorsing such view taken by the Co-ordinate Bench and have no reason to deviate from it in any manner. Similarly, we have taken the same view while deciding Writ Petition No. 233/2015 with Writ Petition No. 883/2016 in our Judgement dated 19.01.2024. All these petitions which are disposed of by the Co-ordinate Bench and by this Bench are infact bunch of the matters which were taken together, however, de-tagged for the reasons disclosed therein. Thus, the third report of Justice M.B. Shah Commission is infact only an expression of opinion without any authoritativeness.

55. In the present matters, the reasons for re-opening clearly goes to show that Assessing Officer, except borrowing the information from the third report of Justice M.B. Shah Commission, failed to record independently to his own satisfaction any reason so as to direct re-opening of assessment. We do not see any reason independently forming opinion by the Assessing Officer, apart from what was borrowed from the Justice M.B. Shah Commission report. Thus, such reasons which are not having any

application of mind as well as any independent material and reason to believe, cannot be construed as legal reasons for re-opening of the assessment.

56. Finally, in some matters it is claimed that the assessee failed to disclose fully and truly the material findings that beyond 22.11.2007, the mining activities were illegally continued. In all these matters, the returns were filed somewhere in the year 2009-10, even though, there was no such decision passed by the Apex Court holding that mining leases beyond 2007 were illegal.

57. It is a fact that for making disclosure truly and fully the assessee must have the knowledge of it. It is necessary to note here that the case of *Goa Foundation Vs. Union of India in Writ Petition No. 435 of 2012* was decided by the Apex Court on 21.04.2014. While deciding the said petition, the Supreme Court observed that the mining leases in Goa expired in the year 1997 and thereafter, renewal could have been granted only for 20 years upto 2007.

58. Thus, the Apex Court observed that from November 2007 all mining leases in Goa are required to be considered as illegal for the simple reason that there was no power to renew such leases beyond 20 years. The fact remains that these observations of the

Apex Court are in connection with mining leases, however, the Apex Court nowhere expressed that till the date of such decision i.e. 21.04.2014, the mining activities carried on by the lease-holders were considered to be illegal. The illegality of the lease is one thing and carrying out business activities on assuming that such leases exist is another thing. Similarly, business activities were carried out and Iron Ore was extracted, sold, exported till all the activities came to a grinding hold. The lease-holders paid royalty, customs duty, other charges to the Government till such activities were stopped. Extraction of Iron Ore including export and payment of remaining charges to the concerned department till 2014 were not declared as illegal. Even this fact, that the mining leases beyond 2007 were not legal, was even not known to the Assessing Officer himself, till such declaration came from the Apex Court in the year 2014. Thus, claiming that the assessee failed to disclose truly and fully that such activities were illegally carried out and that too while filing returns for the assessment year 2009-10 would not arise. In this regard the observation in the case of *Calcutta Credit Corporation (supra)* would clearly attract.

59. Thus, we are of the considered opinion that notices issued for re-opening and assessment in all these matters failed to satisfy

twin conditions. The Assessing Officer, therefore, could not have exercised jurisdiction for re-opening of assessment which were concluded way back.

60. The additional affidavit filed in two petitions cannot be looked into for the above reason as Revenue or the Assessing Officer is not entitled to supplement material beyond the reasons recorded at the time of issuance of notice under section 147/148 of Income Tax Act.

61. For all the above reasons, we hold that the impugned re-opening notices and the orders passed rejecting the objection needs interference and are required to be quashed and set aside. Accordingly, we allow the Petitions by quashing and setting aside the notices as well as the orders rejecting objections filed by the petitioners.

62. Rule is made absolute in above terms. Petition stands disposed of with no orders as to cost.

VALMIKI MENEZES, J.

BHARAT P. DESHPANDE, J.