

**IN THE INCOME TAX APPELLATE TRIBUNAL  
"C" BENCH, MUMBAI**

**BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND  
SHRI PAVAN KUMAR GADALE, HON'BLE JUDICIAL MEMBER**

**ITA NOs. 7214, 7212 & 7213/MUM/2017  
(A.Y. 2008-09, 2010-11 & 2011-12)**

DCIT – 3(2)(2) Room No. 674, 6th Floor Aayakar Bhavan, M.K. Road Mumbai - 400020	v.	M/s. Phulchand Exports Pvt. Ltd., 254B, 4 <sup>th</sup> Floor, Nirlon House Dr. Annie Besant Road Worli, Mumbai - 400030  <b>PAN: AAACP2529C</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**ITA.No. 746/MUM/2017 (A.Y. 2009-10)**

ACIT – 3(2)(2) Room No. 608 Aayakar Bhavan, M.K. Road Mumbai - 400020	v.	M/s. Phulchand Exports Pvt. Ltd., 67, Bajaj Bhavan, Nariman Point Mumbai - 400021  <b>PAN: AAACP2529C</b>
<b>(Appellant)</b>		<b>(Respondent)</b>

**C.O. No. 221/MUM/2018  
[ARISING OUT OF ITA.No. 746/MUM/2017 (A.Y. 2009-10)]**

M/s. Phulchand Exports Pvt. Ltd., C/o. Shankarlal Jain & Associates LLP Chartered Accountants 12 Engineer Building 265 princess Street Mumbai – 400020  <b>PAN: AAACP2529C</b>	v.	ACIT – 3(2)(2) 6 <sup>th</sup> Floor Aayakar Bhavan, M.K. Road Mumbai - 400020
<b>(Appellant)</b>		<b>(Respondent)</b>

<b>Assessee by</b>	<b>:</b>	<b>Shri Shankarlal Jain</b>
<b>Department by</b>	<b>:</b>	<b>Shri Sandeep Raj</b>
<b>Date of Hearing</b>	<b>:</b>	<b>16.02.2022</b>
<b>Date of Pronouncement</b>	<b>:</b>	<b>12.05.2022</b>

## **ORDER**

### **PER S. RIFAUR RAHMAN (AM)**

**1.** These appeals are filed by the revenue against different orders of the Learned Commissioner of Income Tax (Appeals)-8, Mumbai [hereinafter in short "Ld.CIT(A)"] dated 20.09.2017 for the A.Y. 2008-09, 2010-11 & 2011-12 and dated 28.10.2016 for the A.Y. 2009-10. Cross objection is filed by the assessee for the A.Y. 2009-10.

**2.** Since the issues raised in all the appeals are identical, therefore, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. We are taking Appeal in ITA.No. 7214/MUM/2017 for Assessment Year 2008-09 as a lead case.

**3.** Revenue has raised following grounds in its appeal: -

*(i). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that there was non application of mind by the AO while reopening*

*the assessment without appreciating that the AO had duly applied his mind while reopening the case and that the case was validly reopened.*

*(ii). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the reopening was beyond the period of four years and that the AO has not brought on record any material to establish that there was any non disclosure of any information on part of the assessee during the original assessment proceedings without appreciating that the new tangible material in form of the information from the DCIT-19(2), New Delhi was received by the AO on which the AO had acted and that the case was validly reopened.*

*(iii). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO can be said to be arrived at assumption of escapement of income and that there is no reason to believe on part of the AO to reopen the assessment without appreciating that the AO had reasons to believe that the income has escaped assessment and that the case was validly reopened.*

*(iv). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO had reopened the case to make fishing enquiries without appreciating that the AO had the information supplied by the DCIT-19(2), New Delhi on record which was sufficient to form the reason to believe and at no point of the time during the assessment proceedings the AO had made any fishing enquiries and that the case was validly reopened.*

*(v). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO has not arrived at his own satisfaction based on new tangible material and independent analysis as required under the provisions of the Act and that the conclusion of the AO was conjecture based on suspicions of another officer without appreciating that on the basis of information received from own department and other agencies, the AO had formed his own satisfaction after making an analysis of the material and that the AO*

*has not acted on the belief formed by others and that the case was validly reopened.*

*(vi). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO in the assessment order has not brought on record any evidence to establish that the assessee has realized higher export price than recorded in the books without appreciating that for the purpose of reopening of the assessment only prima facie satisfaction of the AO is sufficient and the fact that in the assessment order nothing has brought on record to establish that the assessee has realized higher export price than recorded in the books is irrelevant for the purpose of reopening of the case.*

*(vii). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO has based its reopening on the basis of the statement of an unconnected person without appreciating that M/s PEC Ltd is an connected party and that the assessee is an associate of this party.*

*(viii). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in holding that the reopening of the assessment u/s 147 of the I T Act 1961 was bad in law by treating that the AO has not brought on record any evidence to establish the under invoicing or that the trading receipts recorded in the books of the assessee were wrong and that the AO has reopened the case on presumption expecting the assessee to prove the negative without appreciating that without appreciating that for the purpose of reopening of the assessment only prima facie satisfaction of the AO is sufficient and the fact that in the assessment order nothing has brought on record to establish that assessee has done under invoicing or that the trading receipts recorded in the books of the assessee were wrong is irrelevant for the purpose of reopening of the case.*

*(ix). Whether on the facts and circumstances of the case and in law, the Ld CIT(A) has erred in deleting the addition of Rs 24,82,70,847 on account of under invoicing of goods exported without appreciating that said addition is made as per the comparable export price which was determined by the Hon'ble Justice M.B. Shah commission in its report on illegal mining.*

(x). *The appellant prays that the order of the CIT(A) on the above grounds be set-aside and that of the Assessing Officer be restored.*

(xi). *The appellant craves leave to amend or alter any ground or add a new ground which may be necessary."*

**4.** Ld.DR submitted consolidated written submissions for all the Assessment Years under consideration, which are reproduced below:-

*"The following written submissions are placed before your honours perusal and necessary consideration while deciding the above appeals.*

2. *Major grounds of appeals from the captioned appeals are broadly categorized on two issues i.e. For the A.Y.2009-10 appellants main ground is upholding by CIT(A) on the issue of Notice u/s.148 whereas revenues main contention is on deletion of quantum additions made by AO.*

3. *As the issues are broadly on the above aspects in the captioned years, it is therefore A.Y.2009-10 was taken for discussion.*

3.1 *In this case assessment u/s.143(3) was completed on 08/11/2011 accepting the declared income of the appellant. A notice u/s.148 was issued on 28/04/2014 on the ground below:*

*Appellant had shown to have purchased from M/s. Bath Classic and M/s. Aman Enterprises. This information was received from sales tax department that these parties are bogus and resorting to accommodation entries without conducting any business activity and appellant was one of the beneficiaries of such accommodation entries.*

3.2 *In response to this notice, Appellant had submitted to treat the revised return on 21/09/2009 as the return filed in response to the notice u/s. 148. Objections of the appellant also dealt with by the AO and disposed on the issue of this notice. Accordingly, AO arrived at the disallowance @ 10% on the quantum of bogus purchases. During the reopening proceedings AO identified that the appellant had resorted to under invoicing.*

3.3. Appellant's main contention was on the issue of reopening before CIT(A), major objections of the appellant are as under:

1. Reason for reopening was based on mere reliance on sales tax dept information. In support of its submissions, appellant had placed various judicial pronouncements. CIT(A) had given careful thought on all these aspects and upheld the action of the AO on reopening of the assessment. CIT(A) had relied on the following judicial pronouncements.

- a). *Phoolchand Bajranglal Vs ITO 203ITR 456,477*
- b). *ALA Firm Vs CIT 189 ITR 285,298*
- c). *Indian and Eastern Newspaper Society Vs CIT 119 ITR 996, 1004*
- d). *ITO Vs Lakhmani Mewal Das 103 ITR 437 ,445*

3.4 However while dealing on account of 'under invoicing' of goods exported CIT(A) deleted the addition without appreciating that said addition is made as per the comparable export price which is as determined by Hon'ble Justice M.B.Shah Commission on illegal Mining.

4. During the earlier hearings before your honour for the A.Y.2008-09 , the hon'ble bench had directed to obtain the copy of the correspondence between AO of PEC Ltd, New Delhi who has parted the information to the present AO who has completed assessment order in Mumbai. This information was called for on the objection of the appellant specifically emphasizing that the AO had mere relied on Justice M.B.Shah Commission report in reopening of the assessment which amounts to borrowed satisfaction . Appellant had relied on the case of Sesa Sterlite. Ltd in 417 ITR 0334 (Bom), wherein the reasons for reopening were Stated to be the Report of Justice M B Shah Commission, hence the hon'ble Bombay High Court had held that the re-opening was on borrowed satisfaction.

