

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, डी, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "D", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री एन. के. प्रधान, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member**

**ITA NO.6398/Mum/2012
Assessment Year: 2003-04**

Disha N. Lalwani, J-301, Vardhaman Nagar JN. Of R.P. Rd. & M.G. Rd. Mulund (W), Mumbai-400080	बनाम/ Vs.	Income Tax Officer- 23(2)(2), C-10-Pratyakshkar Bhavan, 02 nd Floor, Bandra Kurla Complex, Bandra, Mumbai-400007
(निर्धारिती/Assessee)		(राजस्व /Revenue)
P.A. No. AAAPL6056H		

निर्धारिती की ओर से / Assessee by	Shri M. Subramanian
राजस्व की ओर से / Revenue by	Shri Purushottam Kumar-DR

सुनवाई की तारीख / Date of Hearing :	16/03/2017
आदेश की तारीख /Date of Order:	22/03/2017

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee is aggrieved by the impugned order dated 23/07/2012 of the Ld. First Appellate Authority, Mumbai. The assessee through ground no. 1 & 2 has challenged initiation/reopening of assessment proceedings u/s 147/148 of the Income Tax Act, 1961 (hereinafter the Act).

2. During hearing, the ld. counsel for the assessee, Shri M. Subramanian, though challenged the reopening, but fairly agreed that all the figures were not tallying. It was contended that only reasons recorded by the Assessing Officer has to be considered. Reliance was placed upon the decision from Hon'ble jurisdictional High Court in 324 ITR 154 (Bom.). It was also agreed by the ld. counsel for the assessee that notice issued u/s 148 of the Act was duly received by the assessee. It was contended that the statement of Shri Mukesh Chokshi was recorded, wherein, he never tendered that the transaction was bogus. Our attention was invited to pages 2, 4 and 9 of the paper book. It was explained that the assessee purchased a shares from Gold Star Fin Invest. Pvt. Ltd., Buniyad Chemicals and N.E. Electronics. For the details of the same, our attention was invited to paged 9 to 25 of the paper book. It was contended that the shares were purchased in earlier years. Reliance

was placed upon the decision in 6 SOT 247 (Trib.), which was approved by Hon'ble High Court in ITA No.456 of 2007.

2.1. On the other hand, the ld. DR, Shri Purushottam Kumar, strongly defended the assessment order as well as impugned order by explaining the factual matrix of the present appeal as well as the search carried out at Mr. Mukesh Chokshi. It was explained that the Ld. Assessing Officer was having good and sufficient reasons to believe that income had escaped assessment. The ld. DR explained that the assessment was framed u/s 143(1) of the Act and not u/s 143(3) of the Act. It was asserted that even there is no change of opinion by the Assessing Officer. Reliance was placed upon the decision from Hon'ble Apex Court in 291 ITR 500 (SC). Pleas was also raised that there was enough material with the Assessing Officer and certainly there was dispute in the figures also. It was pleaded that before the Assessing Officer, the assessee never disputed that bogus transactions were made by the assessee. The ld. DR explained that reasons were duly recorded by the Assessing Officer and the assessee never asked for the reasons rather the assessment proceedings were duly attended by the assessee. Reliance was placed upon the decision in 315 ITR 84 (Bom.) and the decision in ITA No.2026 of 2010 order dated 21/09/2012 from Hon'ble Delhi High Court and 353 ITR 264 (Del.). The reopening of assessment was argued to be validly made by defending the impugned order. A strong plea was raised that even the assessee did cross

examination of Shri Mukesh Chokshi. When confronted on the issue of cross examination, the ld. counsel for the assessee fairly agreed that Mr. Mukesh Chokshi were cross examined by the assessee.

2.2. In reply, the ld. counsel for the assessee, placed reliance upon the decision in (2015) 373 ITR 661 (SC) and 322 ITR 622 (Del.). On merit, the ld. counsel for the assessee claimed that the transactions are genuine, sales bills were produced before the Assessing Officer, therefore, there was nothing to indicate that the transactions were bogus. In reply, the ld. DR strongly contended that all the transactions are bogus and the transactions were done through stock exchange i.e. off-market transaction.

2.3. We have considered the rival submissions and perused the material available on record. So far as, challenging reopening u/s 147/148 of the Act is concerned, the facts, in brief, are that the assessee declared income of Rs.4,60,890/- in her return filed on 16/09/2003, which was processed u/s 143(1) of the Act. The case of the assessee was reopened u/s 147 of the Act for which reasons were recorded for such reopening and the Assessing Officer duly received the approval from the competent authority/Addl. Commissioner of Income Tax . A notice dated 30/03/2010, u/s 148 was issued/served upon the assessee. In response to the notice, the assessee/authorized representative duly attended the proceedings and vide letter dated 13/04/2010

claimed that the returns already filed on 16/09/2003 may be treated to be filed in response to notice u/s 148 of the Act. Thereafter, notices u/s 143(2) and 142(1) of the Act were issued and served upon the assessee. In response to these notices, the assessee attended the proceedings and furnished the details. There was an information from the DDIT with respect to bogus transactions, therefore, search and seizure action u/s 132 of the Act was carried out upon Mahanagar Securities Pvt. Ltd. (now Alag Securities Pvt. Ltd.) on 25/11/2009. During search action, it was revealed that Mahanagar Securities Pvt. Ltd. and its related group of 34 odd companies including M/s Gold Star Finvest Pvt. Ltd., run by Shri Mukesh Chokshi, were engaged in fraudulent billing activities and are engaged in providing bogus speculation profit. One of the beneficiaries of such transaction is the present assessee, who has procured bogus bills from M/s Gold Star Finvest Pvt. Ltd. It was also revealed that there was heavy cash deposit in certain accounts including M/s Gold Star Finvest Pvt. Ltd. During search operation, it was also found/revealed that Shri Mukesh Chokshi, a Chartered Accountant by profession had floated these companies/approximately 34 companies like M/s Talent Infoway Ltd. and M/s Buniyad Chemicals. It was also revealed that no genuine business is carried out by any of the company and they are engaged in providing bogus bills of long term capital gains/loss etc. and these companies of Shri Mukesh Chokshi are receiving commission through agents. There was also information

that Shri Mukesh Chokshi was not having valid license as a broker for trading on any stock exchange and bogus transactions are carried out for the beneficiaries. It was also revealed that capital gain entries were provided to the beneficiaries off-market sale. It was also explained by the Id. DR that there was no actual delivery of shares and rather illegal transactions were carried out, thus, the alleged purchases do not provide any right to legally claim the long term capital gain. Before us, the Id. DR, took us to various pages of the assessment including para 8 onwards, describing the modus-operandi. The crux of the argument by the Id. DR is that back dated purchase bills are issued to the clients and cashes taken for the alleged purchases and no actual delivery of shares takes place, thus, the it was a illegal and fraudulent transactions by the companies as these companies legally cannot transact and had no right to issue the bills.

2.4. Statement of Shri Mukesh Chokshi was recorded u/s 131 of the Act on 11/12/2009, where he tendered that he was engaged in providing accommodation entries through various companies and bogus long term gains were issued to various parties. The crux of the statement is that the sale and purchases of bills issued by him are bogus as cash is received for issuing accommodation entries/bills and there is no real transaction. It was established that the assessee also entered into such bogus transaction with Shri Mukesh Chokshi/companies of Shri Mukesh Chokshi.

Information was also called u/s 133(6) of the Act from SEBI by the Assessing Officer vide letter dated 06/10/2010 and also to confirm whether the contract notes, enclosed with the above letter have passed through SEBI. The ld. Assessing Officer vide letter dated 15/10/2010 was informed by SEBI that no trades were found to be executed during the relevant period. Thereafter a show cause notice vide letter dated 15/11/2010 was issued to the assessee asking her to explain as to why the entire sale transactions of alleged shares may not be treated genuine as these are merely accommodation entries to generate bogus credits. Proceedings u/s 68 of the Act along with penalty proceedings was initiated against the assessee. The assessee duly responded to the show cause notice/proceedings by claiming the same to be genuine. The Assessing Officer vide letter dated 02/12/2010 (served upon the assessee 03/12/2010) asked the assessee to furnish/explained the details as mentioned in para-10 of the assessment order. In turn, the assessee vide letter dated 09/12/2010 reiterated the stand taken in earlier letter dated 18/11/2010 by explaining that the assessee met the broker at a party and as per the suggestion of the broker the scrip was purchase in cash. The assessee also claimed that the actual delivery of shares was taken. The assessee vide letter dated 08/12/2010, the assessee claimed that the long term capital gain may be treated as taxable as NSE informed that no transaction have taken place. The explanation of the assessee was duly examined and finally the sale transaction

of Rs.7,66,653/- and brokerage of 130 was treated as bogus/non-genuine and consequently, addition u/s 68 was made. In such a situation, now question arises, whether reopening of assessment u/s 147/148 of the Act is valid or not.

