IN THE INCOME TAX APPELLATE TRIBUNAL, 'B' BENCH MUMBAI

BEFORE: SHRI M.BALAGANESH, ACCOUNTANT MEMBER
&
SHRI RAVISH SOOD, JUDICIAL MEMBER

ITA No.2930/Mum/2019
(**Assessment Year :2007-08**)

ACIT CIR, 12(1)(2) Room No.128D, 1st Floor Aayakar Bhawan Churchgate, Mumbai – 400 020	Vs.	M/s. Bharti Axa Life Insurance Company Ltd., Unit No.601 & 602, 5th Floor, Raheja Titanium W.E. Highway, Goregaon East, Mumbai – 400 063
PAN/GIR No. AACCB7227P		
(Appellant)	..	**(Respondent**)

CO No.63/Mum/2020
(Arising out of ITA No.2930/Mum/2019)
(**Assessment Year :2007-08**)

M/s. Bharti Axa Life Insurance Company Ltd., Unit No.601 & 602, 5th Floor, Raheja Titanium W.E. Highway, Goregaon East, Mumbai – 400 063	Vs.	ACIT CIR, 12(1)(2) Room No.128D, 1st Floor Aayakar Bhawan Churchgate, Mumbai – 400 020
PAN/GIR No. AACCB7227P		
(Appellant)	..	**(Respondent**)

Revenue by	Shri Purushottam Tripuri
Assessee by	Shri Ajay Vohra & Shri Rohit Jain
Date of Hearing	**06/01/2021**
Date of Pronouncement	**31/03/2021**

आदेश / O R D E R

***PER M. BALAGANESH (A.M)*:**

This appeal in ITA No.2930/Mum/2019 & CO No.63/Mum/2020 for A.Y.2007-08 arise out of the order by the ld. Commissioner of Income Tax (Appeals)-55, Mumbai in appeal No.CIT(A)-55/DCIT-12(1)(2)/IT-247/2017-18 dated 06/02/2019 (ld. CIT(A) in short) against the order of assessment passed u/s.143(3)/144C(3) r.w.s. 147 of the Income Tax Act, 1961 (hereinafter referred to as Act) dated 31st March 2015 by the ld. Dy. Commissioner of Income Tax, Circle 12(1)(2), Mumbai (hereinafter referred to as ld. AO).

2. We find that the assessee in its cross objections had questioned the validity of reopening of assessment on several legal grounds. Since this is a preliminary issue on assumption of jurisdiction by the ld AO, we deem it fit and appropriate to address the grounds raised in the cross objections of the assessee first and simultaneously address the grounds raised by the revenue on merits.

3. The assessee has raised the following grounds of appeal in its cross objections :-

> *"1. That the Commissioner of Income Tax (Appeals) ['CIT(A)'] erred on facts and in law in upholding the validity of reassessment order dated 31.03.2015 passed by the assessing officer under section 143(3) read with section 147 of the Income Tax Act, 1961 ('the Act').*
>
> *1.1 That the CIT(A) erred on facts and in law in not appreciating that the reassessment order dated 31.03.2015 passed by the assessing officer is illegal and bad in law, being barred by limitation in terms of proviso to section 147 of the Act.*

1.2 That the CIT(A) erred on facts and in law in upholding validity of reassessment proceedings, despite the same having been initiated on the basis of mere change of opinion, without any new tangible material/ information coming to the possession of the assessing officer subsequent to completion of assessment under section 143(3) of the Act.

1.3 That the CIT(A) erred on facts and in law in not testing/ examining the validity of the reopening strictly on the basis of the reasons recorded, and instead, referring to/ relying upon finding not mentioned therein.

1.4 That the CIT(A) erred on facts and in law in not appreciating that reassessment is barred by limitation in terms of section 149 of the Act, since reasons recorded (that too, without copy of sanction obtained under section 151) were communicated much after the expiry of limitation of 6 years as prescribed in that section.

1.5 That the CIT(A) erred on facts and in law in not appreciating that the reassessment order was without jurisdiction, illegal and bad in law, since sanction obtained under section 151 was not provided to the appellant, much less within limitation prescribed in section 149 of the Act."

3.1. The revenue has raised the following grounds of appeal in its appeal:-

"1. "Whether on the facts and circumstances of the case, the Ld. CIT(A) was right in deleting the disallowance of the claim of loss of Rs. 8,42,56,839/- which was merely due to accounting changes made by transfer of funds from shareholders Account to Policy holders account and did not result in actual loss"

2. "Whether on the facts and circumstances of the case, the Ld. CIT(A) was right in relying on the judgment of Hon'ble ITAT in the case of HDFC Standard Life Insurance Company in granting relief on the issue of claim of loss of Rs.8,42,56,839/- ignoring the fact that the relevant decision of the Honorable ITAT has not been accepted by the department and an appeal is pending for disposal before the Honorable Bombay High Court."

3. "Whether on the facts and circumstances of the case, the Ld. C1T(A) was right in granting relief to the assessee on the issue of addition on account of negative reserves at Rs.2,74,91,000/- by holding the same to be in the nature of adjustment to the actuarial valuation ignoring the fact that there was no such adjustment but merely the addition of the assets in the nature of negative reserves which was not included in the valuation"

4. "Whether on the facts and circumstances of the case, the Ld. CIT(A) was right in relying on the judgment of Hon'ble Bombay High Court in the case of ICICI Prudential Life Insurance Company Ltd. and HDFC Life Insurance Company without appreciating that they are not applicable in the present case as there was no attempt on the part of the Assessing Officer to disturb the actuarial valuation given by actuary."

5. The appellant prays that the order of the Ld.CIT (A) on the grounds be set aside and that of the Assessing Officer be restored.

6. The appellant craves leave to amend or alter any grounds or add a new ground which may be necessary."

4. We have heard the rival submissions and perused the materials available on record. We find that the assessee was incorporated on 27.10.2005 under the Companies Act, 1956 to undertake and carry on the business of life insurance. The assessee had obtained a license from the Insurance Regulatory and Development Authority (IRDA) on 14.7.2006 for carrying on the business of life insurance. The assessee company commenced its commercial activities on 22.8.2006. The return of income for the Asst Year 2007-08 was filed by the assessee company on 31.10.2007 declaring total loss of Rs 80,42,56,839/-. The return of income was attached with the detailed notes thereon as under:-

"1. The taxability of an insurance company is governed by the provisions of section 44 of the Act read with First Schedule to the Act. The formats for presentation of insurance accounts have been amended by the IRDA (Actuarial Report and Abstract) Regulations, 2000 without a corresponding amendment to the First Schedule requiring the preparation of Policyholder's and Shareholder's Profit and Loss accounts distinctly. The earlier formats for presentation of accounts, aggregated the results relating to shareholders and policyholders and thus the surplus / deficit as computed included the impact of both. To give effect to the change in the presentation of the accounts of an insurance company as per IRDA Regulation, the results of the 'shareholders' accounts and the policyholders' accounts have been aggregated. The net deficit in the Revenue Account was Rs.80,42,56,839/-. In view of the above, assessee's profits and gains under section 44 of the Act read with Rule 2 of the First Schedule to the Act has been computed at a loss of Rs 80,42,56,839/- for the valuation year ended 31.3.2007.

2. Bharti Axa had incurred certain expenses prior to obtaining license to carry on life insurance business from the IRDA. These expenses are not disallowed while computing its taxable profit or loss under the Act since the income of an insurance company is computed as per section 44 read with the First Schedule to the Act and these provisions override the other computational provisions of the Act.

3. An Insurance Company is required to prepare its accounts as per the format prescribed by the IRDA and Schedule VI of the Companies Act, 1956 is not applicable to an Insurance Company. This e-return form contain format prescribed under Schedule VI of the Companies Act. Hence, the figures are clubbed for disclosure purpose, wherever required, further details have been provided to the extent possible given the peculiar features of Insurance Company financials and overriding legislation impacts (Such as details in the shareholders' account and the policyholders' account have been aggregated for disclosure purposes in this form since the form contain only Profit and Loss Account and does not have policyholders' account).