4.1 As seen from the facts, the Hon'ble jurisdictional High Court judgement Squarely applicable to the case of AO of PEC Ltd, New Delhi whose basis for reopening was on Justice M.B.Shah Commission report whereas in our case the information provided by the departmental officer has been independently analyzed by the AO of our appellant and on the basis of the analysis AO has independently came to a conclusion that there was income which

*escaped assessment . Accordingly issued notice u/s.148. These facts are more visibly clear from the reasons recorded by the AO which is mentioned as under:*

*The Reasons for re-opening reads;*

*..... The appellant company is in the business of import and export of various items. During the Financial Year 2010-11, the appellant company had acquired financial assistance from M/s.PEC Limited, a Govt of India Undertaking, New Delhi for export of iron ore as an associate company. On verification of information received from DCIT 19(2) New Delhi where M/s.PEC Limited is assessed, it was ascertained that the said companies have committed large-scale under invoicing in comparison to export of other companies on export of same grade iron ore on the same date it is also learnt that the company has exported iron ore at different prices to different importers on the same date ..... (Emphasis supplied) (para 3 page 2 Asst. Order)*

*4.2 From the above reasons in the case of the appellant, as the AO in the Reasons for reopening had clearly mentioned that it was on verification of information received from the Assessing Officer of M/s. PEC Ltd and further, nowhere in the reasons there was a mention of the Honorable Justice MB Shah Commission. Therefore, it is humbly submitted before your honours that the action of the AO is justiciable and it was not on borrowed satisfaction. It is also placed here that the Reopening was based on new Information.*

*4.3. Similarly, the ratio decided in the case of Ashapura Minechem Limited, is also not applicable in the case of the appellant mainly because first time that a reference to the Honorable Justice M B Shah Commission came into focus was at the instance of the appellant itself (please refer to paragraph 2 in para 4.1 on page 2 of the Assessment Order) vide letter dated 11th March 2016.*

*4.4 The Counsel of the appellant has also relied on the ratio in the case of Principal Commissioner of Income Tax versus Rawmin Mining & Industries Private Limited. However that case factually not akin to our case. In this case, the appellant himself was an exporter on its own behalf.*

*5. Therefore, it is humbly submitted before your honours that the reopening by the AO was done on the basis of proper application*

*of mind and not on borrowed satisfaction. In the case of the appellant, by its own admission it was clarified that it is an Associate Company, as a supplier of M/s. PEC Limited and does not export on his own account. These facts are supported by the facts below:*

*i. The Agreement between M/s. PEC Limited New Delhi and the appellant dated 31st July 2010, which is provided as a sample document, may please be perused. On page 2, it is stated,*

*.....*

*AND Where is P E C has in consultation with and with the concurrence of the 'Associate Supplier' entered into a Contract No. PEC/ NET/ 8/ 10-11 dated 13-10-2010 (hereinafter called 'Foreign Contract') with M/s. Network trading PTE Limited .....*

*ii. AND Whereas the 'Associate Supplier' has advised PEC that they have already received confirmation from Different suppliers for Supply of minimum quantity of .....*

*AND Whereas the 'Associate Supplier' has agreed to fulfil perform, and discharge the obligations and responsibilities of PEC under, in terms of and by virtue of the above... " {Emphasis Supplied) (Page 34 Paper Book dated 15/01/2021)*

*5.1 The above terms of the Contract clearly shows that the appellant was consulted and that the agreement was made on the advice of the 'Associate Supplier', which in this case is the appellant. Therefore, it can be stated that the appellant was aware of the rates at which exports made by other similar exporters as well as the market conditions and PEC had contracted with other foreign entities for the export of iron ore based on the inputs by the appellant.*

*6. On the factual support, I rely on assessment order. Therefore, these facts may be taken on record while deciding the case."*

**5.** In support of the above contentions, Ld.DR relied on the following judicial pronouncements: -

- (i). *Hon'ble Calcutta High Court decision in the case of Selected Dalurband Coal (P.) Ltd. [1978] 113 ITR 510 (Cal.)*
- (ii). *Hon'ble Calcutta High Court decision in the case of Selected. Dalurband Coal (P.) Ltd. [1978] 113 ITR 489 (Cal.)*
- (iii). *Hon'ble Supreme Court decision in the case of Selected Dalurband Coal (P.) Ltd. [1996] 217 ITR 597 (SC)*
- (iv). *Hon'ble High Court of Gujarat decision in the case of Jayant Security & Finance Ltd. Vs. ACIT Circle 1(1) [2018] 91 taxmann.com 181 (Gujarat)*
- (v). *Hon'ble Supreme Court decision in the case of Raymond Woolen - Mills Ltd. Vs. Income Tax Officer [1999] 236 ITR 34 (SC)*
- (vi). *Hon'ble Madras High Court decision in the case of Triveni Earthmovers Pvt. Ltd. Vs. ACIT, Central Circle, Salem in Writ Petition No. 38185 & 38186 of 2016*
- (vii). *Hon'ble ITAT Kolkata A Bench decision in the case of ACIT Central - Circle 4(2), Kolkata Vs. Narbheram Vishram in (ITA No.: 685/Kol/2018*
- (viii). *'Hon'ble High Court of Rajasthan decision in the case of Ankit Agrochem (P.) Ltd. Vs. JCIT, Range 1, Bikaner (2018] 89 taxmann.com 45 (Rajasthan)*
- (ix). *"Hon'ble High Court of Madras decision i in the case of Home Finders Housing Ltd. Vs. Income Tax Officer, Corporate Ward 2(3), Chennai | [2018] 93 taxmann.com 371 (Madras)*
- (x). *Hon'ble High Court of Bombay decision in the case of Nickunj Eximp Enterprises (P.) Ltd. Vs. ACIT, Range 1(2), Mumbai (2014] 48 taxmann.com 20 (Bombay)*
- (xi). *Hon'ble High Court of Delhi decision in the case of PCIT-7 Vs. Paramount Communication (P.) Ltd [2017] 79 taxmann.com 409 (Delhi)*
- (xii). *Hon'ble Supreme Court decision in the case of Income Tax Officer Vs. Purushottam Das Bangur [1997] 90 Taxmann 641 (SC)*
- (xiii). *Hon'ble High Court of Bombay decision in the case of Rabo India Finance Ltd. Vs. DCIT (2012] 27 taxmann.com 163 (Bombay)*

- (xiv). *Hon'ble Supreme Court decision in the case of ACIT Vs. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316 (SC)*
- (xv). *Hon'ble High Court of Delhi decision in the case of Rattan Gupta Vs. Union of India [1998] 234 ITR 220 (Delhi).*
- (xvi). *Hon'ble High Court of Kerala decision in the case of CIT, Cochin Vs. Raji Sanalkumar [2011] 15 taxmann.com 22 (Kerala)*
- (xvii). *Hon'ble Supreme Court of India decision in the case of Sumati Dayal Vs. CIT [1995] 80 Taxman 89 (SC)*
- (xviii). *Hon'ble Supreme Court of India decision in the case of CIT Vs. Durga Prasad More [1971] 82 ITR 540 (SC)*
- (xix). *Hon'ble ITAT Mumbai G Bench decision in the case of Priya S. Kothari Vs. ITO 6(3)(4), Mumbai (2014) 45 taxmann.com 77 (Mum. Trib)*

**6. In reply Ld. AR of the assessee submitted as under: -**

*"Assessment for Assessment Year 2008-09 was reopened under a notice U/s.148 dated 26.03.2015. Original assessment was completed U/s.143(3) dated 14.03.2014. Assessment was reopened after lapse of four years from the end of the assessment year. Appellant filed its submission as placed in additional compilation dated 25.01.2021(AC) and submitted that 'Reason to Believe' being based on the report of Justice M B Shah Commission, notice U/s 148 is bad in law as held by High Court of Bombay in the case of Sesa Sterlite Ltd. 417 ITR 334 (BOM).*

*1. Reasons recorded for A.Y. 2008-09 are as under:*

*a. "1. The assessee company is in the business of import and export of various items. During the Financial Year 2007-08, the assessee company had acquired financial assistance from M/s. PEC Ltd. a Govt. of India Undertaking, New Delhi for export of iron ore as an associate company. On verification of information received from DCII, 19(2), New Delhi, where M/s. PEC Ltd. is assessed, it was ascertained that the said companies have committed large scale under invoicing in comparison to export of other companies on export of same grade iron or on the same date. It is also learnt that the company has exported iron ore at different prices to different*

*importers on same date and for the same grade. Therefore, it is estimated that M/s. Phuichand Exports Pvt. Ltd. has committed under invoicing of exports of iron ore as an associate company of M/s. PEC Ltd. to the extent of Rs.15,52,87,638/- (A).*

*b. On further information received in this office, it is seen that exports of iron ore to China made by M/s. Phulchand Exports Pvt. Ltd. during F.Y 200708, pertaining to A.Y 2008-09 were under invoiced as given below:-*

Shipping Bill date	Qty of export alongwith FE content in%	FOB rate per WMT (Rs.)	FOB value	% of under invoicing as compared to average sale FOB price for same grade and period	Actual value of the sale	Under invoicing
10.08.2007	28000(55%)	1023.352	28653856	60	71634640	42980784
11.05.2007	20000(58%)	1342.98	26859600	58	63951428	37091828
10.04.2007	160(59%)	1642.413	262786	54	571274	308488
21.09.2007	22000(58%)	1498.14	32959080	53	70125702	37166622
17.11.2007	25000(58%)	2109.138"	52728450	34	79891590	27163141
17.04.2007	37000(55%)	1134.04	41959665	31	60811108	18851444
						163562307(8)