2.5. Under the aforementioned facts, it is our bounded duty to examine the validity of reopening u/s 147 r.w.s 148 of the Act. Before adverting further we are reproducing hereunder the relevant provision of section 147 of the Act for ready reference and analysis:-

“If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;
- (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;
- (ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;
- (c) where an assessment has been made, but—
 - (i) income chargeable to tax has been underassessed ; or
 - (ii) such income has been assessed at too low a rate ; or
 - (iii) such income has been made the subject of excessive relief under this Act ; or
 - (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;
- (d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.”

2.6. If the aforesaid provision of the Act is analyzed, we find that after insertion of Explanation -3 to section 147 of the Act by the Finance (No.2) Act of 2009 with effect from 01/04/1989 section 147 has an effect that Assessing officer has to assess or reassess income (such income) which has escaped assessment and which was basis of formation of belief and, if he does so, he can also assess or reassess any other income which has escaped assessment and which came to the notice during the course of proceedings. Identical ratio was laid down by Hon'ble jurisdictional High Court in CIT vs Jet Airways India Pvt. Ltd. (2010) 195 taxman 117 (Mum.) and the full Bench decision from Hon'ble Kerala High Court in CIT vs Best Wood Industries and Saw Mills (2011) 11 taxman.com 278 (Kerala)(FB). A plain reading of explanation-3 to section 147 clearly depicts that the Assessing Officer has power to make addition, where he arrived to a conclusion that income has escaped assessment which came to his notice during the course of proceedings of reassessment u/s 148. Our view is fortified by the decision in Majinder Singh Kang vs CIT (2012) 25 taxman.com 124/344 ITR 358 (P & H) and Jay Bharat Maruti Ltd. Vs CIT (2010) Tax LR 476 (Del.) and V. Lakshmi Reddy vs ITO (2011) 196 taxman 78 (Mad.). The provision of the Act is very much clear as with effect from 01/04/1989,

the Assessing Officer has wide powers to initiate proceedings of reopening. The Hon'ble Kerala High Court in CIT vs Abdul Khadar Ahmad (2006) 156 taxman 206 (Kerala) even went to the extent so long as the Assessing Officer has independently applied his mind to all the relevant aspect and has arrived to a belief the reopening cannot be said to be invalid.

2.7. We are aware that "mere change of opinion" cannot form the basis of reopening when the necessary facts were fully and truly disclosed by the assessee in that situation, the ITO is not entitled to reopen the assessment merely on the basis of change of opinion. However, powers under amended provision are wide enough where there is a reasonable belief with the Assessing Officer, that income has escaped assessment, because the powers with effect from 01/04/1989 are contextually different and the cumulative conditions spelt out in clauses (a) and (b) of section 147, prior to its amendment are not present in the amended provision. The only condition for action is that the Assessing Officer "should have reason to believe" that income chargeable to tax has escaped assessment. Such belief can be reached in any manner and is not qualified by a pre-condition of faith and true disclosure of material facts by an assessee as contemplated in pre-amended section 147. Viewed in that angle, power to reopen assessment is much wider under the amended provision. Our view is fortified by the decision from Hon'ble Delhi High Court in

Bawa Abhai Singh vs DCIT (2001) 117 taxman 12 and Rakesh Agarwal vs ACIT (1996) 87 taxman 306 (Del.). The Hon'ble Apex Court in CIT vs Sun Engineering works Pvt. Ltd. 198 ITR 297 (SC) clearly held that proceedings u/s 147 are for the benefit for the Revenue, which are aimed at gathering the 'escaped income'. At the same time, we are aware that powers u/s 147 and 148 of the Act are not unbridled one as it is hedged with several safeguards conceived in the interest of eliminating room for abuse of this power by the Assessing Officer . However, the material available on record, clearly indicates that income chargeable to tax had escaped assessment, therefore, the ld. Assessing Officer was within his jurisdiction to reopen the assessment. The Hon'ble Apex Court in Ess Ess Kay Engineering Co. Pvt. Ltd. (2001) 247 ITR 818 (SC) held that merely because the case of the assessee was correct in original assessment for the relevant assessment year, it does not preclude the Income Tax Officer to reopen the assessment of an earlier year on the basis of finding of his fact that fresh material came to his knowledge.

2.8. Under section 147, as substituted with effect from 01/04/1989, the scope of reassessment has been widened. After such substitution, the only restriction, put in that section is that "reason to believe". That reason has to be a reason of a prudent person which should be fair and not necessarily due to failure of the assessee to disclose fully and partially some material facts relevant for assessment

(Dr. Amin's Pathology Laboratory vs JCIT (2001) 252 ITR 673, 682 (Bom.) Identical ratio was laid down by Hon'ble Delhi High court in United Electrical Company Pvt. Ltd. vs CIT (2002) 258 ITR 317, 322 (Del.) and Prafull Chunnilal Patel vs ACIT 236 ITR 832, 838 (Guj.). The essential requirement for initiating reassessment proceeding u/s 147 r.w.s 148 of the Act is that the ld. Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year. The Hon'ble Gujarat High Court in Prafull Chunnilal Patel vs ACIT (supra) even went to the extent that at the initiation stage formation of reasonable belief is needed and not a conclusive finding of facts. Identical ratio was laid down in Brijmohan Agrawal vs ACIT (2004) 268 ITR 400, 405 (All.) and Ratnachudamani S. Utal vs ITO (2004) 269 ITR 272, 277 (Karnataka) applying Sowdagar Ahmed Khan vs ITO (1968) 70 ITR 79(SC).

2.9. So far as, the meaning of expression, "reason to believe" is concerned, it refers to belief which prompts the Assessing Officer to apply section 147 to a particular case. It depend upon the facts of each case. The belief must be of an honest and reasonable person based on reasonable grounds. The Assessing Officer is required to act, not on mere suspicion, but on direct or circumstantial evidence. Our view find support from the ratio laid down in following cases:-

- i. Epica Laboratories Ltd. vs DCIT 251 ITR 420, 425-426 (Bom.),
- ii. Vishnu Borewell vs ITO (2002) 257 ITR 512 (Orissa),
- iii. Central India Electric Supply Company Ltd. vs ITO (2011) 333 ITR 237 (Del.),
- iv. V.J. Services Company Middle East ltd. vs DCIT (2011) 339 ITR 169 (Uttrakhand),
- v. CIT vs Abhyudaya Builders (P.) Ltd. (2012) 340 ITR 310 (All.),
- vi. CIT vs Dr. Devendra Gupta (2011) 336 ITR 59 (Raj.),
- vii. Emirates Shipping Line FZE vs Asst. DIT (2012) 349 ITR 493 (Del.).
- viii. Reference may also made to following judicial decisions:-
- ix. Safetag international India P. Ltd. (2011) 332 ITR 622 (Del.),
- x. CIT vs Orient Craft Ltd. (2013) 354 ITR 536 (Del.)
- xi. Acorus Unitech Wirelss Pvt. Ltd. vs ACIT (2014) 362 ITR 417 (Del.).
- xii. Praful Chunilal Patel: Vasant Chunilal Patel vs Asst. CIT (1999) 832, 843-44, 844-45 (Guj.),
- xiii. Venus Industrial Corporation vs Asst. CIT (1999) 236 ITR 742, 746 (Punj.),
- xiv. Srichand Lalchand Talreja vs Asst. CIT (1998) 98 taxman 14, 19 (Bom.),
- xv. Usha Beltron Ltd. vs JCIT (1999) 240 ITR 728, 736-37, 739 (Pat.)
- xvi. Kapoor Brothers vs Union of India (2001) 247 ITR 324, 331, 332-33
- xvii. Vippy Processors Pvt. Ltd. vs CIT (2001) 249 ITR 7, 8 (MP)

2.10. In Dilip S. Dahanukar vs Asst. CIT (2001) 248 ITR 147, 150-51 (Bom.). The Hon'ble jurisdictional High Court held as under:-

“Held, that there was material on record on the basis of survey and statement of person to show that the assessee had wrongfully claim deduction u/s 80IA. Therefore, the Assessing Officer had reason to believe that income had escaped assessment for assessment year 1994-95.”

Identically in the case of Srichand Lalchand Talreja v. Asst. CIT, (1998) 98 Taxman 14, 19 (Bom), where the information regarding acquisition of the asset was not available with the Assessing Officer during the relevant assessment year 1992-93 and such information was disclosed in the return for the assessment year 1995-96, the Hon'ble jurisdictional High Court held that the Assessing Officer can form a bona fide belief that there was escapement of income in relation to assessment year 1992-93.

