IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCHES "E": DELHI

BEFORE SHRI G.S. PANNU, HON'BLE VICE PRESIDENT
AND
SHRI AMIT SHUKLA, JUDICIAL MEMBER

ITA.No.2478/Del./2013
Assessment Year 2004-05

Marble Art B-358, New Friends Colony, New Delhi. PAN No. AAFFM2468R	vs.	ACIT Circle 22(1) New Delhi.
(Appellant)		(Respondent)

ITA.No.2479/Del./2013
Assessment Year 2002-03

Marble Art B-358, New Friends Colony, New Delhi. PAN No. AAFFM2468R	vs.	ACIT Circle 22(1) New Delhi.
(Appellant)		(Respondent)

&

ITA.No.2480/Del./2013
Assessment Year 2003-04

Marble Art B-358, New Friends Colony, New Delhi. PAN No. AAFFM2468R	vs.	ACIT Circle 22(1) New Delhi.
(Appellant)		(Respondent)

For Assessee :	Shri C.S. Aggarwal, Sr. Adv. Shri R.P. Mall, Advocate
For Revenue :	Ms. Ramita M. Biswas, CIT DR

Date of Hearing :	19.11.2020
Date of Pronouncement :	08.03.2021

ORDER

PER AMIT SHUKLA, J.M.

1. The aforesaid three appeals filed by the assessee are against separate impugned orders passed by Ld. CIT(A) 23 New Delhi, for the quantum of assessment passed u/s 143(3)/147 for the assessment years 2002-03 vide order dated 25.01.2012; and for A.Y. 2003-04 and A.Y. 2004-05 vide order dated 28.02.2013. In all the appeals common issues are involved and therefore, were heard together and are thus being disposed of by way of this consolidated order.

2. In the appeals, the assessee has raised following grounds of appeal:

A. ITA No. 2479/Del/2013 for AY 2002-03:

1. The learned CIT(A) was not justified not to consider that the issue of notice u/s 148 of I.T. Act, was barred by limitation and as such the assessment made on the basis of it was illegal, ab initio void and without jurisdiction.

2. The learned CIT(A) was not justified to uphold the addition of Rs. 69,42,652/- (34.7% of Rs. 2,00,07,645/-) to the income of the appellant and income from undisclosed sources. The addition of Rs. 69,42,652/- is unfounded and uncalled for.

3. The learned CIT(A) failed to appreciate that:

(a) e books of account.

(b) The appellant was not confronted with any evidence by the learned Assesssing officer that it had made any sale outside the books of account.

4. The various reasons given by the learned CIT(A) to uphold the addition of Rs. 69,42,652/- to the income of the appellant are misconceived and incorrect.

(c) The appellant has not made any sale, which is not recorded in the books of account.

All the sales affected by the appellant to M/s Margra Industries, Gharoli are duly accounted for in the books of account. There is no sale made to this party which has not been recorded in the books of account.

5. The appellate order is contrary to the facts and law of the case.

6. The appellant craves leave to add, amend or alter any of the foregoing grounds of appeal at the time of hearing.

B. ITA No. 2480/Del/2013 for AY 2003-04:

1. The learned CIT(A) was not justified not to hold that the notice issued u/s 148 of the I.T. Act was illegal, ab initio void and without jurisdiction.

2. The learned CIT(A) was not justified to uphold the addition of Rs. 53,63,998/- (25.37% of Rs. 2,11,07,645/-) to

the income of the appellant as income from undisclosed sources. The addition of Rs. 53,63,998/- is unfounded and uncalled for.

3. The observations of learned CIT(A) are incorrect that:

(a) The appellant has failed to file any evidence to contradict the findings of Customs & Central Excise Authorities that he sales of Rs. 2,11,42,997/- had been made through cancelled invoices.

(b) The Appellant's objection to the adoption of market price in estimating the undisclosed sales also is without merit as the sale price has been taken from the cancelled invoices.

4. The learned CIT(A) failed to appreciate that:

(a) the appellant has not made any sales, which was not recorced in the books of account.

(b) complete books of account, sale and purchase vouchers were produced by the appellant.

5. The various reasons given by the learned CIT(A) to uphold the addition of Rs. 53,63,998/- to the income of the appellant are misconceived and incorrect.

6. The appellate order is contrary to the facts and law of the case.

7. The appellant craves leave to add, amend or alter any of the foregoing grounds of appeal at the time of hearing.

C. ITA No. 2478/Del/2013 for AY 2004-05:

1. The learned CIT(A) was not justified not to hold that the notice issued u/s 148 of the I.T. Act was illegal, ab initio void and without jurisdiction.

2. The learned CIT(A) was not justified to uphold the addition of Rs. 82,00,985/- (33.51% of Rs. 2,44,73,246/-) to the income of the appellant as income from undisclosed sources on the ground that unaccounted sales of Rs. 2,44,73,246/- had been made outside the books of account.

3. The learned CIT(A) erred to uphold the addition of Rs. 1,04,39,050/- to the income of the appellant as income from undisclosed sources on account of excess stock found in the search made by the Customs and Excise Department. The addition of Rs. 1,04,39,050/- to the income of the appellant is unfounded and uncalled for.