*c. In view of the above, I have reason to believe that the assessee company income to the extent of Rs,31,88,49,945/- (A + B) has escaped assessment in the hands of M/s. Phuichand Exports Pvt. Ltd for A.Y. 2008-09 within the meaning of section 147 of the I.T. Act on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment." (Pg.2 of A 0)*

*Reasons to belief is in two parts:*

*i. part A is regarding escapement of income on exports made by PEC Ltd. of Rs.15.52 Cr by appellant.*

*ii. para B is relate to appellant's own export where escapement is claimed at Rs.16.35 Cr.*

*1.1 Only variance in reasons recorded for A.Y.2010-11 as well A.Y.2011-12 is that there is no believe of escapement in appellant's own export and notices in these two years are issued within 4 years, while for AY 08-09 after lapse of 4 years.*

2. The department submitted its Written submission dated 28.1.2021 para 1 to 3 deals with A.Y.2009-10, the same be commented upon in that year. In para 4.1 Ld. CIT(DR) stated that decision of Hon. High Court, Bombay is "squarely applicable to the case of AO of PEC Ltd. New Delhi whose basis for reopening was Justice M.B. Shah Commission report", however, in the present case "reasons to believe" is based on information provided by Delhi officer, which were independently analyzed by AO and hence it is argued that reasons to believe is not based on Justice M.B.Shah Commission report. In para 4.2 it is stated that "nowhere in the reasons there was a mention of the Hon. Justice M.B.Shah Commission". Ld. CIT(DR) in para 5 referred to back to back agreement entered between PEC Ltd and appellant and concluded in para 5.1 That "the above terms of the Contract clearly shows that the appellant was consulted and that the agreement was made on the advice of the 'Associate Supplier', which in this case is the appellant. Therefore, it can be stated that the appellant was aware of the rates at which exports made by other similar exporters as well as the market conditions and PEC had contracted with other foreign entities for the export of iron ore based on the inputs by the appellant."

3. DELHI OFFICERS' INFORMATION: Letter dated 09.03.2015 of Delhi Office to the AO informed:

a. "on the basis of report of Justice M.B. Shah Commission forwarded to this office by DIT(Investigation), Kolkatta in which it was observed that M/s. PEC Ltd. while exporting iron ore, has committed large scale under- invoicing in comparison to export of other companies on the same date or same grade of iron ore. It was also indicated in this report that the company has exported iron ore at different prices to different importers on the same date and for the same grade. The extent of under-invoicing worked out on the basis of M.B. Shah Commission's Report in comparison with the price of other company is as per Annexure A-1 and A-2."(para2)

b. PEC Ltd informed" that in the export transaction made by it, its exposure is in the financing the transaction against committed payment (e.g. letter of credit from the buyer in PEC's favour) and the associate take care of the viability of this price." PEC Ltd. has limited role/no role in export price but kept broad export price idea through 'Platts price' on the

*internet and transactions with other parties in the trade."*  
 (para3)

*Next information provided is that such under invoicing relates to appellant based on certain information made available by M/s PEC LTD. Para 4 list out details provided by PEC Ltd.*

- a. *a chart showing particulars of iron ore exported by PEC where the appellant acted as an associate supplier. Annexure 4(7AC)*
- b. *copy of agreement as entered by PEC with foreign buyer (26 32AC),*
- c. *back to back agreement with appellant(33-37AC)*
- d. *ledger copies of the parties to whom export made in books of PEC(8-13AC),*
- e. *appellant's copy of accounts in books of PEC (14-23AC)*
- f. *iron ore fine exports account in books of PEC (24-25AC).*

*In para 5 the Delhi Officer advised Mumbai Officer "It is the contention of M/s.PEC that its associate is entering in to transactions relating to export of iron ore and M/s. PEC is only financing for the said transaction. In the Report of Justice M.B. Shaha, the under invoicing in such transactions has clearly been worked out. Since the Associate is carrying out the transactions through PEC Ltd, necessary action with regard to under invoicing needs to be taken in the hands of its associates. As the above associate M/s. Phulchand Exports Pvt.Ltd. is assessed in your charge, necessary action may be taken in its hands by reopening the assessment for the A.Ys.2008-09. In the case of M/s.PEC, the assessment has already been re-opened.*

*A copy of report of Justice M.B. Shah can be downloaded from the website"*

*3.1 Information of Delhi Officer are solely Based on Commission Report: Delhi Officer information is(i) PEC LTD carried export of iron ore ,committed large scale under invoicing as per findings in report of Justice M.B. Shah Commission (ii)PEC LTD claimed that exports are carried out by associates through PEC Ltd., (iii) as PEC Ltd. is only financing, (iv)under invoicing is of the associates as worked out*

*by Justice M.B. Shah Commission in exports as made by PEC where appellant acted as an associate supplier as per details in ANN.4*

*Thus Delhi Officer informed that PEC LTD committed large extent under invoicing of iron export as price charged were lower to other exporters as found in Justice M.B. Shah Commission report. Thus such information are solely based on Justice M.B. Shah Commission report. Reasons recoded solely based on Commission's Report, even report not referred in the reasons recoded. Thus Decision of*

*Bombay High Court is fully applicable.*

*3.2 In case of appellants' own exports, in reasons recorded state " On further 'information received in this office," there is under invoicing to the extent of Rs.163562307/-.What are information for the belief are not disclosed in the reasons. Hence belief is devoid of any reason. However chart, in reasons, is based on Commission's Report. As such High Court decision is fully applicable.*

*3.3 In the Assessment order Ld. AO based addition solely on comparative rates provided in Justice M.B. Shah Commission report as is clear from para 5.4 and 6 of the assessment order not only in case exports of PEC Ltd. but also in own exports of the appellant. No other enquiry is conducted by Ld. AO either before recording reasons or making assessment. Thus reasons recorded are solely and only based on Justice M.B. Shah Commission report and decision of High Court of Bombay in the case of Sesa Sterlite Ltd. (supra) is fully applicable and notice issued U/s.148 is bad in law.*

*4. Exports are of PEC: It is submitted that understatement, if any, in exports made by PEC LTD are, only, of PEC and the same cannot be of appellant. There is complete lack of any reasoning for such, improvable conclusion without even alleging that PEC acted as benami of the Appellant. PEC entered export contracts with foreign buyers, specifying quantity to be exported, price at which to be exported and price adjustment permitted etc. All exports made are duly recoded in books of PEC, ledger account in PEC books of appellant clearly reflect finance provided by PEC and how the same are adjusted against export proceed realized by PEC. It is submitted that there is complete lack of evidence any extra export price realized by appellant. Delhi Officer informed further that PEC Ltd. has claimed that an associate take care of "viability of price". 'Viability' of the price only, means that associate can supply within that price range, can procure material for shipment. PEC Ltd. has limited role/no role*

*in export price but kept broad export price idea through 'Platts price' on the internet and transactions with other parties in the trade. "Thus PEC was not solely guided by appellant advice.*

*An export contract is with one importer Psons Ltd. dated 24th April 2007(26- 32AC) is provided by Delhi Officer. PEC Ltd agreed to export iron ore 40,000 wmts at USAD 64 CNF port China. Price adjustment is provided in cl.5, terms of payment in cl 6, export documents to be executed by PEC Ltd in cl 7, weighing, sample analysis, loading terms, arbitration etc. under cl 8-18 of the agreement.*

*4.1 PECLTD entered into a back to back agreement with appellant with respect to above export contract dated 24-04-07(33-37AC). Agreement provides that PEC in consultation of 'Associate Supplier' entered into export contract, referred above, for supply of iron ore of specification, quantity, payment and other terms and Associate Supplier agreed to fulfil, perform and discharge PEC obligation under foreign export contract. Cl.7 provide for financial assistance. Cl 7 provide That PEC will negotiate L/C and proceed will be given to 'Associate Supplier' after deducting payments made by PEC and its margin. Thus 'Associate Supplier ' agreed to fulfil ,and discharge the obligation of PEC under export contract.*

*Ld. CIT(DR) in para 5 after referring to back to back agreement in para 5.1 stated That "the above terms of the Contract clearly shows that the appellant was consulted and that the agreement was made on the advice of the 'Associate Supplier', which in this case is the appellant. Therefore, it can be stated that the appellant was aware of the rates at which exports made by other similar exporters as well as the market conditions and PEC had contracted with other foreign entities for the export of iron ore based on the inputs by the appellant."*

*It is submitted that even if export contract entered by PEC on advice of Appellant, PEC, too, having requisite information of prevailing market price, it does not lead to reasoning that appellant received any extra un-recorded export price or appellant used any device to receive any unrecorded income. There is no allegation of any extra receipt by appellant in reasons recorded. Ld. CIT(DR) this argument supplement reasons which is not permissible.*