2.11. The Hon'ble jurisdictional High Court in Export Credit Guarantee Corporation of India Ltd. v. Addl. CIT, (2013) 350 ITR 651 (Bom), where there had been no application of mind to the relevant facts during the course of the assessment proceedings by the Assessing Officer, the reopening of the assessment was held to be valid.

2.12. The Hon'ble jurisdictional High Court in Girilal & Co. v. S.L. Meena, ITO, (2008) 300 ITR 432 (Bom), held that in order to invoke the extraordinary jurisdiction of the court the petitioner must also make out a case that no part of the relevant material had been kept out from the Assessing Officer). The information was in the annexures and consequently Explanation 2(c)(iv) of section 147 would apply. The reassessment proceedings after four years were valid.

2.13. In the case of Deputy CIT v. Gopal Ramnarayan Kasat, (2010) 328 ITR 556 (Bom), it was not the case of the assessee that the notice issued was after the expiry of the time limit provided in section 153(2). The reassessment proceedings were held to be valid. In Indian Hume Pipe Co. Ltd. v. Asst. CIT, (2012) 348 ITR 439 (Bom), both in the computation of taxable long-term capital gains in the original return of income and in the computation that was submitted in response to the query of the Assessing Officer there was a complete silence in regard to the dates on which the amounts were invested, as such there being a failure to disclose fully and truly material facts necessary for assessment. The reassessment proceedings were held to be valid. This view was also confirmed in following cases:-

- a. Dalmia P. Ltd. v. CIT, (2012) 348 ITR 469 (Del);
- b. CIT v. K. Mohan & Co. (Exports), (2012) 349 ITR 653 (Bom);
- c. Remfry & Sagar v. CIT, (2013) 351 ITR 75 (Del);

d. OPG Metals & Finsec Ltd. v. CIT, (2013) 358 ITR 144 (Del).

2.14. In the case of Venus Industrial Corporation v. Asst. CIT, (1999) 236 ITR 742, 746 (P & H) [Where initiation was started within four years for re-examining the deduction under section 80HHC, was held to be wrongly allowed in the original assessment. Identically, in the case of Happy Forging Ltd. v. CIT, (2002) 253 ITR 413,416-17 (P & H), where excise duty paid in advance was shown as an asset in the balance sheet and was allowed as a deduction, reassessment notice on the ground that excise duty was shown as an asset in the balance sheet and was not routed through the profit and loss account. The reopening at this stage was held to be valid. In the case of Vipin Khanna v. CIT, (2002) 255 ITR 220, 230 (P & H), where from the facts it was clear that the assessee had claimed depreciation in the return at the rate of 50 per cent and he had nowhere disputed the fact that the admissible rate of depreciation to him was 40 per cent., such fact alone was sufficient to initiate reassessment proceedings under section 147 and, therefore, such initiation was sustained. The Hon'ble Punjab & Haryana High Court in Mrs. Rama Sinha v. CIT, (2002) 256 ITR 481, 483, 486, where the reassessment notice has been issued on the basis of definite information from CBI regarding investments by the assessee which had not been disclosed during the original assessment proceedings, such initiation has been upheld.

2.15. In the case of *Pal Jain v. ITO*, (2004) 267 ITR 540, 544-45, 548, 549 (P & H), applying *Phool Chand Bajrang Lal v. ITO*, (1993) 203 ITR 456 (SC), although the transaction of sale of shares was disclosed and accepted in the original assessment, but the subsequent discovery by the DDI (Investigation) revealed that the transaction was not genuine, a reassessment notice after four years has been held to be valid because there was no true disclosure of the material facts. In this regard, the petitioner-assessee cannot draw any support from the statement for challenging the validity of the notice for reassessment. It goes without saying that for the purpose of making the assessment, the Assessing Officer shall have to confront the petitioner with the entire material in his possession on the basis of which he proposes to make the additions. In *Punjab Leasing Pvt. Ltd. v. Asst. CIT*, (2004) 267 ITR 779, 781-82 (P & H), where depreciation was allowed to the assessee, who was engaged in the business of financing of vehicles and consumer durables on 'hire-purchase basis' as well as on 'lease/rent basis', a reassessment notice issued after four years has been held not to suffer from any illegality as the same was based on the bona fide action of the competent authority to determine whether or not the vehicles in respect of which the petitioner had been claiming depreciation, were actually owned by it.

2.16. In *Jawand Sons v. CIT(A)*, (2010) 326 ITR 39 (P & H), in the initial assessment, the benefit of deduction of the duty drawback and DEPB under section 80-IB was wrongly granted to the assessee, for which it was not entitled. Therefore, reassessment proceedings to withdraw the deduction were held to be valid. Likewise, in *CIT v. Hindustan Tools & Forgings P. Ltd.*, (2008) 306 ITR 209 (P & H), where, the assessee in the regular assessment had been allowed deduction more than actually allowable under section 80HHC. Therefore, the action initiated by the AO for reassessment under section 147(b) could not be held to be invalid.

2.17. In the case of *Markanda Vanaspati Mills Ltd. v. CIT*, (2006) 280 ITR 503 (P & H), wherein, the information furnished by the assessee gave no clue to the payment of liability in regard of the sales tax collected in excess. The Assessing Officer was held to be validly initiated the reassessment proceedings under section 147 for both the years under consideration. In the case of *Sat Narain v. CIT*, (2010) 320 ITR 448 (P & H), the document did not form the sole basis for the Assessing Officer to initiate reassessment proceeding but he also took into consideration the letter written by the Assistant Commissioner as well as the fact that no return had been filed by the assessee for assessment year 1995-96. Thus, it was held that the Assessing Officer had rightly invoked the jurisdiction to initiate the reassessment proceedings under section 147. In the case of

CIT v. Hukam Singh, (2005) 276 ITR 347 (P & H), it was held that the respondents did not have the locus standi to question the orders of reassessment on the ground of lack of notice. Non-issuance of notice to some of the legal heirs of the late P was merely an irregularity and the same did not affect the validity of the reassessment orders. Likewise, in Tilak Raj Bedi v. Joint CIT, (2009) 319 ITR 385 (P & H), wherein, facts coming to light in a subsequent assessment year could validly form the basis for initiating reassessment proceedings, in view of Explanation 2 to section 147. The action of the income tax authorities in reopening the assessment of the assessee and restricting the deduction under section 80-IB was held to be valid.

2.18. In the case of Smt. Usha Rani v. CIT, (2008) 301 ITR 121 (P & H), there was nothing on record to show the relationship between the donor and the donee, capacity of the donor to make gifts and the occasion therefore. The assessee had failed to discharge the onus to prove the gifts. The reassessment proceedings were held to be valid. In the case of Usha Beltron Ltd. v. Joint CIT, (1999) 240 ITR 728, 736-37, 739 (Pat), where the investigation report indicated that the Officer had reason to believe that on account of failure on the part of the petitioner-assessee to disclose true and full facts, income had been grossly under assessed, reassessment proceedings were held validly initiated.

2.19. In the case of Kapoor Brothers v. Union of India, (2001) 247 ITR 324, 331, 332-33 (Pat), where the material evidence for the purpose of reopening of the assessment already completed has been brought to the notice of the authority during the course of enquiry. The notice was held to be valid by the Hon'ble High Court. In the case of Vippy Processors Pvt. Ltd. v. CIT, (2001) 249 ITR 7, 8 (MP), where the need to issue notice arose due to noticing of vast difference in value of properties disclosed by the assessee and that of the report of the Valuation Officer and the reasons that led to the issue of the notice were duly recorded and the same were also adequate and based on relevant facts and material, initiation was upheld. In Triple A Trading & Investment Pvt. Ltd. v. Asst. CIT, (2001) 249 ITR 109, 110-11 (MP), where the notice was issued after recording reasons in that regard, initiation was upheld.

2.20. Likewise, Hon'ble Gujarat High Court in Garden Finance Ltd. v. Add/. CIT, (2002) 257 ITR 481, 489, 494-95, special leave petition dismissed by the Supreme Court: (2002) 255 ITR (St.) 7-8 (SC), where the assessee was holding shares in an amalgamating company and he was allotted shares in the amalgamated company and such shares were sold by him and he has disclosed the market price of such shares as on the date of amalgamation as the cost of acquisition of such shares and has not disclosed the cost of acquisition of shares in the amalgamating company in accordance with section 49(2) read with section 47(vii),

initiation of reassessment proceedings after four years has been sustained because there was failure on the part of the assessee to disclose material facts necessary for assessment.