4.1. Hence, it could be seen that the return of income was prepared by the assessee company strictly in accordance with section 44 read with Rule 2 of the First Schedule to the Act, which requires the assessee engaged in life insurance business to determine taxable income on the basis of actuarial surplus in accordance with Insurance Act, 1938. During the course of original assessment proceedings, the ld AO had showcaused the assessee as to why the amount paid to Talisma Corporation Pvt Ltd and Indigo Systems & Technology Consulting India Private Limited for purchase of software and website development should not be treated as capital expenditure. In response to this query, the assessee had replied vide its letter dated 18.11.2010 (enclosed in pages 60 & 61 of the paper book filed before us) that income of the assessee is determined based on section 44 read with Rule 2 of First Schedule to the Act and that the said provision overrides other computational provisions such as capital gains , income from house property etc including provisions of section 28 to 43B dealing with computation of income under the head ' profits and gains of business or profession'. The assessee also placed reliance on the decision of Co-ordinate bench of Mumbai Tribunal in the case of Birla Sun

Life Insurance Company Limited reported in 2010-TIOL-535-ITAT-MUM , wherein, relying on the decision of Hon'ble Supreme Court in the case of Life Insurance Corporation of India Limited in 51 ITR 773 , it was interalia held that software expenses claimed by the assessee cannot be disallowed in the light of the special provisions having non obstante clause governing the insurance sector.

4.2. The original assessment was completed u/s 143(3) read with section 144C(3) of the Act on 30.12.2010 determining total loss at Rs. 73,28,08,306/- after making addition u/s 92CA(3) in respect of transfer pricing adjustment of Rs 7,14,48,533/-. In the said assessment order, there is a specific observation made by the ld AO that the income of the assessee life insurance company was determined in accordance with section 44 read with First Schedule to the Act.

4.3. Later this assessment was sought to be reopened by the ld AO vide issuance of notice u/s 148 of the Act on 29.3.2014 which was duly served on the assessee on 1.4.2014. This notice was admittedly issued beyond 4 years but within 6 years from the end of the relevant assessment year. The assessee filed a letter dated 22.4.2014 requesting the ld AO to consider the same as a return filed in response to notice u/s 148 of the Act and sought for copy of reasons recorded together with the approval from the competent authority in terms of section 151 of the Act. The ld AR before us submitted that the reasons recorded were furnished to the assessee by the ld AO only in part for reasons best known to the ld AO vide letter dated 13.2.2015 and copy of sanction / approval from the competent authority was not provided as sought for in the letter dated 22.4.2014. The assessee filed its objections to the reasons recorded for reopening vide letter dated 5.3.2015. The ld AO disposed of the

objections of the assessee by way of a separate order dated 5.3.2015 (i.e on the same day on which objections were received from assessee). The assessee filed separate letter dated 20.3.2015 filing its objections to the rebuttal order passed by the ld AO dated 5.3.2015. Thereafter, the ld AO proceeded to frame the re-assessment on 31.3.2015 by passing an order u/s 143(3) /144C(3) read with section 147 of the Act rejecting the objections filed by the assessee determining total income at Rs. 9,89,39,533/- by making the additions on account of computation of income as per surplus / deficit shown in Form -I as against section 44 of the Act and addition of negative reserves of Rs. 2,74,91,000/-.

4.4. We find that the ld CITA had dismissed the grounds raised by the assessee on the validity of reopening of assessment and assumption of jurisdiction by the ld AO thereon. However, the ld CITA had deleted the additions made on merits except the transfer pricing adjustment. The ld CITA specifically observed that the addition made on account of transfer pricing adjustment had emanated out of original assessment proceedings and was subject matter of appeal before this tribunal in an independent proceeding and hence no finding need to be given by him thereon.

4.5. Aggrieved by the aforesaid order of the ld CITA, the revenue is in appeal before us on merits of additions and assessee had preferred cross objections challenging the validity of reopening of assessment and assumption of jurisdiction by the ld AO.

4.6. We find that the reasons recorded by the ld AO as furnished to the assessee by the ld AO are as under :-

"Reassessment proceeding in your case has been initiated vide notice u/s 148 doted 29.03.2014, in compliance to this notice vide your Setter dated 22.04.2014 stated that original return filed u/s 139(1) for A.Y. 2007-08 is treated as return filed in response of notice u/s 148.

2. Further, you have requested to give reasons for reopening assessment u/s 148 vide your letter dated 22.04.2014. The reasons recorded for issuance of notice u/s 148 provided as under:

a. "The assessee M/s Bharti AXA Life Insurance Co, Ltd having PAN AACC87227P is assessed to tax in this charge. In this case return of income was e-filed on 31.10.2007 declaring total loss at Rs. 80,42,56,839/-. The assessment u/s 143(3) /144C (3) was passed on 30.12.2010 at loss of Rs.73,28,08,306/-.

b. On verification of records, it is noticed that the assessee has declared loss of Rs.80,42,56,839 in the return of income and carried it forward to set It off against profits for subsequent years. The assessee, being a life Insurance company has claimed that its income has been computed as per section 44 read with First schedule to the I.T.Act. 1961. In the assessment order, the profits and gains from insurance business as declared by the assessee have been accepted subject to an addition of Rs.7,14,48,533/- made in accordance with the order of the TPO.

c. In this connection, it is necessary to reproduce provisions of sections 44 and Rule 2 of the First Schedule as follows: Not withstanding anything to the contrary contained in the provisions of this Act.....shall be computed in accordance with the rules contained in the First Schedule.

d. Thus, the profits and gains of the insurance have to be determined in accordance with the surplus disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 in respect of the last inter-valuation period ending before the commencement of the assessment year.

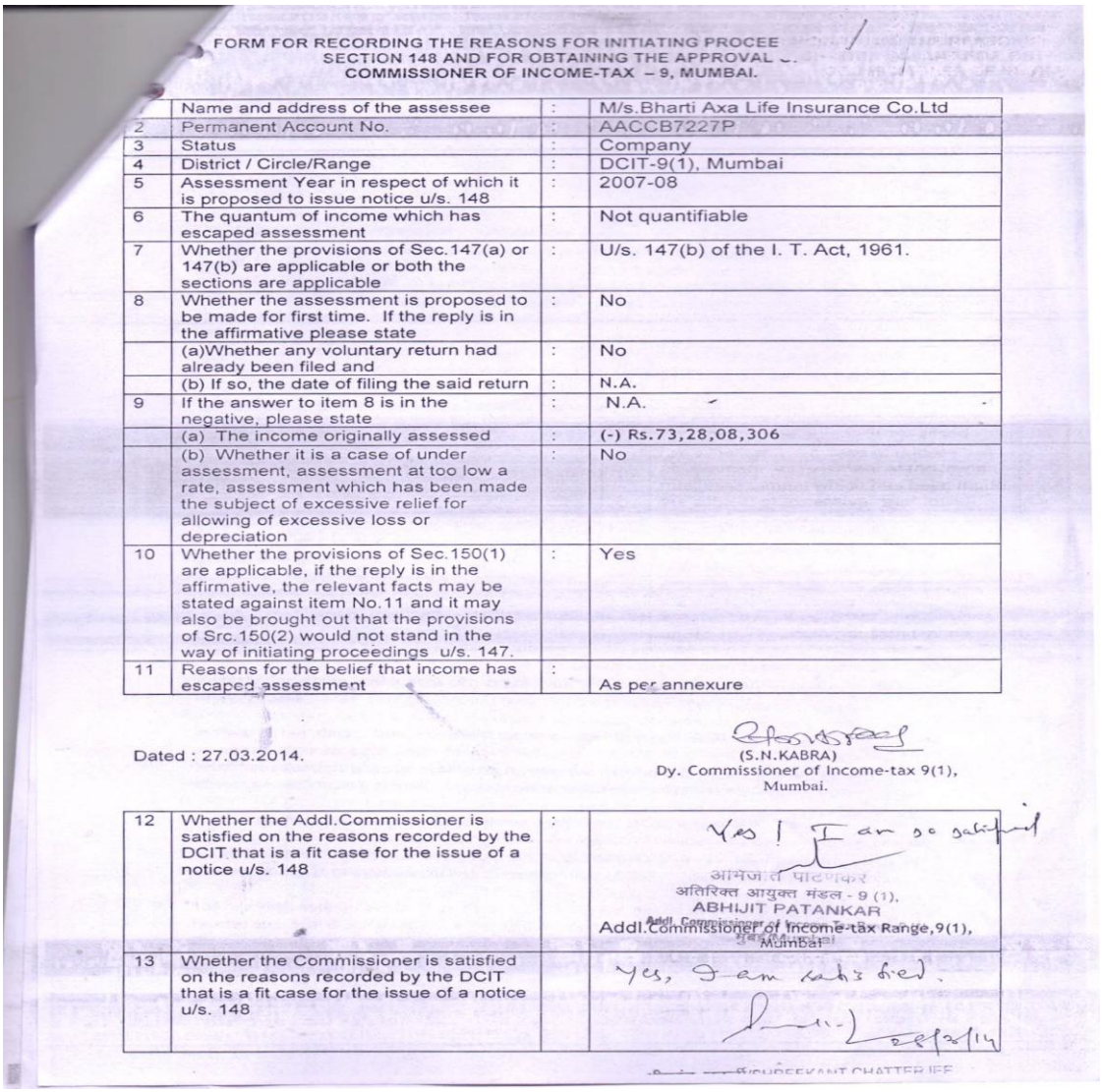
e. The assessee has in fact, not followed the above cited provision, it has simply picked up the figure of loss from its profit and loss account for the year ended March 31,2007 which is also termed as the shareholders' Account (Non-technical account). The loss has been arrived at as.....it can be seen that the loss has arisen only on account of transfer of funds from the shareholders account to the policyholders account has been shown by the assessee as its loss from the insurance business, which is against the provisions of section 44 read with Rule 2 of first schedule.

f. In view of the above, treatment of a mere transfer of funds from the shareholders' account as loss eligible to be carried forward was not correct. As the amount of surplus as per actuarial valuation is not available on record, the exact underassessment of income and tax effect cannot be determined. However same will be not less than Rs. One lakh."