*None of the information show any flow of export proceed to the appellant or enjoyment of any income. The reasons recorded does not show any income being accrued or received by the assessee. The*

*reason to belief arrived at "Therefore, it is estimated that M/s. Phulchand Exports Ltd has committed under invoicing of exports of iron ore as an associate company of M/s. PEC Ltd to the extent of Rs.15,52,87,638/- (A)" is not a possible "belief". Export price negotiated by PEC, export bills issued and proceed realized by PEC, with no logic, appellant will commit any under invoicing. In lack of any process of reasoning for escapement of income by appellant the belief recorded by the LAO is no belief.*

5. *Even if, the Reasons are not based on Commission Report, findings of High Court in Sesa Sterlite Ltd (supra)are fully applicable. Based on comparative rates of export as found by the Commission reasons to belief arrived at of under invoicing. The Court observed "the further information, however, that there was therefore under-invoicing of exports by the Assessee does not simply follow from this primary information." "There is nothing whatsoever in the impugned notice issued by the Assessing Officer to indicate that he has applied his mind to this aspect of the matter." Inference to be drawn from primary facts must be such as might follow from primary fact; not a conjecture or surmise, in any event, the officer has to apply his mind to arrive at such inference. (para16)*

*"There is nothing, however, in the reasons indicated by the Assessing Officer in the present case to suggest that any such income has accrued to any person or the Assessee. The reasons do not indicate that the Assessing Officer has formed any belief that under-pricing was adopted by the Assessee as a device by which income had accrued to any other person or the Assessee himself in any other form and such income had escaped assessment." (para 17).*

*What was available to the Assessing Officer was only information that export price received by the assessee was less than the market price. The information itself is highly doubtful as there appears to be no particular market price at the relevant date. The export price realised by the other exporters only indicate a particular market price. Price in individual export contract is based on various parameters. The Court further observed that even if we assume that the Assessee's export prices were in fact so less, there is nothing to indicate that any particular income has accrued to anyone as a result of such difference in prices. "There is, thus, no direct nexus or live link between the difference in prices and escapement of income." "There is, in other words, no way the Assessing Officer could have formed a belief that any income has escaped assessment simply on*

*the basis of the differences in the export prices of the Assessee when compared to others (para 18).*

*5.1 In the present case based on information that PEC Ltd. exported Iron & Ore at a price lower than other exporters appellant having acted as an associate supplier, the Reason to Belief of escaped income in export of PEC, by Appellant is not having any nexus to belief and also not a possible belief. The Court in Sesa Sterlite Ltd(supra) referred to certain criteria for valid reopening of the assessment and held that there was nothing to show that assessee received any extra price by any back door method "It must be demonstrably shown that the material used by Assessing Officer is reasonably capable of formation of his belief that income has escaped assessment. As the Supreme Court observed in Lakhmani Mewal Das (supra), belief does not mean a purely subjective satisfaction on the part of the Income Tax Officer. It must be held in good faith; it cannot be merely a pretense. It is open to the Court to examine whether the reason has a rational connection with or relevant bearing on the formation of the belief; it must not be extraneous or irrelevant for the purpose. In the present case, as we have noted above, the reason has no such bearing or rational connection with the formation of the belief. It is purely speculative on the part of the Assessing Officer to form a belief of escapement of income from taxation simply on the basis of lesser export prices charged by the Assessee. There is no material or even suggestion that any income corresponding to the so-called under-invoicing of exports was in fact received by any party or by the Assessee through any backdoor method. In the premises, there is no legitimate reason to believe which can sustain the impugned notice issued by the Assessing Officer."(para20)*

*In present case exports are made by PEC LTD, export contracts entered, export documents executed and export proceeds being realized and entered into its books of accounts, there is nothing to show to lead a belief of escapement in the hands of appellant.*

*6. It is submitted that a reason to believe merely based on information from DELHI OFFICER. Ld. AO did not make any enquiry with said officer whether any statement recorded of any officer of PEC alleging that appellant received any extra export price in addition to realized by PEC. Even a copy of affirmation made by PEC in its assessment proceeding not obtained but acted on conclusion drawn by said officer without any further enquiry. Hence notice is bad in*

*law. In PHOOLCHAND BAJRANGLAL 203 ITR 456 SC, the court held "ITO acquires jurisdiction to reopen assessment under s 147(a) t/ws 148 only if on the basis of specific, reliable and relevant information coming to his possession subsequently ",which tends to expose untruthfulness of facts. Sufficiency of material cannot be challenged but open to assessee to establish that there in fact existed no belief or the belief is not bona fide one or based on based on vague ,irrelevant and non specific information. Court referred to CHHUGAMAL RAJPAL 79 ITR 603 SC where notice was issued based on CIT circular intimating name lenders, without any other material, court held mere information will not be sufficient. However, unlike general circular AG made enquires in case of Phoolchand Bajrariglal as to existence of party. Court also referred LAKHMANI MEWAL DAS 103 ITR 437 SC holding, a general statement without specifying assessee and period be vague information.*

*In SABH INFRASTRUCTURE LTD 398 hR 198 DEL Information from wing, K admitted to be entry operator giving cheques against cash belief arrived at based on statement, AG arrived at belief of paper cos, the Court held information insufficient without further enquiry as to existence of cos . In MEENAKSHI OVERSEAS P LTD 395 ITR 677 DEL observed that mere suspicion without objective material and further enquiry reason to believe cannot be arrived on information. It will be borrowed satisfaction. In NU POWER OWER RENEWABLES P LTD 94 TAXMAN.COM 29 BOM Assessee issued debentures Rs 64 cr to S who received unsecured loan, prima fascia from a shell co. No verification of tangible material received, amount to outsourcing reason to believe. In SHODIMAN INVESTMENT P LTD 422 itr 337 BOM Information were received from inv. wing as to search on one party who carried suspicious transaction, based on information notice was issued In para 11 the Court observed, 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. However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. 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. In para12 the*

*Court stated 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." It is open to examine whether the reason to believe has rational connection with the formation of the belief. Apex Court in ITO v/s. Lakhmani Merwal Das 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". In para13 the Court further remarked, the reasons 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." The Assessing Officer has merely issued a re-opening notice on the basis of intimation 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.*

*Ld. CIT(DR) has argued that reasons to belief is not based on Justice M.B. Shah Commission report but information received from Delhi Officer it is submitted that Delhi Officer's report has no linkage/nexus to the conclusion that income chargeable to tax has escaped assessment. In 'reasons' facts mentioned in said Delhi Officer's letter are just repeated without any independent enquiry. Supreme Court rejected department SLP as filled in case of ANDALEEB SEHGAL 277 TAXMAN 492 SC against decision of High Court of Delhi 277 taxman 493 del cancelling notice under sec 148 as reasons were based on investigation by Enforcement Directorate, without independent enquiry by AO to hold assessee bribed Iraqui official ,it being a borrowed satisfaction and no material or precise document based on which belief can be said to be formed. In present case reasons lake process of reasoning to arrive at belief of escapement.*

*7. No Mind Application: In the reasons recorded Ld. AO computed escaped income in exports made by PEC Ltd. at Rs.15,52,87,638, based on FOB of exports of RS 32.06 Cr as Ann.1&2 to said Delhi OFFICER'S letter. Sales to PEC of appellant were only Rs.15.36 Cr.as per details filled in original assessment proceedings (PB26). In Annexure 4 to said letter the transactions effected through appellant as an associated supplier are listed, it shows that only one transaction of export is from Goa Port of 42440 WMP on 27.4.2007 on which under assessed profit computed of Commission is Rs.8,47,08,540/- out of transactions mentioned in Annexure 2. All Transactions in Ann.1&2 are exports of PEC as listed by Commission but all does not relate to appellant. It was submitted before Ld. CIT(A) that there is no application of mind while recording "reasons to believe. Ld. CIT(A) in para 5.1.7 upheld the contention of the appellant following the decision of High Court of Delhi in the case of Suren International Pvt.Ltd. 357 ITR 224 Delhi. There being no mind application but only Delhi officer advice being followed, notice is bad in law.*

*7.1 Similarly in A.Y. 2010-11 in the reasons recorded escaped income stated at Rs.220.02 Cr. in 49 transactions of the export of RS 426.73 cr carried out by PEC Ltd. Sales to PEC of appellant were only Rs 108.75 cr.as per details filled in original assessment proceedings (PB172).Ultimately it is found that appellant acted as a supporting supplier only in 9 transactions of export in which Justice M.B. Shah's report escapement computed is Rs.29.91 Cr. In A.Y. 2011-12 the LAO recorded in the reasons to believe that appellant committed escapement of income in exports through PEC Ltd.in 22 transactions of Rs.86.95 Cr.in export sales of RS164.28 cr while it is ultimately ascertained that appellant acted as associate supplier only in two exports in which escapement of income is Rs.1 Cr. hence it is submitted that reasons to believe is being arrived at without application of mind. The correct facts are ascertainable from annexures to Delhi Officer's letters itself.*