Likewise, in *Suman Steels v. Union of India*, (2004) 269 ITR 412,418-19 (Raj), where the return of the assessee for assessment year 1995-96 was processed under section 143(1)(a) accepting the net profit rate declared by the assessee, who carried on contract business, initiation of reassessment proceedings by issuing a notice dated 15-5-2001 proposing to reassess petitioner-assessee at higher rate in view of the presumptive rate prescribed under section 44AD has been sustained. In the case of *Dr. Sahib Ram Giri v. ITO*, (2008) 301 ITR 294 (Raj), the reassessment proceedings were initiated after recording reasons in writing by the AO. The non-availability of a few documents demanded by the assessee would not make the reassessment proceedings initiated for the reasons recorded in detail illegal.

2.21. In the case of *Desh Raj Udyog : Chaman Udyog v. ITO*, (2009) 318 ITR 6 (All), in the assessment years in question, the matter was still to be decided finally by the assessing authority whether the income should be treated under the head 'Business income' or 'property income'. The assessee would get opportunity to show sufficient cause to the assessing authority during the course of assessment. Thus, it could not be said that there was no relevant material to initiate proceedings under section 147. In the

case of *Kartikeya International v. CIT*, (2010) 329 ITR 539 (All), in view of the matter, the petitioner was not entitled for the deduction on the duty drawback amount under section 80-IB and since it had been allowed in the assessment order passed under section 143(1), it had escaped assessment. On these facts the initiation of the proceedings under section 147 read with section 148 for assessment years 2005-06 and 2006-07 was legal and in accordance with law.

2.22. Likewise, in the case of *Sunil Kumar Jain: Suresh Chandra Jain v. ITO*, (2006) 284 ITR 626 (All), notwithstanding the fact that the amount had been assessed to tax in the hands of P, he had taken a stand that the amount did not belong to him and instead belonged to S. Thus, it was not clear as to in whose hands the amount in question had to be assessed. The ITO was justified in taking proceedings under section 147 for assessing the amounts in the hands of the petitioners according to the claim made by the petitioners. Likewise, Hon'ble Kerala High Court in *CIT v. Dr. Sadique Ummer*, (2010) 322 ITR 602 (Ker), where, the Assessing Officer collected further information to complete the reassessments which was also permissible under the Act. The finding of the first appellate authority as well as the Tribunal, that the Assessing Officer had no material to believe that the income had escaped assessment was wrong and contrary to facts. The assessee had not maintained any books of account. Therefore, the reopening of assessments was held to be valid and within time. In the case of *CIT v.*

Uttam Chand Nahar, (2007) 295 ITR 403 (Raj), the notice requiring the assessee to file the return within 30 days was in accordance with section 148 as it must be deemed to be in force with effect from 1-4-1989, and in force as on the date notice was issued. There was no violation of section 148 in respect of the specified period within which the return is to be submitted. The reassessment proceedings were held to be valid.

2.23. In the case of CIT v. C. V. Jayachandran, (2010) 322 ITR 520 (Ker), where, the assessee did not concede the income on capital gain either under the un-amended provision or under the amended provision, the recourse open to the Department was to bring to tax income escaping assessment under section 147 which was not time barred or otherwise invalid. Likewise, in Atul Traders v. ITO, (2006) 282 ITR 536 (All), the account books or record and other material were all common which were being considered by the CIT(A) in the proceedings relating to three appeals. The petitioner had notice and opportunity of being heard. The reassessment proceedings were held to be validly initiated. In the case of Inductotherm (India) P. Ltd. v. JAMES Kurian, Asst. CIT, (2007) 294 ITR 341 (Guj), the Assessing Officer had found that there were errors in the computation of allowances. The reassessment proceedings were held to be valid. In the case of Papaya Farms Pvt. Ltd. vs. DCIT, (2010) 323 ITR 60 (Mad), where the assessee had furnished

incorrect particulars and therefore, the reopening of the assessment was held to be justified.

2.24. In the case of CIT v. Kerala State Cashew Development Corporation Ltd., (2006) 286 ITR 553 (Ker), wherein, the assessee was following the mercantile system of accounting should not have claimed deduction of penal interest which had accrued not in the previous year relevant to the assessment year but in earlier years. This the assessee had not disclosed. The reassessment was held to be valid. Likewise, in Kusum Industries P. Ltd. v. CIT, (2008) 296 ITR 242 (All), as the award had become final it would be taken that the directors of the assessee had accepted the factum of earning of secret profit not reflected in the books of account, which was also binding on the company. The non-appearance of one of the arbitrators and one of the directors in respect of the summon issued under section 131 would not make the reassessment invalid. The Hon'ble Kerala High Court in CIT v. Indo Marine Agencies (Kerala) P. Ltd., (2005) 279 ITR 372 (Ker), held that the entry would amount to an order under section 144. The mere fact that it was not communicated to the assessee would not make such an assessment recorded in the order sheet illegal and that would not bar further proceedings under section 147. Thus, the assessment was held to be validly reopened under Explanation 2(c) to section 147. Likewise, in CIT v. N. Jayaprakash, (2006) 285 ITR 369 (Ker), where, the assessee could not, after having persuaded the assessing authority to

withdraw the notice dated 1-10-1993, pointing out that it was not in conformity with law, be allowed to contend that the notice was valid due to the omission of the time-limit by the Finance (No.2) Act, 1996, with effect from 1-4-1989. In the absence of specific provision in the Finance (No. 2) Act, 1996, invalidating proceedings initiated by the Income-tax Officer, the action taken by him applying the then existing law could not be said to be invalid.

2.25. Likewise, in *CIT v. S.R. Talwar*, (2008) 305 ITR 286 (All), the factum of taking advances or loan from T and K, in which the assessee was one of the directors had not been disclosed nor a copy of the ledger account of the assessee maintained by the company filed. In view of the absence of these details, the Assessing Officer could not examine the taxability of advances or loan raised by the assessee. There was failure to disclose material facts necessary for assessment. The reassessment proceedings were held to be valid. In another case, the Hon'ble Allahabad High Court in *Chandra Prakash Agrawal v. Asst. CIT*, (2006) 287 ITR 172 (All), wherein, the Income-tax Department had sent a requisition on 27-3-2002, under section 132A requisitioning the books of account and other documents seized by the Central Excise Department. The record of the proceeding dated 18-4-2002, showed that the requisition was not fully executed as all the books of account and other documents had not been delivered to the

requisitioning authority. The proceedings initiated under section 147 was held to be valid.

2.26. In Ramilaben Ratilal Shah v. CIT, (2006) 282 ITR 176 (Guj), held that the noting in the diary constituted sufficient information for the escapement of income by either non-declaration of correct sale consideration or furnishing of inaccurate particulars as regards sale consideration. Thus, the Tribunal was justified in holding that the assessee had failed to disclose fully and truly all material facts necessary for the assessment of the relevant assessment year. The reassessment proceedings had been validly initiated.

Likewise, in CIT v. Abdul Khader Ahamed, (2006) 285 ITR 57 (Ker), it was clear from the reasons recorded by the Deputy CIT that he prima facie had reason to believe that the assessee had omitted to disclose fully and truly the material facts and that as a consequence income had escaped assessment. The reassessment was held to be valid. In the case of U.P. State Brassware Corporation Ltd. v. CIT, (2005) 277 ITR 40 (All), the principles laid down by the Calcutta High Court in CIT v. New Central Jute Mills Co. Ltd. : (1979) 118 ITR 1005 (Cal) did constitute information on a point of law which should be taken into consideration by the ITO in forming his belief that the income to that extent had escaped assessment to tax and, the reassessment was held to be valid. In Sunder Carpet Industries v. ITO, (2010) 324 ITR 417 (All), held that the Departmental

Valuer's Report constituted material for entertaining a belief of escaped income in the years under consideration. The reassessment proceeding was held to be valid.

2.27. In *Aurobindo Sanitary Stores v. CIT*, (2005) 276 ITR 549 (Ori), there being a substantial difference between the figures of liabilities towards sundry creditors in the party ledgers of the assessee-firm and the figures of liabilities towards sundry creditors in the balance-sheet of the assessee-firm for the previous year relevant to the assessment year 1989-90. These materials had a direct link and nexus for formation of a belief by the Assessing Officer that income of the assessee-firm had escaped assessment because of failure of the assessee to disclose fully and truly all material facts necessary for the assessment. In the case of *CIT v. Best Wood Industries & Saw Mills*, (2011) 331 ITR 63 (Ker), the assessee challenged the validity of the reassessment on the ground that the AO had exceeded his jurisdiction under section 147 and both the first appellate authority as well as the Tribunal accepted the contention of the assessee holding that so far as the reassessments related to assessment of unexplained trade credits, they were invalid. On appeal, it has been held that the reassessments were to be valid. In *Honda Siel Power Products Ltd. v. Deputy CIT*, (2012) 340 ITR 53 (Del), there being omission and failure on the part of the assessee to disclose fully and truly material facts Thus reassessment proceedings were held to be valid.