4. The learned CIT(A) was not justified to uphold the addition of Rs. 11,48,057/- by applying GP rate of 33.51% on 34,26,014/- to the income of the appellant as income from undisclosed source on account of short stock of marble profiles and marble mosaic found during the search made by the Customs & Central Excise Department. The addition of Rs. 11,48,057/- is arbitrary and uncalled for.

5. Without prejudice to the contention of the appellant that no sale outside the books of account was made by the appellant, the learned CIT(A) was not justified to allow deduction u/s 10B of the I.T. Act on such sales.

6. The learned CIT(A) failed to appreciate that:

(a) No copies of documents/details relating to suppression of sales or removal of goods without payment of duty, cancelled invoices were supplied to the appellant firm.

(b) No documents/details in respect of excess stock of Rs. 1,04,39,050/- stock short of Rs. 34,26,014/- and unaccounted sale of Rs. 2,44,73,246/- were supplied to the appellant firm. Infact, there was no difference in the stocks.

(c) complete books of account, sale & purchase vouchers, bank statements, voucher of expenses etc were produced by the appellant.

(d) the appellant has not made any sale which was not recorded in the books of account.

7. The various reasons given by the learned CIT(A) to uphold the aforesaid additions to the income of the appellant are misconceived and incorrect.

7. The appellate order is contrary to the facts and law of the case.

8. The appellant craves leave to add, amend or alter any of the foregoing grounds of appeal at the time of hearing.

3. All these three appeals are outcome of the reassessment proceedings initiated under section 147 of the Act on the basis of notices issued u/s 148. In these appeals filed, the assessee has challenged the validity and legality of the initiation of the reassessment proceedings as well as it

has challenged the additions made and sustained by the CIT (A). In respect of initiation of the reassessment proceedings u/s 147 of the Act, the submission of the assessee was that initiation of the reassessment proceedings *per se* was bad in law and on facts, since there was no escapement of income and further the proceedings initiated were without jurisdiction. One of the contentions raised by the assessee was that there was complete lack of tangible material enabling the AO to initiate the proceedings u/s 147 of the Act as such, notice issued u/s 148 is misconceived both on facts and in law.

4. Thus, in order to examine the contention of the assessee, on 04.12.2018, the Bench had initially directed the revenue to place on record such material as the AO had before initiating the reassessment proceedings u/s 147 of the Act. On 04.12.2018, the Bench had passed the following order:

> *"Before us, learned Senior Counsel, Shri. C.S. Aggarwal, challenging the validity of reopening u/s 147/148 and the reasons recorded by the Assessing officer, the copy of which has been placed in the paper book at page 35, submitted that he same has been reopened on the basis of certain information received from ADIT (Investigation), Ghaziabad alleging that assessee removed goods without payment of duty; and certain invoices were though raised, but later on shown to have been cancelled which contains*

the details of the removal of the goods. He submitted that no such information or invoices were made available to the assessee during the course of entire re-assessment proceedings as well as before the appellate proceedings. Even the reasons are vague and there was no tangent material available with the Assessing Officer while recording the reasons. While drawing an adverse inference against the assessee on merits also, there is no reference to the said invoice except for presumption that based on this information assessee must have made sales outside the books of account.

2. Since the information and material in the form of report submitted by ADIT (Investigation), Ghaziabad is very crucial and goes to the very route of the issue involved not for deciding the issue on merits but also on the validity of reasons recorded, therefore it was felt necessary that Department should produce not only the said report from the investigation wing but also the alleged invoices referred in the reasons as well as assessment order upon which presumption has been drawn that such cancelled invoices has led to undisclosed sale on which GP addition has been made.

3. Ld. CIT-DR, Mr. S.S. Rana requested that since it is very crucial document having a bearing on the case, therefore, some time should be given to produce the records.

4. Accordingly, we direct the assessing officer through ld. CIT-DR that all the relevant records mentioned in the

reasons recorded as well as the entire assessment record should be produced before the Bench with a copy to the assessee on or before 30th January, 2019. The department should ensure that these documents should be produced otherwise the Bench will proceed to here the matter available on record before us. Adj. to 30.01.2019.

Parties informed in the open Court…"

5. Since the aforesaid direction of the Tribunal was not complied, as such, again on 25.04.2019, following order was made:

"Order dated 04.12.2018 has not been complied by the ld. CIT DR. She stated that Assessment record is with her. However,, she will comply the order dated 04.12.2018 of the Bench. Hence requested two weeks time to do the same. On her request, the case is adjourned for 21.05.2019 to comply the earlier order dated 04.12.2018 for final argument…."

6. Thereafter on 15.05.2019, in compliance to the aforesaid directions of the Tribunal, the revenue has filed following four documents:

i) *A copy of letter issued by Addl. Director of Income Tax (Inv.), Meerut, dated 24.03.2009, to Addl. CIT, Range – 22, New Delhi.*

ii) A copy of letter issued by Addl. Director of Income Tax (Inv.), Noida, dated 17.03.2009, to Addl. DIT (Inv.) Meerut.

iii) A copy of order passed by Sh. S. K. Goel, Commissioner, Central Excise, Noida.

iv) A copy of letter dated 18.02.2019, addressed by Senior Investigating officer of Customs, Central Excise & Service Tax Settlement Commission, Principal Bench, New Delhi to persons stated therein.