*8. Own Export: Belief is based "On further information received in this office", what are those information not disclosed, It is submitted that it can be no other information other than comparative rates of export as reported by the Commission, all data are taken from said report. LD CIT(DR) in para 4.1 accepted that Jurisdictional High Court judgment is applicable to PEC LTD, on the same logic it is applicable to appellant as this part of reasons is not based on Delhi Officers' letter but solely on Justice M B Shah Report. Reasons*

*recorded does not disclose any other information based on which the belief is arrived at. Reasons recorded are required to be interpreted as it is without any addition or subtraction. It is submitted that as far as own export is concerned there is no "reason" based on which LAO arrived at the belief.*

*9. Quantum Addition: Ground No.9 in department's appeal is against deletion for addition of Rs.24,82,70,847/- as made by Ld.AO on account of under statement of profit in export of iron ore. It includes profit alleged to be earned Rs.16,35,62,305/- in appellant's own export and profit of Rs.8,47,08,540/- in export made by PEC Ltd. The appellant submitted that merely based on export price being higher as disclosed by some other exporters, itself, cannot be a basis to reject export price recorded in books of accounts by the appellant, without any evidence of any extra export price realized or accrued, directly or indirectly to appellant. The appellant is a trade exporter, not a miner, exported iron ore to other traders against immediate payment, on rate agreed under prior executed advance export agreements. The LAO in para 5.4 reject the submissions and completed assessment, making addition based on Justice M.B. Shah Commission comparative rates. No other verification is made or evidence relied. Trade run on price difference, and an assessment, not to be based on presumed income, based on comparative export price of another exporter, without any evidence of extra undisclosed export price realised.*

*9.1 A reference to terms of reference along with finding given by Justice M.B. SHAH Commission clearly shows that finding are only tentative. The Commission advised that finding be further investigated by the authorities, pg.25-27 of LID CIT(A)'s order.*

*In Sesa Sterlite(supra) in para15 Court observed, referring to its decision in the case of Fomento Resources Pvt.Ltd that facts found and the conclusion drawn by a commission of enquiry are not judicial pronouncement. The report neither constitute a binding judgment nor a definite pronouncement. The Court also referred to the decision of Goa Foundation wherein Government gave an Undertaking that "Union would not take any action against mining lessees or traders for exports of ore only on the basis of the Commission's report without making its own assessment of facts and without first giving opportunity of producing evidence to the affected parties. It is impermissible to the department to act exclusively on the basis of the commission's report" (para15)*

*In present case addition is based solely on comparative rates as found by the Commission, without any further evidence, hence bad in law, being against commitment of the government. Observation of the Commission not being binding evidence an addition cannot be based merely on comparative rates found by Commission which are declared to be tentative by Commission itself.*

*9.2 It was submitted that PEC Ltd. is a Govt. of India Undertaking and cannot be presumed to doing underhand dealing in convince with appellant. Certain case laws are relied as given at pg.29 para 6.1 of Ld. CIT(A)'s order.*

*9.3 Assessment is based on averments made by PEC Ltd in its own reassessment proceedings before Delhi Officer unsupported by any corroborative evidence or even a sworn statement of any officer of PEC ,it is not permissible to base assessment on such unverified averments. Such Submissions were made by appellant as given in para 6.3 to 6.6 at pg.31-33 of LD CIT(A)'s order. Even Ld. AO did not carry out any enquiry with PEC to find nature of transaction of appellant with PEC being, just, supporting supplier and PEC being an approved government Trading House.*

*In response to notice u/s.133(6) of Delhi Officer (PB 29), appellant explained nature of transactions it had with PEC (PB 30— 31). The facts were also explained under appellant's director's affidavit (PB 73-79).*

*9.4 In the audited accounts of PEC Ltd iron ore exports is duly included as its business (PB 95-104). The copy of iron export in the books of Account of PEC Ltd (24 AC) also confirm the fact that all transactions are duly recognized as its transaction by PEC.*

*9.5 Representative documents of one export made by PEC are placed in PB at 51- 64. It includes i. Export bill to foreign importer (PB pg.55) ii. Bills of Lading, certificate of quality, certificate of weighment, (PB pg.55-57), notice to custom authorities for short shipment by PEC (PB pg.58), exchange control declaration by PEC ,export duly authenticated by customs authorities (PB pg.59-60), shipping bill duly verified by Central excise issued to PEC (PB 61-62), certificate of export realization in the name of PEC (PB 63), local bill of supplies of the appellant (pg.64). All these documents are executed by PEC. Export is recorded in the Books of PEC duly reflected in audited account audited by CAG. Based on these facts it is not possible to even presume that any part of income from export of PEC is of the*

*appellant. There is nothing to show that any part of profit accrued to the appellant, directly or indirectly. There is no basis to arrive at a finding that any profit not recorded in the Books of Accounts of the appellant is either received or accrued to the appellant. There is no charge against the appellant that it has used any device to divert any profit of the PEC to itself. There is no allegation of any export to any Associate Enterprise.*

*9.6 Representative documents In case of appellant's own export appellant submitted all the documents before Ld. AO as copy of export agreement entered with a foreign buyer such as export bill, bill of lading, certificate of quality, shipping bill for export duty, bank export realization certificate, etc. and submitted that there is nothing to show that appellant received any extra price than recorded in its Books of Account. Ld. AO merely using the comparative records as found by the Commission made the addition. The complete documents of one of the export documents is placed at (pg.80-94 of PB).*

*10. It is submitted that appellant's income from business is to be computed as per method of accountancy employed by it U/s.145 of the Act. Book of account can be rejected based on proof of defect in the books of account without pointing out any defect in Books of Account, it is not permissible to estimate an income. The Ld. AC has not relied on any evidence proving under invoicing and solely harbored upon the commission report. Charge of the under declaration of sale price being labeled by Ld. AC the same is to be sustained by Ld. AO. The appellant cannot be asked to prove negative. It is submitted wherever the legislature thought it fit to discard the sale price recorded in Books of Accounts but to base assessment on market price, the specific provisions are being made in law as sec.50 C permits assessment of capital gain based on Stamp Duty value, sec.43CA permits assessment of sale price in case of an immovable property in case of assessment of business income. In case of foreign transactions carried out with an Associate Enterprise, Sec.92 provides the adjustment to the income based on Arms' Length Price/ profit rate. It is not department's allegation that any of the export is to an Associate Enterprise. It is submitted that there is no justification for rejection of Books of Accounts to estimate export price in selected exports based on commission report instead of as declared by the appellant. The issue is considered by the courts:*

a. *Shivami & Co. Pvt. Ltd. 1591TR 71(SC)* Capital gain to be assessed based on price realized.

b. *A. Ramen & Co. 671TR 11(SC)* the court held that an income which could have been earned but not earned not to be taxed.

c. *Calculated discount Co.Ltd.91 ITR9(SC)* in this case certain investment were transferred by the assessee company to its own subsidiary at a price lesser than prevailing market price. The Court held that sales being bona-fide even if the goods are being sold at concessional rate income not accrued is not taxable.

d. *KK Enterprises, 178 taxman 187 (RAJ)* in this case assessee sold plots of land at average 18.66 per s ft as against Stamp Duty rate of Rs.40 per sft. The Court held that it cannot be presumed that land has been sold at higher price than the consideration shown.

e. *Devidayal Rolling Mills, 382 ITR 514,( BOM)* the Court held that even if the market price of waste is higher than the sale price received unless there is material to show that assessee actually received higher price the assessment not to be reopened.

f. *Yes Power & Infrastructure Pvt. Ltd. ITA No.813 of 2015 (BOM) dated 20/2/2018.* In this case books of accounts were rejected as goods were sold at a price lower than purchase price and gross profit was estimated. The Tribunal deleted the addition as AC did not find any defect in the books of account, quantity details furnished, merely because a trader sold goods at lower price would not warrant rejection of books of accounts. In para 7 the court observed "we find that it is not the case of revenue that amount reflected as sale price and /or purchase price in the books do not correctly reflect the sale and/or purchase price." The court observes under para 8 "It is not the case of the Revenue that any of the above circumstances specified in Section 145(3) of the Act are satisfied. The rejection of accounts is not justified on the basis that it is not possible for the Assessee who is a trader to sell goods at the prices lower than the market price or purchase price. In fact as observed by the Apex Court Commissioner of Income Tax, Gujarat Vs. A. Raman & Co. and in S.A. Builders

*Vs. Commissioner of Income Tax, the law does not oblige/compel a trader to make maximize its profits."*

*g. The High Court of Bombay in the case of Sesa Sterlite (Supra) after referring Raman and Co. 67 ITR 11(SC) the court observed "the law does not oblige a trader to make' maximum profit out of his trading transactions. It is the income which accrues to a trader which is taxable in his hands; not the income which he could have, but has not earned. No doubt, by adopting a device, if it is made to appear that income which really belonged to the assessee had been earned by some other person or by the Assessee in some other form or means, that income may be brought to tax in the hands of the Assessee and if such income has escaped tax in a previous assessment, a case for reassessment under Section 147(b) may be made out."(par 17)*