3. The reasons for reopening have been provided to you in the lines of principle enumerated by the Hon'ble SC in the case of GKN Driveshaft (I) Ltd.

4. You are requested to file your objection if any within 05 days of receipt of this communication."

4.7. The ld DR at the time of hearing before us vide letter dated 6.1.2021 furnished the copy of complete reasons recorded for reopening the assessment together with the prescribed proforma in which approval in terms of section 151 of the Act was obtained from the superior officers. The full text of the reasons recorded for reopening the assessment and the statutory proforma for obtaining approval in terms of section 151 of the Act are reproduced hereunder for the sake of convenience :-



FORM FOR RECORDING THE REASONS FOR INITIATING PROCEE
SECTION 148 AND FOR OBTAINING THE APPROVAL
COMMISSIONER OF INCOME-TAX – 9, MUMBAI.

1	Name and address of the assessee	:	M/s.Bharti Axa Life Insurance Co.Ltd
2	Permanent Account No.	:	AACCB7227P
3	Status	:	Company
4	District / Circle/Range	:	DCIT-9(1), Mumbai
5	Assessment Year in respect of which it is proposed to issue notice u/s. 148	:	2007-08
6	The quantum of income which has escaped assessment	:	Not quantifiable
7	Whether the provisions of Sec.147(a) or 147(b) are applicable or both the sections are applicable	:	U/s. 147(b) of the I. T. Act, 1961.
8	Whether the assessment is proposed to be made for first time. If the reply is in the affirmative please state	:	No
	(a)Whether any voluntary return had already been filed and	:	No
	(b) If so, the date of filing the said return	:	N.A.
9	If the answer to item 8 is in the negative, please state	:	N.A.
	(a) The income originally assessed	:	(-) Rs.73,28,08,306
	(b) Whether it is a case of under assessment, assessment at too low a rate, assessment which has been made the subject of excessive relief for allowing of excessive loss or depreciation	:	No
10	Whether the provisions of Sec.150(1) are applicable, if the reply is in the affirmative, the relevant facts may be stated against item No.11 and it may also be brought out that the provisions of Src.150(2) would not stand in the way of initiating proceedings u/s. 147.	:	Yes
11	Reasons for the belief that income has escaped assessment	:	As per annexure

Dated : 27.03.2014.

(S.N.KABRA)
Dy. Commissioner of Income-tax 9(1),
Mumbai.

12	Whether the Addl.Commissioner is satisfied on the reasons recorded by the DCIT that is a fit case for the issue of a notice u/s. 148	:	Yes I am so satisfied अभिजीत पाटणकर अतिरिक्त आयुक्त मंडल - 9 (1), ABHIJIT PATANKAR Addl.Commissioner of Income-tax Range,9(1), Mumbai
13	Whether the Commissioner is satisfied on the reasons recorded by the DCIT that is a fit case for the issue of a notice u/s. 148		Yes, I am satisfied. 28/3/14

SUDEEPAK CHATTERJEE

1. The assessee M/s Bharti AXA Life Insurance Co,. Ltd having PAN AACCB7227P is assessed to tax in this charge. In this case return of income was e-filed on 31.10.2007 declaring total loss at Rs. 80,42,56,839/-. The assessment u/s 143(3) /144C (3) was passed on 30.12,2010 at loss of Rs.73,28,08,306/-.

2. On verification of records it is noticed that the assessee has declared loss of Rs.80,42,56,839 in the return of income and carried it forward to set it off against profits for subsequent years. The assessee, being a life insurance company has claimed that its income has been computed as per section 44 read with First schedule to the I.T.Act, 1961. In the assessment order, the profits and gains from insurance business as declared by the assessee have been accepted subject to an addition of Rs.7,14,48,533/- made in accordance with the order of the TPO.

3. In this connection, it is necessary to reproduce provisions of sections 44 and Rule 2 of the First Schedule as follows:

Not withstanding anything to the contrary contained in the provisions of this Act.....shall be computed in accordance with the rules contained in the First Schedule.

Thus, the profits and gains of the insurance have to be determined in accordance with the surplus disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938 in respect of the last inter-valuation period ending before the commencement of the assessment year.

The assessee has in fact, not followed the above cited provision, it has simply picked up the figure of loss from its profit and loss account for the year ended March 31, 2007 which is also termed as the shareholders' Account (Non-technical account). The loss has been arrived at as....,it can be seen that the loss has arisen only on account of transfer of funds from the shareholders account to the policyholders account has been shown by the assessee as its loss from the insurance business, which is against the provisions of section 44 read with Rule 2 of first schedule.

In view of the above, treatment of a mere transfer of funds from the shareholders' account as loss eligible to Le carried forward was not correct. As the amount of surplus as per actuarial valuation is not available on record, the exact underassessment of income and tax effect cannot be determined. However same will be not less than Rs. One lakh.

4. Therefore, I have reason to believe that assessee's income is escaped amount within the meaning of section 147 of the IT Act 961 by the reason of omission of the part of the assessee by way of disclosing the income as per aforesaid provisions of the I.T. Act 1961. Therefore I am satisfied that this case is fit case to issue notice u/s148 r.w.s.147 of the I.T.Act, 1961.

5. The relevant assessment year being A.Y. 2007-08, the period of re-opening is within 6 years. Hence, approval & satisfaction of the Commissioner of Income tax is sought for re-opening the case as per provisions of section 151(1) of the I.T.Act.

4.8. The various contentions raised by the ld AR before us could be summarised as under:-

a) The issue of notice u/s 148 of the Act is time barred as per first proviso to section 147 of the Act.

b) Reasons recorded for reopening the assessment to be furnished by the ld AO within a reasonable time. In the instant case, the reasons for reopening were communicated almost after 10 months.

c) The reopening of assessment is merely on the basis of mere change of opinion which is against the well settled principles laid down in number of judicial precedents.

d) There is no new material on record for reopening the assessment and thus there is no reason to believe that income had escaped assessment.

e) The assessment cannot be reopened merely on the basis of audit objection raised by revenue's internal audit team. Reliance in this regard was placed on the decisions of *Hon'ble Jurisdictional High Court in the case of DCIT vs DRM Enterprises reported in 230 Taxman 61 (Bom) and CIT vs Shankardas B Pahajani reported in 93 taxmann.com 248 (Bom).*

f) Only extract of reasons were provided to the assessee by the ld AO vide letter dated 13.2.2015 which was incomplete. This itself makes the entire reassessment proceedings as bad in law. Reliance in this regard was placed on the following decisions :-

> *(i) Decision of Hon'ble Jurisdictional High Court in the case of PCIT vs Shodiman Investments (P) Ltd reported in 93 taxmann.com 153 (Bom)*, wherein it was held that partial furnishing of reasons will render the reopening invalid and bad.
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> *(ii) Decision of Hon'ble Delhi High Court in the case of Sabh Infrastructure Ltd vs ACIT reported in 398 ITR 198 (Del)* wherein

the Court at Para 19 of the order, laid down the following guidelines that ought to be followed by the Department in case of reopening of assessments:-

(*i*)	*while communicating the reasons for reopening the assessment, the copy of the standard form used by the Assessing Officer for obtaining the approval of the Superior Officer should itself be provided to the assessee. This would contain the comment or endorsement of the Superior Officer with his name, designation and date. In other words, merely stating the reasons in a letter addressed by the Assessing Officer to the assessee is to be avoided ;*
(*ii*)	*the reasons to believe ought to spell out all the reasons and grounds available with the Assessing Officer for reopening the assessment—especially in those cases where the first proviso to section 147 is attracted. The reasons to believe ought to also paraphrase any investigation report which may form the basis of the reasons and any enquiry conducted by the Assessing Officer on the same and if so, the conclusions thereof ;*
(*iii*)	*where the reasons make a reference to another document, whether as a letter or report, such document and/or relevant portions of such report should be enclosed along with the reasons ;*
(*iv*)	*the exercise of considering the assessee's objections to the reopening of assessment is not a mechanical ritual. It is a quasi-judicial function. The order disposing of the objections should deal with each objection and give proper reasons for the conclusion. No attempt should be made to add to the reasons for reopening of the assessment beyond what has already been disclosed.*