7. After the receipt of the aforesaid documents supplied by the revenue, the assessee filed its submission on 14.08.2019, and contended that only partial compliance has been made, and neither all the relevant records mentioned in the reasons recorded has been provided, nor has furnished the copies of the alleged invoices referred in the reasons recorded for initiating the proceedings as well as assessment order upon which presumption had been drawn that such cancelled invoices has led to undisclosed sale on which GP addition has been made. The assessee submitted that in so far as the letter dated 17.03.2009 of Addl. Director of Income Tax (Inv.), Noida is concerned, same was supplied to the assessee during the course of the assessment on 10.12.2009, and in response thereto, the assessee filed a letter on 14.12.2009, and submitted that all the sales made to M/s Margra Industries Ltd. during the assessment year 2002-03 are duly entered in the books of account of the assessee firm and the assessee has not removed any goods without payment of duty and therefore, requested to provide the copies of cancelled invoices.

However, despite the request of the assessee, cancelled invoices were not supplied to the assessee. In respect of the communication dated 24.03.2009, addressed by the Addl. DIT(Inv.), Meerut to Addl. CIT, Range – 22, New Delhi, the assessee submitted that the Addl. DIT (Inv.) Meerut had recommended the cases of the assessee to be reopened, and the recommendation had been made without providing to the Assessing Officer any supporting material. It was submitted that since in the 'reasons recorded' the AO had not referred to either any communication dated 24.03.2009 by the Addl.DIT (Investigation) Meerut to Addl.CIT, Range – 22, New Delhi and to the order of Commissioner of Custom and Excise, Noida undated, the same cannot be considered to be any tangible material available at the time of reopening of the assessment. It was submitted that Addl. DIT (Inv.) Meerut who recommended the cases to be reopened, had no tangible material with him other than the intimation received that the Customs & Central Excise Authorities had conducted a search on assessee's business premises on 19.08.2003, during the course of which certain 'discriminatory documents' (SIC) were found, however Ld. Counsel pointed out that none of the documents which is stated to be discriminatory were available with the AO at the time of initiation of proceedings so as to be satisfied that assessee's income had escaped assessment.

8. In view of the aforesaid submissions of the assessee, the Tribunal again on 30.09.2019 required the revenue to produce any record which was available with the AO at the time of issuance of notice by way of following order sheet entry:

"The assessee has challenged the validity of reopening u/s. 148 in the following seven counts.

I	*That reasons recorded are not based on any tangible and relevant material*
II	*That reasons recorded are not based on any application of mind much less independent application of mind*
III	*That reasons have been recorded to conduct investigation and examination i.e. to make fishing and roving enquiries, which is not permissible*
IV	*That in the absence of any sum of income having been specified which has allegedly escaped the precondition as envisaged u/s 149(1)(b) since remained unsatisfied, there was a lack of foundation for initiate the proceedings*
V	*Non furnishing of foundational material vitiates the proceeding for invoking section 147 of the Act has not been satisfied*
VI	*That approval granted is a mechanical approval and hence initiation of proceedings u/s 147 of the Act*

VII	*That once the basis or edifice on which proceedings have been initiated ceases to exist, the action is without jurisdiction*

Ld Senior Counsel, Shri C.S Agarwal had pointed that on earlier occasions, this Bench had directed the ld. CIT-DR to produce the relevant records as mentioned in the 'reason recorded' as well as the material which has been relied upon along with the assessment records. Thereafter, in compliance thereof, the Revenue had filed letter dated 15.05.2019, which were also supplied to the Ld. counsel. However, assessee has filed these material on detail objection vide letter dated 21.05.2019 stating that firstly, these documents are not even complete and secondly, nowhere such documents as stated in the reason have been provided, specifically the allegation of removal of goods without payment of duty and invoices issued well later on cancelled by the assessee.

Ld. CIT-DR today at the time of hearing requested that that further opportunity should be given in order to ascertain, whether any such material or information was there in some separate folder available with the assessing officer. Ld. Senior Counsel further pointed out that from the perusal of the reason recorded, it can be seen that the Assessing Officer in view of the allegation given in the information from the Additional Director of income tax

(Investigation) is trying to examine the claim of exemption u/s.10B, which is impermissible in law.

Ld. CIT-DR is directed to produce any record which is available with the assessing officer at the time of issuance of notice and also given her statement on the objection raised by the ld. Senior Counsel. It is made clear that no further adjournment shall be given as already several round of hearing has taken place. Dasti be given to the parties."

9. Even after the aforesaid direction, the ld. CIT DR on 20.10.2020 merely furnished the copy of letter issued by Addl. Director of Income Tax (Inv.), Meerut, dated 24.03.2009, to Addl. CIT, Range – 22, New Delhi and copy of letter issued by Addl. Director of Income Tax (Inv.), Noida, dated 17.03.2009, to Addl. DIT (Inv.) Meerut which had already been filed on earlier occasion and noted hereinabove and no other document was filed. In view of the aforesaid facts, since revenue could not produce any other document nor they could produce the cancelled invoices which made the basis to assume undisclosed sale on which GP addition has been made, as such, these appeals were finally heard on the basis of material/documents furnished by the assessee and produced by the revenue before us.