*h. The High Court of Gujarat in the case of Rawmine Mining & Industries Pvt. Ltd. ITA 746 of 2019 (Guj.) considered an addition made, based on findings as to comparative export rates of iron ore, by the Justice M.B. Shah commission, even being unable to lay his hand on any evidence exhibiting under invoicing by the assessee. The AO solely harbored upon commission's report. It is pertinent to observe that a charge of suppressed sales carried out by the assessee has been raised by the AO against it. It is duty of the AO to prove the prima facie that such a charge can be leveled against the assessee, thereafter it can be called for disproving that. The AO assumed charge and thereafter put a negative upon the assessee to prove that it has not exported iron ores by under invoicing. This cannot be enforced in law. It is the AO who has to first prove the factum of under- invoicing done by the assessee with reliable evidence in law. With regard to the alleged report of Hon'ble M.B. Shah Commission, it contended that this report was challenged before the Hon'ble Supreme Court by way of writ petition Government of India and other law enforcement agencies took the stand that on the basis of this they are not going to take any action, rather they will investigate the issue further. Thereafter Court extracted from said decision in para 19 of the decision.*

*The Court in para 20 observed that competitive rates are even not correctly worked out under the report of the commission, certain discrepancies are pointed out.*

*The Court finally held in para 20 "It is also pertinent to observe that the assessee is a trader and not a miner. It has goods from the open market and exported. It has exported a single shipment to world renowned national company and it is not a sister concern of the importer. The goods were sold at arms length purchased royalty paid iron ore and evidence to this effect has been brought to our notice and available nos. 113 to 129 of the paper book. Therefore, we are of the view that report which the Commission itself as tentative report could be setting the investigation machinery in motion. But treated equivalent to a decree which is required to be executed as it is, more so, in the light of finding the Hon'ble Supreme Court and the stand taken by the respective States. The AO has miserably failed any evidence against the assessee demonstrating the fact that it has under-invoiced its export and received unaccounted sale proceeds. The undisclosed sales cannot be worked out on the basis of this no addition required to be made in the absence of any evidence. We allow this fold of contention of assessee and delete the addition."*

*i. Discovery Estate Pvt. Ltd. 356 ITR 159 (Delhi) Certain shops were sold to sister concerns at lower rate, the court held that if on further probe AO was not able to unearth any evidence of actual higher sale price, no addition can be made based on prevailing market price.*

*j. A. Khadr Basha 232 taxman 434 (Karnataka) In this case purchases were effected from a concern falling u/s.40A(2) on average price of Rs.3,890 per mt. and sold on the selling price of Rs.2277/- per mt. The Court rejected the addition made.*

*It is submitted that in appellant's case also it is found that in A.Y. 2010-11 price difference computed by the commission in two export transactions is Rs.95.53 lacs as given in Anx/A1' but as per Anx.'A2' it is worked out at Rs.427.15 lacs, in A.Y. 2011-12 similarly as per Anx/A1' the price difference in three exports is 936.41 lacs and as per Anx/A2' Rs.2061.14 lacs. In A.Y. 2009-10 in 4 export transactions as per Anx/A1" difference is Rs.7.47 lacs and as per"A2" Rs.127.90 lacs. Thus commission worked out price difference for the same export transaction by adopting 2 methodology at very substantial different figures.*

*In present case also the assessee is a trader and not a miner. It acquired goods from the open market and exported. None of the importers are alleged to be its sister concern. The goods were sold at arms length. Report of the Commission is as tentative report to set the investigation machinery in motion. Report cannot be treated equivalent to a decree which is required to be executed as it is, more so, in the light of undertaking given, before the Hon'ble Supreme Court and the stand taken that no action be taken merely based on finding in the Report without independent investigation. The AO has failed to bring any evidence against the assessee demonstrating the fact that it has under-invoiced its export and received unaccounted sale proceeds, but enhanced export price, merely based on comparative rates as found by Commission. It is on record that Commission worked out two wide different export price for one and same export. It is submitted that appellant discharged its onus by producing documentary evidences to prove correctness of its export price/price realised from PEC Ltd., nothing has been brought on record to prove any realization not recorded in books. Even no enquiry made from PEC LTD to find correctness of its allegations, so heavily relied. Supreme Court in ADAMINE CONSTRUCTION PLTD 259 TAXMAN 131(SC) held that an addition based on a report of outside agency without own enquiry, cannot be basis of assessment, as such report is not primary material and assessee discharged its onus by producing evidences. Supreme Court in case of ODEON BUILDING PVT LTD 418 hR 515 SC confirmed the orders of lower authorities deleting addition, as assessment was based, on ,solely, third party information and not subjected to further enquiry. It is submitted that undisclosed sales cannot be worked out on the basis of such comparative rates, rejecting books of accounts. It is further submitted that no addition be upheld in the absence of any evidence brought on record.*

*10.1. The facts of A.Y. 2010-11 and 2011-12 are similar and above submissions are equally applicable to those years."*

**7.** Ground No. i to viii are relating to reopening of assessment, considered the submissions of both the parties and material placed on record. With regard to AY 2008-09, we observe that the reopening of assessment was initiated after expiry of 4 years based on the information

received from the AO of PEC Ltd, Delhi. There is no doubt that AO has not recorded any reasons on the failure on the part of assessee to initiate proceedings u/s 147(1). However, we observe that the proceedings were initiated on the basis of information from AO of PEC Ltd, in turn the information forwarded by the AO of PEC also based on the findings given by Justice M.B. Shah Commission. Considering the wide range irregularities in the case of PEC, it was necessary to verify the supporting supplier assessments, the reassessment proceedings were initiated. The Ld CIT(A) considered the objections raised by the assessee in the grounds of appeal and accordingly allowed the same. However, Ld CIT(A) has given relief on merit. That is the reason, the revenue is in appeal. Even though the case was reopened after the expiry of 4 years from the end of the assessment year, in case there is merit in the ground raised by the revenue, however, it is submitted before us that the issue under consideration is covered in favour of the assessee by the order of the Hon'ble Bombay High Court in Sesa Sterlite Ltd., (supra), therefore, we do not see any merit in adjudicating the issue of reopening. It will leads to academic purpose only. Therefore, this issue is kept open.

**8.** Ground No. ix is in respect of "issue of under invoice", considered the argument of the Ld.DR, he submitted that the assessee as an associate supplier aware of the negotiations made by the PEC Ltd with the importers. The allegations were that PEC contended that its associate is entering into transactions relating to export of iron ore and PEC is only financing for the said transaction. By referring to the Justice M B Shah report, it was alleged that under invoicing were done since the associate is carrying out the transactions through PEC Ltd, it is possible that even the supporting associates were also indulged in such under invoicing transactions. However, we observe that in the case of Rawmine Mining & Industries Pvt. Ltd. ITA 746 of 2019 (Guj.) the High Court of Gujarat considered an addition made, based on findings as to comparative export rates of iron ore, by the Justice M.B. Shah commission, even being unable to lay his hand on any evidence exhibiting under invoicing by the assessee. The AO solely harbored upon commission's report. It is pertinent to observe that a charge of suppressed sales carried out by the assessee has been raised by the AO against it. It is duty of the AO to prove the prima facie that such a charge can be leveled against the assessee, thereafter it can be called for disproving that. The AO assumed charge and thereafter put a negative upon the assessee to prove that it

has not exported iron ores by under invoicing. This cannot be enforced in law. It is the AO who has to first prove the factum of under- invoicing done by the assessee with reliable evidence in law. With regard to the alleged report of Hon'ble M.B. Shah Commission, it contended that this report was challenged before the Hon'ble Supreme Court by way of writ petition Government of India and other law enforcement agencies took the stand that on the basis of this they are not going to take any action, rather they will investigate the issue further. The Court observed that competitive rates are even not correctly worked out under the report of the commission, certain discrepancies are pointed out. The Court finally held, "It is also pertinent to observe that the assessee is a trader and not a miner. It has goods from the open market and exported. It has exported a single shipment to world renowned national company and it is not a sister concern of the importer. The goods were sold at arms length purchased royalty paid iron ore and evidence to this effect has been brought to our notice and available nos. 113 to 129 of the paper book. Therefore, we are of the view that report which the Commission itself as tentative report could be setting the investigation machinery in motion. But treated equivalent to a decree which is required to be executed as it is, more so, in the light of finding the Hon'ble Supreme Court and the

stand taken by the respective States. The AO has miserably failed any evidence against the assessee demonstrating the fact that it has under-invoiced its export and received unaccounted sale proceeds. The undisclosed sales cannot be worked out on the basis of this no addition required to be made in the absence of any evidence. We allow this fold of contention of assessee and delete the addition.

**9.** Similarly, Hon'ble High Court of Bombay in the case of Sesa Sterlite Ltd. 417 ITR 334 (BOM), came to similar view on the report of Justice B M Shah. Since the facts in the present appeal by the revenue are similar and the decisions reached by the Hon'ble High Courts, we do not see any reason to disturb the findings of Ld CIT(A), therefore, we are inclined to dismiss the grounds raised by the revenue in this regard. Ground raised by the revenue is dismissed.