Moreover, in the said extract of reasons recorded as submitted to the assessee by the ld AO, there was no mention of the failure on the part of the assessee in furnishing full and true information necessary for the purpose of assessment, thereby violating the statutory requirement as mandated in the proviso to section 147 of the Act. Reliance in this regard was placed on the decision of *Hon'ble Jurisdictional High Court in the case of Hindustan Lever Ltd vs R B Wadkar reported in 268 ITR 332 (Bom).* It is pertinent to note that the full text of the reasons recorded for reopening the assessment were furnished by the ld DR at the time of hearing before us for the first time to the assessee. It was also pointed out by the ld AR by drawing specific reference to the pages 2,3, 48 to 61 of the paper book filed before us that the ld AO had duly examined the computation of income of the assessee engaged in life insurance business

to be in consonance with provisions of section 44 read with First Schedule to the Act (which is a self contained code by itself having non obstante clause) in the original assessment proceedings. Reliance in this regard was placed on the decision of the *Hon'ble Jurisdictional High Court in the case of Life Insurance Corporation of India vs CIT reported in 119 ITR 900 (Bom)*. The main reason adduced in the reasons recorded by the ld AO is that the assessee had failed to furnish the actuarial valuation certificate which was also vehemently argued by the ld DR as a failure on the part of the assessee. To this, the ld AR assailed the argument that the assessee failing to produce the valuation certificate is of no consequence, since it has no bearing on the computation of taxable income of the assessee under the provisions of the Act. The ld AR further stated that in terms of IRDA Regulations, 2000, which provides for specific rules for presentation of insurance accounts as prescribed in IRDA (Preparation of Financial Statements and Auditor's Report of Insurance Companies – Rule 3 read with Rule 5 of Schedule A) Regulations, 2002, every insurance company is mandated to prepare its financial statements after taking into consideration the actuarial valuation. The ld AR submitted that the entire audited financial accounts had been prepared after taking into consideration the actuarial valuation and accordingly, the allegation of absence of the valuation report was stated to be incorrect.

g) Sanction obtained u/s 151 of the Act was never provided to the assessee by the ld AO despite being sought for in writing by the assessee. This was provided by the ld DR at the time of hearing before us and assessee had filed rebuttal to the same by stating that since the assessment has been reopened beyond 4 years from the end of the relevant assessment year, satisfaction is to be obtained only from ld PCIT. In the instant case, satisfaction has been obtained from the Additional CIT in addition to the approval of the ld PCIT, thereby the said approval

becomes invalid in terms of section 151 of the Act. Reliance in this regard was placed on the decision of *Hon'ble Jurisdictional High Court in the case of Ghanshyam K Khabrani vs ACIT reported in 346 ITR 443 (Bom)*. It was argued that grant of approval by an officer other than the one authorized u/s 151 of the Act including a superior officer, is a jurisdictional defect in the issue of notice u/s 148 of the Act. Reliance in this regard was placed on the decisions of *Hon'ble Delhi High Court in the case of CIT vs SPL's Siddhartha LTd reported in 345 ITR 223 (Del) and CIT vs Soyuz Industrial Resources Ltd reported in 58 taxmann.com 336 (Del)*. It was argued that it is trite law that if the law requires an act to be done in a particular manner, more particularly acts conferring jurisdiction like the present one, then, such act has to be done in that manner alone. Section 151 of the Act clearly demarcates the situation in which approval is required from different authorities and in the present case, authorization was required to be taken from the ld PCIT alone. The ld Additional CIT had no locus standi in the present case and was therefore, not competent to grant any satisfaction. The action of the ld Additional CIT, therefore, in granting sanction and then forwarding the same to ld PCIT, vitiated the entire legal process of obtaining sanction from ld PCIT alone, as mandated by section 151 of the Act. Reliance in this regard was placed on the following decisions:-

> *(i) Decision of Hon'ble Jurisdictional High Court in the case of CIT vs Aquatic Remedies (P) Ltd reported in 406 ITR 545 (Bom) - Special Leave Petition of the revenue was dismissed by the Hon'ble Apex Court in 269 Taxman 195 (SC).*
>
> *(ii) Decision of Hon'ble Delhi High Court in the case of Yum Restaurants Asia Pte Ltd vs DDIT reported in 397 ITR 665 (Del).*

h) Approval u/s 151 of the Act by the ld PCIT and ld Additional CIT had been granted in the instant case without due application of mind as in the prescribed proforma, they had just stated that "Yes I am satisfied". This

tantamounts to improper sanction obtained and does not amount to judicial satisfaction after proper application of mind. It was argued by the ld AR that the ld PCIT had cryptically recorded his approval, without any application of mind. The ld PCIT had failed to even question the nature of information that was purportedly in the possession of the ld AO, on the basis of which he formed such reason to believe. Reliance in this regard was placed on the following decisions :-

> *(i) Decision of Hon'ble Supreme Court in the case of Chhugamal Rajpal vs S.P.Chaliha reported in 79 ITR 603 (SC) ;*
> *(ii) Decision of Hon'ble Delhi High Court in the case of United Electrical Co. Pvt Ltd vs CIT reported in 258 ITR 317 (Del);*
> *(iii) Decision of Hon'ble Madhya Pradesh High Court in the case of CIT vs M/s S Goyanka Lime and Chemicals Ltd reported in 231 Taxman 73 (MP) – Special Leave Petition of the revenue was dismissed by the Hon'ble Apex Court reported in 237 Taxman 378 (SC) ;*
> *(iv) Decision of Hon'ble Calcutta High Court in the case of S P Agarwalla alias Sukhdeo vs ITO reported in 140 ITR 1010 (Cal) ;*

4.9. From the perusal of the reasons recorded for reopening the assessment, as furnished to the assessee, it is a fact that the said reasons communicated to the assessee were incomplete and no where in the reasons recorded, the failure on the part of the assessee to furnish full and true information necessary for the purpose of assessment was mentioned. When this was put to ld DR, he argued that the full text of the reasons recorded would be available in the assessment folder and that whatever is relevant to be given to the assessee had been duly furnished by the ld AO. We find that the ld DR had duly furnished the full text of the reasons recorded for reopening the assessment which was also duly placed before the competent authority while seeking approval in terms of section 151 of the Act. In the said full text of reasons, omission on the part of the assessee was mentioned as a general and vague statement without specifically pointing out as to what was the clear omission or failure on the part of the assessee in not furnishing the

requisite information that was necessary for the assessment. Infact the reasons recorded starts with "On verification of records …… ". This statement itself very clearly proves that the entire information was very much available with the ld AO in the records which alone enabled him on bare perusal, to come to a conclusion that income of the assessee had escaped assessment. Hence in this scenario, how failure or omission could be attributed on the part of the assessee. Once there is no failure on the part of the assessee in providing requisite information, then the basic premise on which the entire reassessment was framed by recording reasons, vanishes in thin air. This makes the entire reassessment proceedings void abinitio. Moreover, we also find that the ld AO had triggered the reopening only based on verification of records. This goes to prove beyond doubt that there was absolutely no tangible material available with the ld AO to form a belief that income of the assessee had escaped assessment. On this count also, the reopening of the assessment deserves to be declared as bad in law.

4.9.1. We find that the assessee upto the completion of reassessment and first appellate proceedings thereon was supplied only with the extract of reasons recorded which was admittedly incomplete as narrated above. Even the said extract of reasons recorded were supplied to the assessee without furnishing the sanction obtained in terms of section 151 of the Act, though it was specifically sought for in writing by the assessee. In this regard, we find that the ld AR rightly placed reliance on the decision of *Hon'ble Jurisdictional High Court in the case of PCIT vs Shodiman Investments (P) Ltd reported in 93 taxmann.com 153 (Bom)*, wherein it was held as under:-

> ***9.*** *We find that at the time of re-opening of the Assessment, the Assessing Officer did not provide the reasons recorded in support of the re-opening notice in its entirety, to the Respondent-Assessee. This was contrary to and in defiance of the*

decision of the Apex Court in GKN Driveshafts v. ITO [2002] 125 Taxman 963/[2003] 259 ITR 19. The entire objects of reasons for re- opening notice as recorded being made available to an Assessee, is to enable the Assessing Officer to have a second look at his reasons recorded before he proceeds to assess the income, which according to him, has escaped Assessment. In fact, non furnishing of reasons would make an Assessment Order bad as held by this Court in CIT v. Videsh Sanchar Nigam Ltd. [2012] 21 taxmann.com 53/340 ITR 66. In fact, partial furnishing of reasons will also necessarily meet the same fate i.e. render the Assessment Order on re- opening notice bad. Therefore, on the above ground itself, the question as proposed does not give rise to any substantial question of law as it is covered by the decision of this Court in Videsh Sanchar Nigam Ltd.'s, case (supra) against the Revenue in the present facts.