10. We have heard the rival submissions and perused the relevant finding given in the impugned orders and material placed on records which were referred to before us at the time of hearing. It is seen that assessee is engaged in the business of manufacture and export of natural stone products. All the three present appeals emanate from the proceedings initiated u/s 147 of the Act. The relevant factual details in respect of present appeals qua the status of earlier return of income and assessments are as under:

Assess--ment Year	**Return of income filed on**	**Assessment made originally u/s 143(3)**	***Notice issued u/s 148 on***	**Assessment made u/s 147/143(3)**
2002-03	31.10.2002 At NIL	No assessment u/s 143(3).	*17.03.2009*	29.12.2009 at an income of Rs. 1,44,85,734/- by ACIT, Circle 22(1), New Delhi
2003-04	02.12.2003 At Rs. 22,74,705/-	20.03.2006	*31.03.2010*	12.12.2011 at an income of Rs. 1,05,84,430/- by ACIT, Circle 22(1), New Delhi
2004-05	01.11.2004 At Rs. 5,39,261/-	22.12.2006	*30.03.2011*	12.12.2011 at an income of Rs. 2,46,07,267/- by ACIT, Circle 22(1), New Delhi

11. Aforesaid details shows that except for the AY 2002-03, assessment u/s 143(3) of the Act was framed in the case of the assessee for the AY 2003-04 and 2004-05 and in all the three assessment years, the reassessment proceedings were initiated beyond the four years. The assessee apart from disputing the merits of the additions made in the order of assessment, has challenged the assumption of jurisdiction u/s 147 of the Act by the AO on various grounds which can be summarised as under:

a. *That reasons recorded are not based on any tangible and relevant material;*
b. *That reasons recorded are not based on any application of mind much less independent application of mind;*
c. *That reasons have been recorded to conduct investigation and examination i.e. to make fishing and roving enquiries, which is not permissible;*
d. *That in the absence of any sum of income having been specified which has allegedly escaped the precondition as envisaged u/s 149(1)(b) since remained unsatisfied, there was a lack of foundation for initiate the proceedings;*
e. *Non furnishing of foundational material vitiates the proceeding for invoking section 147 of the Act has not been satisfied;*

f. *That approval granted is a mechanical approval and hence initiation of proceedings u/s 147 of the Act;*

g. *That once the basis or edifice on which proceedings have been initiated ceases to exist, the action is without jurisdiction.*

12. For the AYs 2003-04 and 2004-05, since the assessment was originally made u/s 143(3) of the Act, and assessment was reopened beyond four years, it was also contended by the assessee that there was no failure on the part of the assessee to disclose fully and truly all material facts as such, action u/s 147 of the Act was in excess of jurisdiction.

13. During the course of the hearing, learned Senior Counsel, Shri. C.S. Aggarwal argued at length in respect of the aforesaid contentions. He submitted that proceedings u/s 147 of the Act had been initiated in the case of the assessee without any tangible material as in the reasons to believe, the learned AO on the basis of letter of Addl. DIT (Inv), Ghaziabad and report of ADIT (Inv), Noida has alleged that assessee is not keeping proper records of raw material and finished goods produced therefrom in collusion with Margra Industries. It was submitted that aforesaid allegation was based on the alleged fact that assessee has removed goods without payment of duty and certain invoices were though raised but these invoices were later

shown cancelled though they contained details like the date and time of removal transport vehicle no etc, however no such information or the cancelled invoices were made available to the assessee either during the assessment or in the appellate proceedings. It was submitted that assessee has not removed any goods without payment of duty and in fact, during the assessment proceedings, the assessee has furnished the copies of the invoices as well as the quantitative details of the all the sales and purchases made. It was submitted that assessee during the assessment proceedings vide letter dated 14.12.2009 had specifically requested to provide the copy of the cancelled invoices and even after the directions of the Tribunal on various dates, the revenue could not furnish the alleged cancelled invoices, which shows that there was no such material with the learned AO at the time of forming his reasons to believe and hence assumption of jurisdiction by the learned AO without having the material before him is bad in law.

13.1 It was further contended that reassessment proceedings has been initiated in the case of the assessee mechanically merely on the basis of report of investigation wing and, not on independent application of mind as report of the investigation wing refer the cancelled invoices, which was not even there before the learned AO and therefore, the proceedings initiated are without jurisdiction. It was also contended that the in the 'reasons to believe' for the AY

2003-03, it has been recorded by the learned AO that in view of the allegation made in the information received from Addl. DIT (Inv), Ghaziabad, the claim of exemption u/s 10B needs to be examined, and this fact shows that there was no material before the learned AO and proceedings have been initiated merely to examine the exemption claimed u/s 10B of the Act. It was submitted that initiation of the proceedings to examine the claim of exemption u/s 10B of the Act is outside the scope of section 147 of the Act as reassessment proceedings can be initiated only in the case of tangible material that the income of the assessee has escaped assessment, and recourse of section 147 of the Act cannot be take to make roving and fishing enquiry. It was submitted that in the 'reasons to believe' for the AY 2002-03, it has not even been mentioned what is the amount of income which has been escaped assessment as such, in view of section 149(1) of the Act, initiation of the reassessment proceedings is illegal.