In *Atma Ram Properties Private Ltd. v. Deputy CIT*, (2012) 343 ITR 141 (Del), as the books of account and other material were not produced and no letter was filed, the order passed by the Commissioner (Appeals) in the assessment year 2001-02 would constitute 'information' or material from any external source and, as such, the reassessment proceedings for the assessment year 2000-01 were held to be valid. Likewise, in the case of *CIT v. Smt. R. Sunanda Bai*, (2012) 344 ITR 271 (Ker), the reassessment in question were held to be valid on the fact that the assessee claimed and was given relief under section 80HHA for the three preceding year which disentitled her for deduction under section 80HH for the assessment years 1992-93 and 1993-94.

2.28. In the case of *Aquagel Chemicals P. Ltd. v. Asst. CIT*, (2013) 353 ITR 131 (Guj), since there being sufficient material on record for the Assessing Officer to form a belief as regards the escapement of income in relation to the claim of depreciation in respect of the building of coal fire boiler, the reassessment was held to be valid. In the case of *Convergys Customer Management v. Asst. DIT*, (2013) 357 ITR 177 (Del), where there being prima facie material in the possession of the Assessing Officer to form a tentative belief that section 9(1)(i) held attracted, said reason by itself constituted a relevant ground to reopen the assessment of the assessee.

Reference may also be made to

- i. Ajai Verma v. CIT [(2008) 304 ITR 30 (All)];
- ii. Ashok Arora v. CIT [(2010) 321 ITR 171 (Del)];
- iii. CIT v. Chandrasekhar BaLagopaL [(2010) 328 ITR 619 (Ker)];
- iv. Jayaram Paper Mills Ltd. v. CIT [(2010) 321 ITR 56 (Mad)];
- v. Kerala Financial Corporation v. Joint CIT [(2009) 308 ITR 434 (Ker)];
- vi. Mavis Satcom Ltd. v. Deputy CIT [(2010) 325 ITR 428 (Mad)];
- vii. CIT v. Madhya Bharat Energy Corporation Ltd. [(2011) 337 ITR 389 (Del)];
- viii. Kone Elevator India P. Ltd. v. ITO [(2012) 340 ITR 454 (Mad)];
- ix. Vijay Kumar Saboo v. Asst. CIT [(2012) 340 ITR 382 (Karn)];
- x. Siemens Information Systems Ltd. v. Asst. CIT [(2012) 343 ITR 188 (Bom)];
- xi. I.P. Patel & Co. v. Deputy CIT [(2012) 346 ITR 207 (Guj)];
- xii. Dishman Pharmaceuticals & Chemicals Ltd. v. Deputy CIT [(2012) 346 ITR 228 (Guj)];
- xiii. Video Electronics Ltd. v. Joint CIT [(2013) 353 ITR 73 (Del)];
- xiv. A G Group Corporation v. Harsh Prakash [(2013) 353 ITR 158 (Guj)];
- xv. Inductotherm (India) P. Ltd. v. M. GopaLan, Deputy CIT [(2013) 356 ITR 481 (Guj)]; CIT v. Dhanalekshmi Bank Ltd. [(2013) 357 ITR 448 (Ker)];
- xvi. Sitara Diamond Pvt. Ltd. v. ITO [(2013) 358 ITR 424 (Bom)];
- xvii. Rayala Corporation P. Ltd. v. Asst. CIT [(2014) 363 ITR 630 (Mad)].

2.29. So far as, the decision in the case of CIT vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) is concerned, the Hon'ble Apex Court, while coming to a particular conclusion, only in a situation, when not a single piece of paper or document was recovered, therefore, the Hon'ble Court held that since there was no tangible material found and the addition was merely on the basis of statement only then reopening of assessment u/s 147 of the Act was not permissible. It is further noted that retraction was made by the assessee, merely after a long gap of more than two years and not at the earliest possible time. It was merely as afterthought. There is a possibility that the statement, if, recorded under duress and threat (which is not the case in the present appeals) in that situation, there is a less possibility of retraction during that period, however, if the retraction is made within short span of time then retraction carries more weight. The assessee never alleged that the statement was recorded under duress and threat. Likewise, in the case of CIT vs S. Khader Khan Son (2012) 254 CTR 228 (SC), affirming the decision of Madras High Court in (2008) 300 ITR 157 (Mad.), the whole addition was made solely on the basis of statement u/s 133A and no other material was found, in that situation, it was held that the such statement has no evidentiary value, thus, under the peculiar facts in the present appeal, the cases relied upon by the assessee are not of much help as is clearly oozing out from the contents of the statement tendered by the assessee without duress or threat, connecting the assessee of non-

recording of purchase and sale in the regular books of accounts.

If the material available on record and the judicial pronouncements discussed hereinabove are kept in juxtaposition with the facts of the present appeal, we find that there was admission by Shri Mukesh Chokshi that he was engaged in providing bogus long term gains claim in lieu of cash and he was duly examined by the assessee. Totality of facts clearly indicates that there was reasonable belief with the Assessing Officer that income has escaped assessment, therefore, so far as, reopening is concerned, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), thus, this ground is decided against the assessee.

3. So far as, the merits of case is concerned, we note that as per the Ld. Assessing Officer, the assessee showed profit of Rs.7,66,783/- in the share transaction from broker i.e. Shri Mukesh Chokshi and his associate companies. The statement of Shri Mukesh Chokshi was recorded on oath on 11/12/2009. The relevant portion of the same has been reproduced in para 3.5 onwards of the impugned order. The statement tender by Shri Mukesh Chokshi and cross examination of the assessee along with the relevant finding of the Ld. Commissioner of Income Tax (Appeal) is reproduced hereunder:-

“ 3.5 Shri Mukesh Chokshi was examined on oath under section 131 of the Act on 11.12.2009 by DDIT(Inv.), Unit 1(4), Mumbai and statement was recorded. *The relevant part of the statement is as under:-*

"Q.2 Kindly state your education qualification and the nature of business being carried out by you at Block No. H, Shree Sadashiv CHS Ltd., 6th Road, Santacruz (East), Mumbai -55.

Ans. I am a Chartered Accountant by training, having completed my Chartered Accountancy in 1978. I am engaged in the business of providing the accommodation entries through various companies floated by me like Mahasagar Securities P. Ltd., Mihir Agencies P. Ltd., Alliance Intermediaries & Network P. Ltd., Gold Star Finvest P. Ltd. etc. which all are run by me from the office at 6 Road, Santacruz (E) above. In brief the various business activities carried out by my companies are as below:

- i. Speculation profit adjustment entries***
- ii. Short term profit adjustment entries***
- iii. Long term capital gains adjustment entries***
- iv. Share application adjustment entries***

Q.3. Kindly describe in detail the modus operandi followed by you in providing these difference types of entries, details of receipts of cash/cheques and details of services provided by you to the beneficiaries.

Ans. 1) Speculation profit

- a) Our agents send us the names of entry seekers and their respective amount of entries desired by them. We receive this information either through phone or fax.*
- b) On receipt of the information we prepare the bills.*
- c) We deliver the bills to the agents.*
- d) Agents issue cheques to the beneficiaries. The signed cheque books are kept with the agents.*
- e) The agents receive the fund and deposit the same in the bank account. The cheques issued by them are then cleared.*
- f) We receive the commission on the total amount of bank*

transaction on monthly basis

When the agents are new, we request them to carry out transactions through us. Few agents are getting bills printed outside also and doing transaction less paying commission to us.

2) Short Term profit:

- a) We receive the information about short term gain desired by the beneficiaries.*
- b) We then select the scrips whose prices have appreciated the most during the last 6 months*
- c) We then request the parties to deliver the tunes or manage the shares by themselves.*
- d) They receive the shares in their denial c out of their own funds,*
- e) They then sell the shares in the open market.*
- f) The difference between purchase price and sale price is the short term gain.*

3. Long term gain:

- a) The party first decides the amount of LTG required by them.*
- b) We then decide the scrips.*
- c) They acquire the shares in their demat account out of their own funds.*
- d) They sell them in the open market.*
- e) We simply provides purchase bill in STG & LTG*

4. Share application adjustment entry:

- a) The party/ agent provide us the name of the company which desire such entries.*
- b) We sign the application forms and provide the necessary documents. Then party complete the bank transaction out of their own funds.*

Q.4 I am showing you the various registers/ diaries/ 'notebooks which were seized from the office in the Garage at ground floor, Modern Villa Opp. HDFC Bank, 7th Road, Santacruz

(E), from where printing of bogus contract notes issued by your various companies was found to be taking place. Kindly confirm that these diaries which are number Annexure A-1 to A-147 are the same as seized from your premises during the course of action u/s.132 on 25.11.2009.