10. *Besides, the submissions made on behalf of the Revenue that in view of the decision of the Apex Court in Rajesh Jhaveri Stock Brokers (P.) Ltd.'s, case (supra), the Assessing Officer is entitled to re-open the Assessment for whatever reasons and the same cannot be subjected to jurisdictional review, is preposterous. First of all, taking out a word or sentence from the entire judgment, divorced from the context and relying upon it, is not permissible (see CIT v. Sun Engg. Works (P.) Ltd. [1992] 64 Taxman 442/198 ITR 297 (SC)). It may be useful to reproduce the context in which the sentence in Rajesh Jhaveri Stock Brokers (P.) Ltd.'s case (supra) being relied upon by the Revenue to support its case, was made. The context, is as under:—*

> *"The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitutions. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed to confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under Section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices."*

Therefore, the sentence being relied upon was made in the context of the change in law that under the amended provision 'reason to believe' that in case of escaped assessment, is sufficient to re-open the assessment. This unlike the earlier provision of Section 147(a) of the Act which required two conditions i.e. failure to disclose fully and truly all facts necessary for assessment and reason to believe that income has escaped assessment. Thus, the observations being relied upon must be read in the context in which it was rendered. On so reading the submission, will not survive.

11. *Further, a reading of the entire decision, it is clear that the reasonable belief on the basis of tangible material could be, prima facie, formed to conclude that income chargeable to tax has escaped assessment. Mr. Mohanty, learned Counsel is ignoring the fact that the words 'whatever reasons' is qualified by the words 'having reasons to believe that income has escaped assessment'. The words whatever reasons only means any tangible material which would on application to the facts on record lead to reasonable belief that income chargeable to tax has escaped assessment. This material which forms the basis, is not restricted, but the material must lead to the formation of reason to believe that income chargeable to tax has escaped Assessment. Mere obtaining of material by itself does not result in reason to believe that income has escaped assessment. In fact, this would be evident from the fact that in para 16 of the decision in Rajesh Jhaveri Stock Brokers (P.) Ltd.'s, case (supra), it is observed that the word 'reason' in the .... 'reason to believe' would mean cause or justification. Therefore, it can only be the basis of forming the belief However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. Otherwise, no meaning is being given to the words 'to believe' as found in Section 147 of the Act. Therefore, the words 'whatever reasons' in Rajesh Jhaveri Stock Brokers (P.) Ltd.'s, case (supra), only means whatever the material, the reasons recorded must indicate the reasons to believe that income has escaped assessment. This is so as reasons as recorded alone give the Assessing Officer power to re-open an assessment, if it reveals/indicate, reasons to believe that income chargeable to tax has escaped assessment.*

12. *The re-opening of an Assessment is an exercise of extra-ordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the material (whatever reasons) which form the basis of re-opening Assessment and its reasons which would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped Assessment. This is a settled position as observed by the Supreme Court in S. Narayanappa v. CIT [(1967] 63 ITR 219, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in ITO v. LakhmaniMerwal Das [(1976] 103 ITR 437 had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.*

13. *In this case, the reasons as made available to the Respondent- Assessee as produced before the Tribunal merely indicates information received from the DIT (Investigation) about a particular entity, entering into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does not indicate the amount which according to the*

Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.

14. *Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a re-opening notice on the basis of intimation regarding re-opening notice from the DDIT (Inv.) This is clearly in breach of the settled position in law that re- opening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.*

15. *Therefore, in the above facts, the view taken by the impugned order of the Tribunal cannot be found fault with. This view of the Tribunal is in accordance with the settled position in law.*

16. *Therefore, the question as framed does not give rise to any substantial question of law. Thus, not entertained.*

17. *Accordingly, Appeal dismissed. No order as to costs.*

In the instant case, admittedly it has been proved beyond doubt that the assessee was provided only with incomplete reasons upto the stage of coming to this tribunal in the re-assessment proceedings. Hence respectfully following the aforesaid decision of Hon'ble Jurisdictional High Court, we have no hesitation in holding that the entire reassessment becomes bad in law.

4.9.2. We further find that the sanction obtained in terms of section 151 of the Act was not provided to the assessee along with the reasons recorded despite assessee asking for the same in writing before the ld AO. This, in our considered opinion, is against the settled principles of natural justice as reopening of an assessment is an extraordinary power available to the ld AO and it should not be done in a cavalier manner. That is why the legislature in its wisdom had put lot of restrictions by imposing conditions for seeking approval and sanction from a superior officer in terms of section 151 of the Act. Hence the said approval obtained from competent authority ought to have been furnished by the ld AO along with the reasons recorded for reopening the assessment to

the assessee. Moreover, in the instant case, the approval of both Additional CIT as well as ld PCIT had been obtained by the ld AO in terms of section 151 of the Act as is evident in the statutory proforma enclosed by the ld DR before us. Since the reopening in the instant case had been done beyond 4 years from the end of the relevant assessment year, approval and sanction ought to have been granted only by ld PCIT alone. Hence this is a case where satisfaction of ld Additional CIT is also obtained in addition to the approval of ld PCIT, the said approval becomes invalid in terms of section 151 of the Act. It is trite law that if the law requires an act to be done in a particular manner, more particularly acts conferring jurisdiction like the present one, then, such act has to be done in that manner alone and the same cannot be compromised in any manner whatsoever. On perusal of the standard proforma for seeking approval in terms of section 151 of the Act, the legislature in its wisdom had prescribed such proforma, clearly demarcating and defining the circumstances under which the approval had to be granted by ld Additional CIT and circumstances under which the approval had to be granted by the ld PCIT. The said defined circumstances cannot be rendered otiose by obtaining approval from both Additional CIT as well as ld PCIT by the ld AO, as was done in the present case before us.

4.9.2.1. Reliance in this regard was rightly placed by the ld AR on the decision of *Hon'ble Jurisdictional High Court in the case of Ghanshyam K Khabrani vs ACIT reported in 346 ITR 443 (Bom)* wherein it was held that :-

> ***6.*** *The second ground upon which the reopening is sought to be challenged is that the mandatory requirement of election 151(2) has not been fulfilled. Section 151 requires a sanction to be taken for the issuance of a notice under Section 148 in certain cases. In the present case, an assessment had not been made under Section 143(3) or Section 147 for A.Y. 2004-05. Hence, under sub-section 2 of Section 151,*

no notice can be issued under Section 148 by an Assessing officer who is below the rank of Joint Commissioner after the expiry of 4 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. The expression "Joint Commissioner" is defined in Section 2(28C) to mean a person appointed to be a Joint Commissioner of Income Tax or an Additional Commissioner of Income Tax under section 117(1). In the present case, the record before the Court indicate that the Assessing Officer submitted a proposal on 28 March 2011 to the CIT(1) Thane through the Additional Commissioner of Income-Tax Range (1) Thane. On 28 March 2011, the Additional CIT forwarded the proposal to the CIT and after recording a gist of the communication of the Assessing Officer stated that :

> *"As requested by the A.O. Necessary approval for issue of notice u/s. 148 may kindly be granted in case, if approved."*

On this a communication was issued on 29 March 2011 from the office of the CIT(1) conveying approval to the proposal submitted by the Assessing officer. There is merit in the contention raised on behalf of the Assessee that the requirement of Section 151(2) could have only been fulfilled by the satisfaction of the Joint Commissioner that this is a fit case for the issuance of a notice under Section 148. Section 151(2) mandates that the satisfaction has to be of the Joint Commissioner. That expression has a distinct meaning by virtue of the definition infection 2(28C). The Commissioner-of Income Tax is not a Joint Commissioner within the meaning of Section 2(28C). In the present case, the Additional Commissioner of Income Tax forwarded the proposal submitted by the Assessing Officer to the Commissioner of Income Tax approval which has been granted is not by the Additional Commissioner of Income Tax but by the Commissioner of Income Tax. 'There is no statutory provision hereunder which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner. In a similar situation the Delhi High Court in CIT v. SPL'S Siddhartha Ltd. [2012] 204 Taxman 115/17 taxmann.com 138 (Delhi) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court.

***7.** In view of the findings which we have recorded on submissions (i), (ii) and (iv), it is not necessary for the Court to consider submission (iii) which has been urged on behalf of the Assessee. Once the Court has come to the conclusion that there was no compliance of the mandatory requirements of Section 147 and 151(2), the notice reopening the assessment cannot be sustained in law.*

4.9.2.2. Reliance in this regard was rightly placed by the ld AR on the decision of Hon'ble Jurisdictional High Court in the case of CIT vs Aquatic

Remedies P Ltd reported in 406 ITR 545 (Bom) wherein it was held that :-

> ***6.*** *Before considering the rival submissions, it is necessary to reproduce the relevant extracts from 'FORM FOR RECORDING REASONS FOR INITIATING PROCEEDINGS U/S. 148 OF THE ACT, AND FOR OBTAINING APPROVAL OF THE COMMISSIONER OF INCOME TAX, CENTRAL -V, MUMBAI' tendered across the Bar. The Form itself indicates that the Assessing Office had submitted the proposal to obtain approval of the Commissioner of Income Tax before issuing the notice dated 25th March, 2011. The remark by Additional Commissioner of Income Tax on the form, is as under:—*
>
> *"12. Remark of the Addl. CIT: Yes. I am satisfied. It is a fit case to re-open the case u/s. 147 of the Act. The notice u/s. 148 may be issued subject to CIT approval.*
>
> *Sd/-*
>
> *(VIRENDRA OJHA)*
>
> *Addl. Commissioner of Income Tax,*
>
> *Central Range 10, Mumbai."*
>
> *It, thereafter, was examined by the Commissioner of Income Tax who expressed his approval in the following form:*
>
> *"13. Remark of the CIT*
>
> *Yes, I am satisfied that in view of facts, … as indicated in the Annexure, it is a fit case for issue of notice u/s. 148 of the I.T. Act.*
>
> *Sd/-*
>
> *(H.C.JAIN)*
>
> *Commissioner of Income Tax,*
>
> *Central IV, Mumbai."*
>
> ***7.*** *Further, the learned Counsel for the parties also produce before us a letter dated 24th March, 2011 addressed by the Additional Commissioner of Income Tax to the Commissioner of Income Tax and letter dated 25th March, 2011 from the office of the Commissioner of Income Tax to the Additional Commissioner of Income Tax. The letter dated 24th March, 2011 records the view of Additional Commissioner of Income Tax that he agrees with the reasons given by the Assessing Officer to issue the re-opening notice and seeks permission of the Commissioner of Income Tax to enable the Assessing Officer to issue the re-opening notice for Assessment Year 2004-05. While, letter dated 25th March, 2011 from the office of the Commissioner of Income Tax, addressed to the Additional Commissioner of Income Tax states that he has granted approval to the Assessing Officer to issue a notice under Section 148 of the Act. All the three*

communications, referred to herein above in paragraphs 6 and in this paragraph, are taken on record and marked A, B & C for identification.

8. *Mr. Tejveer Singh, learned Counsel appearing for the Revenue submits that the Additional Commissioner of Income Tax is the jurisdictional Officer to grant sanction under Section 151 (2) of the Act. This, Officer he, submits has recorded his satisfaction with the reasons recorded by the Assessing Officer to issue the re-opening notice. Thus, the requirement of Section 151 (2) of the Act is satisfied inasmuch as the Additional Commissioner of Income Tax has found it to be a fit case for issuing of notice. It is further submitted that even though, the approval was obtained from the Commissioner of Income Tax for issuance of the notice, it does not take away the fact that the Additional Commissioner of Income Tax was satisfied with reasons recorded by the Assessing Officer. Therefore, it is submitted that the notice dated 25th March, 2011, cannot be said to be without jurisdiction.*

9. *It is undisputed position before us that in terms of Section 151(2) of the Act, the sanctioning/ permission to issue notice under Section 148 of the Act has to be issued by the Additional Commissioner of Income Tax. We find that the Assessing Officer had not sought the approval of the Designated Officer but of the Commissioner of Income Tax. This is clear from the Form used to obtain the sanction. In any case, the approval/ satisfaction recorded in the form submitted for sanction of the Commissioner of Income Tax by the Assessing Officer reproduced herein above, it is clear that the Additional Commissioner of Income Tax had not granted permission to initiate re-opening proceedings against the Respondent-Assessee. The view of the Additional Commissioner of Income Tax was subject to the approval of his superior - the Commissioner of Income Tax. Thus, there was no final sanction granted by the Additional Commissioner of Income Tax for issuing the notice dated 25th March, 2011 to re-open the Assessment. Further, it is the Commissioner of Income Tax who directed the issuance of the notice under Section 148 of the Act to the Assessing Officer. Thus, it is very clear that the final sanction/ approval was that of the Commissioner of Income Tax as indicated in the Form and also in the two letters dated 24th March, 2011 and 25th March, 2011.*

10. *This Court in Ghanshyam K Khabrani (supra) while dealing with almost similar/ identical situation has observed as under:—*

> *" The approval which has been granted is not by the Additional Commissioner of Income Tax but by the Commissioner of Income Tax. There is no statutory provision here under which a power to be exercised by an officer an be exercised by a superior officer. When the statute mandates the satisfaction of a particular manner, it has to be done in that manner. In a similar situation, the Delhi High Court in CIT v. SPL's Siddhartha Ltd. (ITA No. 836 of 2011 decided on September 14, 2011) - since reported in [2012] 345 ITR 223 (Delhi) held that powers which are conferred upon a particular authority have to be exercised by that authority and the satisfaction which the statute mandates of a distinct authority cannot be substituted by the satisfaction of another. We are in respectful agreement with the judgment of the Delhi High Court."*
>
> *(emphasis supplied)*

> ***11.*** *In the aforesaid facts, the view taken by the Tribunal, cannot be found fault with as it merely follows the decision of this Court in Ghanshyam K Khabrani (supra). Therefore, the question as framed does not give rise to any substantial question of law. Thus, not entertained.*
>
> ***12.*** *Accordingly, Appeal dismissed. No order as to costs.*

The Special Leave Petition preferred by the revenue before the Hon'ble Apex Court against this judgement was dismissed in 269 Taxman 195 (SC).

4.9.3. Moreover, in the instant case, on perusal of the sanction obtained in terms of section 151 of the Act, we find that the ld PCIT had merely recorded – "Yes, I am satisfied". The same, in our considered opinion, could not be regarded as a valid satisfaction as it does not reflect due application of mind of the sanctioning authority before granting satisfaction. This cryptic noting only leads to the inescapable conclusion that there was, in reality, no independent application of mind by the sanctioning authority while according approval in terms of section 151 of the Act. This clearly vitiates the purpose behind the inbuilt safeguards and checks provided by the statute on exercise of powers by the ld AO u/s 147/148 of the Act. It is trite law that the sanctioning authority is expected to judiciously review and then record objective satisfaction which is conspicuously absent in the present case. Hence it could be safely concluded that the sanction in terms of section 151 of the Act had been accorded in a mechanical manner without application of mind. Reliance in this regard was rightly placed on the decision of the *Hon'ble Apex Court in the case of Chhugamal Rajpal vs S.P.Chaliha reported in 79 ITR 603 (SC)* wherein it was held that :-

> *"When this appeal came up for hearing on the last occasion, as we found the affidavit filed by the Income-tax Officer to be vague and indefinite, we directed the learned counsel for the department to produce before us the records of the*

Income-tax Officer to show that the Income-tax Officer had complied with the requirements of section 148 and section 151(2) of the Act. When the appeal was taken up for hearing on the 18th January, 1971, only the report submitted by the Income-tax Officer to the Commissioner and the order of the Commissioner was produced. The order sheet recording the reasons of the Income-tax Officer as required by section 148(2) was not produced. Here in below, we have set out the report of the Income-tax Officer as well as the order of the Commissioner:

"Report in connection with the starting of proceedings under section 147 of the Income-tax Act, 1961.

	Name of district		
	Ward or Circle.....	A-Ward, Muzaflarpur	
	G.I.R. No.....	303-C.	
1.	Name and address of the assessee		M/s. Chugamal Rajpal, Muzaffarpur
2.	Status	—	R.F.
3.	Assessment year for which notice under s. 148 is proposed to be issued.	—	1960-61.
4.	Whether it is a new case or one in which reassessment (or recomputation) has to be made.	—	Reassessment.
5.	If a case of reassessment (or re-computation) the income (or loss or depreciation allowance) origin ally assessed/determined.	—	Rs. 73,604
6.	Whether the case falls under cl. (*a*) or (*b*) of s. 147.	—	147(*a*)
7.	Brief reasons for starting proceed-ings under s. 147 (indicate the items which are believed to have escaped assessment.)	—	Kindly see overleaf (Sd.) S.P. Chaliha, I.T.O., 30-4-66 A-Ward, Muzaffarpur.
8.	Whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148.		Yes (Sd.) K. Narain, 13-5-66. Commissioner of Income-tax, Bihar and Orissa, Patna.

9.	Whether the Board is satisfied that it is a fit case for the issue of notice under s. 148.		Secretary, Board of Revenue.

During the year the assessee has shown to have taken loans from various parties of Calcutta. From D.I.'s Inv. No. A/P/Misc. (5) D.I./63-64/ 5623 dated August 13, 1965, forwarded to this office under C.I.T., Bihar and Orissa, Patna's letter No. Inv. (Inv.) 15/65-66/1953-2017 dated Patna September 24, 1965, it appears that these persons are name-lenders and the transactions are bogus. Hence, proper investigation regarding these loans is necessary. The names of some of the persons from whom money is alleged to have been taken on loan on hundis are:

1.Seth Bhagwan Singh Sricharan.

2Lakha Singh Lai Singh.

3.Radhakissen Shyam Sunder.

The amount of escapement involved amounts to Rs. 1,00,000.

Sd. S.P. Chaliha, 30-4-66.

Income-tax Officer,

A-Ward, Muzaffarpur."

In his report the Income-tax Officer does not set out any reason for coming to the conclusion that this is a fit case to issue notice under section 148. The material that he had before him for issuing notice under section 148 is not mentioned in the report. In his report he vaguely refers to certain communications received by him from the Commissioner of Income-tax, Bihar and Orissa. He does not mention the facts contained in those communications. All that he says is that from those communications "it appears that these persons (alleged creditors) are name-lenders and the transactions are bogus". He has not even come to a prima facie conclusion that the transactions to which he referred are not genuine transactions. He appears to have had only a vague feeling that they may be bogus transactions. Such a conclusion does not fulfil the requirements of section 151(2). What that provision requires is that he must give reasons for issuing a notice under section 148. In other words he must have some prima facie grounds before him for taking action under section 148. Further his report mentions : "Hence proper investigation regarding these loans is necessary". In other words his conclusion is that there is a case for investigating as to the truth of the alleged transactions. That is not the same thing as saying that there are reasons to issue notice under section 148. Before issuing a notice under section 148, the Income-tax Officer must have either reasons to believe that by reason of the omission or failure on the part of the assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax

has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the Income-tax Officer has no jurisdiction to issue a notice under section 148. From the report submitted by the Income-tax Officer to the Commissioner, it is clear that he could not have had reasons to believe that by reason of the assessee's omission to disclose fully and truly all material facts necessary for his assessment for the accounting year in question, income chargeable to tax has escaped assessment for that year; nor could it be said that he, as a consequence of information in his possession, had reasons to believe that the income chargeable to tax has escaped assessment for that year. We are not satisfied that the Income-tax Officer had any material before him which could satisfy the requirements of either clause (a) or clause (b) of section 147. Therefore, he could not have issued a notice under section 148. Further, the report submitted by him under section 151(2) does not mention any reason for coming to the conclusion that it is a fit case for the issue of a notice under section 148. We are also of the opinion that the Commissioner has mechanically accorded permission. He did not himself record that he was satisfied that this was a fit case for the issue of a notice under section 148. To question No. 8 in the report which reads "Whether the Commissioner is satisfied that it is a fit case for the issue of notice under section 148", he just noted the word "Yes" and affixed his signature thereunder. We are of the opinion that if only he had read the report carefully, he could never have come to the conclusion on the material before him that this is a fit case to issue notice under section 148. The important safeguards provided in sections 147 and 151 were lightly treated by the Income-tax Officer as well as by the Commissioner. Both of them appear to have taken the duty imposed on them under these provisions as of little importance. They have substituted the form for the substance.

In the result this appeal is allowed, the order of the High Court is set aside and the impugned notice quashed. The respondent No. 2 shall pay the costs of the appellant both in this court and in the High Court."

We find that similar decision was rendered by Hon'ble Madhya Pradesh High Court in the case of CIT vs M/s S Goyanka Lime and Chemicals Ltd reported in 231 Taxman 73 (MP), wherein the Special leave petition preferred by the revenue was dismissed by the Hon'ble Apex Court in 237 Taxman 378 (SC). Respectfully following the said decisions, the reopening of assessment deserves to be declared as void ab initio for improper sanction u/s 151 of the Act also.

4.10. Since reopening of assessment is quashed for more than one reason as enumerated above, we do not deem it fit to address the other

legal issues raised by the ld AR as they would be purely academic in nature and hence they are left open. Accordingly , the cross objections raised by the assessee are allowed in view of the abovementioned terms.

5. We find that the revenue had raised the grounds only on merits of the additions. At the cost of repetition, we find that the Act provides for a specific mechanism for computation of taxable profits of an insurance company and the taxable profits of an insurance company are required to be computed under the provisions of section 44 read with First Schedule to the Act which is a self contained code in itself. Rule 2 of First Schedule to the Act specifically provides that profits and gains of life insurance business is to be computed as per surplus / deficit disclosed by the actuarial valuation made in accordance with the Insurance Act, 1938. In line with this mandate, the assessee had computed its taxable income for the Asst Year 2007-08 in accordance with section 44 read with Rule 2 of First Schedule to the Act i.e as per the surplus / deficit disclosed by the actuarial valuation made in accordance with Insurance Act, 1938. It is pertinent to note that the significant changes made to the formats of the financial statements and other reporting requirement of insurance companies as brought out by IRDA , has got no impact on taxability u/s 44 of the Act. One such change mandated by IRDA Regulations, 2000 was with respect to the preparation of financial statements. As per the formats for presentation of insurance accounts prescribed by IRDA, life insurance companies are required to present their accounts separately in the form of Policyholders' sub-account and Shareholders' sub-account being the Revenue Account and Profit and Loss Account, respectively. Thus, while IRDA regulations oblige, two separate sub-accounts, so far as the business of the company is concerned, it is only one ingle, indivisible business only viz life insurance business. We find that the ld AR

vehemently argued that separate sub-accounts namely Revenue Account and Profit and Loss Account are prepared purely to adhere to the monitoring requirements of IRDA , in order to ensure the interest of the persons insured are protected in the life insurance companies so that, when the policy matures, either by efflux of time or by demise of the insured person, the beneficiaries are assured of the payments due to them. We find that these two separate sub-accounts does not have any bearing to the income tax law more particularly u/s 44 read with First Schedule to the Act.

5.1. As stated above, prior to amendment of the Insurance Act, 1938, life insurance business was monopoly of the State till 1999. With the enactment of Insurance Regulatory Development Authority. 1999 private insurers were also allowed to carry on insurance business, including life insurance business.

5.1.1. It is pointed out that under the erstwhile Insurance Act. 1938. Life insurance companies were preparing/ submitting to the Controller of Insurance, the following key account statements:

a) Consolidated Revenue Account [Form G].
b) Summary and Valuation of Policies [Form H]
c) Valuation Balance Sheet [Form-1] notified under the relevant schedules of the said Act.

5.1.2. The consolidated Revenue Account was prepared without segregating income/ expenses for policyholders as well as shareholders. Therefore, the said Form-1 reflected the surplus/ deficit of the <u>business as a whole</u> (i.e.. considering shareholders" as well as policyholders" account)

since in those days there was no bifurcation of the accounts of insurance companies into policyholders and shareholders accounts.

5.1.3. It is further pointed out that post introduction of IRDA Regulations, 2000. IRDA. the insurance regulator, has made specific rules for presentation of insurance accounts as prescribed in IRDA (Preparation of Financial statements and Auditor's Report of Insurance Companies) Regulations. 2002. Under these norms, profit & loss of life insurance company is divided into a technical account (policy holder's account represented in Form A-RA) also called as revenue account and non-technical account (shareholder's account represented as Form A-PL) also called Profit & Loss A/c. The technical account deals \vith all the transactions relating to and includes income from premium and expenditure in relation to the Policyholders account and related investment income.

5.1.4. Further. Rule 3 read with the Rule 5 of Schedule A to the IRDA (Preparation of Financial Statements and Auditor's Report of Insurance Companies) Regulations, 2002 mandates a life insurance company to prepare its financial statements after taking into consideration the actuarial valuation.

5.1.5. The jurisdictional Bombay High Court in the case of Life Insurance Corporation of India vs. CIT: 119 ITR 900 summarized the scope of section 44 of the Act in the following terms:-

> *..... It is now well known that so far as the life insurance business is concerned, the computation of I he profits has to be made no! in the manner in which it is normally done in the case of an ordinary assessee hut according to the special and artificial mode prescribed in the First Schedule, having regard to the provisions of s. 44 of the I. T. Act. 1961. The effect of s. 44 of the I. T. Act, 1961, is that the provisions relating to*

interest on securities, income from house property, capital gains and income from other sources are not made applicable in the case of an insurance company and the profits are to be computed in accordance with rr. 2, 3 and 4 in the First Schedule so far as life insurance business is concerned. Thus, so far as the proceedings regarding assessment to tax under the I. T. Act are concerned, they will be controlled solely by the provisions of s. 44 and the First Schedule which, as already pointed out, is an artificial mode of computation of income. The basic figure which is required to he taken for the purposes of computation of income from insurance business is the annual average of the surplus. Rule 2(b). which is the only material rule so far as the present case is concerned. provides for the annual average of the surplus. The surplus contemplated is the surplus as determined actuarially in accordance with s. 13 read with Sch. IV of the Insurance Act. ... ..." (emphasis supplied}

6. As explained above, actuarial valuation in accordance with Insurance Act. 1938 should thus be taken as the basis for computing the taxable income of the Life Insurance Company and not Form-1 prepared in accordance with IRDA Regulations. 2000.

6.1.1. It is submitted that if Form-I prepared as per IRDA Regulations. 2000 is considered as a basis for computation of taxable income of life insurance company, it would, in fact, lead to a manifestly absurd result, i.e. only a part of the income of the Company would be subjected to tax [i.e., surplus / deficit in the Policy Holders Account ("PHA")] and the balance part of the income viz. surplus / deficit in the Shareholder's Account ["SHA"] would be ignored. This does not appear to be the intention of the law. Accordingly, for the period under consideration, surplus/deficit as per Form-1 (prepared as per IRDA Regulations, 2000) cannot, it is submitted, be considered as the basis for computing the taxable income of the Company.

6.1.2. Without prejudice to the above, it is submitted that even if the internal transfers of Rs.8,46,669 (in 000's) from Shareholders" A/c to

Policyholders' A/c are ignored, the profit and loss of the company as a whole will remain the same, i.e., loss of Rs.804.257 (in 000's) and hence is tax neutral. The same is summarized in the abridged table as under:

(Rs. in -000's)

Particulars	Including internal transfer	Excluding internal transfer
Surplus/ (Deficit) in Policyholders' A/c	NIL	(846.669)
Surplus/ (Deficit) in Shareholders' A/c	(804.257)	42.412
Total surplus/ deficit	(804,257)	(804,257)

6.1.3. Further, the said internal transfer from Shareholders' A/c to Policyholders' A/c is clearly reflected in the financial statements of the company which was provided to the AO during the course of assessment. Therefore, the contention of the AO emerged out of nothing but a fresh application of mind on the existing records which is legally an invalid reason for reopening of assessment.

6.1.4. Reliance in this regard is placed on the decision of Mumbai Bench of Tribunal in the case of ICICI Prudential Insurance Co. Ltd. vs. ACIT [2012 140 ITD 41 (ICICI-2012') wherein it was held that surplus disclosed in Form-1 cannot form the basis of computation of taxable profits in the case of insurance company. The aforesaid decision was followed by Mumbai Bench of the Tribunal in the following cases:

- HDFC Standard Life Insurance Company Ltd vs. DCIT (OSD)-l(l) (ITA No.2203 of 2012) (HDFC)
- ICICI Prudential Insurance Company Limited vs. ACIT. Circle 6(1) (I.T.A. No.5251/Mum/2013 and 5252/Mum/2013) (ICICI-2015)

6.1.5. Further, even the DRP, while giving directions for AY 2011-12 relying on ICICI-2012 decision, appreciated the assessee's submissions

and held that taxable income under section 44 of Act is the surplus as per Form-I prepared as per IRDA Regulations. 2000 and surplus in the Shareholders' A/c (prior to internal transfer) needs to be considered.

6.1.6. It is pertinent to note here that, based on the DRP's direction for AY 2011-12, even the AO in all the subsequent assessment orders passed by him (i.e.. AY 2012-13 to AY 2016-17), on a consistent basis, accepted the above contention of the assessee and accordingly, determined the surplus or deficit after merging both the Policyholders account and the Shareholders' account and ignoring the transfer of funds from 'Shareholders' account to 'Policyholders' account (i.e..Internal transfer).

6.1.7. In view of the above, it is submitted that the CIT(A) rightly accepted the income offered by the assessee as the income taxable in accordance with Section 44 read with Rule 2 of the First Schedule of the Act. i.e., considering surplus or deficit after merging both the Policyholders' account and the Shareholders' account and ignoring the transfer of funds from 'Shareholders' account to 'Policyholders' account (i.e. Internal transfer).

7. With regard to addition made on account of negative reserve of Rs. 2,74,91,000/-, we find that the ld AO in the reassessment order made an addition on account of negative reserves reflected in Form -I ignoring the fact that it is a mere disclosure requirement stipulated by IRDA till March 2016 which has no impact on the total income of the assessee company. We find that it does not have any impact on the financial statements.

7.1. It is submitted that at the valuation date, present value of future liabilities on every policy is estimated [using actuarial techniques prescribed by IRDA and Institute of Actuaries of India (MAT)]. This is also known as actuarial reserves. This reserve, at a policy level, is estimated by projecting future payouts [on the happening of the insured event (i.e. death, illness, etc.), future payouts on survival (i.e. annuity, maturity, survival benefits, surrender, lapse, etc.), future expenses associated with the policy (e.g. commission, policy maintenance expense, claims expense, etc.)] and future premiums receivable (after considering estimated deaths, lapses, surrenders, etc). This net cash flow for each future period (i.e.. net of future payouts / and future receivables) is discounted at the valuation date. All the above valuations are based on the guidance and methods provided in regulations issued by IRDA and professional standards issued by the IAI. In case the resulting actuarial reserve is negative, it is known as 'Negative Reserve'. Regulations issued by IRDA mandate that the actuarial reserve for a policy should be the higher of zero, surrender value and the estimated actuarial reserve. The sum of such modified actuarial reserve for all policies is the total policy liabilities reported in the financial statements.

7.1.2 Therefore, based on the above discussion, negative reserves are nothing but discounted value of estimated future net income of the Company which cannot be brought to tax in the year under consideration. Reliance is placed on Mumbai Tribunal Judgment in the case of ICICI Prudential Insurance Co. Ltd. vs. ACIT [2012 140 ITD 41] wherein it was held that negative reserve disclosed in Form-1 does not give rise to distributable surplus.

7.1.3. The aforesaid decision was followed by Mumbai Bench of the Tribunal in the following cases:

- AEGON Religare Life Insurance Company Limited vs. ACIT ([2016] ITA No. 4110/Mum/2014, ITA No. 4130/Mum/2014, (2018)ITA No. 6336/Mum/2016, (2018)ITA No.3726/Mum/2017. (2018)ITA No. 4528/Mum/2017 and [2019J ITA No. 4200/Mum.2018)
- HDFC Standard Life Insurance Company Ltd vs. DCIT (OSD)-l(l) [2013] (ITA No.2203 of 2012)
- IC1CI Prudential Life Insurance Company Limited vs. Asst. CIT. Circle 6(1) [2015] (ITA No. 5251, 5252 of 2013)
- DCIT vs. SBI Life Insurance Co. Ltd: ITA No. 3385/Mum/2017 (Mum)-

7.1.4. It is also pertinent to note that Bombay High Court in ease of ICICI Prudential Life Insurance Company Limited [2015] (ITA 711 of 2013 and ITA 688 of 2013) and HDFC Standard Life Insurance Company Limited [2016] (ITA No. 548 of 2014) did not admit the aforesaid ground, raised by the department, relying on the decision of the Apex court in case of LIC Vs. CIT 51 1TR 773.

7.1.5. Further, as per IRDA (Actuarial Report and Abstract for Life Insurance Business) Regulations. 2016, the disclosure of negative reserves in the Form-1 is not required. Hence, this further proves the assessee's contention that negative reserves in Form-I is just a disclosure requirement. For the aforesaid cumulative reasons, it is respectfully submitted that the AO be directed to delete the addition of negative reserves amounting to Rs.2,74,91,000.

7.16. In view of the aforesaid observations, we do not find any infirmity in the order of the ld CITA granting relief in respect of negative reserves in the sum of Rs 2,74,91,000/-.

8. Accordingly, the grounds raised by the revenue are dismissed.

9. In the result, the appeal of the revenue is dismissed and cross objection of the assessee is allowed.

Order pronounced on 31/03/2021 by way of proper mentioning in the notice board.

Sd/-	**Sd/-**
(RAVISH SOOD)	**(M.BALAGANESH)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai; Dated 31/03/2021
KARUNA, *sr.ps*

Copy of the Order forwarded to :

1. The Appellant
2. The Respondent.
3. The CIT(A), Mumbai.
4. CIT
5. DR, ITAT, Mumbai
6. Guard file.

//True Copy//

BY ORDER,

(Asstt. Registrar)
ITAT, Mumbai