**10.** Coming to the appeal for the A.Y. 2009-10, revenue has raised two issues in the grounds of appeal, first is relating to bogus purchase addition and other is relating to under invoicing issue, which is common in all the assessment years. Therefore, the second issue is adjudicated in the above Para No. 8 &9 is applicable mutatis mutandis. Hence ground no. 2 and 3

are dismissed. For the sake of clarity, the grounds of appeal are reproduced below: -

*"1. Whether on the facts and circumstances and in law, the Ld.CIT (A) was right in deleting the addition of Rs. 13,499/- on account of purchases claimed to have been made from M/s. Bath Classic and M/s. Aman Enterprises held as bogus without appreciating that specific information was received from Sales Tax Department that the alleged parties had confessed to providing accommodation entries without conducting any business activity and that the assessee was one of the beneficiary of such accommodation entries.*

*2. Whether on the facts and circumstances and in law, the Ld. CIT (A) was right in deleting the addition of Rs.44,51,81,265/- on account of under invoicing of goods exported without appreciating that said addition is made as per the comparable export price which is as determined by the Hon'ble Justice M.B. Commission in its report on illegal mining.*

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

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

**11.** With regard to above grounds of appeal, at the time of hearing, Ld.DR submitted that he has submitted consolidated written submissions for the A.Y. 2008-09 and other AYs and he relied on written submissions submitted above.

**12.** On the other hand, Ld. AR of the assessee submitted his submissions which are reproduced below: -

*"The assessment was originally completed under order dated 8-11-2011 at income of Rs.3.23 Cr. Appellant is in trading export of commodities and had a turnover of Rs.260.51 Cr. Thereafter, a notice U/s.148 dtd. 28-03-2014 was issued. Appellant through Cross Objections has challenged validity of notice u/s 148. The reasons recorded are as below:*

*1. "During the Previous Year 2008-09 relevant to A.Y. 2009-10 the assessee had shown purchases from M/s. Bath Classic to Rs.64,688/and from M/s. Aman Enterprises to Rs.7,030/-. Information has been received from DGIT (Inv.) vide his letter No. DGIT (Inv.)/Corr. Field/2012-13 dtd. 01.01.2013 that this party had confessed before the Sales Tax Department that it had actually not sold any material of any sort to the assessee but only issued bills totaling to Rs.71,718/during the year. The key person of M/s. Bath Classic and M/s. Aman Enterprises have confessed that they have never purchased nor sold any material of any sort. They have further stated that they have merely issued sale bills without actual delivery of any material and whatever amounts have been received towards these alleged sales by cheque has been withdrawn from banks and returned back to the alleged purchaser in cash".*

*1.1 Appellant's objections were rejected under order dated 16-02-15. Ld. CIT (A) upheld validity of notice U/s. 148 per para 5.1.2 of the order. Appellant requested for all material relied for 'belief' to enable it to filling effective objection. Statements relied were not provided for filling objection or Even, in assessment proceeding, even such statements, based on which 'belief' is based are extracted in the Assessment Order.*

*1.2 It is submitted that mere information from wing without any further verification, Ld. AO recording reasons to belief is based on borrowed satisfaction. Reasons Recoded does not reflect any mind application, even statements relied are not extracted. In PHOOLCHAND BAJRANGLAL 203 ITR 456 SC, the court held "ITO acquires jurisdiction to reopen assessment under Sec. 147(a) r.w.s. 148 only if on the basis of specific, reliable and relevant information coming to his possession subsequently ",which tends to expose untruthfulness of facts. Sufficiency of material cannot be challenged but open to assessee to establish that there in fact existed no belief or the belief is not bona-fide one or based on vague, irrelevant and non specific information. Court referred to CHHUGAMAL RAJPAL 79 ITR 603 SC where notice was issued based on CIT circular intimating*

*name lenders, assessing officer without any other material or enquiry issued notice, court found it not be sufficient. Court also referred LAKHMANI MEWAL DAS 103 ITR 437 SC where court held a general statement without specifying assessee and period held to be vague information. However, unlike AO made enquires in case of Phoolchand Bajranglal as to existence of party. Hence based on such enquiry the Court upheld the notice.*

*In SABH INFRASTRUCTURE LTD 398 ITR 198 DEL Information from wing K admitted to be entry operator giving cheques against cash belief arrived at based on statement, AO arrived at belief of paper cos , the Court held information insufficient, without further enquiry as to existence of cos. In MEENAKSHI OVERSEAS P LTD 395 ITR 677 DEL observed that mere suspicion without objective material and further enquiry reason to believe cannot be arrived on information. it will be borrowed satisfaction. In NU POWER OWER RENEWABLES P LTD 94 TAXMAN.COM 29 BOM Assessee issued debentures Rs.64 cr. to S who received unsecured loan, prima fascia from a shell co. No verification of tangible material received, amount to outsourcing reason to believe. Court held notice to be bad.*

*SHODIMAN INVESTMENT P LTD 422 ITR 337 BOM Information were received from inv. wing as to search on one party who carried suspicious transaction, based on information notice was issued In para 11 the Court observed 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. However, the belief must be independently formed in the context of the material obtained that there is an escapement of income. 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. In para 12 the Court stated 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 reopening 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." It is open to examine whether the reason to believe has rational connection with the formation of the belief. Apex Court in ITO v/s. Lakhmani Merwal Das 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". in para13 the Court further remarked, In this case, the reasons 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." The Assessing Officer has merely issued a re-opening notice on the basis of intimation 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.*

*1.3 Reasons are based on alleged statement made by two suppliers before Sales Tax authorities not to have sold or purchased any material. Said confessional statements are neither provided to appellant at any stage nor any portion quoted in the order. (t clearly reflect that no confessional statement was before Ld. AO at the time of recoding reason. In SATYA SHEEL GUPTA 52 ITR (Tri) (SN) 35 DEL Hon. ITAT "Held allowing the appeal, that the basis given by the Assessing Officer in the reasons was that the entry providers admitted that they gave accommodation entries to the parties whose lists had been provided by them. It was apparent that the Assessing Officer at that point of time when he recorded the reasons did not have a copy of the statement or any other material in which these people were alleged to have provided accommodation entries to the assessee, This position gets also corroborated from the facts stated by the Assessing Officer himself in the assessment order. Therefore, the reassessment was not valid." High Court of Gujrat in VARSHABEN SANATBHAI PATEL 282 CTR 75(GUJ) held a notice for reopening based on external material which does not form part of record Is bad,*

*It is submitted that Ld. AO, merely, based on the information of Inv. Wing as to statement made by suppliers before Sales Tax Authorities, without, himself verifying the same or to conduct any enquiry himself before recoding Reasons. Having regard to volume of the appellants' business, it do not come to reason that appellant went out to obtain bogus bills of mere 71,718/-. Correctness and applicability of statement not being verified, statements being general, such vague information may lead to a suspicion but not 'belief'. Supreme Court rejected department SLP as filled in case of ANDALEEB SEHGAL 277 TAXMAN 492 SC against decision of High Court of Delhi 277 taxman 493 del cancelling notice under sec 148 as reasons were solely based on investigation by Enforcement Directorate, without independent enquiry to hold that assessee bribed Iraqi officia, it being a borrowed satisfaction and no material or precise document based on which belief can be said to be formed. In present case, as 'belief' is solely recorded based on third party information without any independent verification, it is submitted that notice is bad in law.*

*The Department in GR.1 has challenged deletion by Ld. CIT (A) addition of RS 13,499/- on account of bogus purchases as per para 5.2.10 and 5.2.11 .Appellant, in its objection, filled copies of purchase bills, along with its bank statement reflecting payment by cheque and explained that purchases from Bath Classic RS 65338/are of furniture on which depreciation at 10% and to Aman enterprise, debit being cost for getting Memorandum & Articles of the Company reprinted, was reversed in A.Y.2010-11 and no payment is made (PB 6-12C).Appellant submitted that goods were supplied at its office, requested for copy of statement and cross examination. Ld. AO stated that suppliers were not found at address, notices u/s 133(6) remained unserved. Ld. AO further observed that delivery Challan, Octroi receipt, excise or custom bill, lorry receipt etc. not produced. In para 6.7 of assessment order referred to appellant contention that goods purchased are solid, entered in quantity records and only profit alimnt to be assessed, Ld. AO referred to certain decision for the said proposition. It is submitted that appellant never made these submissions. Other observations of Ld. AO are not based on facts on record. Thus Ld. AO made addition without application of mind.*

*2.1 it Is submitted that Investigation by another department cannot be a basis of assessment. Supreme Court in the case of ATMS Mohd. 197 ITR 196 observed that It is needless to emphasize that FERA and Income Tax Act are two separate and Independent Acts*