13.2 Lastly, it was submitted that approval granted u/s 151 of the Act was not in accordance with law and was without application of mind and hence reassessment proceedings initiated is vitiated in law. It was submitted that in all the three assessment years i.e. AY 2002-03, 2003-04 and 2004-05, approval has been taken from Addl. CIT, Range 22, New Delhi who has merely stated "approved". It was submitted that firstly approval granted is not a sanction

as mandated u/s 151of the Act and secondly in the case which falls under proviso to section 151(1) of the Act, approval has to be granted by the Chief Commissioner or Commissioner and since for the AY 2003-04 and 2004-05, approval has been granted by the Addl. CIT hence initiation of proceedings under section 147 of the Act is invalid. In respect of each of the contention, the appellant has cited number of judicial precedents, which shall be dealt with while adjudicating the issue.

14. The learned CIT- DR, Departmental Representative, on the other hand supported the order of the AO and CIT (A). It was submitted by her that proceedings have been initiated on the basis of material i.e. information received from the Addl. DIT (Inv), Ghaziabad and report of ADIT (Inv), Noida which constitutes the material for the assumption of jurisdiction. It was further submitted that while granting the approval, if Addl. CIT, Range 22, New Delhi has granted approval by writing "approved", it does not show that he has granted mechanically. It was submitted that approval granted is in accordance with law and same cannot be faulted with.

15. We have heard the rival contentions, perused the relevant findings of the authorities below and the material available on record on the issue of validity of re–opening under section 147. In these appeals, though the assessee

has challenged the reassessment proceedings on various propositions, however, firstly we propose to deal with the aspect of approval granted under section 151 of the Act.

15.1 It is seen that in the case of the assessee, proceedings had been initiated for the three assessment years i.e. AY 2002-03, 2003-04 and 2004-05 and except for the AY 2002-03, in remaining two years, assessment was also originally framed u/s 143(3) of the Act. In all the three assessment years, notice had been issued beyond a period of four years from the relevant assessment years. At this stage, it is relevant to refer the provisions of section 151 of the Act, which reads as under:

"Sanction for issue of notice.

151. *(1) In a case where an assessment under sub-section (3) of section 143 or section 147 has been made for the relevant assessment year, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:*

Provided *that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing*

Officer aforesaid, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under sub-section (1), no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice."

15.2 Ergo, provisions of sub section (1) of section 151 of the Act deals with the cases wherein assessment was earlier framed u/s 143(3) or section 147 of the Act, whereas subsection (2) provides for the cases, wherein no assessment was framed earlier. Under sub section (1) of section 151, if the proceedings are initiated within four years, no notice shall be issued under section 148 , unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice. However, the proviso to the sub-section (1) provides for the approval in the cases where notice is issued after the expiry of four years from the end of the relevant assessment year. The proviso provides that if the notice is issued beyond four years, such notice shall be issued after taking approval from the Chief Commissioner or Commissioner on the reasons recorded by the Assessing

Officer. Further under sub-section (2), it was provided that if no assessment was framed earlier u/s 143(3)(147, no notice shall be issued under section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

15.3 Therefore, under the statutory provision, the Act provide for the safeguards for issuing notice u/s 148 of the Act. It is the intent of the legislature that superior authority should apply his mind and give his satisfaction before issuance of notice. In such circumstances, the approval should not be mechanical but should be objective satisfaction and satisfaction recorded should reflect that there is application of mind. In fact, the issue is no more res integra. The Apex Court in the case of **Chhugamal Rajpal vs. S.P. Chaliha & Ors reported in 79 ITR 603 (SC)** has held that important safeguards are provided in sections 147 and 151 of the Act and same cannot be lightly treated by the Commissioner. It was held that while granting the approval, the Commissioner should give reason for coming to the conclusion that it is a fit case for the issue of a notice under section 148 of the Act. The jurisdictional High Court in the case of **United Electrical Company Pvt. Ltd. vs. CIT reported in[2002] 258 ITR 317 (Delhi)** has held that the

Legislature has provided certain safeguards to prevent arbitrary exercise of powers by an Assessing Officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. In fact, in the case of **CIT v. S. Goyanka Lime & Chemical Ltd. reported in 231 Taxman 73 (MP) it was held that sanction granted by merely recording** "Yes, I am satisfied" is mechanical and same is unsustainable. In fact, SLP filed against the aforesaid judgment of Madhya Pradesh High Court is also dismissed and same is reported in **237 Taxman 378 (SC). In fact, in the case of Pr. CIT vs M/s N.C. Cables Ltd. reported in [2017] 391 ITR 11 (Delhi)** jurisdictional High Court has held as under:

> *"11. Section 151 of the Act clearly stipulates that the CIT (A), who is the competent authority to authorize the reassessment notice, has to apply his mind and form an opinion. The mere appending of the expression 'approved' says nothing. It is not as if the CIT (A) has to record elaborate reasons for agreeing with the noting put up. At the same time, satisfaction has to be recorded of the given case which can be reflected in the briefest possible manner. In the present case, the exercise appears to have*

been ritualistic and formal rather than meaningful, which is the rationale for the safeguard of an approval by a higher ranking officer. For these reasons, the Court is satisfied that the findings by the ITAT cannot be disturbed."