Ans. Yes. I confirm that these are the same diaries/ notebooks.

Q.5 Kindly confirm that these diaries/ notebooks contains the details of various bogus contract notes issued by you to various parties over the years.

Ans. Yes. I confirm the same.

Q.6 I am showing you by way of example, notebook No.A-60 which contain written pages from 1 to 170. Kindly explain the entries in various pages

Ans. Page 1 — It is titled S.M. which is the name of one of my agent — Sandeep Merchant

Page 2 contains the entries/ bogus contact notes issued on 14.04.2005 from Mahasagar Securities P. Ltd., Alliance Intermediaries & Network P. Ltd.

Here "SP" refers to speculation profit, "pur" refers to purchase, "sal" refers to sale, "SIT" or "D/L" refers to speculation loss or delivery loss. The method of making entries is to make purchase, speculation profit or sale followed by the name of the company in which the alleged purchase, speculation or sale has taken place. Here "maha" refers to Mahasagar Securities P. Ltd., "Alliance" or "All" refers to Alliance Intermediaries & Network P. Ltd., "Gold" refers to Goldstar Finvest Pvt. Limited. On the left hand side of the page is written the numbers of the shares allegedly purchased or sold, the name of the company whose shares were purchased or sold, the date on which the bogus purchase/ sale has been booked, bill and transaction No./ valan No., name of beneficiaries, amount purchased/ sold/ transacted. For e.g. the entry on Pg 2-3 of Annexure 'A-60' is 14/4105 'Purchase Alliance'

e.g. 50,000 -- Prrenta Industries 16/8/04 157/2 Shailesh Vaishnav 355575/51

As explained above this represents the fact that 50000 shares of Prrenta Industries have been purchased on 14.04.2005

with the bill dated 16.08.2004, bearing bill No.15712 for Shri Shailesh Vaishnav and the amount of this purchase which took place in the company M/s. Alliance Intermediatories & Network Pvt. Limited is Rs.355575.51.

E.g. 2 on page 93 of the same notebook, a sale of 20500 shares of Karuna has been made vide bill No.155/5 dated 12.08.2005 for M/s. Meena Chetan KumarBhadra and the amount of such sale is Rs.1004808/26.

In cases of Speculation profit, the details of shares are not recorded as it is intraday transaction.

Q.7. *How genuine are these sales and purchases (of shares)?*

Ans. Both sale and purchase bills issued by inc are bogus transactions. I would like to clarify here that the client may have acquired the shares from elsewhere in cash but most definitely the transaction as mentioned by me in my sale/purchase bill is not a genuine one.

Q.8 *Kindly explain the meaning of the entries which are scored out after being written. For e.g. page 92 of Notebook titled Annexure A-60.*

Ans. These represent transactions which did not go through i.e. after placing an order for (bogus) sale/purchase of shares the client/ beneficiary did not claim the bogus contract note. However, I had generated the same which was entered in my notebook. Hence the same has been scored out.

Q.9. *Where are the physical copies of such bills (which are not claimed)?*

Ans. They are destroyed.

Q.10 *Has the cash component/component of commission been received in respect of these transactions?*

Ans. No, we receive our commission only when the deal goes through.

Q.11 *Can one say that in cases wherein there is a gap of more than 12 months between the date of the actual transaction and the*

date of the bill issued for such transaction, this has been done to ensure Long Term Capital Gain for the client? For e.g. Page 2 of Annexure A-60 wherein 8600 shares of "Media Matrix" have been actually purchased on 14.04.2005 but the bill is dated 11.01.2004?

Ans. Yes. In this case the beneficiary of such long term capital gain is Shri Shashi K. Lahoti.

Q.12 It is seen that the companies Mahasagar Securities Pvt. Ltd., M/s Alliance Intermediatories & Network Pvt. Ltd. and M/s. Goldstar Finvest Pvt. Ltd. have entered into such huge transactions amounting to crores of rupees. Have regular books of account been maintained for these companies? If so, where are they being maintained?

Ans. No Apart from bank book, no books of accounts are being maintained for these companies and the transactions reflected in them are bogus transactions.

Q.13 Then on what basis are the Profit and Loss Accounts, Balance sheet etc. of these companies (which were found during course of action u/s.132 at your office) prepared?

Ans. Last year balances are carried forward with only a difference in bank balance. The turnover of the various companies represents the total of the entries in the bank statements of the various companies (i.e. turnover of bogus share billing/ adjustment entries).

Q.14 Kindly throw light on the Share Application Adjustment entries carried on by your group companies and give the names of the companies who have taken share application money from your companies.

Ans. These share subscription transactions are known as either 'One Time Settlement' transactions or 'Two Time Settlement' transactions, In One Time Settlement transaction, my company will subscribe to shares of say 'X' Pvt. Ltd., shares with a face value of Rs.10 will be subscribed at a premium of say Rs, 190 per share. Hence the subscription of shares of face value of Rs.1,00,000 will entail payment of share premium to the tune of

Rs, 19 lakhs. These kinds of transactions are done to convert black into white money. In Two time settlement transactions, my company subscribes shares at a premium and after a gap of 1-2 years, those shares are bought back by the management at throwaway price of say Rs.5 as against Rs.200 including share premium. In both the above mentioned transactions, the management of the company pays me corresponding equivalent cash plus a nominal commission. The cash is deposited in the bank accounts of my companies and these companies further issues cheques subscribing to share capital at a high premium. I do not recall the names of the companies at present to whom I have provided such share capital adjustments but details of them can be found **in** the files located in the external portable hard disk seized from my office premises on 25.11.2009.

Q.15 I am now showing you the files contained in the folder called "One Time" located in "Investment 1" folder which in turn is located in located in 'Mukesh 1' which is in 'Sagar' folder in the external hard disk seized from your office during action u/s.132 on 25.11.2009 (working copy). Are these the same files and folders you are referring to?

Ans. Yes.

3.6. During cross examination, the statement is recorded on 20.04.2012 as under:-

"Q.1 AO to Deponent No.1

Please identify yourself and confirm that oath is administered to you and also confirm that the consequences of false statement given on oath is explained to you.

Ans. I am Shri Mukesh Maneklal Choksi, aged 57 years residing at flat No.600, Shanti Kutir building, 10th Road, Santacruz (E), Mumbai-400055. I confirm that oath has been administered to me and also I confirm that the consequences of false statement given on oath is explained to me.

AO to Deponent No.2

Please identify yourself and confirm that oath is administered to you and also confirm that the consequences of false statement given on oath is

explained to you.

Ans. I am Shri Jiyo Ghansh yam Lalwani, aged 47 years residing at flat No.J-301, Vardhaman Nagar, Junction of R.P. and M.G. Road, Mulund(W), Mumbai-400080. I confirm that oath has been administered to me and also I confirm that the consequences of false statement given on oath is explained to me.

Q.2 AO to Deponent No.2

Please state the capacity in which you are giving the present statement.

Ans. I am holding a letter of authority on behalf of my sister-in-law Smt. Disha N. Lalwani, on the strength of which I am giving the present deposition.

Q.3 AO to Deponent No.2

During the course of assessment proceedings in the case of Mrs. Disha N. Lalwani, it has come to light that the assessee had sold certain shares details of which are as under:

- | | | |
|------------|--------------------------|--------------------|
| <i>(a)</i> | <i>Buniyad Chemicals</i> | <i>3500 shares</i> |
| <i>(b)</i> | <i>N.E. Electronics</i> | <i>2600 shares</i> |

The total consideration received in respect of the sale of above shares was Rs.5,58,937/- after brokerage. Consequently, the assessee had declared long term capital gain of Rs.5,51,006/- and claimed exemption. Please explain.

*Ans. Yes, I confirm the **same**.*

AO to Deponent No.1'

Ans. Yes, I confirm the same.

Q.4 Deponent No.2

As you are aware, you are asking for an opportunity to cross examine Mr. Mukesh Chokshi before the CIT(A) and accordingly, the case has been remanded back to the undersigned. Now Mr. Mukesh Chokshi is present before you. Therefore, I request you to take this opportunity and cross examine Mr. Mukesh Chokshi.

Ans. Yes, I do.

Deponent No.2 to Deponent No.1:

(a) I am showing you certain bills issued by your office in the name of Leela G.. Lalwani regarding the sale of shares of above share scrips during the financial year 2002-03.

Ans. I have seen the bill: and confirm that the bills have been issued by my office regarding sale of above shares.

(b) Can you remember the cheques issued against these bills?