*operating In two different fields. The statement recoded under TLRA proceeding cannot be applied in IT proceedings as scope of two independent Acts are entirely different and dissimilar. in the case Vijay Kamdar, 42TT) 475 ITAT Bench Mumbai, the AO held that assessee has over invoiced purchase based of enquiry conducted by customs authorities and non appearance of the vendors in the assessment proceedings. The ITAT deleted the addition. High Court of Bombay In the case of Jagdish Mohanlal Joshi, 259 Taxman 342 Bombay addition based on statement recorded by Maharashtra Central Organization Crime Act, statement neither provided nor a cross examination accorded, deleted addition. SLP filed by the department stand rejected 349 taxman 342(SC). In Novelty Electronics, 89 taxman.com 413 Guj. a statement was recorded during IT search and based on that statement additional tax was Imposed under GST without any independent verification. The High Court of Guj. deleted the addition. The decision in case of Jagdamba Trading Co. vs. ITO 16 SOT 66 (Jodh.)(URO)and in case of Premchand 25 SOT 11 Jodhpur (URO) may also be referred holding that based on proceeding before Sales Tax department ,an assessment of income cannot be based.*

*2.2 No copy of statement provided. No cross examination provided although requested. High Court of Bombay in RW Promotion Pvt. Ltd. 281 CTR 200 Bombay deleted the addition as there was breach of principles for natural justice by not allowing cross examination. In the case of Andaman Timber Industries, 281 CTR SC 241 held that non affording cross examination of the witness made the order nullity. In case of JMD Computers and Comm. Pvt. Ltd, 320 ITR (ST) 17 SC purchases were taken as inflated based on statement of witness which were relied without affecting cross examination. The Court confirmed the deletion of addition. Similar observations are made by Supreme Court in the case of Sunita Dhadha 403 ITR(ST) 309 SC as well as in Ordeon Builders P.Ltd.418 ITR 315 SC. High Court Of Bombay in case of ASISH INTERNATIONAL ITA NO 4299 OG 2009 DATED 228° FEB.2011 also confirmed ITAT order deleting addition based on suppliers' statement, not subjected to cross examination.*

*2.3 It is submitted that purchases stands proved by purchase bills issued and payments being made through banking channel. Punjab & Haryana high court in the case of CIT vs. Smt. Anju Jindal - 387 ITR 418 (P&H) held that no addition is to be made holding purchases as bogus, if payments are made by cheques. ITAT in the case of*

*DCIT vs. Shivshankar R. Sharma — 48 CCH 43 (Mumbai) Observed: The AO has not conducted any independent enquires for making the addition especially since the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing bills for purchase of goods. LD AO relying on the official website of the Sales Tax Department, Government of Maharashtra regarding suspicion parties providing accommodation entries made addition. Neither any document being provided by the AO nor he has given any opportunity to the assessee to cross examine the said party. The Hon. Tribunal deleted addition made of purchases.*

*Ramesh Kumar & Co. v. ACIT (Mum.)(Trib.);www.itatonline.org S. 69C: Unexplained expenditure-Assessment Bogus purchases-Hawala dealers-AO is not entitled to treat all purchases as bogus merely because sales-tax department has called the seller a ""Hawala dealer". The AO ought to have verified the bank details of the assessee and the seller and other evidence before treating the purchases as bogus.*

*Deepak Popatial Gala (Mum.)(Trib.);www.itatonline.org S. 69C : Unexplained expenditure-Bogus purchases-Hawala dealers Addition towards bogus purchases cannot be made solely on the basis of statements of seller before salestax authorities. The AO has to conduct own enquiries and give assessee opportunity to cross-examine the seller The AO has made addition merely on the basis of observations made by the Sales tax department and has not conducted any independent enquiries for making the addition especially in a case where the assessee has discharged its primary onus of showing books of account, payment by way of account payee cheque and producing vouchers for sale of goods, such an addition could not be sustained. (ITA no. 5920/Mum/2013, dt. 17.03.2015)*

*ACIT vs. Ramila Pravin Shah (ITAT Mumbai) (ITATOLINE) Bogus purchases: Fact that suppliers names appear in the list of hawala dealers of the sales-tax dept and that assessee is unable to produce them does not mean that the purchases are bogus if the payment is through banking channels Further, it has to be appreciated that (i)Payments were through banking channel and by Cheque, (ii) Notices coming back, does not mean, those Parties are bogus, they are just denying their business to avoid sales tax/VAT etc., (iii) Statement by third parties cannot be concluded adversely in isolation and without corroborating evidences against appellant ,(iv) No cross*

*examination has been offered by AO to the appellant to cross examine the relevant parties (who are deemed to be witness or approver being used by AO against the appellant) whose name appear in the website [www.mahavat.gov.in](http://www.mahavat.gov.in) and (v) Failure to produce parties cannot be treated adversely against appellant.*

*2.4 High Court of Bombay in VAMAN INTERNATIONAL LTD 107CCH 300 (BOM) confirmed deletion as made by ITAT of addition based on Vat Department information through Investigation Wing. Tribunal held that Assessing Officer could not bring on record any material evidence to show that the purchases were bogus. Mere reliance by the Assessing Officer on information obtained from the Sales Tax Department or the statements of two persons made before the Sales Tax Department would not be sufficient to treat the purchases as bogus and thereafter to make addition under Section 69C. Tribunal has also held that if the Assessing Officer had doubted the genuineness of the purchases, it was incumbent upon the Assessing Officer to have caused further enquiries in the matter to ascertain genuineness or otherwise of the transaction and to have given an opportunity to the assessee to examine/cross-examine those two parties vis-a-vis the statements made by them before the Sales Tax Department. Without causing such further enquiries in respect of the purchases, it was not open to the Assessing Officer to make the addition under Section 69C. "In para 15 Court referred to decision of High Court of Gujrat in case of KRISHNA TEXTILES 310 ITR 227 (GUJ) holding onus on revenue to prove that the income really belong to assessee. In para 16 referred the fact that all payments were made through banking channel.*

*In SHAPPONJI PALLONJI & CO 423 ITR 220 (BOM) The Court observed"15. From the assessment order, we find that assessing officer had noted that the respondent - assessee had made purchases of Rs.3,23,944.00 and Rs.8,923.00 from M/s. Kant Enterprises and M/s. Nutan Metals respectively. Assessing officer further noted that information was received from the Sale Tax Department, Government of Maharashtra that the above two parties had not actually sold any material to the respondent - assessee. Accordingly, show cause notice was issued to the respondent - assessee to furnish details relating to above purchases. In response to the show cause notice, respondent - assessee furnished copies of the bills and entries made in its books of accounts relating to such purchases pertaining to glass mosaic tiles from M/s. Kant Enterprises and stainless steel top railing from M/s. Nutan Metals. However,*

*assessing officer vide his assessment order dated 31.01.2013 held that there was no actual purchase of goods by the respondent - assessee and accordingly the aforesaid two amounts totaling Rs.3,32,867.00 was disallowed and consequently added to the total income of the respondent - assessee.*

*19. We are in agreement with the views expressed by the Tribunal. Merely on suspicion based on information received from another authority, the assessing officer ought not to have made the additions without carrying out independent enquiry and without affording due opportunity to the respondent - assessee to controvert the statements made by the sellers before the other authority. Accordingly, we do not find any good ground to entertain this question for consideration as well." Stating so Departmental appeal was dismissed."*

*in view of the above it is submitted that no addition on account of purchases is warranted, hence rightly deleted.*

**13.** Ground No. 1 is in respect of deleting the addition of ₹.13,499/- on account of purchases claimed to have been made from M/s. Bath Classic and M/s. Aman Enterprises held as bogus without appreciating that specific information was received from Sales Tax Department that the alleged parties had confessed to providing accommodation entries without conducting any business activity and that the assessee was one of the beneficiary of such accommodation entries.

**14.** Considered the rival submissions and material placed on record, we observe that the issue involved relating to bogus purchased and the amount involved are very small. Considering the quantum of amount

involved, there may not be any reason for the assessee to indulge in such bogus purchases transactions. Therefore, this issue is decided in favour of the assessee, accordingly, the ground raised by the revenue is dismissed.

**15.** Accordingly, the appeal filed by the revenue is dismissed.

**16.** Coming to the Cross objection filed by the assessee for the A.Y.2009-10. Ld. AR of the assessee has not pressed the cross objection, accordingly, the same is dismissed.

**17.** In the result, appeal filed by the revenue and cross objection filed by the assessee are dismissed.

**18.** Coming to the appeals relating to A.Ys. 2010-11 and 2011-12, we have already decided the common issue of reopening, even though the reopening was made within 4 years and within time, as discussed in the Para No 7 above, the reopening issue even we decide in favor of the revenue but the merit is in favour of the assessee. It will lead to unfruitful discussion and for academic purpose, hence not adjudicated and kept it open. With regard to the issue of under invoicing of goods exported while

adjudicating the appeal in A.Y. 2008-09, since facts in these cases are mutatis mutandis, therefore the decision taken in A.Y. 2008-09 (Para No. 8 above) is applicable to these Assessment Years also. Accordingly, these appeals are also dismissed.

**19.** In the result, appeals filed by the revenue are dismissed and cross objection filed by the assessee is dismissed.

Order pronounced in the open court on 12.05.2022.

Sd/-  
**(PAVAN KUMAR GADALE)**  
**JUDICIAL MEMBER**

Mumbai / Dated 12.05.2022  
Giridhar, Sr.PS

Sd/-  
**(S. RIFAUR RAHMAN)**  
**ACCOUNTANT MEMBER**

**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, Mum**