15.4 When the facts of this case are seen in the light of the aforesaid binding precedents, it is found that in this case also while according approval, the ld. Addl. CIT while granting approval has merely recorded "approved" and has not given any reason at all the reason for granting approval. In fact, this shows that while granting approval, he has not even examined whether the material referred in the reasons to believe is available with the AO and had he applied his mind, he would have found that even the material referred in the reasons to believe is not available with the AO. Now be that as may be, in the A.Y. 2002-03 even the reasons recorded do not clothe the AO with the jurisdiction to reopen the assessment, as he did not had the relevant material.

15.5 From a bare perusal of the reasons recorded for the AY 2002-03, it is seen that same is based on certain information received from Addl. DIT (Inv.)-Ghaziabad. The relevant portion of the 'reasons recorded' is reproduced hereunder:

"Information has been received from the Addl. DIT(Inv.), Ghaziabad alongwith a report of the Addl. DIT(Inv.) Noida alleging that the assessee M/s Marble Art is not keeping proper records of raw material and finished goods produced there from and in collusion with M/s Margra Industries Ltd. is evading taxes. For the AY 2002-03, the assessee has removed goods without payment of duty and these invoices were later shown cancelled though they contained details like the date and time of removal, transport vehicle no. etc. The records of the assessee firm were examined. The assessee has business transactions with M/s Marga Industries. The assessee is engaged in the business of export of natural stone products and claims exemption u/s 10B. In view of the above allegations, the business activity of the assessee along with its claim of exemption u/s 10B needs to be examined. Therefore, there is a reason to believe that there is income which has escaped assessment in the case of the assessee for the said Assessment Year."

15.6 As discussed above, the Bench had directed the Revenue to produce the material which the AO had at the time of initiation of proceedings u/s 148 apart from the

aforementioned letter. However, the Revenue had filed only four documents which are as under:

i. *"A copy of letter issued by Addl. Director of Income Tax (Inv.), Meerut dated 24.03.2009, to Addl. CIT, Range-22, New Delhi.*
ii. *A copy of letter issued by Addl. Director of Income Tax (Inv.), Noida, dated 17.03.2009, to Addl. DIT(Inv.) Meerut.*
iii. *A copy of an undated order passed by Sh. S.K. Goel, Commissioner, Central Excise, Noida.*
iv. *A copy of letter dated 18.02.2019, addressed by Senior Investigating Officer of Customs, Central Excise & Service Tax Settlement Commission, Principal Bench, New Delhi to persons stated therein."*

15.7 First of all, in the reasons there is no whisper regarding documents at Sl. No. *(iii.)* & (*iv*.) now filed by the department. Nowhere it has been brought on record what was the amount and goods which has been alleged to be removed without payment of duty and what are these cancelled invoices. The Revenue could not even produce the copies of alleged invoices referred in the reasons recorded upon which presumption had been drawn that such cancelled invoices has led to undisclosed sale of which GP

addition has been made. From the communication dated 24.03.2009 addressed by Addl. DIT (Inv.), Meerut to Addl. CIT, Range-22 which reads as under: -

> *"In this case Custom & Central Excise Authorities conducted a search on the business premises of M/s Marble Art, on 19.08.2003. During the course of search, certain discriminatory documents were found and seized by Custom Authorities. A show cause notice dated 16.08.2004 was issued by the Commissioner of Custom & Central Excise Noida. Later on an order dated 21.11.2005 was passed by the Commissioner of Custom & Central Excise Noida by confirming almost all the allegation in the show cause notice. Against the order of the Custom & Central Excise Commissioner, the firm M/s Marble Art, has gone in Custom & Central Excise Settlement Commissioner. The decision of Hon'ble Settlement Commission is still pending.*
>
> *On the basis of show cause notice, order of Commissioner of Custom & Central and material impounded by the ADIT(Inv.) Noida. ADIT (Inv.) has submitted his report to the undersigned within the preview of Income Tax Act. In this report the ADIT (Inv.) has recommended that the case M/s Marble Art Ltd. may kindly be reopened for AY 2002-03, 2003-04 and 2004-05.*

You are therefore, requested to take necessary action bringing income of M/s Marble Art for relevant assessment year by reopening this case."

15.8 From the contents of aforesaid communication it is seen that ADIT (Inv.), Meerut had recommended the case of the assessee to be reopened without providing the AO any supporting material. It can thus be safely concluded and inferred that reopening proceedings had been initiated not on the basis of satisfaction of the AO, albeit on the basis of mere recommendation of ADIT (Inv.), Meerut. The 'reason to believe' has to be that of the AO who is initiating the proceedings and in absence of any independent application of mind and satisfaction of the AO the reason to believe falls in the realm of conjectures. The AO has to have tangible material with him and even if the information has come from Investigation wing, the AO must perused the material which has been referred in the said information and examine what is the income which has escaped assessment. Recommendation may come from any person or authority but it is the AO who has to entertain reason to believe based on material before him that income chargeable to tax has escaped assessment. The most crucial material here in this case is that assessee has removed goods without payment of duty and there were invoices which were later shown to be cancelled but nowhere there is any whisper about the

invoices nor they have been produced. AO simply appears to have reopened to examine the claim of section 10B and what was the basis and premise before him as to how the claim on examine u/s 10B has incorrect is not coming fore. Mere intimation received from any authority cannot lead to immediate presumption but it needs to be verified by the AO and to apply his mind. Here in this case, even the documents pertaining to Custom & Central Excise Authorities was not available with the AO at the time of initiation of proceedings which fact has been surfaced before us. Thus, we hold that the reasons recorded by the AO do not give jurisdiction to reopen the assessment u/s 147 read with section 148.

16. Now in so far as other two years, that is, AYs 2003-4 & 2004-05, it is also seen that in the case of the assessee, not only approval was mechanical but approval was also not taken from competent authority. The relevant details in respect of the approval for these years are as under:

Assessment Year	**Assessed under section**	**Notice issued u/s 148 of the Act on**	**Sanction u/s 151 was taken from**	**Competent authority to grant sanction u/s 151**
2002-03	143(1)	17.03.2009	Addl. CIT	Addl. CIT/JCIT

2003-04	143(3)	31.03.2010	Addl. CIT	Chief CIT/CIT
2004-05	143(3)	30.03.2011	Addl. CIT	Chief CIT/CIT

16.1 From the above table, it is apparent that the learned assessing officer has obtained the sanction from the learned Addl. CIT for all the three assessment years, which is not in accordance with law, as for the AY 2003-04 and 2004-05, assessment was originally framed u/s 143(3) of the Act and notice u/s 148 of the Act was issued beyond the four years as such, the sanction for the AY 2003-04 and 2004-05 should have been obtained of Chief CIT/CIT. This issue has also been considered in plethora of judgments, wherein it has been held that if the sanction has not been taken from the appropriate authority as provided u/s 151 of the Act, initiation of the reassessment proceedings is not in accordance with law. The assessee has furnished a summary of various judgments on this issue in tabular form which are as under:

S.No.	Name of the case	Notice issued by	Approval taken from	As per the Hon'ble Court, approval should have been taken from
1	CIT vs. SPL's Siddhartha Ltd [2012] 345 ITR 223 (Delhi)	ACIT	CIT	JCIT/Addl CIT
2	Yum! Restaurants Asia Pte. Ltd vs. DDIT [2017] 397 ITR 639	DCIT	DIT	Addl. DIT

	(Delhi)			
3	CIT v. Soyuz Industrial Resources Ltd. [2015] 232 Taxman 414 (Delhi)	AO	CIT	JCIT
4	CIT *v.* Aquatic Remedies (P.) Ltd [2018] 406 ITR 545 (Bombay)	DCIT	CIT	Addl CIT
5	Ghanshyam K. Khabrani*v.* ACIT [2012] 346 ITR 443 (BOM)	DCIT	CIT	Addl CIT
6	DSJ Communication Ltd. *v.* DCIT [2014] 41 taxmann.com 151 (Bombay)	DCIT	CIT	Addl. CIT
7	CIT vs. Gee Kay Finance & Leasing Co. Ltd ITA 935/2009 dated 08.02.2018	DCIT	No approv al	CIT
8	Dhadda Exports *v.* ITO [2015] 377 ITR 347 (Rajasthan)	ITO	JCIT	CIT
9	Reliable Finhold Ltd. *v.* Union of India [2014] 369 ITR 419 (Allahabad)	ITO	-	CIT
10	ITO v. Bhavesh Kumar [2011] 140 TTJ 257 (Agra)	ACIT	JCIT	CCIT / CIT

16.2 It is seen that in the case of CIT vs. SPL's Siddhartha Ltd [2012] 345 ITR 223 (Delhi), wherein approval was taken by the AO from superior authority i.e.

CIT, whereas the under the statutory provision, approval was to be taken from JCIT/Addl CIT, it was held that notice issued u/s 148 of the Act is invalid. The relevant finding of the Hon'ble High Court is as under:

> ***7.*** *Section 116 of the Act also defines the Income Tax Authorities as different and distinct Authorities. Such different and distinct authorities have to exercise their powers in accordance with law as per the powers given to them in specified circumstances. If powers conferred on a particular authority are arrogated by other authority without mandate of law, it will create chaos in the administration of law and hierarchy of administration will mean nothing. Satisfaction of one authority cannot be substituted by the satisfaction of the other authority. It is trite that when a statute requires, a thing to be done in a certain manner, it shall be done in that manner alone and the Court would not expect its being done in some other manner. It was so held in the following decisions:*
>
> *(i) CIT v. Naveen Khanna (dated 18.11.2009 in IT Appeal No. 21 of 2009 (DHC).*
>
> *(ii) State of Bihar v. J.A.C. Saldanna AIR 1980 SC 326.*
>
> *(iii) State of Gujarat v. ShantilalMangaldas AIR 1969 SCN 634.*
>
> ***8.*** *Thus, if authority is given expressly by affirmative words upon a defined condition, the expression of that*

condition excludes the doing of the Act authorised under other circumstances than those as defined. It is also established principle of law that if a particular authority has been designated to record his/her satisfaction on any particular issue, then it is that authority alone who should apply his/her independent mind to record his/her satisfaction and further mandatory condition is that the satisfaction recorded should be "independent" and not "borrowed" or "dictated" satisfaction. Law in this regard is now sell-settled. In SheoNarain Jaiswal v. ITO [1989] 176 ITR 352/45 Taxman 213 (Pat.), it was held:

"Where the Assessing Officer does not himself exercise his jurisdiction under Section 147 but merely acts at the behest of any superior authority, it must be held that assumption of jurisdiction was bad for non-satisfaction of the condition precedent."

9. *The Apex Court in the case of Anirudh Sinhji Karan Sinhji Jadeja v. State of Gujarat [1995] 5 SCC 302 has held that if a statutory authority has been vested with jurisdiction, he has to exercise it according to its own discretion. If discretion is exercised under the direction or in compliance with some higher authorities instruction, then it will be a case of failure to exercise discretion altogether.*

10. *We are, therefore, of the opinion that the Tribunal has rightly decided the legal aspect, keeping in view well-established principles of law laid down in catena of judgments including that of the Supreme Court."*

16.3 In the case of CIT vs. **Soyuz Industrial Resources Ltd. reported in** [2015] 232 Taxman 414 (Delhi), the jurisdictional High Court has held as under:

"8. *The Revenue's argument seems plausible and even logical because the Commissioner or a Chief Commissioner is unarguably ranked higher in authority than a Joint Commissioner. Yet at the same time, this Court has to give effect to plain words of the statute which unambiguously states that the competent authority in such cases is the Joint Commissioner (and not the Chief Commissioner or the Principal Commissioner). The Revenue's submissions that all such cases, are covered under proviso to Section 147(1), the competent authority for prior approval would be four superior officers, renders Section 151(2) superfluous. If anything the Court is clear that it is not its job to render, in the process of interpretation, an entire provision academic or inoperative. This court is of the opinion that accepting the Revenue's position would result in that consequence. The Court also invokes the principle enunciated by the Privy Council in Nazir Ahmad v. Emperor AIR 1936 PC 253 : that if*

the statute mandates that something be done in a particular manner, should be in that manner or not at all. In this case, since the original assessment was completed "other than" the eventualities contemplated in Section 151(1), i.e. it was processed under Section 143(1). Thus, clearly Section 151(2) applied."

16.4 Aforesaid two judgments were subsequently followed in the case of **Yum Restaurants Asia Pte Ltd vs. DDIT reported in [2017] 397 ITR 639 (Delhi)**, wherein it was held as under:

8. *The above submission cannot be accepted. Where the original assessment is processed under section 143(1) of the Act, and the reopening is sought to be done after the expiry of four years from the end of the relevant assessment year, the mandatory requirement under section 151(2) of the Act is that the approval for the reopening of the assessment should be by an officer of the rank of the Joint Commissioner (in this case, the Addl. DIT) and not other officer including a superior officer….*

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11. *In view of the clear position in law, the court has no hesitation in concluding that in the present case, the mandatory requirement under section 151(2) of the Act, as it stood at the relevant time, has not been fulfilled and therefore, the reopening of the assessment for the*

assessment year 2005-06 by the impugned notice is bad in law.

16.5 Therefore, now the issue is squarely covered in favour of the assessee as for reopening of the assessment for the AY 2003-04 and 2004-05 the sanction has been taken from the learned Addl. CIT instead of CIT, as such sanction granted for assumption of jurisdiction is not in accordance with the provisions of section 151 of the Act. Hence, respectfully following the decision of the honourable Delhi High Court, we hold that the notice issued by the AO u/s 148 of the Act for the AY 2003-04 and 2004-05 is bad in law on this ground also.

17. Since we have already quashed the assessment being without jurisdiction under section 147 on the ground that approval granted is mechanical and also for the AY 2003-04 and 2004-05, even the so called approval is not from the competent authority, therefore, other grounds raised by the assessee challenging the assumption of jurisdiction as well as the merits of additions have become purely academic.

18. Accordingly, appeals of the assessee are allowed.

Order pronounced in the open Court on 08/03/2021

Sd/-	Sd/-
(G.S. PANNU)	(AMIT SHUKLA)
VICE PRESIDENT	JUDICIAL MEMBER

Dated: 08/03/2021

*Kavita Arora

Copy to

1.	The appellant
2.	The respondent
3.	CIT(A) concerned
4.	CIT concerned
5.	D.R. ITAT 'SMC-2' Bench, Delhi
6.	Guard File.

// BY Order //

Assistant Registrar, ITAT Delhi Benches :
Delhi.