Ans. Yes, I say that since the bills have been issued by my office, subsequently cheques are also issued by my office.

(c) I am showing you bills of my following family members who have also sold shares and received cheques:

- i) Anita J. Lalwani
- ii) Kamla L. Hardasani
- iii) Jiyo G. Lalwani (myself)
- iv) Leela G. Lalzvani
- v) Ruki L. Hardasani

Ans. Yes, I have seen the bills and confirm that bills have been issued by my office.

(d) Whether the share transactions were carried out through recognized Stock Exchange?

Ans. No, the transactions have been carried out off the market.

(e) Whether the above scrips are listed with the Stock Exchange? Ans. Yes, the above scrips are listed on the recognized Stock Exchange.

(f) Whether they are registered with the R.O.C.?

Ans. Yes, they are also registered with R.O.C.

(g) If you confirm that you have sold the shares on our behalf then who has purchased the shares.

Ans. Since the shares are sold off market, they have been purchased by.....

(h) The Department has assessed on the different figure of Rs.7,66,653/- instead of Rs.5,58,937/- actual figure of sale proceeds and cheque received.

Ans. Since all my data has been seized by the Department and certain data was corrupted, there might be some error. We have already issued copy of ledger account which shows the correct figure.

Q.5 Deponent No.2 to AO

As per the bills available with us and the total amount of consideration received by way of cheque from Mukesh Choksi in connection with the above transaction, the total receipt comes to Rs.5,58,937/- only whereas you have made an addition of Rs.7,66,653/- under this head that too without making any mention or break up with respect to the amount of Rs.7,66,653/-. May I request you to please explain the above discrepancy.

Ans. The amount of Rs.7,66,653/- is based on the statement forwarded by the Investigation Wing along with their forwarding letter.

Q.6 AO to Deponent No.1

In this connection, I invite your kind attention to your statement recorded u/s.131 by the DDIT(Inv.), Unit I(4), Mumbai dated 11.12.2009 wherein you have categorically affirmed that all the bills issued to different entities are accommodation entries without having any proper transactions. Please comment.

Ans. It was my general statement and since the shares were given actually, the transactions had taken place through sub-broker and therefore I cannot comment about the transactions.

Q.7 A perusal of the answer given to Q.No.6, it is clear that there is a contradiction in your answer given before DDI and the answer given today. Please explain.

Ans. As my answer to Q.No.6, the transactions are routed through sub-brokers and therefore I am unable to comment on the said transactions.

Q.8 AO to Deponent No.1 &.2

Do you want to add anything other than the above?

Ans. No,"

3.7 From answers to question Nos. 2, 3, 6, 7, 9, 10, 11, 12

etc. of statement of Shri Mukesh Chokshi recorded u/s.131 of the Act on 11.12.2009, it is evident that broker Shri Mukesh Chokshi has admitted that he has been engaged in providing accommodation entries and he also explained the manner in which accommodations entries have been provided for various transactions including Long Term Capital Gain and details of such transactions are recorded in various books seized. During the cross-examination of Shri Mukesh Chokshi before the AO, Shri Chokshi has admitted the transactions made in the name of the appellant. Shri Chokshi has also admitted that the transactions are carried out as off market transactions. Shri. Chokshi has also confirmed his statement recorded under section 131 of the Act dt. 11.12.2009 but failed to explain contradictions in his statement.

3.8 From the statement of Shri Mukesh Chokshi and his cross examination by the appellant, it is evident that the transactions are not actual transactions but they are accommodation entries for which cash has been provided by the appellant and, thereafter, cheque of even amounts, shown as income from Long Term Capital Gain, has been given by Shri Mukesh Chokshi in lieu of such cash provided by the appellant.

3.9 Reference is also made to the various orders of the ITAT in cases of Shri Mukesh Chokshi and his associates as under.

(a) Order dated 28.03.2008 in ITA No.s.4625/Mum/2005 and 5000/Mum/2005 for the A.Y. 2002-03 in the case of M/s Gold Star Finvest P. Ltd.

(b) Order dated 29.08.2008 in the cases of (i) Richmond Securities P. Ltd. (Subsequently known as Mahasagar Securities P. Ltd. and now known as Alag Securities) in ITA No.4624/MUM/2005 for the A.Y.2002-03, and M/s. Alpha Chemie Trade Agencies Pvt. Ltd. in ITA No.4999/Mum/2005 for the A.Y.2002-03.

(c) Decision in ITA No.4912/Mum/2005 dated 30.05.2008, in the case of M/s. Mihir Agencies Pvt. Ltd.

Based upon these ITAT orders, all the concerns including M/s. Alliance Intermediaries and Network P. Ltd., M/s. Gold Star Finvest P. Ltd. and M/s. Alpha Chemie Trade Agencies Pvt. Ltd. have also filed their returns declaring it to be in the business of an entry provider and estimating its income @0.15% of total receipts from entry seekers. The same has been accepted in the assessment order dated 12.11.2008 for the A.Y.2007-08 u/s.143(3) by ACIT (OSD-1), Central Range-7, Mumbai.

- 3.10 On the basis of the aforesaid orders of ITAT in case of Shri Mukesh Chokshi and his associates, it is a concluded fact that Shxi Mukesh Chokshi is not doing any business of share transactions or stock brokering but he has provided only accommodation entries of share transactions and thus facilitated in helping the appellant for showing bogus, tax free, Long Term Capital Gain. For accommodation entries provided by Shri Mukesh Chokshi and his associates, his net income @0.15% of total transactions has been shown as income and has been accepted by the ITAT.
- 3.11 Therefore, all these transactions are bogus and also the Long Term Capital Gain shown in the return is bogus. Accordingly, the addition made by the AO is upheld and grounds of appeal No. 1, 3 & 4 are dismissed.
4. Regarding second ground of appeal, an opportunity of cross-examination has already been provided to the appellant, therefore, this ground is already allowed.

5. The Ld. AR has further argued that he has shown an income of Rs.5,51,006/- only under the head Long Term Capital Gain out of total sale proceeds of Rs.5,58,937/- and therefore, addition of Rs.7,66,653/- against receipt of Rs.5,58,937/- cannot be made and further details of transactions resulting into Long Term Capital Gain of Rs.7,66,653/- have not been given by the AO.

"As regards the contention of the assessee that the receipt on account of sale proceeds of shares were adopted in the assessment at Rs.7,66,6531- as against Rs.2,81,0061- shown by the assessee in the return, the same appears to be baseless

as he assessee himself has shown Rs.5,51,006/- in his computation of total income. As such, if at all there is a difference, the same is insignificant. Further, the assessee'S claim for exemption u/s.54EC is also not considered since the income shown under the head Long Term Capital Gain was treated as unexplained cash credit zds.68 of the I.T. Act,"

5.1. The facts are considered. The AO is directed to collect details of transactions in the name of the appellant from the records seized from the broker, Shri Mukesh Chokshi and his associates available in the office of DGIT(Inv.) or the AO of Shri Mukesh Chokhi and others and provide a copy of the same to the appellant and determine the amount of payment received by the appellant from Shri Mukesh Chokshi and his associate concerns correctly as per records and tax only such amount u/s.68 of the Act after giving an opportunity of being heard and before giving effect to this order. Any discrepancy should be verified thoroughly in consultation with DDIT(Inv.) who is in custody of seized records and only the correct amount received as sale proceeds by the appellant should be taxed."

3.1. In the light of the aforesaid statement and the facts if analyzed, the factual matrix oozing out is that it is an admitted position that Shri Mukesh Chokshi was engaged in providing bogus accommodation entries such as long term capital gains, wherein, the assessee is one of the beneficiaries. It is evidently clear that off-market transactions were carried out by the assessee in collusion with Shri Mukesh Chokshi. The transactions were given the colour of genuine transaction but fact remains that only paper work was done in lieu of cash and there was no actual gain/transaction. It is also noted that identically in the case of Mukesh Chokshi/associates/firms of Mukesh Chokshi, there are various orders like M/s Goldstar Finvest Pvt. Ltd.

ITA No.4625/Mum/2005 and 5000/Mum/2005 order dated 28/03/2008, Richmond Securities Pvt. Ltd. (subsequently known as Mhanagar Securities Pvt. Ltd. and now known as Alag Securities Pvt. Ltd.) ITA No.4624/Mum/2005 and M/s Alpha Chemie Trade Agencies Pvt. Ltd. (ITA No.4999/Mum/2005) for Assessment Year 2002-03 along with the case of M/s Mihir Agencies Pvt. Ltd. (ITA No.4912/Mum/2005) order dated 30/05/2008. All these orders and the fact clearly indicates that Shri Mukesh Chokshi was actually not doing any business of share transaction/stock broking but was merely providing accommodation entries of share transaction showing the bogus long term capital gain, etc. and was used to get commission income at the rate of 0.15% of the total transaction. The assessee is also one of the beneficiaries of such camouflage. Thus, when the total transaction is illusory/bogus. Our view find supports from the ratio laid down by the Indore Bench of the Tribunal in the case of M/s Agarwal Cole Corporation (63 DTR 201; 135 ITD 270)(Indore Bench of the Tribunal), wherein, one of us (Judicial Member) is signatory to the order. The ratio laid down in the case of CIT vs Nova Promoters and Finlease Pvt. Ltd. (2012) 324 ITR 0169 (Del.) supports our view. It is also noted that the Hon'ble Delhi High Court while coming to a particular disapproved the decision taken in CIT vs Oasis Hospitalities Pvt. Ltd. (2011) 333 ITR 119 and also considered the decision in DIT vs Bharat Diamond Bourse (2003) 259 ITR 280 (SC) and Lovely Exports Pvt. Ltd. (2008) 299 ITR 268

(SC). The relevant finding from the aforesaid order dated 15/02/2012 (Nova Promotors and Finlease Pvt. Ltd.) is reproduced hereunder:-

“The assessee seems to have sent the Assessing Officer on a vain chase. It was first pleaded that the statements of Mukesh Gupta and Rajan Jassal should be given to it for rebuttal. They were given along with other material available with the Assessing Officer. When the assessee made a request for cross examination by letter dated 16-11-2007 (after the change of counsel) the Assessing Officer took efforts to issue summons to them. They were served, but those persons did not appear. On 4-12-2007 affidavits from them, along with affidavits from some other persons connected with the subscriber-companies were filed before the Assessing Officer. In these affidavits the earlier statements were retracted and the advancing of monies to the assessee as share application monies was confirmed. The Assessing Officer did not accept the affidavits. On appeal, the CIT(A) issued a direction to the Assessing Officer to examine the deponents of the affidavits. The Assessing Officer issued summons on 24-4-2009 but nobody appeared. He therefore reported to the CIT(A) that examination of the deponents on their affidavits was not possible. The CIT(A) held that the affidavits remain uncontroverted and therefore ought to have been accepted. The aforesaid conclusion is fallacious. The Tribunal, however, endorsed the finding of the CIT(A). The attempt of the assessee is there to see. It had been blocking any enquiry by the Assessing Officer at every stage on some plea or the other, including a frivolous plea even before the CIT(Appeals) that no cross-examination of Mukesh Gupta and Rajan Jassal was allowed, overlooking that once they filed the affidavits retracting from their earlier statements the plea loses force. There is no explanation as to why the deponents could not be produced and did not appear.

(Para 28)

The findings of the Tribunal cannot be upheld as they are based on irrelevant material or have been entered by ignoring relevant material. The finding that the share application monies have come through account payee cheques is, at best, neutral. The question required a thorough examination and not a superficial examination. If anything, in the light of the material gathered by the investigation wing about the modus operandi followed by the entry providers, the statements of Mukesh Gupta and Rajan Jassal the plea that the money was sent through banking channels loses all force. The Tribunal ought to have seen that the modus operandi involves receipt by the entry providers of equivalent amount of cash from the assessee. The fact that the companies which subscribed to the shares were borne on the file of the ROC is again a neutral fact. Every company incorporated under the Companies Act, 1956 has to comply with statutory formalities. That these companies were complying with such formalities does not add any credibility or evidentiary value. In any case, it does not ipso facto prove that the transactions are genuine. The finding that Mukesh Gupta and Rajan Jassal were involved with only 4 out of the 16 companies which advanced monies is only part of the picture. They had

stated before the investigation wing that their operations were routed through 22 companies whose names were also given. Fifteen out of those 22 companies have subscribed to the shares of the assessee. Therefore even if they were not directors of 12 companies, the fact remains, as admitted by them, that their entry providing operations were carried out through 22 companies, 15 of which have subscribed to the shares of the assessee-company. The Tribunal has ignored this vital aspect and has examined the issue rather superficially. Compliance with statutory norms and requirements is only one aspect, but in the present case a deeper scrutiny was required and the camouflage adopted was the primary aspect that required adjudication. This aspect has been ignored. Bonafide and genuineness of the transactions was the issue.

(Para 29)

The finding that since the summons issued to Mukesh Gupta, Rajan Jassal and the directors of 12 companies both during assessment and remand proceedings were served on them, their existence or identity stood established, even if this finding is assumed to be correct in the technical sense overlooks their non-appearance. They were even otherwise not ready and willing to appear before the Assessing Officer. The genuineness of the transactions cannot be said to have been established for the same reason. The genuineness of the transaction critically hinges on the true and veracity of the claim made by the assessee. Material was gathered by the investigation wing and made available to the Assessing Officer, who in turn had made it available to the assessee. Nothing has been said by the Tribunal about the said material. Thus the Tribunal, with respect, seems to have ignored relevant material.

(Para 30)

The Tribunal also erred in law in holding that the Assessing Officer ought to have proved that the monies emanated from the coffers of the assessee-company and came back as share capital. Section 68 permits the Assessing Officer to add the credit appearing in the books of account of the assessee if the latter offers no explanation regarding the nature and source of the credit or the explanation offered is not satisfactory. It places no duty upon him to point to the source from which the money was received by the assessee. The view taken by the Tribunal on the duty cast on the Assessing Officer by section 68 is contrary to the law laid down by the Supreme Court. Even if one were to hold, albeit erroneously and without being aware of the legal position adumbrated above, that the Assessing Officer is bound to show that the source of the unaccounted monies was the coffers of the assessee, we are inclined to think that in the facts of the present case such proof has been brought out by the Assessing Officer. The statements of Mukesh Gupta and Rajan Jassal, the entry providers, explaining their modus operandi to help assessee's having unaccounted monies convert the same into accounted monies affords sufficient material on the basis of which the Assessing Officer can be said to have discharged the duty. The statements refer to the practice of taking cash and issuing cheques in the guise of subscription to share capital, for a consideration in the form of commission. As already pointed out, names of several companies which figured in the

statements given by the above persons to the investigation wing also figured as share-applicants subscribing to the shares of the assessee-company. These constitute materials upon which one could reasonably come to the conclusion that the monies emanated from the coffers of the assessee-company. The Tribunal, apart from adopting an erroneous legal approach, also failed to keep in view the material that was relied upon by the Assessing Officer. The CIT(Appeals) also fell into the same error. If such material had been kept in view, the Tribunal could not have failed to draw the appropriate inference.

(Para 31)

*One is unable to uphold the order of the Tribunal confirming the deletion of the addition of Rs.1,18,50,000 made under section 68 of the Act as well as the consequential addition of Rs.2,96,250. The question of law is answered in favour of the department. The assessee shall pay costs of Rs.30,000/-. Commissioner of Income-Tax, West Bengal II v. Durga Prasad More, (1971) 82 ITR 540, Commissioner of Income-Tax (Central), Calcutta v. Daulat Ram Rawatmull, (1973) 87 ITR 349, Edwards (Inspector of Taxes) v. Bairstow, (1955) 28 ITR 579 (H.L.), Mehta Parikh and Co. v. CIT, (1956) 30 ITR 181, Director of Income-Tax v. Bharat Diamond Bourse, (2003) 259 ITR 280 (SC), Lovely Exports P. Ltd. in (2008) 299 ITR 268 **relied** ; CIT v. Oasis Hospitalities Private Limited, (2011) 333 ITR 119 disapproved*

(Para 42)

Conclusion :

In the facts of the case, addition of Rs.1,18,50,000 made under section 68 of the Act as well as the consequential addition of Rs.2,96,250 representing commission paid to the parties who facilitated the transactions, is upheld.

In the aforesaid order an elaborate discussion has been made by Hon'ble Delhi High Court. Likewise, the Indore Bench of the Tribunal in the case of Agarwal Coal Corporation has considered various decisions and finally decided in favour of the Revenue. If the facts of the present appeal are analyzed on the touch scale of aforesaid decisions, one fact is clearly oozing out that merely a paper work was camouflaged by the assessee with the help of Shri Mukesh Chokshi and its associates firms. It is also undisputed facts that the statement tendered by Shri Mukesh Chokshi was neither contradicted nor proved to

false, therefore, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), thus, on merit also, the order of the Ld. Commissioner of Income Tax (Appeal) is affirmed..

Finally, the appeal of the assessee is dismissed.

This Order was pronounced in the open court on 22/03/2017.

Sd/- (N.K. Pradhan)	Sd/- (Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 22/03/2017

Shekhar, P.S/निजी सचिव

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai,