

आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"A" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA. No. 770/JPR/2023
निर्धारण वर्ष / Assessment Years : 2013-14

Lovely Promoters Private Limited 47A 47A, 3 rd Floor Zakaria Street, Kolkata-700073.	Vs.	ACIT, Central Circle, Ajmer.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABCL1338C		
अपीलार्थी / Appellant		प्रत्यर्थी / Respondent

निर्धारिती की ओर से / Assessee by : Shri Mayank Taparia (Adv.)
राजस्व की ओर से / Revenue by : Shri A.S. Nehra (Addl.CIT)

सुनवाई की तारीख / Date of Hearing : 21/02/2024
उदघोषणा की तारीख / Date of Pronouncement : 08/03/2024

आदेश / ORDER

PER: RATHOD KAMLESH JAYANTBHAI, AM

This appeal is filed by the assessee aggrieved from the order of the Learned Commissioner of Income Tax (Appeals), Jaipur-5 dated 19.10.2023 [Here in after referred as "CIT(A)"] for the assessment year 2013-14, which in turn arise from the order dated 26.03.2022 passed under section 147 of the Income Tax Act, [Here in after referred as "Act"] by the AO.

2. The assessee has marched this appeal on the following grounds:-

“1. That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the AO's order dated 26-03-2022 passed for the AY 2013-14 u/s. 147 r.w.s. 143(3) of the Act without appreciating true and correct facts of the case and documentary evidences brought on record by the assessee.

2. On the facts and in circumstances of the case and in law, the assessment framed by the AO is a nullity and without jurisdiction because the transfer of the reassessment proceedings initiated by notice u/s 148 of the Income-tax Act, 1961 were not legally transferred by the Chief Commissioner/Director General, Kolkata after recording and communicating the reasons and providing opportunity to the appellant as prescribed u/s 127(1) of the Income-tax Act, 1961.

3. On the facts and in circumstances of the case and in law, the Id. CIT(A) in his order dated 19-10-2023 failed to comment on technical plea raised by the appellant in ground no. 2 before him regarding non mentioning of Document Identification Number (DIN) in the body of the order u/s. 127 of the Act dated 08-09-2021 and various other technical pleas raised in grounds of appeal regarding validity of notice u/s. 148 of the Act, thereby appellate order passed by the CIT(A) is non-speaking order and deserves to be quashed.

4. On the facts and in circumstances of the case and in law, the AO erred in issuing notice u/s. 148 of the Act as it was a search related case u/s. 132 r/w s. 153, there is no jurisdiction of section 148 for connected search cases. Proper step was to issue notice u/s. 153C or 153A. This is not done in the present case.

5. On the facts and in the circumstances of the case and in law, the assessment u/s 148/147 of the Income-tax Act, 1961 is invalid and illegal because the reopening of the assessment is not in conformity with the express legal provisions so as the appellate order dated 19-10-2023 passed in assessee's case in view of the following:

The notice u/s 148 of the Act was issued on 01-04-2021 though signed on 31-03-2021 as such the AO should have followed procedure laid

down in newly amended section 148A of the Act w.e.f. 01-04-2021. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

b) The ITO Ward-14(1), Kolkata has issued notice u/s 148 without satisfying the mandatory condition of obtaining approval of the concerned authority as laid down u/s 151 of the Income-tax Act, 1961. Even it is presumed that the requisite approval was given by the concerned authority but the same was in a mechanical manner without applying the mind to the facts of the case. By No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

c) The Assessing Officer in the reasons recorded does not spell out and establish the factum of escapement of chargeable income. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19- 10-2023.

d) Reopening of the assessment is done without application of mind since the reasons state that loss booked by the assessee in Derivative transactions was bogus, is factually incorrect. Had the Assessing Officer applied its mind then he would have realized that there was genuine loss. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

e) The Assessing Officer does not establish a live link between the material obtained pursuant to the searches conducted at various brokers and the escapement of assessable income with reference to transactions entered into by the appellant. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

f) The Assessing Officer failed to dispose of objections raised by the assessee regarding issuance of notice u/s. 148 of the Act thereby totally disregarded the procedure laid down by the Hon'ble Apex Court in case of GKN Driveshaft. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

6. That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 1,09,99,289/- by upholding the AO's action in treating the real loss incurred by the assessee in Derivative transactions as bogus without considering the assessee's submission in right perspective. The entire decision of the CIT(A) is just

confirmation of investigation report of the Mumbai without there being any consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.

7. That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 2,19,736/- u/s. 69C of the Act by upholding the AO's findings that the assessee incurred expenditure for arranging fictitious loss. This entire finding of the AO was based on his hypothetical Imagination as loss incurred by the assessee in Derivative transactions was real. The CIT(A) failed to record any speaking findings while confirming this addition and there being no consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.

8. That on the facts and circumstances of the case, the CIT(A) erred in not issuing directions for allowing relief regarding charging of interest u/s. 234A, 234B and 234C of the Act.

9. That on the facts and circumstances of the case, the CIT(A) erred in not issuing directions for dropping penalty proceedings u/s. 271(1)(c) of the Act.

10. The appellant craves leave to add or to amend the foregoing ground of appeal, if it becomes necessary to do so in the interest of justice.”

3. The fact as culled out from the record is that in this case originally return of income was e-filed on 30.09.2013 declaring total income at Rs. Nill, and in fact as per computation of income, during the year there was net loss of (-) Rs. 11,04,719/- claimed by the assessee. Thus, the assessee paid tax as per section 115JB on book profit of Rs. 32,14,608/-. The case was completed u/s. 143(3) of the Act, vide order dated 25.01.2016 at Rs. (-) 7,75,356/-.

Thereafter, notice u/s 148 of the I.T. Act, was issued by ITO, Ward-14(1), Kolkata on 31.03.2021 after duly recording reasons and obtaining necessary sanction of PCIT, Kolkata-5, u/s 151 of the I.T. Act.

3.1 In response to the same vide reply filed on 08.07.2021, it was stated that return of income filed earlier i.e. 30.09.2013 may be treated as return of income filed in response to notice u/s 148 of the Act. Thereafter, the case was transferred to Central Circle, Ajmer u/s 127 of the Act dated 08.09.2021 by order of PCIT-5, Kolkata, after duly disposing of objections of the assessee. The Id. AO, Ajmer noted that since, return of income was not filed in response to notice u/s 148 reason recorded were not provided. Thereafter, a notice u/s 142(1) of the Act was issued by Id. AO asking to file some information / explanation on 17.11 2021. A request was also made to file return of income in response to notice u/s 148 of the Act.

3.2 Considering the reply, vide letter dated 04.02.2022, the assessee was advised to file fresh return of income in response to notice u/s 148 of the Act and informed that thereafter reasons recorded would be provided. However, again vide letter dated

09.02.2022, assessee reiterated the same arguments for treating the return filed earlier to be considered as return filed in response to notice u/s 148 of the Act. The Id. AO relying on the decision of the Apex Court in the case of GKN Driveshafts (I) Ltd. held that assessee has to file return of income in response to notice u/s 148. Nowhere, it has been stated that return of income filed earlier may be treated as return of income in response to notice u/s 148 of the Act. Therefore, the case laws quoted by the assessee, which are prior to the decision of Hon'ble Supreme Court were not found applicable. In view of above, vide notice dated 21.02.2022 the assessee was informed that "it is apparent that you are not interested in making compliance of statutory notices but in raising objections only. Therefore, I have no alternative but to proceed for completing the assessment u/s 144 of the I.T. Act, 1961,"

3.3 In response to the same the assessee on 26.02.2022 requested for adjournment up to 10.03.2022 which was allowed. On 10.03.2022 ROI in response to notice u/s 148 of the Act was filed and written reply in response to notice u/s 142(1) dated 21.02.2022 was also filed. In view of ROI filed notice u/s 143(2) of the Act was also issued on 11.03.2022. In response to the same

reply was filed on 15.03.2022 objecting to issue of notice u/s 148 of the IT Act. Objections filed by the assessee were disposed off vide letter dated 20.03.2022. It is important to highlight that the assessee filed ROI on 10.03.2022 only i.e. almost after one year from the receipt of notice u/s 148 of the Act. Objections to notice u/s 148 of the Act were filed on 15.03.2022. Thus, the assessee deliberately delayed assessment proceeding. The Id. AO has made addition for Rs. 1,09,99,289/- to the returned income by disallowing loss incurred by the assessee in transaction on stock exchange. Further, the addition of Rs. 2,19,763/- has been made invoking provisions of section 69C on the presumption that for alleged accommodation entry of loss such expenses ought to be incurred.

4. Aggrieved from the order of the assessing officer, assessee preferred an appeal before the Id. CIT(A). Apropos to the grounds of appeal which are disputed were sustained by the Id. CIT(A) and thereby the appeal of the assessee was dismissed. The relevant finding of the Id. CIT(A) is reiterated here in below for the sake of convenience :-

“Decision on ground no. 1 to 6 and additional ground.

5.2 All grounds are related to "challenge to jurisdiction" and "reopening is bad in law." I have considered the facts of the case and written submission of the appellant as against the observations/ findings of the AO in the assessment order for the year under consideration. The contentions/submissions of the appellant are being discussed and decided as under-

- a) Originally the jurisdiction of this case was at PCIT-5, Kolkata.
- b) Search proceeding was carried out on 13/02/2020 at the residential and business premises of Saini Gupta Jain Somani Malpani Group of Ajmer. As stated by AO, being a related concern, a request was sent to PCIT-5, Kolkata and accordingly order u/s 127 dated 07/04/2021 was passed from the office of PCIT-5, Kolkata for transferring jurisdiction of Assessee Company from Kolkata to Ajmer (Rajasthan). In such order it has been stated that jurisdiction has been centralized in consequence of search and survey operation conducted in the group "Saini Gupta Jain Group". In such order it has not been stated that search has been conducted against the assessee company itself or against the group of which assessee company is a part.
- c) Vide letter dated 05/08/2021 the appellant company had objected such order of transfer of jurisdiction before PCIT-5, Kolkata Considering objection raised by assessee, PCIT-5, Kolkata passes an order on 09/08/2021 cancelling the centralization of case by order dated 07/04/2021.
- d) Thereafter on 11/08/2021 a show cause notice was issued from the office of PCIT-5, Kolkata asking as to why jurisdiction of assessee not to be transferred from Kolkata to Ajmer. After taking cognizance of appellant's replies the PCIT-5 Kolkata had again transfer jurisdiction from Kolkata to Ajmer vide order dated 08/09/2021
- e) Assessment orders 147 was passed on 26 03-2022.

Thus by carefully reading the above chronological events, it is seen that the order for transfer of jurisdiction from Kolkata to ACIT, central Circle, Ajmer (Rajsthan) was duly passed by the PCIT-5, Kolkata and the current AO was having jurisdiction on the date of passing the reassessment order. Thus the grounds in which the appellant had raised the objection of jurisdiction is duly dismissed.

Further, the appellant had also taken grounds that reopening proceedings is bad in law. In this regard following points are important to mention:-

- i. A notice u/s 148 for the year under consideration was issued on 31/03/2021 by ITO, W-14(1) Kolkata. At this point of time the jurisdiction was rightly held with this AO.
- ii. Notice was issued after taking sanction from PCIT-5, Kolkata
- iii. return of income in response to such notice had filed on 10/03/2022
- iv. Notice u/s 143(2) was issued on 11.03.2022
- v. After filing of such return of income, reasons recorded prior to issuance of notice u/s 148 were provided.
- vi. Thereafter objections were raised by the appellant for issuance of notice u/s 148 on 15.03.2022.
- vii. Objection raised against issuance of notice u/s 148 based on such reasons were rejected by AQ by passing order dated 20.03.2022. All the allegation related to reopening has already been dealt by the AO in his order dated 20.03.2022.
- viii. The information was borrowed but not the satisfaction. The AO had duly analysed the information received from the Investigation wing and satisfied before issuing the notice wls 148.

Thus, by carefully reading the above chronological events, I do not find any anomalies in reopening proceedings. Thus the grounds in which the appellant had raised the objection of "reopening is bad in law" is duly dismissed.

Further the appellant had also taken an additional ground that the notice w/s 145 for the AY 2013- 14 was issued to assessee on 01/04/2021 and should be subject to the provision of section 148A which has not been complied with in the case under consideration. The argument put forth by the appellant is not acceptable. The notice uls 148 was issued on 31/03/2021 with DIN & Notice no ITBAJAST/S/148/2020-21/1032-106259(1).

.....

Thus, by seeing the above notice, it is very much clear that the same was issued on 31.03.2021. I do not find any anomalies in this notice.

Thus the additional ground in which the appellant had challenged the notice is duly dismissed.

Thus, considering the above discussion, ground no. 1 to 6 and additional ground is duly dismissed.

6. Ground No. 7:- This ground is related to addition made for Rs. 1,09,99,289/- treating the loss incurred by assessee in derivative transactions is erroneous.

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6.7 Brief Information about the Scam: Illiquid Stock Trading and Tax Evasion: Although the AO had already discussed about the scam in detail in the assessment order but for better understanding this scam can be explained more in like this. The 'scam' that of allegedly executing fraudulent trades in illiquid stock options by committing irregularities in the equity derivative segment. Operation Falcon scam unearthed after the investigation wing of the I-T Department launched 'Operation Falcon' and searched 22 brokerage offices in various cities, including Mumbai, Kolkata, Kanpur Hyderabad and the Nation Capital Region (NCR). Although SEBI was already investigating this issue and was already onto it. The Securities and Exchange Board of India (Sebi) levied a total penalty of over Rs 55 lakh on nine entities for fraudulent trading in illiquid stock options of the BSE. The action had come after the regulator conducted an investigation into the trading activity in the segment from April 2014 to September 2015, after observing large-scale reversal of trades. The regulator had observed that entities repeatedly bought and sold stock options and executed reversal trades with the same set of entities for the same quantity within a short span of time with substantial price difference. Later, these entities had created artificial volume in the contracts, which is in violation of unfair trade practices rules. In April 2018, SEBI announced that it had decided to take action in a phased manner against 14,720 entities for fraudulent trade in the illiquid stock options segment. Thereafter, the tax agency found out another 6,000 entities for allegedly executing similar trades in violation of SEBI norms. So far, the market regulator had passed more than 60-70 orders against such entities. The probe covers trades of the last five years, starting 2014. As many as 21,900 entities are supposedly under the scanner of Income Tax Department for allegedly evading taxes through non-genuine trades in the illiquid stock options contract segment of the Bombay Stock Exchange (BSE) Ltd.

6.8 Modus Operandi: Reversal Trading It is alleged that some share brokers were facilitated either by themselves or by connivance with another broker to generate profits and losses for clients through this market by modus operandi of Reversal trading. This involves buying and selling of stocks from and to the same counterparty during a day which creates artificial trade units of stocks (artificial volume). One party takes losses through buying stock at higher rate and, then, execute reversal trade and sell these stocks to the same counter party at a relatively lower rate thereby resulting in gains for other party in a very short span of time.. Conversely it can be understood as follows:

Step 1 is to sell options without the corresponding off set position in the underlying scrip, then selling them at extremely low prices.

Step 2 is buying back same options by same entities at a later trading date but at a high price. A loss is obviously created.

Illustration X wants a manufactured loss of Rs 100 to reduce taxable income. While Y wants to launder Rs 100 untaxed money.

A broker puts X and Y on the opposite SIDE of a series of trades in some options contracts that is in effect substance less. The trades will be matched such that Y makes a profit of Rs 100 and X gets a loss of the same amount. SEBI calls such trades as reversal trades, which were pre- mediated.

Later, money settlement takes place between X and Y clandestinely to settle amounts, by cash or other methods.

6.9 SEBI Settlement scheme, 2020 SEBI has been passing orders against several entities, Including those connected to this scam, on options trading in liquid alocks on the BSE Thereafter it introduced the SEBI Settlement Scheme 2020 (and of October 31, 2020), which offers a one-time settlement opportunity for entities that expduded reversal trades in the stock options segment of BSE. A one-time settlement to heady 15 000 practitioners of the technique, instead of fighting long drawn-out cases in the court in the matter of R S Ispat [adjudication order dated 27. 11. 18, a fine of Rs 25 lacs was imposed uls 15 HA of SEBI ACT 1992 for indulging in execution of reversal trades in stock options with same entities on the same day thereby Creating Artificial Volume leading to false and misleading appearance of trading in the illiquid stock options. The scheme seems a fallout of Hon'ble SAT order in this matter. "We are adjourning this matter today, so that SEBI may

consider holding a Lok Adalat or adopting other alternative dispute resolution process with regard to the illiquid stock options [Dated 14th October, 2019 in the matter of R S Ispat Ltd vs SEBI].

Hence, to settle the proceedings initiated for such entities, SEBI introduced the scheme.

6.10 In the case of SEBI Vs. Rakhi Trading Private Ltd. Civil Appeal No. 1969 of 2011 decided on February 08, 2018 (SC) in para 35"..... The platform of the stock exchange has been used for a non-genuine trade. Trading is always with the aim to make profits. But if one party consistently makes loss and that too in preplanned and rapid reverse trades, it is not genuine, it is an unfair trade practice....."

6.11 The IT department as well as SEBI had unearthed such kind of scam and had shared such information with the jurisdictional AO, then the Appellant have no stand in this case. The investigation report of SEBI and Income tax department are having sufficient evidentiary value to decide such revenue case, the concept of 'Evidence' is statutorily and judicially recognised in the Income Tax proceeding. However, the strict provisions of the Evidence Act do not apply to income-tax proceedings and Income Tax authorities are not bound by the technical rules of evidence. Rules of Evidence and Indian Evidence Act are applicable to proceedings in the courts before the judges and the magistrates. They apply to judicial proceedings. Further, the proceedings for assessment are not proceedings relating to a civil right. The liability to income-tax is not a civil right enforceable as such in courts of law. Such proceedings are of the nature of revenue proceedings.

6.12 The Supreme Court in the case of Indian & Eastern Newspaper Society v CIT 119 ITR 996 held that, the proceedings for assessment before the Assessing Officer are quasi-judicial in character. The Delhi High Court in Addl. CIT v. Jay Engg. Works Ltd. 113 ITR 389 held that: While the word 'evidence may recall the oral and documentary evidence as may be admissible under the Indian Evidence Act, the use of the word material shows that the ITO not being a court can rely upon material which may not be strictly evidence admissible under the Indian Evidence Act for the purpose of making an order of assessment. The Supreme Court in S.S. Gadgil v. Lal & Co. 53 ITR 231 held that the income-tax authorities who have power to assess and recover tax are not acting as judges deciding a litigation between the citizen and the State, they are administrative authorities whose proceedings are regulated by statute, but whose function is to estimate the income of the

taxpayer and to assess him to tax on the basis of that estimate Further under the Income Tax Act, the Assessing Officer is empowered to assess the correct Income of the assessee. For this purpose, the AD may make necessary enquiries and gather evidences or may rely upon the materials and evidences collected by the investigating agencies.

6.13 Considering the facts of scam unearthed by Investigation wing, Mumbai and relying upon above decision, the addition made by the AO is hereby upheld and the ground of appeal on this Issue is hereby dismissed.

7. Ground No. 8: This ground is related to addition made invoking provisions of section 69C for Rs. 2,19,736/- on the presumption that for arranging this fictitious loss the company would have incurred some expenditure.

7.2 I have considered the facts of the case and written submission of the appellant as against the observations/ findings of the AO in the assessment order for the year under consideration. The facts of the case and addition of fictitious loss had already discussed and confirmed in above para 6. This addition is related to addition of fictitious loss, therefore the estimation of such unaccounted expenses and addition of Rs 2,19,736/- made by the AO is hereby upheld and the ground of appeal on this issue is hereby dismissed.

8. The 9th ground of appeal is that on the facts and in the circumstances of the case, the Id AO grossly erred in charging interest u/s 234A, 234B and 234C of the Act. This issue is consequential in nature so no needing any specific adjudication and are accordingly treated as dispose off.

9. The ground no.10th is consequential in nature no needing any specific adjudication and is accordingly treated as dispose off

10. The last Ground of Appeal is that the appellant craves leave to add, alter, amend or withdraw any of the grounds of appeal during the course of appellate proceedings. The appellant has not added or altered, amend or withdraw any of the above mentioned grounds of appeal. Accordingly, such mention by the appellant in its ground is treated as specific adjudication and is accordingly treated as nature, no needing any specific adjudication and is accordingly treated as dispose off.

11. In the result, the appeal is treated as dismissed.”

5. Feeling dissatisfied with the above order of the Id. CIT(A), the assessee has preferred the present appeal on the ground as stated hereinabove. In support of the various grounds so taken by the assessee the Id. AR of the assessee relied on the written submission and the same is reproduced herein below:-

With your kind permission, before arguing the grounds of appeal and unwarranted additions sustained vide order u/s. 250(6) of the Act by the CIT(A), Jaipur-5, vide appellate order dated 19-10-2023, your humble appellant would like to narrate brief facts of the case as under:-

1. In this case, the assessee company e-filed its return of income for the AY 2013-14 on 30.09.2013 declaring total income at Rs. Nil. As a matter of fact, as per computation of income, during the year there was net loss of (-) Rs.11,04,719/-. Tax was paid u/s 115JB on book profit of Rs.32,14,608/-. Original assessment u/s. 143(3) of the Act was completed on 25-01-2016 at Rs. (-) 7,75,356/- by the ITO W-8(3) Kolkata(PB Page72-77).
2. Thereafter, a notice u/s 148 for the year under consideration was issued on 31/03/2021 (as per online e-proceedings, issue date is 01.04.2021) by ITO, W-14(1), Kolkata to file return in response to such notice(PB Page78).
3. As per assessment order framed u/s 153A for AY 2015-16(PB Page 194-196), a search proceeding were carried out on 13/02/2020 at the residential as well as business premises of "Saini Gupta Jain Group" of Ajmer. No information about such search is available with assessee company till the date of receipt of order u/s 127 dated 07/04/2021, from the office of PCIT-5, Kolkata(PB Page 46-48), wherein it has been mentioned that during the course of search proceedings at Saini Gupta Jain Group, certain incriminating documents belonging to assessee company was found and therefore, the jurisdiction over the assessee's case was transferred from ITO, Ward-14(1), Kolkata to the ACIT, Central Circle, Ajmer. Aggrieved by the said order, assessee company filed various representation before the Ld. CIT, Kolkata, pursuant to which, Ld. PCIT, Kolkata cancelled its order dated 07.04.2021 transferring the case from

Kolkata to Ajmer. However, a fresh show cause Notice was issued in this respect and despite various objections by assessee company, the Ld. PCIT, Kolkata, without providing any information; based on which it can be held that assessee company is part of the group mentioned and covered in the search (as no search warrant has ever been served against the assessee company), again transferred the jurisdiction over the assessee's case to Ajmer (ACIT, Central Circle) from Kolkata (PB Page69-71). The said order dated 08.09.2021 of PCIT-5, Kolkata, transferring the jurisdiction of assessee company, did not contain DIN on the body of such order and no reason has been assigned for framing such order without DIN.

4. Due to technical glitches of the portal, return in response to such notice u/s 148, can be filed on 10/03/2022 only after raising several grievances on the portal regarding non accepting return in response to notice u/s 148 and after filing of such return of income, reasons recorded prior to issuance of notice u/s 148 were provided along with notice u/s 143(2) by ACIT, CC, Ajmer. Thereafter, objections were raised for issuance of notice u/s 148 which were rejected arbitrarily by the Ld. AO. (PB Page91-95)
5. Irrespective of the fact that there is no concrete evidence other than allegations of escapement, additions were made for Rs. 1,09,99,289/- to the returned income by disallowing loss incurred by the assessee in the genuine transaction on stock exchange. In the assessment order it has been categorically recorded at page 7 that *"7.6 Reply of the assessee has been considered. So far as request to provide all material is concerned it is not maintainable. Vide show cause letter it was duly informed that an enquiry was conducted by Investigation wing Mumbai regarding claim of fictitious loss through coordinated and premeditated trading in illiquid stock options. Data related to this company was also collected and found that it has also arranged fictitious loss. Details of such transaction was duly provided to the assessee. Nothing more is required to be provided. It is analysis of trade data which is relevant."* Therefore, it can be seen that merely based on detail of transactions available on the platform of stock exchange, which were executed by the assessee, it was held that transaction executed by assessee are not genuine as the result of such transactions are loss.
6. The ACIT, Central Circle, Ajmer completed u/s 143(3)/147 of the Act, vide order dated 26-03-2022 by making addition for Rs. 1,09,99,289/- to the returned income by disallowing loss incurred by the assessee in the

transaction on stock exchange and addition of Rs. 2,19,763/- u/s. 69C of the Act by alleging that such expenses ought to be incurred on accommodation entry of loss.

7. The said order of the AO was confirmed by the Id. CIT(A), Jaipur-5, vide order dated 19-10-2023. That the Id. CIT(A), Jaipur-5 has grossly erred in confirming the additions by dismissing submissions(PB Page 1-45) put forward by assessee company. The assessee company denies its liability towards the same. Aggrieved with the first appellate authority's order, the appellant preferred the present appeal before your honour, raising following grounds of appeal:-

- “1. That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the AO's order dated 26-03-2022 passed for the AY 2013-14 u/s. 147 r.w.s. 143(3) of the Act without appreciating true and correct facts of the case and documentary evidences brought on record by the assessee.*
- 2. On the facts and in circumstances of the case and in law, the assessment framed by the AO is a nullity and without jurisdiction because the transfer of the reassessment proceedings initiated by notice u/s 148 of the Income-tax Act, 1961 were not legally transferred by the Chief Commissioner/Director General, Kolkata after recording and communicating the reasons and providing opportunity to the appellant as prescribed u/s 127(1) of the Income-tax Act, 1961.*
- 3. On the facts and in circumstances of the case and in law, the Id. CIT(A) in his order dated 19-10-2023 failed to comment on technical plea raised by the appellant in ground no. 2 before him regarding non mentioning of Document Identification Number (DIN) in the body of the order u/s. 127 of the Act dated 08-09-2021 and various other technical pleas raised in grounds of appeal regarding validity of notice u/s. 148 of the Act, thereby appellate order passed by the CIT(A) is non-speaking order and deserves to be quashed.*
- 4. On the facts and in circumstances of the case and in law, the AO erred in issuing notice u/s. 148 of the Act as it was a search related case u/s. 132 r/w s. 153, there is no jurisdiction of section 148 for connected search cases. Proper step was to issue notice u/s. 153C or 153A. This is not done in the present case.*

5. *On the facts and in the circumstances of the case and in law, the assessment u/s 148/147 of the Income-tax Act, 1961 is invalid and illegal because the reopening of the assessment is not in conformity with the express legal provisions so as the appellate order dated 19-10-2023 passed in assessee's case in view of the following:*
- a) *The notice u/s 148 of the Act was issued on 01-04-2021 though signed on 31-03-2021 as such the AO should have followed procedure laid down in newly amended section 148A of the Act w.e.f. 01-04-2021. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*
 - b) *The ITO Ward-14(1), Kolkata has issued notice u/s 148 without satisfying the mandatory condition of obtaining approval of the concerned authority as laid down u/s 151 of the Income-tax Act, 1961. Even it is presumed that the requisite approval was given by the concerned authority but the same was in a mechanical manner without applying the mind to the facts of the case. By No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*
 - c) *The Assessing Officer in the reasons recorded does not spell out and establish the factum of escapement of chargeable income. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*
 - d) *Reopening of the assessment is done without application of mind since the reasons state that loss booked by the assessee in Derivative transactions was bogus, is factually incorrect. Had the Assessing Officer applied its mind then he would have realized that there was genuine loss. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*
 - e) *The Assessing Officer does not establish a live link between the material obtained pursuant to the searches conducted at various brokers and the escapement of assessable income with reference to transactions entered into by the appellant. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*
 - f) *The Assessing Officer failed to dispose of objections raised by the assessee regarding issuance of notice u/s. 148 of the Act thereby*

totally disregarded the procedure laid down by the Hon'ble Apex Court in case of GKN Driveshaft. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

6. *That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 1,09,99,289/- by upholding the AO's action in treating the real loss incurred by the assessee in Derivative transactions as bogus without considering the assessee's submission in right perspective. The entire decision of the CIT(A) is just confirmation of investigation report of the Mumbai without there being any consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.*
7. *That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 2,19,736/- u/s. 69C of the Act by upholding the AO's findings that the assessee incurred expenditure for arranging fictitious loss. This entire finding of the AO was based on his hypothetical imagination as loss incurred by the assessee in Derivative transactions was real. The CIT(A) failed to record any speaking findings while confirming this addition and there being no consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.*
8. *That on the facts and circumstances of the case, the CIT(A) erred in not issuing directions for allowing relief regarding charging of interest u/s. 234A, 234B and 234C of the Act.*
9. *That on the facts and circumstances of the case, the CIT(A) erred in not issuing directions for dropping penalty proceedings u/s. 271(1)(c) of the Act.*
10. *The appellant craves leave to add or to amend the foregoing ground of appeal, if it becomes necessary to do so in the interest of justice."*

(Ground wise submissions are as follows)

After discussing the brief facts of the case and grounds of appeal, the appellant very humbly and respectfully begs to submit the following facts and

submissions in support of the grounds of appeal raised in the present appeal before your honor for your kind consideration and allowing appropriate relief:

(Ground No. 1)

That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the AO's order dated 26-03-2022 passed for the AY 2013-14 u/s. 147 r.w.s. 143(3) of the Act without appreciating true and correct facts of the case and documentary evidences brought on record by the assessee

Our submissions:-

At the outset, your humble appellant would like to bring your kind attention that notice issued u/s. 148 (PB Page 78) of the Act in our case was Time-barred and passed after the limitation prescribed under second proviso to sec. 149 of the Income-tax Act, 1961 and therefore, assessment should be quashed treating it 'Time-barred'. In this regard, we may submit that as per provisions of second proviso to sec. 149 of the Income-tax Act, 1961, notice u/s. 148 of the Act should have been issued on or before 31-03-2020 but the same was issued on 01-04-2021 (31.03.2021- as mentioned in the Notice) in the light of Taxation and Other Law (Relaxation And Amendment of Certain Provisions) Act, 2020 (TOLA) wherein time limit was extended upto March, 31,2021. However, in the very recent judgment of the Hon'ble Bombay High Court in the case of New India Assurance Company Ltd. vs. ACIT [2024] 158 taxmann.com 367 (Bombay) it has been specifically held that where limitation under Act (erstwhile section 149) for reopening assessment for assessment year 2013-14 expired on 31-3-2020, notice issued in June 2021 in case of assessee was barred by limitation, hence, section 148 notice dated 28-7-2022 issued pursuant to Ashish Agarwal v. ITO [2022] 130 taxmann.com 246 (SC) and CBDT Instruction No. 1/2022 to revive notice issued under old regime was to be quashed and set aside as it was invalid, without jurisdiction and barred by limitation. For ready reference, the head note from this judgment is reproduced as under for kind perusal:-

“Section 148A, read with sections 148 and 149, of the Income-Tax Act, 1961 and section 3 of the Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020 - Income escaping assessment - Conducting inquiry, providing opportunity before issue of notice (Reassessment) - Assessment year 2013-14 - Whether a notice under section 148 cannot be issued in order to reopen assessment of

an assessee in a case where right to reopen assessment was already barred under pre-amended Act on date when new legislation came into force - Held, yes - Whether therefore, where limitation under Act (erstwhile section 149) for reopening assessment for assessment year 2013-14 expired on 31-3-2020, notice issued in June 2021 in case of assessee was barred by limitation, hence, reassessment proceedings initiated pursuant to judgment in Ashish Agarwal v. ITO [2022] 130 taxmann.com 246 (SC) will also be regarded as beyond time limit - Held, yes - Whether further, since limitation under erstwhile section 149 for reopening assessment for assessment year 2013-14 expired on 31-3-2020, therefore, CBDT Notification No.20/2021 would not apply to facts of present case and even relate back theory of revenue could not safeguard reassessment proceedings initiated after 1-4-2021 - Held, yes - Whether therefore, section 148 notice dated 28-7-2022 issued pursuant to Ashish Agarwal v. ITO [2022] 130 taxmann.com 246 (SC) and CBDT Instruction No. 1/2022 to revive notice issued under old regime was to be quashed and set aside - Held, yes [Paras 35 to 38][In favour of assessee]

In the aforesaid judgment of the Hon'ble Bombay High Court in the case of New India Assurance Company Ltd.(supra), the Hon'ble Bombay High Court while considering the question "Whether a notice under section 148 cannot be issued in order to reopen assessment of an assessee in a case where right to reopen assessment was already barred under pre-amended Act on date when new legislation came into force" gave answer in affirmative which means benefit of TOLA is not extended to notice issued for the AY 2013-14. The Hon'ble Bombay in High Court in their judgment explicitly held that Time limit for issuing notice u/s 148 extended till 30-06-2021 is not applicable to AY 2013-14.

We may also place reliance upon the decision of the the Hon'ble Rajasthan High Court Judgment in Sudesh Taneja v. 2022 TaxPub(DT) 805 (Raj-HC) : (2022) 442 ITR 289 (Raj) holding that new time limits as per substituted section 149(1)(b) not to apply to notices time barred under old provisions

The time limits for issuing notice for reassessment have been changed. The concept of income chargeable to tax escaping assessment on account of failure on the part of the assessee to disclose truly or fully all material facts is no longer relevant. Elaborate provisions are made under section 148A of the Act enabling the assessing officer to make enquiry with respect to material suggesting that income has escaped assessment, issuance of notice to the

assessee calling upon why notice under section 148 should not be issued and passing an order considering the material available on record including response of the assessee if made while deciding whether the case is fit for issuing notice under section 148. There is absolutely no indication in all these provisions which would suggest that the legislature intended that the new scheme of reopening of assessments would be applicable only to the period post 1-4-2021. In absence of any such indication all notices which were issued after 1-4-2021 had to be in accordance with such provisions. To reiterate, we find no indication whatsoever in the scheme of statutory provisions suggesting that the past provisions would continue to apply even after the substitution for the assessment periods prior to substitution. In fact, there are strong indications to the contrary. Time limits for issuing notice under section 148 of the Act have been modified under substituted section 149. The first proviso to section 149(1) provides that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1-4-2021 if such notice could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of subsection (1) of section 149 as they stood immediately before the commencement of the Finance Act, 2021. As per this proviso thus no notice under section 148 would be issued for the past assessment years by resorting to the larger period of limitation prescribed in newly substituted clause (b) of section 149(1). This would indicate that the notice that would be issued after 1-4-2021 would be in terms of the substituted section 149(1) but without breaching the upper time limit provided in the original section 149(1) which stood substituted. This aspect has also been highlighted in the memorandum explaining the proposed provisions in the Finance Bill. If according to the revenue for past period provisions of section 149 before amendment were applicable, this first proviso to section 149(1) was wholly unnecessary. Looked from both angles, namely, no indication of surviving the past provisions after the substitution and in fact an active indication to the contrary, inescapable conclusion that we must arrive at is that for any action of issuance of notice under section 148 after 1-4-2021 the newly introduced provisions under the Finance Act, 2021 would apply. Mere extension of time limits for issuing notice under section 148 would not change this position that obtains in law. Under no circumstances the extended period available in clause (b) of sub-section (1) of section 149 which now stands at 10 years instead of 6 years previously available with the revenue, can be pressed in service for reopening assessments for the past period. This flows from the plain meaning of the first proviso to sub-section (1) of section 149.

In plain terms a notice which had become time barred prior to 1-4-2021 as per the then prevailing provisions, would not be revived by virtue of the application of section 149(1)(b) effective from 1-4-2021.

Applying above judgment to the facts of the case it may be noted that time limit for issuing notice under section 149 in the case of the assessee expired on 31.03.2020 itself and all such notices cannot be revived by invoking higher time limits as per substituted section 149(1)(b) providing time limit upto 10 years in certain cases.

Prayer:- Hon'ble Sir, our case is related to the AY 2013-14 therefore, the ratio laid down by the Hon'ble Bombay High Court in the case of New India Assurance Company Ltd.(supra) squarely applicable in our case. In the light of this the Id. CIT(A)'s order findings recorded in order dated 19-10-2023 holding notice issued u/s. 148 as valid notice may be held as erroneous and the same needs to be reversed. Therefore, your humble appellant requests your honour to quash the notice u/s. 148 of the Act holding it time-barred so as the assessment order.

(Ground No. 2)

On the facts and in circumstances of the case and in law, the assessment framed by the AO is a nullity and without jurisdiction because the transfer of the reassessment proceedings initiated by notice u/s 148 of the Income-tax Act, 1961 were not legally transferred by the Chief Commissioner/Director General, Kolkata after recording and communicating the reasons and providing opportunity to the appellant as prescribed u/s 127(1) of the Income-tax Act, 1961.

Our submissions:-

Without prejudice to the above ground, it would be seen that the ACIT, Central Circle, Ajmer, has carried on the assessment work and framed the assessment on the ground that the proceedings were transferred to him or by ITO, Ward-14(1), Kolkata. The transfer under consideration is an intercity transfer which requires satisfaction of conditions prescribed under section 127(1) of the Income-tax Act, 1961. Section 127(1) of the Act states that the prescribed authority has to record reasons to justify the transfer and to convey the reasons to the assessee and give an opportunity to him to explain its case before the case can be transferred from the jurisdiction of one Chief Commissioner/Director General to another. This vital mandatory legal requirement has not been complied with by the officers at Kolkata and this

itself nullifies the assumption of jurisdiction by ACIT, Central Circle, Ajmer for framing the assessment. The requirement of recording the reasons and its communication to assessee and grant of opportunity to him are not mere technical compliances. They are vital and indispensable for proper transfer and assumption of jurisdiction. From following the sequence of events, it would be clear that the authorities have not followed procedure as laid down in sec. 127

- i. An order u/s 127 of the I.T Act, 1961 dated 07/04/2021 was passed framed by the PCIT-5, Kolkata transferring jurisdiction of Assessee Company from Kolkata to Ajmer (Rajasthan). (PB Page46-48)
- ii. On assessee's objections(PB Page 49-50), the PCIT-5, Kolkata passed an order on 09/08/2021 cancelling the centralization of case by order dated 07/04/2021.(PB Page 51-53)
- iii. Thereafter on 11/08/2021 a show cause notice was issued from the office of PCIT-5, Kolkata which was served on 16/08/2021 [Annexure 1.4]. In the notice it was asked as to why jurisdiction of assessee not be transferred from Kolkata to Ajmer. (PB Page 54-56)
- iv. Aggrieved with the said Notice, assessee company filed objections vide letter dated 16/08/2021 before PCIT-5, Kolkata (PB Page 57-58)
- v. Another show cause notice was issued u/s 127(2) on 06/09/2021 without providing any supporting document. (PB Page59-61)
- vi. Aggrieved with the said SCN, assessee company again filed an objections vide letter dated 07.09.2021.(PB Page 62-65)
- vii. The concerned authority vide order dated 08-09-2021 transferred jurisdiction from Kolkata to Ajmer.(PB Page 66-68 & 69-71) by rejecting assessee company objections.
- viii. The concerned authority (Ld. PCIT, Kolkata), despite repeated requests, did not provided any information or documents or warrant suggesting that assessee company case is related with the search proceedings conducted at "Saini Gupta Jain Group" of Ajmer.

Your Honour it is requested to kindly take note of the fact that concerned authority itself was un-sure about correct jurisdiction of the assessee. Neither any documents justifying the transfer in assessee's case nor proper procedure was followed by the authority, what to say for opportunity as putting its case before the authority.

Since in our case, no proper exercise is done as per procedure laid down in section 127, the transfer of jurisdiction may be held as invalid so as the assessment order passed in assessee company's case. In this respect reliance is placed on the following judgements:-

- 1.1. Sachin Joshi Vs CIT [[2015] 370 ITR 598 (Bom)]
- 1.2. Vijayasanthi Investments P. Ltd. v. Chief CIT {[1991] 187 ITR 405 (AP)}
- 1.3. Shikshana Prasaraka Mandali v. CIT-since reported in [2013] 352 ITR 53 (Bom)
- 1.4. Sahara Hospitality Ltd. v. CIT [2013] 352 ITR 38 (Bom)
- 1.5. Vijayasanthi Investments P. Ltd. v. Chief CIT [1991] 187 ITR 405 (AP)
- 1.6. DARSHAN JITENDRA JHAVERI vs CIT (INTERNATIONAL TAXATION) [2021] 439 ITR 514 (Bom)
- 1.7. RAJESH MAHAJAN vs CIT [2003] 126 Taxman 87 (P&H)
- 1.8. AJANTHA INDUSTRIES AND OTHERS vs CBDT [1976] 102 ITR 281 (SC)
- 1.9. R.K. AGARWAL Vs CIT [2006] 154 Taxman 220 (All)
- 1.10. SAHARA HOSPITALITY LTD. Vs CIT [2012] 211 Taxman 15 (Bom)

Prayer:- In view of the above submissions and judicial precedents cited supra, the appellant humbly requests your honour to accept the appellant's ground regarding invalid jurisdiction and not following proper procedure u/s. 127 of the Act. Assessment order passed by Ld. AO (ACIT, Ajmer) assuming the jurisdiction, deserves to be quashed.

(Ground No. 3)

On the facts and in circumstances of the case and in law, the Id. CIT(A) in his order dated 19-10-2023 failed to comment on technical plea raised by the appellant in ground no. 2 before him regarding non mentioning of Document Identification Number (DIN) in the body of the order u/s. 127 of the Act dated 08-09-2021 and various other technical pleas raised in grounds of appeal regarding validity of notice u/s. 148 of the Act, thereby appellate order passed by the CIT(A) is non-speaking order and deserves to be quashed.

Our submissions:-

Hon'ble Sir, the appellant would take opportunity to invite your kind attention towards the fact that while issuing order u/s. 127 of the Act dated 08-09-2021(PB Page 69-71), the concerned authority (PCIT-5, Kolkata) did not mention Document Identification Number (DIN) on the body of the order, which is gross violation of CBDT circular No. 19/2019 dated 14/08/2019(PB Page 143-144). For ready reference the relevant CBDT Circular No 19/2019 dated 14/08/2019 which laid that no communication shall be issued by any income-tax authority to the assessee or any other person, on or after the 1st day of October, 2019 unless a computer-generated Document Identification Number (DIN) has been allotted and is duly quoted in the body of such communication is reproduced as under:

“2. In order to prevent such instances and to maintain proper audit trail of all communication, the Board in exercise of power under section 119 of the Income-tax Act, 1961 (hereinafter referred to as “the Act”), has decided that no communication shall be issued by any income-tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person, on or after the 1st day of October, 2019 unless a computer-generated Document Identification Number (DIN) has been allotted and is duly quoted in the body of such communication.

3. In exceptional circumstances such as, —

(i) when there are technical difficulties in generating/allotting/quoting the DIN and issuance of communication electronically; or

(ii) when communication regarding enquiry, verification etc. is required to be issued by an income-tax authority, who is outside the office, for discharging his official duties; or

(iii) when due to delay in PAN migration, PAN is lying with non-jurisdictional Assessing Officer; or

(iv) when PAN of assessee is not available and where a proceeding under the Act (other than verification under section 131 or section 133 of the Act) is sought to be initiated; or

(v) When the functionality to issue communication is not available in the system,

the communication may be issued manually but only after recording reasons in writing in the tile and with prior written approval of the Chief Commissioner / Director General of income-tax. In cases where manual communication 'is required to be issued due to delay in PAN migration. the proposal seeking approval for issuance of manual communication shall include the reason for delay in PAN migration. The communication issued under aforesaid circumstances shall state the fact that the communication is issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner / Director General of Income-Tax for issue of manual communication in the following format-

.. This communication issues manually without a DIN on account of reason/reasons given in para 3(i)/3 (ii)/3(iii)/3(iv)/3(v) of the CBDT Circular No ...dated (strike off those which are not applicable) and with the approval of the Chief Commissioner / Director General of Income Tax vide number dated

4. Any communication which is not in conformity with Para-2 and Para-3 above, shall be treated as invalid and shall be deemed to have never been issued.

2. In this reference reliance is placed on following judicial pronouncements:
- 2.1.** In the case of CIT vs BRANDIX MAURITIUS HOLDINGS LTD (Delhi High Court judgement Dated 20/03/2023 in ITA 163/2023 [Neutral Citation No: 2023:DHC:2502-DB] it was held that:

"8. Therefore, any communication which is not in conformity with the provisions of paragraph 2 and 3 of the 2019 Circular is to be treated as invalid, as if it was never issued [See paragraph 4 of the 2019 Circular1].

8.1 In a nutshell, communications referred to in the 2019 Circular would fall in the following slots:

- i. Those which do not fall in the exceptions carved out in paragraph 3(i) to (v)*
- ii. Those which fall in the exceptions embedded in paragraph 3(i) to (v), but do not adhere to the regime set forth in the 2019 Circular.*

8.2 Therefore, whenever communications are issued in the circumstances alluded to in paragraph 3(i) to (v), i.e., are issued manually without a DIN, they require to be backed by the approval of the Chief

Commissioner/Director General. The manual communication is required to furnish the reference number and the date when the approval was granted by the concerned officer. The formatted endorsement which is required to be engrossed on such a manual communication, should read as follows:

“ . . . This communication issues manually without a DIN on account of reason/reasons given in para 3(i)/3(ii)/3(iii)/3(iv)/3(v) of the CBDT Circular No ... dated (strike off those which are not applicable) and with the approval of the Chief Commissioner / Director General of Income Tax vide number dated ”

8.3 As indicated hereinabove, insofar as communications falling in circumstances alluded to in paragraph 3(i) to 3(iii) are concerned, the process of regularization in the manner indicated in paragraph 5, should take place within fifteen (15) working days of its issuance. This period of regularization with regard to the circumstance referred to in paragraph 3(v) is reduced to seven (7) days, and is required to be marked to the Principal Director General of Income-Tax (Systems) [See paragraph 6 of the 2019 Circular2].

9. In the instant case, there is nothing on record to show that, according to the appellant/revenue, failure to allocate DIN arose out of the “exceptional circumstances” which are set forth in paragraph 3 of the 2019 Circular. It is, however, the case of the appellant/revenue, both before this court and before the Tribunal, that failure to allocate DIN was a mere mistake. Using this as the foundation, the argument put forth before us is that the mistake can be corrected by taking recourse to Section 292B of the Income Tax Act, 1961 [in short, “the Act”].

10. Mr Puneet Rai, learned senior standing counsel who appears on behalf of the appellant/revenue, says that the circular only applies to the communications emanating from the revenue, and not vis-à-vis the substantive orders passed qua the assessee.

10.1 It is Mr Rai’s contention that the failure to generate and allocate DIN in this case is a mistake or at best, a defect and/or an omission, which ought not to invalidate the assessment proceedings.

10.2 In support of this plea, Mr Rai has referred to the judgment of the coordinate bench in CIT v. Jagat Novel Executives Pvt. Ltd., [2013] 356 ITR 562.

11. *Mr Ajay Vohra, learned senior counsel who appears on behalf of the respondent/assessee, contends to the contrary. It is his contention that the 2019 Circular is binding on the revenue.*

11.1 *Mr Vohra also submits that the error is jurisdictional in nature and therefore, cannot be corrected by taking recourse to Section 292B of the Act.*

11.2 *In support of his plea that the 2019 Circular is binding on the revenue, Mr Vohra has relied on the following judgments:*

i. UCO Bank v. CIT, [1999] 237 ITR 889 (SC);

ii. Ellerman Lines Ltd. v. CIT, [1971] 182 ITR 913 (SC); and

iii. DCIT v. Sunita Finlease Ltd., [2011] 330 ITR 491

11.3 *Furthermore, to back his contention that recourse cannot be taken to the provisions of Section 292B of the Act, reliance is placed on the following judgments: i. PCIT v. Maruti Suzuki India Ltd. v. CIT, ITA No. 475 of 2011 (Del); and ii. Spice Entertainment Ltd. v. CIT, ITA No. 475 of 2011 (Del).*

12. *We have heard learned counsel for the parties. The present appeal is preferred under Section 260A of the Act. The Court's mandate, thus, is to consider whether or not a substantial question of law arises for consideration.*

12.1 *As noted above, the impugned order has not been passed on merits.*

13. *The Tribunal has applied the plain provisions of the 2019 Circular, based on which, it has allowed the appeal preferred by the respondent/assessee.*

14. *The broad contours of the 2019 Circular have been adverted to by us hereinabove.*

14.1 *Insofar as the instant case is concerned, admittedly, the draft assessment order was passed on 30.12.2018.*

15. *The respondent/assessee had filed its objections qua the same, which were disposed of by the Dispute Resolution Panel [DRP] via order dated 20.09.2019.*

16. *The final assessment order was passed by the Assessing Officer (AO) on 15.10.2019, under Section 147/144(C)(13)/143(3) of the Act. Concededly, the final assessment order does not bear a DIN. There is nothing on record to show that the appellant/revenue took steps to demonstrate before the Tribunal that there were exceptional circumstances, as referred to in paragraph 3 of the 2019 Circular, which would sustain the communication of the final assessment order manually, albeit, without DIN.*

16.1 *Given this situation, clearly paragraph 4 of the 2019 Circular would apply.*

17. *Paragraph 4 of the 2019 Circular, as extracted hereinabove, decidedly provides that any communication which is not in conformity with paragraph 2 and 3 shall be treated as invalid and shall be deemed to have never been issued. The phraseology of paragraph 4 of the 2019 Circular fairly puts such communication, which includes communication of assessment order, in the category of communication which are non-est in law.*

17.1 *It is also well established that circulars issued by the CBDT in exercise of its powers under Section 119 of the Act are binding on the revenue.*

17.2 *The aforementioned principle stands enunciated in a long line of judgements, including the Supreme Court's judgment rendered in K.P. Varghese v. Income Tax Officer, Ernakulam and Anr., (1981) 4 SCC 173. The relevant extracts are set forth hereafter:*

"12. But the construction which is commending itself to us does not rest merely on the principle of contemporanea expositio. The two circulars of the Central Board of Direct Taxes to which we have just referred are legally binding on the Revenue and this binding character attaches to the two circulars even if they be found not in accordance with the correct interpretation of sub-section (2) and they depart or deviate from such construction. It is now well settled as a result of two decisions of this Court, one in Navnitlal C. Javeri v. K.K. Sen [AIR 1965 SC 1375 : (1965) 1 SCR 909 : 56 ITR 198] and the other in Ellerman Lines Ltd. v. CIT [(1979) 4 SCC 565] that circulars issued by the Central Board of Direct Taxes under Section 119 of the Act are binding on all officers and persons employed in the execution of the Act even if they deviate from the provisions of the Act. The question which arose in Navnitlal C. Javeri case [AIR 1965 SC 1375 : (1965) 1 SCR 909 : 56 ITR 198] was in regard to the constitutional validity

of Sections 2(6-A)(e) and 12(1-B) which were introduced in the Indian Income Tax Act, 1922 by the Finance Act, 1955 with effect from April 1, 1955. These two sections provided that any payment made by a closely held company to its shareholders by way of advance or loan to the extent to which the company possesses accumulated profits shall be treated as dividend taxable under the Act and this would include any loan or advance made in any previous year relevant to any assessment year prior to Assessment Year 1955-56, if such loan or advance remained outstanding on the first day of the previous year relevant to Assessment Year 1955-56. The constitutional validity of these two sections was assailed on the ground that they imposed unreasonable restrictions on the fundamental right of the assessee under Article 19(1)(f) and (g) of the Constitution by taxing outstanding loans or advances of past years as dividend. The Revenue however relied on a circular issued by the Central Board of Revenue under Section 5(8) of the Indian Income Tax Act, 1922 which corresponded to Section 119 of the present Act and this circular provided that if any such outstanding loans or advances of past years were repaid on or before June 30, 1955, they would not be taken into account in determining the tax liability of the shareholders to whom such loans or advances were given. This circular was clearly contrary to the plain language of Section 2(6-A)(e) and Section 12(1-B), but even so this Court held that it was binding on the Revenue and since:

“past transactions which would normally have attracted the stringent provisions of Section 12(1-B) as it was introduced in 1955, were substantially granted exemption from the operation of the said provisions by making it clear to all the companies and their shareholders that if the past loans were genuinely refunded to the companies they would not be taken into account under Section 12(1-B),”

Sections 2(6-A)(e) and 12(1-B) did not suffer from the vice of unconstitutionality. This decision was followed in Ellerman Lines case [(1972) 4 SCC 474 : 1974 SCC (Tax) 304 : 82 ITR 913] where referring to another circular issued by the Central Board of Revenue under Section 5(8) of the Indian Income Tax Act, 1922 on which reliance was placed on behalf of the assessee, this Court observed:

“Now, coming to the question as to the effect of instructions issued under Section 5(8) of the Act, this Court observed in Navnitlal C. Javeri v. K.K. Sen, Appellate Assistant Commissioner, Bombay [AIR 1965 SC 1375 : (1965) 1 SCR 909 : 56 ITR 198] : „

It is clear that a circular of the kind which was issued by the Board would be binding on all officers and persons employed in the execution of the Act under Section 5(8) of the Act. This circular pointed out to all the officers that it was likely that some of the companies might have advanced loans to their shareholders as a result of genuine transactions of loans, and the idea was not to affect such transactions and not to bring them within the mischief of the new provision."

The directions given in that circular clearly deviated from the provisions of the Act, yet this Court held that the circular was binding on the Income Tax Officer."

The two circulars of the Central Board of Direct Taxes referred to above must therefore be held to be binding on the Revenue in the administration or implementation of sub-section (2) and this sub-section must be read as applicable only to cases where there is understatement of the consideration in respect of the transfer."

[Emphasis is ours]

17.3 Also see the following observations of a coordinate bench in Back Office IT Solutions Pvt. Ltd. v. Union of India, 2021 SCC OnLine Del 2742, in the context of the impact of circulars issued by the revenue:

"24....In this context, tax administrators have to bear in mind the well-established dicta that circulars issued by the statutory authorities are binding on them, although, they cannot dictate the manner in which assessment has to be carried out in a particular case. A Circular cannot be side-stepped causing prejudice to the assessee by bringing to naught the object for which it is issued. [See: K.P.Varghese vs. Income-tax Officer¹, [1981] 7 Taxman 13 (SC); Also see: UCO Bank, Calcutta v. Commissioner of Income Tax, W.B., (1999) 4 SCC 599]."

18. The argument advanced on behalf the appellant/revenue, that recourse can be taken to Section 292B of the Act, is untenable, having regard to the phraseology used in paragraph 4 of the 2019 Circular.

19. The object and purpose of the issuance of the 2019 Circular, as indicated hereinabove, inter alia, was to create an audit trail. Therefore, the communication relating to assessments, appeals, orders, etcetera which find mention in paragraph 2 of the 2019 Circular, albeit without DIN,

can have no standing in law, having regard to the provisions of paragraph 4 of the 2019 Circular.

20. The logical sequitur of the aforesaid reasoning can only be that the Tribunal's decision to not sustain the final assessment order dated 15.10.2019, is a view that cannot call for our interference.

21. As noted above, in the instant appeal all that we are required to consider is whether any substantial question of law arises for consideration, which, inter alia, would require the Court to examine whether the issue is debatable or if there is an alternate view possible. Given the language employed in the 2019 Circular, there is neither any scope for debate nor is there any leeway for an alternate view.

21.1 We find no error in the view adopted by the Tribunal. The Tribunal has simply applied the provisions of the 2019 Circular and thus, reached a conclusion in favour of the respondent/assessee.

22. Accordingly, the appeal filed by the appellant/revenue is closed.”

2.2. *Tata Medical Centre Trust vs CIT(E) [ITA No.238/Kol/2021 dated 18/07/2022]:*

“12. From the perusal of above circular, we note that CBDT came out with this circular to mitigate the issues/instances where certain notices, orders, summons, letters and other correspondences which have been issued manually do not have proper audit trail of their communication despite various e-governance initiatives and computerization of its work. Therefore, in order to prevent such instances and to maintain proper audit trail of all the communications, CBDT directed that no communication shall be issued by any Income tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person, on or after the 01.10.2019 unless a computer generated DIN has been allotted and is duly quoted in the body of such communication. We note that para 3 of the said circular provides for certain exceptional circumstances when the communication is issued manually, in which case such manually issued communications should contain the fact that the said communication is issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner/Director General of Income-tax for issue of said manual communication in the prescribed format. Thus, it is observed from the said

circular that all the communications mentioned therein have to be either generated and issued electronically with DIN or in certain exceptional circumstances the communication may be issued manually without DIN, fact of which along with its written approval has to be stated in the body of the said communication, failing which, para 4 of the said circular states that such communication shall be treated as 'invalid' and shall be deemed to have never been issued'.

...

...

13. From the above submissions and arguments, we note that it is an undisputed fact that the impugned order u/s. 263 of the Act has been issued manually which does not bear the signature of the authority passing the order. Further, from the perusal of the entire order, in its body, there is no reference to the fact of this order issued manually without a DIN for which the written approval of Chief Commissioner/Director General of Income-tax was required to be obtained in the prescribed format in terms of the CBDT circular. We also note that in terms of para 4 of the CBDT circular, such a lapse renders this impugned order as invalid and deemed to have never been issued.

13.1 It is also important to note about the binding nature of CBDT circular on the Income-tax Authorities for which gainful guidance is taken from the decision of Hon'ble Supreme Court in the case of CIT v. Hero Cycles [1997] 228 ITR 463 (SC) wherein it was held that circulars bind the ITO but will not bind the appellate authority or the Tribunal or the Court or even the assessee.

...

...

14. Considering the facts on record, perusal of the impugned order, submissions made by the Ld. Counsel and the department, CBDT circular and the judicial precedents including that of Hon'ble Supreme Court and the jurisdictional High Court of Calcutta, we are inclined to adjudicate on the additional ground in favour of the assessee by holding that the order passed by the Ld. CIT(E) is invalid and deemed to have never been issued as it fails to mention DIN in its body by adhering to the CBDT circular no. 19 of 2019. Accordingly, additional ground taken by the assessee is

allowed. Having so held on the legal issue raised by the assessee in the additional ground, the grounds relating to the merits of the case requires no adjudication. Accordingly, the appeal of the assessee is allowed in terms of above observations and findings.

2.3. Dilip Kothari vs Pr. CIT (Central) ITA Nos.403 to 405/Bang/2022:

“14. From the plain reading of the Circular, it is clear that the effective 1st October 2019, no communication shall be issued unless a DIN is allotted and is quoted in the body of the letter except under exceptional circumstances as mentioned in Para 3 which also lays down certain procedures to be followed for issue of manual order under certain circumstances. Accordingly, the manual communication should mention the fact that the communication is issued manually without a DIN and the date of obtaining of the written approval of the Chief Commissioner/ Director General of Income-tax for issue of manual communication in a specific format. Para 4 of the circular states that the communication issued manually not in conformity with Para-2 and Para-3 of the circular, shall be treated as invalid and shall be deemed to have never been issued. ...

...

17. In assessee's case there is no dispute about the fact that the impugned order u/s. 263 of the Act has been issued manually. It is also noticed that the DIN for the order is generated through two separate intimations one bearing the same date as the date of the order u/s.263 and the other is dated 25.03.2022. The argument of the Id DR that the intimation dated 24.03.2022 is part of the order and that there is no violation cannot be accepted as generating the DIN by separate intimation is allowed to be done to regularise the manual order (Para 5 of the circular) provided the manual order is issued in accordance with the procedure as contained in Para 3. On perusal of the order u/s.263, it is noted that the order neither contains the DIN in the body of the order, nor contains the fact in the specific format as stated in Para 3 that the communication is issued manually without a DIN after obtaining the necessary approvals. Therefore, we are of considered view that the impugned order is not in conformity with Para 2 and Para 3 of the CBDT circular.

18. In view of these discussions and respectfully following the decision of the Kolkata and Delhi Benches of the Hon'ble Tribunal we hold that the orders passed u/s.263 for the assessment years 2014-15 to 2016-17 are

invalid and shall be deemed to have never been issued as per Para 4 of the CBDT circular as the order is not conformity with Para 2 and Para 3. It is ordered accordingly.”

Sir, the above technical plea was duly raised before the Id. CIT(A) vide ground no 2 of appeal filed before him. However, the CIT(A) without commenting on the same dismissed the ground of appeal. Section 250 of the Act, itself states that CIT(A) order should be a speaking order. Moreover, it is the consistent opinion of the various courts that first appellate authority always pass order considering each and every please / grounds of appeal. However, in our case, CIT(A) passed the order dated 19-10-2023 without commenting such ground of appeal / technical plea raised before him.

Prayer:- In view of the above, the appellant requests your honour to hold the CIT(A)'s order dated 19-10-2023 as non-speaking so as additions sustained in the order dated 19-10-2023. Furthermore, assessment order passed by Ld. AO (ACIT, CC, Ajmer), assuming jurisdiction from the said Non-DIN order u/s 127 deserves to be quashed.

(Ground No. 4)

On the facts and in circumstances of the case and in law, the AO erred in issuing notice u/s. 148 of the Act as it was a search related case u/s. 132 r/w s. 153, there is no jurisdiction of section 148 for connected search cases. Proper step was to issue notice u/s. 153C or 153A. This is not done in the present case.

Our submissions:-

Without prejudice to other grounds, it is humbly submitted that the issue of notice u/s. 148 is bad-in-law as it fails the jurisdictional test on account of the fact that if the department contention is accepted that it is a search related case u/s. 132 r/w s. 153 (derived from assessment order for A.Y 2015-16), then, there is no jurisdiction of section 148 for connected search cases. Proper step was to issue notice u/s. 153C or 153A. This is not done in the present case. It is not a case of reassessment of escaped income but to tap undisclosed income in a search related case, S. 148 has no jurisdiction. The Appellant is a person related to search. The issue of Notice u/s. 148 is not tenable as it is a search related case (as per AO's himself

allegation which was confirmed by the CIT(A) in his order dated 19-10-2023). Search mechanism provides separate procedure. It is not a case of escaped income during original assessment proceeding.

Furthermore, as per the assessment framed for the A.Y 2015-16 as well as order passed u/s 127 by PCIT-5, Kolkata, when the search action has already been conducted on 13.02.2020, the Notice issued u/s 148 for the year under consideration by ITO, Kolkata on 31.03.2021 (01.04.2021) is bad in law and deserves to be quashed.

Prayer:- In view of the above, the appellant requests your honour to quash the notice issued u/s. 148 of the Act.

(Ground No. 5)

On the facts and in the circumstances of the case and in law, the assessment u/s 148/147 of the Income-tax Act, 1961 is invalid and illegal because the reopening of the assessment is not in conformity with the express legal provisions so as the appellate order dated 19-10-2023 passed in assessee's case in view of the following:

- a) *The notice u/s 148 of the Act was issued on 01-04-2021 though signed on 31-03-2021 as such the AO should have followed procedure laid down in newly amended section 148A of the Act w.e.f. 01-04-2021. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

&

- b) *The ITO Ward-14(1), Kolkata has issued notice u/s 148 without satisfying the mandatory condition of obtaining approval of the concerned authority as laid down u/s 151 of the Income-tax Act, 1961. Even it is presumed that the requisite approval was given by the concerned authority but the same was in a mechanical manner without applying the mind to the facts of the case. By No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

&

- c) *The Assessing Officer in the reasons recorded does not spell out and establish the factum of escapement of chargeable*

income. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.

&

- d) *Reopening of the assessment is done without application of mind since the reasons state that loss booked by the assessee in Derivative transactions was bogus, is factually incorrect. Had the Assessing Officer applied its mind then he would have realized that there was genuine loss. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

&

- e) *The Assessing Officer does not establish a live link between the material obtained pursuant to the searches conducted at various brokers and the escapement of assessable income with reference to transactions entered into by the appellant. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

&

- f) *The Assessing Officer failed to dispose of objections raised by the assessee regarding issuance of notice u/s. 148 of the Act thereby totally disregarded the procedure laid down by the Hon'ble Apex Court in case of GKN Driveshaft. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

Our submissions:-

- a) *The notice u/s 148 of the Act was issued on 01-04-2021 though signed on 31-03-2021 as such the AO should have followed procedure laid down in newly amended section 148A of the Act w.e.f. 01-04-2021. No detailed findings has been recorded by the CIT(A) in his appellate order dated 19-10-2023.*

Our submissions:-

Without prejudice to other grounds, It is humbly submitted that Notice u/s 148 for the AY 2013-14 was issued to the assessee on 01/04/2021 (PB Page 78). As per amended section 148 w.e.f. issuance of

notice u/s 148 shall be subject to provisions of section 148A. In the case under consideration notice u/s 148 for AY 2013-14 was issued on 01/04/2021 without following procedure of section 148A, therefore notice u/s 148 is not a valid notice and assessment framed in consequence of such notice is void ab initio. The fact that notice u/s 148 was issued to assessee on 01/04/2021 can be verified from the income tax portal, wherein it has been clearly stated that notice u/s 148 was issued on 01/04/2021. Relevant extract of the portal is reproduced as under:

Notice/ Communication Reference ID : 100033669695			
148 Notice u/s	ITBA/AST/S/148/2020-21/1032106259(1) Document reference ID	Description : [ITBA]Notice under section 148 of the Income Tax Act, 1961 Issued On : 01-Apr-2021	View Response
			Notice/Letter pdf
			Seek/View Adjudgment

The CIT(A) in his order by reproducing the scanned copy of notice dated 31-03-2021 rejected the assessee's plea. However, the fact remained to be adjudicated that since the notice u/s. 148 of the Act was issued on 01-04-2021, therefore, the AO should have followed procedure laid down in newly amended section 148A of the Act w.e.f. 01-04-2021. Mere digitally signing of a notice is not the issuance of notice. In this regard, we place our precious reliance on the following cases:-

- Suman Jeet Agarwal and Other Versus Income Tax Officer, Ward 61 (1), & Ors. {[2022] 449 ITR 517 (Del)}, wherein Hon'ble Delhi High Court had, inter-alia, observed that "*we are in respectful agreement with the law laid down by the various High Courts in Dajee Abhushan [2022 (3) TMI 784 - ALLAHABAD HIGH COURT], Santosh Krishna HUF [2022 (5) TMI 420 - ALLAHABAD HIGH COURT], Mohan Lal Santwani [2022 (5) TMI 421 - ALLAHABAD HIGH COURT], Advance Infradevelopers (P) Ltd. [2021 (6) TMI 6 - MADRAS HIGH COURT] and Yuvraj v. Income Tax Officer [2022 (3) TMI 536 - MADHYA PRADESH HIGH COURT], that for determining when Notices were issued, the date and time of when the ITBA e-mail software system is triggered and the Notices leave the last ITBA server would be considered.*"
- Dajee Abhushan Bhandar Pvt. Ltd. vs. UOI (Writ Tax No. 78 of 2022) wherein the Hon'ble Allahabad High Court while allowing writ petition of the assessee specifically held as under:-

“29. Thus, considering the provisions of Section 282 and 282 A of the Act, 1961 and the provisions of Section 13 of the Act, 2000 and meaning of the word “issue” we find that firstly notice shall be signed by the assessing authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the Act, 2000 provides that unless otherwise agreed, the dispatch of an electronic record occurs when it enters into computer resources outside the control of the originator. Thus, the point of time when a digitally signed notice in the form of electronic record is entered into computer resources outside the control of the originator i.e. the assessing authority that shall be the date and time of issuance of notice under section 148 read with Section 149 of the Act, 1961.

30. In view of the discussion made above, we hold that mere digitally signing the notice is not the issuance of notice. Since the impugned notice under Section 148 of the Act, 1961 was issued to the petitioner on 06.04.2021 through e-mail, therefore, we hold that the impugned notice under section 148 of the Act, 1961 is time barred. Consequently, the impugned notice is quashed.”

Further, your humble appellant would like to bring to your kind attention that as per judgement in the case of Union of India vs Ashish Agarwal [[2022] 444 ITR 1 (SC)], Hon'ble supreme court held that w.e.f. 01/04/2021 provisions of section 148A mandatorily required to be followed. To validate notices issued u/s 148 by the revenue in between 01/04/2021 to 30/06/2021 without following procedure of section 148A, by such judgement following directions made:

“(i) The respective section 148 notices issued to the assesseees shall be deemed to have been issued under section 148A of the Act as substituted by the Finance Act, 2021 and treated to be show-cause notices in terms of section 148A(b) . The Assessing Officers shall within thirty days provide to the assesseees the information and material relied upon by the Department so that the assesseees could reply to the notices within two weeks thereafter;

(ii) The requirement of conducting any enquiry with the prior approval of the specified authority under section 148A(a) shall be dispensed with as a one-time measure vis-à-vis those notices which had

been issued under section 148 of the unamended Act from April 1, 2021 till date, including those which had been quashed by the High Courts;

(iii) The Assessing Officers shall thereafter pass orders in terms of section 148A(d) after following the due procedure as required under section 148A(b) in respect of each assessee;

(iv) All the defences available to the assessee under section 149 or under the Finance Act, 2021 and in law and whatever rights were available to the Assessing Officer under the Finance Act, 2021 shall continue to be available;

(v) This order shall substitute or modify judgments and orders passed by High Courts across the country quashing similar notices issued under the unamended section 148 of the Act irrespective of whether or not they had been assailed before the Supreme Court.”

In the case under consideration even the notice issued u/s 148 on 01/04/2021 without following procedure of section 148A cannot be validated as the relaxation provided by the hon'ble Supreme Court is not complied with. In absence of compliance of section 148A notice issued u/s 148 and consequence assessment order u/s 147 is not sustainable in the eye of law and may kindly be declared as null and void.

The CIT(A) in his appellate order dated 19-10-2023 failed to consider this aspect of appellant's plea.

Prayer:- Therefore, very base of issuance of notice u/s. 148 of the Act is illegal and deserves to be held as invalid.

(b) Reply to ground no. 5(b) to (f).

Our submissions:-

1. Without prejudice to the submission about the validity of the notice u/s 148 issued on 01/04/2021 without following procedure of section 148A, it is to submit that notice u/s 148 is not a valid notice as per provisions as exist at the time of recording reasons and signing of the notice. Going through the reasons (PB Page 79-88) your good self shall find that same were recorded without judicious application of mind but recorded for the name sake as clerical formality. Approval for issuance of notice u/s 148 on such reasons was also granted by the approving authority as a mere clerical

formality without any judicious application of mind and considering facts narrated in the reason itself (PB Page 79-88). Going through the reason, your good self shall observe that in the first para of the reason it has been recorded that assessment for the year under consideration was framed u/s 143(3) on 25/01/2016(PB Page 72-77). As per first proviso to section 147 (as was exist at the time of recording reasons and granting approval), where an assessment u/s 143(3) or 147 has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s 139 or in response to a notice issued u/s 142(1) or u/s 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. Despite assessment framed u/s 143(3), provisions of clause (b) of explanation 2 of section 147 (as it was there in the statutory provision on the date of recording of reason) invoked for the presumption of escapement of income. Clause (b) of explanation 2 of section 147 reads as under:

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

...

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return; ...”

2. Reasons recorded prior to issuance of notice u/s 148 as annexed with thenotice u/s 143(2) is reproduced as under (PB Page 79-88):

“The assessee M/s Lovely Promoters Pvt. Ltd. having PAN AABCL1338C filed its return of income stating address as 24, Anuj Chambers, 3rd Floor, Park Street, Kolkata- 700016. The main sources of income of the assessee is Income from Business. As per return of Income e-filled by the assessee on 30.09.2013, the total income during the year was Rs.Nil. The said return of income not been processed u/s 143(1) of the I.T. Act, 1961 and subsequently it was assessed u/s 143(3) of the I.T. Act, 1961 on 25.01.2016 assessing total income of Rs.Nil.

The information is made available to this office through the Insight Portal that under ‘Pilot Projects’ and investigation was carried out by DDIT(Inv.)-6(3), Mumbai on unearth tax evasion scheme.

As per the information provided through the Insight Portal, such Fictitious Losses in equity/derivative Trading has been booked by the instant assessee for more than one lakh rupees through M/s SMC Globle Securities Ltd. by transacting multiple time.

On detailed study of the above mentioned information disseminated, it is apparently found that the assessee company had Fictitious Losses in equity/derivative Trading of Rs.1,09,86,800/- through M/s SMC Global Securities Ltd. during F.Y.2012-13 relevant to the A.Y.2013-14.

Upon analysis of the disseminated information and on examination of records, it is found that the assessee had Fictitious Losses in equity/derivative Trading of Rs.1,09,86,800/- through M/s SMC Global Securities Ltd. during F.Y.2012-13 relevant to A.Y.2013-14.

On the basis of this material on record and by the reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, there is enough reason to believe that income has escaped assessment in the hand of assessee. Therefore, I have reason to believe that the Fictitious Profits in Commodity Trading to the extent of Rs.1,09,86,800/- has escaped assessment.

In the instant case, the provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

In this case, time has lapsed more than years from the end of the assessment year under consideration, hence necessary sanction to issue notice u/s 148 of the I.T. Act, 1961 is required to be obtained from the PCIT-5, Kolkata, as per the provision of section 151 of the I.T. Act, 1961.

In view of the above, a proposal is being sent to the Principal Commissioner of Incometax-5, Kolkata through Addl. CIT, Range-13, Kolkata seeking his kind approval for issuing notice u/s 148 of the I.T. Act, 1961 for the A.Y.2013-14.”

3. Without acknowledging the above facts the Ld. AO issued notice u/s 148 on 31-03-2021 (PB Page 78) for assessment of same income which attained finality vide assessment order u/s 143(3)(PB Page 72-77).An order u/s 143(3) was passed on 25-01-2016 subsequently another

predecessor in office of the Assessing officer formed an opinion that income chargeable to tax has escaped assessment. Mere change of opinion is not valid grounds for reopening the assessment.

4. Sir, we humbly submit that the present case is classic example of mere change in opinion despite being settled legal proposition that assessment cannot be reopened on the basis of a mere change of opinion. In this connection we wish to further submit as under:-
 - At the cost of repetition, we reiterate that the assessment of the appellant was completed u/s 143(3) on 25-01-2016. During the course of original assessment proceedings, the details of, Sale/Purchase, Profit/loss in each trading, Copy of Demat Transaction Statement, Confirmation of all brokers ledgers, Copies of Contract Notes, details of trading, etc. were submitted from time to time and after considering all the submitted details and verification the Assessment Order u/s 143(3) was passed on 26-01-2016.
 - Thus, if in the original assessment, the Assessing Officer had formed a view, subsequently, recourse cannot be taken u/s s. 148 for formulation of a different view on the same set of facts. There should be some tangible material with the assessing officer to come to the conclusion that there is an escapement of income. There is no new material which has come in the possession of the A.O. indicating income escaping assessment. There is no independent enquiry done or material found against the appellant. This further goes to prove that the reasons recorded for reopening the assessment is without application of mind.
5. Along with notice u/s 143(2) an attachment provided which is Approval by Ld. PCIT u/s 151 of the IT Act, 1961 for issuance of notice u/s 148(PB Page 79-88). Approval provided by Ld. PCIT (PB Page 89-90) stating that *"I am satisfied with the reason recorded for reopening the assessment, hence the same is approved."* From the bare perusal of the wording of approval it appears that Ld. PCIT approved observation of the Ld. AO that in the case under consideration escapement of income shall be deem because of applicability of clause (b) of Explanation 2 to section 147 (as was exist at the time of granting approval). The very basis of the presumption of escapement of income by the Ld. AO and approval of same by Ld. PCIT is contrary to the fact recorded in the reason itself and therefore apparently formation of belief of escapement of income and approval of same is based on incorrect fact, therefore issuance of notice

based on reasons recorded may kindly be declared as invalid and contrary to the settled legal position.

6. Further to the invalidity of belief of escapement on the presumption of escapement of income invoking provision of clause (b) of Explanation 2, reasons for belief of escapement of income is not as per law considering following facts:
- Though reference about receipt of information from investigation wing has been given, no reference has been provided about the nature of information, nature of investigation carried on by the investigation wing and the basis of the allegation, which leads to conclusion that legal transaction executed by assessee company are fictitious and manipulated. In absence of any concrete material which has been considered by the Ld. AO while recording reason of escapement of income, such reasons cannot be considered as valid belief of escapement as required under the statutory provisions.
 - It may be pertinent to mention that while moving forward of the reasons to the Pr. CIT by Range head and while granting permission for issuance of the notice u/s 148 by the Pr. CIT, only the reasons recorded by the Ld. AO are available. Considering this it can be said that report of investigation wing was not considered by the Range head while moving forward reasons to the Pr. CIT and by Pr. CIT while granting permission of issuance of reason.
 - With reference to the allegation of fictitious transactions it is to submit that the assessee company executed such transactions and incurred loss. By no means, merely because transactions executed wherein loss incurred, same can be declared as fictitious. Till framing assessment and till today no evidence other than allegation has been put on record, based on which a judicious person can laid that there is any force in such allegation. In absence of any discussion about any nature and content of supporting material based on which a judicious person can reach to the conclusion that transaction executed by assessee company were not real but fictitious formation of belief by Ld. AO by recording reason and approval by Ld. Pr. CIT on such reason, entire proceeding of issuance of notice u/s 148 is not sustainable. In absence of any discussion of any supporting material it cannot be said that same was considered by the Ld. AO while recording reason of escapement and by the Ld. Pr. CIT while granting permission for issuance of notice u/s 148. In such circumstances initiation of

proceeding u/s 147 is merely based on allegation of escapement of income, without there being any material based on which a judicious person can frame reason of belief of escapement.

- Despite such serious allegation on the assessee, it is not considered appropriate to provide supporting evidence based on which transaction executed on the legal platform presumed as fictitious.
- Neither along with formation of belief nor during assessment proceeding any concrete evidence other than allegation of evasion of tax has been put on record based on which any belief of escapement can be framed or while framing the assessment it can be held that income has been escaped.

7. Objection raised before Ld. AO(PB Page 117-136) were rejected vide letter dated 20/03/2022 (PB Page 91-95). Observation of the Ld. AO is that since it was recorded in the reasons that information received from investigation wing, it is enough proof of application of mind. Ld. AO want to lay that since in the reason allegation made based on information received from investigation wing it is not required to communicate about the nature of information received from investigation wing and what kind of investigation undertaken by investigation wing. It was recorded that since reasons recorded are self-explanatory there are enough material available with Pr. CIT for granting approval and it cannot be said that approval granted in mechanical manner without due application of mind. It was held that mentioning clause (b) of Explanation 2 was typographical error. Instead of clause (c), clause (b) mentioned. Objection of the assessee that supporting evidence based on which it can be alleged that transactions executed by assessee are fictitious were not provided has been rejected on the finding that an excel sheet provided with notice u/s 142(1) dated 21/03/2022 (correct date is 21/02/2022) (PB Page 96-105), wherein detail of transaction executed by assessee company through broker M/s SMC Global Securities Limited were provided.
8. Sir, one fails to understand that how detail of transaction which in fact executed by assessee can held as supporting evidence for allegation without any material based on which it can alleged that such transactions were not real but fictitious.
9. Your Honour, even for the sake of argument observation of the AO that mentioning of clause (b) instead of clause (c) of the Explanation 2 of section 147 in the reason was typographical error, if considered correct,

non-observation of such serious typographical error by two senior officers i.e. (i) Range Head forwarding reason to approval authority with recommendation for approval and (ii) Pr. CIT, approving Authority. Non observation of such serious typographical error led to the conclusion that reason recorded by the Ld. AO not examined properly the higher authorities. Further in clause (b) there is no sub clause whereas in clause (c) there are four sub clauses. Non mentioning of sub clause of clause (c) proves that mentioning clause (b) was not a typographical error but same has been recorded by the Ld. AO as he wishes to invoke such provision.

10. Sir, from the above, it can be observed that the following conditions are required to be fulfilled before issue of notice u/s 148:

1. AO to have reason to believe that income has escaped assessment; and
2. There is failure on part of the assessee to make a return u/s 139(1) or in response to a notice u/s 142(1) or section 148 or
3. Failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment;

As evident from the facts, the appellant has filed return u/s 139(1) and also in response to notice u/s 148. Thus, there is no failure on part of the appellant with respect to return filing. For a valid reopening u/s 148, both the conditions must be fulfilled i.e. there must be reason to believe that income has escaped assessment and there must be failure on part of the appellant to disclose fully and truly all material facts necessary for assessment.

11. Sir, as stated earlier, the Appellate has not traded with any alleged sub-brokers ever. The Appellant link to any such entity is not established. The details regarding date, item of buy and sale are not specified. Nor any other the details regarding alleged link of the Appellant with any such operator etc are brought out. Even names of any such operator are not stated or any specific statement of any such operator alleging the Appellants involvement is brought out. Accordingly, the notice now issued u/s 148 is without application of mind and with no new or additional information to arrive at the reason to believe as all the records were available in the course of assessment proceedings.

12. As regards the general reliance on the finding of Mumbai Investigation Wing - These are only general observations. The reasons recorded are haphazard, arbitrary and baseless. If any investigations were carried out by the AO or any witnesses were examined by him who implicated the assessee, the report of such investigations or the statements of the

witnesses do not form part of the reasons. No adverse inference should be drawn merely on the basis of presumption/assumption, conjuncture and surmises. Thus, the crucial link between the information made available to the AO and the formation of belief is absent.

13. It is well settled that reopening of the assessment would not be permitted for fishing or roving inquiry. This is seen as part of the first requirement of the AO having reason to believe that income chargeable to tax has escaped assessment. In other words, notice of reopening, which is issued barely for making fishing inquiry, would not satisfy this requirement. Therefore, it is submitted that the re-opening of assessment is ab-initio bad in law and not valid.
14. It is apparent that while recording reasons, the AO has made no effort to look into the return of the appellant nor the records of assessment proceedings and assessment order passed u/s 143(3) which was available with department. On mere surmises and presumption that too on factually incorrect statements recorded in the reasons, the proceedings u/s 147 of the Act cannot be validly initiated more so in the absence of any adverse material or information directly gathered by the AO or recording independent satisfaction and not on borrowed satisfaction.
15. We submit that it is settled law that it is our right to know the reasons recorded and documents/evidences relied/referred in the reasons. We rely on Sabh Infrastructure Ltd. vs. ACIT (2017) 398 ITR 0198 (Delhi HC) wherein the Hon'ble Delhi High Court has laid down guidelines in the matter of reopening of assessment (Refer para 19 the judgment). In view of above, we humbly submit that there is gross violation of rules of natural justice.

Reference is also invited to the decision of the Hon'ble ITAT, Mumbai Bench in the case of Smt. Shree Lekha Damani vs. DCIT reported in

173 TTJ 332 (Mum.) wherein it was held that the legislative intent behind the insertion of section 153D of the Act was that the assessments in search and seizure cases should be made with the prior approval of superior authority which means that the superior authorities should apply their mind to the material on the basis of which the AO is making the assessment. In this case, the Addl. CIT had granted the approval u/s 153D of the Act on the same day and ITAT, Mumbai Bench held that the approval granted by Addl. CIT was mechanical and had been passed without considering the material on record

and was, therefore, devoid of any application of mind. The impugned assessment order was annulled.

Similarly, the Hon'ble ITAT Allahabad Bench in Verma Roadways vs. ACIT reported in 75 ITD 183 (Alld.) held that while granting approval, CIT is required to examine the material before approving the assessment order. In this case, Hon'ble ITAT Allahabad Bench was examining the issue of approval u/s 158BG of the Act and it opined that the object for entrusting the job of approval to a superior and a very reasonable Officer of the rank of Commissioner is that he, with his ability, experience and maturity of understanding can scrutinize the documents, can appreciate its factual and legal aspects and can properly supervise the entire progress of assessment. The Hon'ble ITAT, Allahabad Bench held that the concerned authority while granting the approval, it is expected to examine the entire material before approving the assessment order and further that whenever any statutory obligation is cast on any authority, such authority is legally required to discharge the obligation not mechanically, nor formally but by application of mind.

Your kind attention is also invited towards the judgment of Hon'ble Supreme court in the case of Sahara India (Firm) Vs. CIT (2008)169 Taxman 328 in which it has been held that grant of pre-decisional opportunity necessary.

Similarly, the Hon'ble Apex Court in the case of Sahara India (Firm) vs. CIT & Anr. reported in 300 ITR 403 (SC), while discussing the requirement of prior approval of Chief CIT or CIT in terms of provision of section 142(2A) of the Act, opined that the requirement of previous approval of the Chief CIT or CIT in terms of said the provision being an inbuilt protection against arbitrary or unjust exercise of power by the AO, casts a very heavy duty on the said high ranking authority to see it that the approval envisaged in the section is not turned into an empty ritual.

The Hon'ble Apex Court held that the approval must be granted only on the basis of material available on record and the approval must reflect the application of mind to the facts of the case.

The Hon'ble ITAT Mumbai Bench in case of I.T.A. No. 6656/Mum/2017 Arch Pharmalabs Ltd & Arch Impex P. Ltd. on 7 April 2021 held that :

“11.5 At the cost of repetition, it may be reiterated that in the instant case, approving authority did not mention anything in the approval memo towards his/ her process of deriving satisfaction so as to exhibit his/her due application of mind. We may observe that Para 2 of the above approval letter merely says that "Approval is hereby accorded u/s. 153D of the Income-tax Act, 1961 to complete assessments u/s. 143(3) r.w.s. 153A of the I.T. Act in the following case on the basis of draft assessment orders..." which clearly proves that the Addl. CIT had routinely given approval to the AO to pass the order only on the basis of contents mentioned in the draft assessment order without any application of mind and seized materials were not looked at and/or other enquiry and examination was never carried out.

Hon'ble Sir, in all the cited cases, the ratio have laid down that the power to grant approval is not to be exercised casually and in the routine manner.

The CIT(A) in his order dated 19-10-2023 has not given any detailed findings countering the appellant's objections. Thus, the appellant humbly prays that the impugned order may kindly be held to be invalid because approval was not granted in accordance with the requirements of law so as the CIT(A)'s order dated 19-10-2023.

16. Further we wish to place reliance on following judgements, covering similar situation with the case in hand:-

>Bhanumati Malraj Kabali vs. ITO [2019] 102 taxmann.com 332 (Bombay)

:

Assessing Officer received information from Investigation Wing that assessee made donation to a bogus trust under section 35(I)(ii) - As per information received, amount of donation came back to donor, i.e., assessee, in lieu of commission - On basis of aforesaid information, Assessing Officer initiated reassessment proceedings in case of assessee - It was found from perusal of return of assessee that there was no claim of donation made to said trust - Thus, information supplied to Assessing Officer by Investigation Wing on which he acted for issuing impugned notice under section 148, was a wrong information - Whether in view of aforesaid, impugned reassessment proceedings deserved to be quashed - Held, yes [Paras 4 and 5] [In favour of assessee]

- > Giriraj Enterprise [2019] 102 taxmann.com 188 (Bombay) :

For assessment year 2011-12, Assessing Officer passed assessment order on assessee under section 143(3) accepting returned income. Assessing Officer had reopened assessment of assessee for reasons that (i) on checking of record of assessee it was found that it was a builder and, therefore, to verify intelligence gathered by Intelligence Wing, it was necessary to carry out detailed inquiry, and (ii) it had developed a society land which according to information received did not contain any agreement, Assessing Officer wished to carry out a fishing inquiry and reopening of assessment could not be permitted for carrying out fishing inquiries

- > M/s Balaji Health Care Pvt. Ltd. ITA. No. 566 & 567/JP/2018 (ITAT Jaipur)dated 30.01.2019 :

Reopening of assessment by AO on basis of report of Investigation Wing that assessee was beneficiary of accommodation entries in the form of share capital/premium/loan during the financial year was not justified as AO had not carried out any further examination and analysis in order to establish the nexus between the material and formation of belief that income had escaped assessment.

- > Pr. CIT vs. Shodiman Investments (P.) Ltd. [2018] 93 taxmann.com 153 (Bom HC)

Where Assessing Officer had issued a reassessment notice on basis of intimation from DDIT (Inv.) about a particular entity entering into suspicious transactions, this was clearly in breach of settled position in law that re-opening notice has to be issued by Assessing Officer on his own satisfaction and not on borrowed satisfaction.

- > Nivi Trading Ltd. vs. Union of India 375 ITR 308 (Bom HC)

The important words in section 147 of the Income-tax Act, 1961, are "has reason to believe" and they are stronger than the words "is satisfied". The belief entertained by the Income- tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. While the Court cannot investigate into the adequacy or sufficiency of the reasons which have weighted with the Income-tax Officer in coming to the belief

the court can certainly examine whether the reasons are relevant and have a bearing on the matter in regard to which he is required to entertain the belief before he can issue a notice under section 147(a). If there is no rational or intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on the facts and law could reasonably entertain the belief then the exercise undertaken by the Income-tax Officer can be interfered with.

> CIT vs SFIL Stock Broking Ltd. 325 ITR 285 (Del HC)

Where on basis of information given by Dy. Director of Income-tax (Inv.), Assessing Officer reopened assessment and from so-called reasons, it was not at all discernible as to whether Assessing Officer had applied his mind to information and independently arrived at a belief that, on basis of material which he had before him, income had escaped assessment, reopening of assessment was not justified [In favour of assessee]

> CIT vs Smt. Laxmi Mehrotra 41 taxmann.com 427 (All HC)

Assessing Officer initiated reassessment proceedings on the basis of information supplied by Investigation Wing that the assessee had made certain investment in purchase of plot and carrying on construction on it. Commissioner (Appeals) as well as Tribunal set aside reassessment proceedings taking a view that the said proceedings were initiated mechanically on the basis of information supplied by the Investigation Wing and without ascertaining as to whether assessee had disclosed fact of purchase of plot and cost of construction in original return - Whether since Revenue Authorities could not controvert finding recorded by authorities below, impugned order passed by them was to be upheld -Held Yes.

> Varshaben Sanatbhai Patel vs ITO 64 taxmann.com 179 (Guj)

In absence of any details available on record, Assessing Officer could not initiate assessment proceedings merely on basis of information supplied by DGIT (Inv.) that assessee had made certain bogus purchases and, to said extent, income had escaped assessment.

> Gyandeep Khemka (ITA No. 695/JP/2018) (IT AT Jaipur)
(23.10.2018)

Following the decisions of the Hon'ble Bombay High Court in the case of Pr. CIT Vs. Shodiman Investments (P) Ltd. (supra) as well as the decision of Hon'ble Jurisdictional High Court in the case of Sandeep Stocks Pvt. Ltd. vs ACIT (supra), we hold that the reopening of the assessment based on the report of DIT (Inv) is not valid when the case is hit by the proviso to Section 147 of the Act. It is pertinent to note that the assessee is not expected to disclose the fact that he has indulged in transaction of fictitious transfer of profits but what is required to be disclosed is the transactions carried out by the assessee through the broker. Hence, once the transactions carried out by the assessee are matter of record then the case does not fall in the category of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The assessee is not supposed to do what ought to have been done by the Assessing Officer during the scrutiny assessment. Accordingly, the reopening is bad in law and liable to be quashed.

> Naveen Bhattar ITA No. 2377/Kol/2017 (20.07.2018) (IT AT Kolkata)

A perusal of these reasons demonstrates that there is no independent application of the mind by the Assessing Officer to the information received from the ADIT, Inv., Unit 1(3). The information is general in nature. The aspects of income of Rs.8,04,915/-, does not, in any way, match with the transactions carried out by the assessee in the relevant Financial Year 2008-09 with the broker M/s. Genius Securities. The assessee had furnished before the Assessing Officer details of his transactions and this mismatch/anomaly is not addressed by the Assessing Officer. There is no application of mind by the Assessing Officer to the information received.

> Torm Shipping India Pvt Ltd vs ITO ITA. No.1272 & 73/Mum/2013 -December 2016

Section 147 reopening opens a "Pandora's box" and cannot be done in a casual manner. The reasons cannot be based on mere doubts or with a view to verify basic facts. There must be existence of some tangible material indicating escapement of income. Then only, an AO is permitted to resort to provisions of reopening contained in sections 147 to 151 of the Act. Because, once an assessment is reopened on valid basis, entire pandara's box is open before the AO. Reopening of

an assessment attacks and pierces the concept of finality of litigation. Therefore, an invalid reopening done in the casual manner and without following parameters of law may cause undue hardship to the taxpayers.

> Sarthak Securities Co. P. Ltd. vs. ITO 329 ITR 110 (Del)

Section 147 of the Income-tax Act, 1961 - Income escaping assessment - Nondisclosure of primary facts - Assessment year 2003-04 - Whether though to initiate proceedings under section 147, it is not necessary to have established fact of escapement of income, yet there must be relevant material on record on which a reasonable person can form requisite belief - Held, yes - Assessee had allotted certain shares to four companies on 31-3-2003 - Its return for relevant assessment year had been processed under section 143(1) - Thereafter, Assessing Officer issued a notice under section 148 to assessee stating that on basis of information received from investigation wing that assessee had received accommodation entries from four companies as share application money, he had reason to believe that income chargeable to tax had escaped assessment - Objections filed by assessee were rejected by Assessing Officer - Whether since Assessing Officer was aware of existence of aforesaid four companies; said companies had bank accounts; and payments were made to assessee-company through banking channels, it would not be appropriate to require assessee to go through entire gamut of proceedings - Held, yes - Whether, on facts, initiation of proceedings under section 147 was totally unwarranted and, therefore, notice issued under section 148 was to be quashed - Held, yes

>CIT vs. Kelvinator of India Ltd. 320ITR 561 (SC):

" ...post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. But reassessment has to be based on fulfillment of certain pre-conditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One

must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief...

> Pr. CIT vs. Century Textiles and Industries Limited (Income tax Appeal no. 1367of 2015) (Bom HC) dated 3rd April, 2018:

In this case the Assessing Officer consciously considered the claim for deduction under Section 80IC of the Act as is admittedly evident from the issues raised during the regular assessment proceedings. This by itself would be evidence of the fact that the Assessing Officer had occasion to apply his mind to the claim for deduction under Section 80IC of the Act during the regular assessment proceedings and had taken a view on the claim of deduction under Section 80IC of the Act. Where Assessing Officer sought to re-open assessment though he had duly verified claim for deduction under section 80-IC in original assessment, reassessment was not valid.

> Velingkar Brothers vs. ACIT, Circle 2(1), Goa 85 taxmann.com 8 (Bom):

Where while disposing of scrutiny proceedings, Assessing Officer after examining reply filed by assessee concluded that establishment of assessee was an export oriented unitand, thus, entitled for exemption under section 10B, subsequent notice under section 147 on ground that assessee was not entitled for said deduction was mere change of opinion.

> CIT vs. Jet Speed Audio Pvt. Ltd 55 taxmann.com 531 (Bom):

Section 143(3) assessment order is not a scrap of paper & Assessing Officer is expected to have applied his mind. Reopening on ground of "oversight, inadvertence or mistake" is not permissible. Whether where Assessing Officer raised query with regard to bad debts claimed by assessee and after satisfaction passed original assessment order, re-assessment under section 147 on same ground of bad debts and without recording any tangible material was unjustified - Held, yes [Paras 13 & 14] [In favour of assessee]

> Aventis Pharma Ltd. vs. ACIT 323 ITR 570 (Bom.)

The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power.

> NuPower Renewables (P.) Ltd. [2019] 104 taxmann.com 307 (Bombay):

Assessment was completed under section 143(3) - After expiry of four years from end of relevant year, Assessing Officer initiated reassessment proceedings on basis of information received from Investigation Wing. Whether, on facts, assessee had disclosed all material facts in course of assessment and, thus, initiation of reassessment proceedings merely on basis of information received from Investigation Wing was not permissible -Held, yes [Paras 12 and 17] [In favour of assessee]

> LSG Sky Chefs (India) (P.) Ltd. [2019] 102 taxmann.com 325 (Bombay) :

Where AO having completed assessment under section 143(3), initiated reassessment proceedings after expiry of four years on ground that assessee had incurred certain expenditure but no evidence in respect of deduction of same was produced, in view of fact that there was no failure on part of assessee to disclose all material facts truly and fully at time of assessment, impugned reassessment proceedings deserved to be quashed.

> CIT vs. Alfa ICA (India) Ltd. 34 taxmann.com 262 (Guj HC)(2013)

Where assessee disclosed all material facts truly and fully which were necessary to complete assessment, in such a case, Assessing Officer could not initiate reassessment proceedings after expiry of four years from end of relevant assessment year.

> ACIT v/s M/s Popley Diamond and Gold Plaza Pvt Ltd.-
I.T.A.No.4894/Mum/2009
(2014) (Mumbai ITAT) :

Keeping in view the legal position emanating from the judicial pronouncements of Hon'ble Supreme Court as well as Hon'ble Bombay High Court discussed above and having regard to the facts of the present case, we are of the view that the reopening of assessment originally completed u/s 143(3) by the AO beyond the period of four years from the end of the relevant assessment year was bad in law as rightly held by the Id. CIT(A) as the same was based merely on "change of opinion" and there was no failure on the part of the assessee, specifically pointed by the AO in the reasons recorded, to disclose fully and truly all material facts necessary for his assessment. The assessment completed by the AO u/s 143(3) r.w.s. 147 in pursuance of such invalid initiation, therefore, was bad in law and the Id. CIT(A), in our opinion, was fully justified in cancelling the said assessment. We, therefore, uphold the impugned order of Id. CIT(A) cancelling the assessment made by AO u/s 143(3) r.w.s.147 of the Act and dismiss the appeal filed by the Revenue.

> Meghmani Energy Ltd. [2016] 76 taxmann.com 16 (Gujarat) :

Whether since there was no failure on part of assessee to disclose truly and fully all material facts, in view of proviso to section 147, initiation of reassessment proceedings after expiry of four years from end of relevant assessment year was not justified - Held, yes [Para 14] [In favour of assessee]

> PVP Ventures Ltd. [2016] 65 taxmann.com 221 (Madras) :

Section 69A, read with section 147, of the Income-tax Act, 1961 - Unexplained moneys (Reopening of assessment) - Assessment year 2008-09 - For relevant year, assessee-company filed its return declaring income from sale of land - Assessing Officer treated said transaction as ingenuine and added said amount to assessee's income under section 69A - After expiry of four years, Assessing Officer initiated reassessment proceedings on ground that amount taxable under section 69A did not come under any heads of income and, thus, brought forward losses were wrongly set off against same - Whether since all relevant facts relating to addition under section 69A, were available on record at time of making assessment, in view of proviso to section 147, validity of reassessment proceedings could not be upheld - Held, yes [Para 35] [In favour of assessee]

> SesaGoa Ltd. vs. Joint CIT 294 ITR 101/68 taxman 281(Bom) (2007) :

Reassessment—Full and true disclosure—Notice after expiry of four years—After the expiry of four years from the relevant assessment year, power of AO to reopen the assessment is restricted by the limitations imposed under the proviso to s. 147— Therefore, unless the AO has reason to believe that income chargeable to tax has escaped assessment by reason of failure of the assessee to disclose fully and truly all material facts necessary for assessment, assessment cannot be reopened after the expiry of four years from the end of the relevant assessment year. Reopening of assessment after four years on the basis of a subsequent decision of the jurisdictional High Court would not justify reopening of assessment as it is based on change of opinion.

>Hindustan Petroleum Corporation Ltd. vs. DCIT 192 Taxman 178 (Bom) (2010) :

Assessee's assessment was sought to be reopened under section 147 beyond period of four years from end of relevant assessment year on ground that assessee had wrongly been allowed deductions under sections 80-IA and 80-IB - Facts revealed that assessee had made disclosure of all material facts relating to its claim for deductions under sections 80-IA and 80-IB and Assessing Officer, after due application of mind to all facts, allowed said deductions in assessment - Whether, on facts, condition precedent to a valid exercise of power to reopen assessment beyond period of four years from end of relevant assessment year was satisfied - Held, no.

> Jashan Textile Mills P. Ltd. Vs. DCIT (Bom HC) 284 ITR 542 (2006) :

Section 147, read with section 143, of the Income-tax Act, 1961 - Income escaping assessment - Non-disclosure & primary facts - Assessment year 1999-2000 - Subsequent to completion of assessment under section 143(3), Assessing Officer after expiry of four years from end of relevant assessment year issued notice under section 148 on ground that on basis of director's report dated 31-3-1993, as well as submission made by assessee during assessment proceedings for assessment year 2002-03, it was evident that transfer price fixed by assessee in respect of goods manufactured by it for

earlier years was incorrect - Whether since original assessment was completed after taking into consideration said director's report, contents of that report could not constitute failure on part of assessee to disclose fully and truly all material facts - Held, yes - Whether assuming, that assessee had agreed during assessment proceedings for a subsequent assessment year that determination of market value of goods for earlier years was erroneous, that could not be a ground to reopen assessment because that admission was not on account of any failure on part of assessee to disclose fully and truly all material facts - Held, yes.

Summary of Submission in response to above ground 5 (b) to 5(f):-

The Assessing Officer as well as CIT(A) have ignored and failed to appreciate the fact apparent from the record of the appellant that the appellant is trader in shares / securities / commodities/currencies/derivatives, offering business income/losses with respect to its trading. The appellant had disclosed all the income regarding the transaction in the return of income. These crucial facts available on record are totally ignored while forming belief. For issue of notice u/s 148 there has to be escapement of income. The purchase/sale during the year was made through SEBI/FMC registered broker on the recognized Stock Exchange as per information available before the AO. The income/losses are duly shown in the Return of Income and verified/disclosed during the course of original assessment proceedings under section 143(3) of Income Tax Act,1961. Thus, there is no escapement of income so as to reopen the case. The details before AO reflected that the all the transactions are settled through the respective Exchanges as per its mechanism and payments have been settled through normal pay-in and pay-out mechanism. The facts of appellant's case are totally different then what is alleged. There is no failure on appellant's part to make full and true disclosure of relevant facts. In the reasons recorded nowhere details of the transaction are given like sale/purchase, broker, banks, date of transaction and amount much less to establish that the impugned transactions were in the nature of accommodation entries. It is settled law that no inference should be drawn merely on the basis of presumption/assumption, conjuncture and surmises. Therefore, invoking the provisions of sec. 147 and issuance of Notice u/s 148 of the Act thereof for the assessment year under consideration is untenable and thus, deserves to be quashed.

Humble Prayer:- In view of the above facts and submissions/ legal propositions, it can be seen that there is absence of any adverse tangible

material or information directly gathered by the AO and the reasons are recorded for reopening the assessment are arbitrary, baseless, irrational without any material on record on borrowed satisfaction, without application of mind and is mere suspicion and factually incorrect reasons. The AO has not applied his mind so as to come to an independent conclusion that he has reason to believe that income has escaped assessment during the year and has not verified even basic facts before re-opening. Hence the consequent notice under section 148 issued in a casual and mechanical manner issued for AY 2013-14 is not in compliance with the legal provisions and is invalid, bad in law and void ab-intio. *It is further humbly submitted in his appellate order dated 19-10-2023, the CIT(A) did not consider these technical / legal pleas raised by the and he only summarily rejected our pleas and hence, his order cannot be said to be a speaking order and deserved to be reversed at your end.*

(Ground No. 6)

That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 1,09,99,289/- by upholding the AO's action in treating the real loss incurred by the assessee in Derivative transactions as bogus without considering the assessee's submission in right perspective. The entire decision of the CIT(A) is just confirmation of investigation report of the Mumbai without there being any consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.

Our submissions:-

Hon'ble Sir, facts regarding this addition are stated in the assessment order dated 26-03-2022, therefore, the same are not repeated here. However, from the assessment order and CIT(A)'s findings, entire action of AO in making addition of Rs. 1,09,99,289/- by upholding the AO's action in treating the real loss incurred by the assessee in Future and Option (F&O) as bogus and sustaining the addition by the CIT(A) is simply based on Report of Mumbai Investigation Wing.

For want of justice, the appellant wishes to submit that the assessee company is engaged in Shares / derivatives trading transaction during the year under consideration and the whole transactions are dully accounted for in regular books of accounts of the assessee company Moreover, in the year under reference the books of accounts and all bills/vouchers are duly audited by the chartered accountant in terms of section 44AB of the Income Tax Act,

1961. The assessee company have account with SMC Global Securities, Kolkata and during the year under consideration assessee company "have made transaction of Trading in Derivatives (F & O) in various securities" and in resulted assessee company having a loss of Rs. 1,09,95,925.32 and also Transaction Charges applied by SMC Global Securities Ltd to the tune of Rs, 3,364.15 and after bearing of such transaction charges assessee company having a net loss of Rs. 1,09,99,289.47 from this transaction.

Moreover, in support of our claim all copies of contract note of SMC global Securities Ltd for all such transactions are provided here with for your kind consideration.(PB Page 146-163)

That, the such addition made by the Ld. AO on the basis of surmise and thought that the assessee company arrange such loss by using expiry traders on BSE option derivative segment, in respect to this assessee company humbly submitted that the such losses arose during the year under consideration were from all running traders on BSE option derivative segment and which can be well justify / proved from the contract notes of SMC Global Securities Ltd which has been provided along with this submission.

Importantly, it is worthwhile to mentioned here that and as per the contract note of SMC Global Securities Ltd. It can be seen that the mostly securities in which assessee company was trade during the year under consideration are engaged in banking companies, and most popular companies of India to fortify our claim the names of securities in which assessee company was trade during the year under consideration are as under: -

Andhara Bank,

Gujrat State Petroleum

IDBI bank Ltd.

JSW Energy Ltd.

Chambal Fertilizer

Dish TV India Ltd.

GVK Power and Infrastructure

Housing Development Finance Corporation

Indian Hotel

Reliance Power Ltd.

Shivam autotech

Sintex Industries

Tata Power Company

Dena Bank

PTC India Ltd.

That, the losses arose by the assessee company from the above trade in derivative (F&O) transaction during the year under consideration has been duly paid through banking channel a copy of bank statement abstract of Indian Overseas Bank for period 14/03/2013 to 22/03/2013 reflecting transaction of payments made to SMC Global Securities Ltd which has been provided here with for your kind verification.(PB Page 164-193)

That, the Financial Statement of assessee company in the books of SMC Global Securities Pvt. Ltd as well as copy of Ledger of M/s SMC Global Securities Pvt. Ltd. appearing in the books of accounts of the assessee company are provided here with for your kind consideration.(PB Page 145)

It is further submitted that the appellant had made transactions of trading of derivative (F&O) transaction through M/s. SMC Global Securities Ltd. under put and call option which resulted into loss of Rs. 1,09,86,800/-. On the basis of Mumbai Investigation Wing's report, the AO alleged that this was fictitious loss booked by the assessee, this allegation was further confirmed by the CIT(A) in his appellate order dated 19-10-2023 merely by citing and referring Mumbai Investigation Report without going into the details and documentary evidence furnished before him. That the assessee has filed copies of the main broker's accounts statement showing complete details trade done by it. There is no allegation from the AO as well as CIT(A) that all the transactions were not made through exchange and the same were not recorded and verified from the books. By producing the relevant documents such as copies of broker bills, copies of contract note, copy of ledger account of the assessee in the books of brokers, copy of bank statement, copy of confirmation accounts duly signed by broker with PAN, the appellant had discharged his burden. Sir, in our case, the AO's as well as CIT(A) action in doubting the transactions entered by the assessee which ultimately booked it loss is based on his assumption and presumptions. The appellant has furnished various vital evidences/ documents which duly establish that the transactions were genuine. Contract notes are one of the most important legal

documents available to stock market investor. It keeps track of all his transactions at one place together with data of profit and loss. Contract note is the legal record of any transaction carried out on a stock exchange through a stock broker. It serves as the confirmation of trade done on a particular day on behalf of a client on a stock exchange. This document is also available in digitally signed electronic format. Contract note describes key details of a particular transaction together with date, time, price, quantity traded etc. A valid contract note should have Details of trade like, Order Number, Trade Number., Trade Price, Trade execution Time, Traded Quantity, Brokerage Charged, Settlement Reference Number, details of other Service Charges. In the instant case, contract notes furnished by the appellant contained all such details.

Reliance is placed on the decision of the Hon'ble ITAT, 'I' Bench, Mumbai, in the case of ACIT vs. Claridges Investments & Finances (P) Ltd. dealing with similar issue where the Assessing Officer denied business loss on the ground that share transactions were not genuine, decided the issue in favour of the assessee. The relevant extract of such order are reproduced as under:-

“As the matter stands the assessee’s transactions are supported by the movement of shares as reflected in demat account, movement of money as reflected in the bank account, entries in the books of account of the assessee, prevalent market quotations of CSE, contract notes and delivery bills issued by Kolkata brokers and their statements in response to the enquiries made by the AO. Last but not the least the assessee has shown net profit of Rs. 16.18 crores. As against these the case of Revenue is that certain material information was not given in the contract notes and columns in that respect were left blank. Copy of Form B was not filed in CSE. For these reasons it is not verifiable as to whether the trades in question were done through the trading system of the exchange or not. The answer of the assessee to these deficiencies and irregularities is that it could not be held responsible for the same. It was not the assessee but the three Kolkata brokers who were the members of CSE. It was the obligation of Kolkata parties to comply with the prescriptions of Calcutta Stock Exchange. Be half as it may, the conclusions of the AO that these transactions were shown only in order to generate loss or profit and were not genuine share transactions could not be reached for reason only of deficiencies and irregularities in the

documentation at the end of Kolkata brokers. The AO does not have support from the special auditors, CSE or any other quarter to that effect whereas the assessee has relied upon cogent evidence and material. The AO has acted upon grossly inadequate material and his conclusions are in the realm of suspicion, conjectures and surmises. Accordingly it is directed that the profit/loss from the assessee's transactions with the three Kolkata brokers be assessed as shown in the books of account of the assessee.—Maddi Venkataraman & Co. (P) Ltd. vs. CIT (1998) 144 CTR (SC) 214 : (1998) 229 ITR 534 (SC), Bombay Stock Exchange vs. Jaya I. Shah & Anr. (2003) 185 CTR (SC) 36 and Asstt. CIT vs. Subhash Chand Shorewala (2004) 91 TTJ (Del) 57 distinguished.

Assessee's share transactions being supported by movement of shares and money as reflected in its bank account, books of account prevalent market quotations, contract notes and delivery bills issued by brokers and brokers' statements, and assessee having shown net profit of Rs. 16.18 crores, losses incurred in the transactions could not be disallowed treating the transactions non-genuine on the basis of deficiencies in documentation left by the brokers."

Similarly, the Hon'ble Jharkhand High Court in the case of CIT vs. Arun Kumar Agarwal (HUF) held as below:-

"10. We have considered the submissions of the learned counsel for the parties and we are of the considered opinion that the learned Assessing Officer was much influenced by the enquiry report which may has been brought on record by the efforts of the Assessing Officer and that enquiry report was prepared by the SEBI and from the observations made by the Assessing Officer himself, it is clear that after getting that enquiry report, the SEBI prima facie found involvement of some of the share brokers in unfair trade practices. Even in a case where the share broker was found involved in unfair trade practice and was involved in lowering and rising of the share price, and any person, who himself is not involved in that type of transaction, if purchased the share from that broker innocently and bonafidely and if he show his bonafide in transaction by showing relevant material, facts and circumstances and documents, then merely on the basis of the reason that share broker was involved in

dealing in the share of a particular company in collusion with others or in the manner of unfair trade practices against the norms of S.E.B.I and Stock Exchange, then merely because of that fact a person who bonafidely entered into share transaction of that company through such broker then only by mere assumption such transactions cannot be held to be a sham transaction. Fact of tinted broker may be relevant for suspicion but it alone necessarily does not lead to conclusion of all transaction that broker as tinted. In such circumstances, further enquiry is needed and that is for individual case. Such further enquiry was not conducted in that case.

At this juncture, it would be relevant to mention here that it is not disputed by the Revenue before us that the shares of these assesseees were already shown in the earlier Balance Sheet submitted by the assesseees, and therefore, in that situation, how the revenue condemned the transaction even on the ground of steep rise in the shares. If within a period of one year, the share price has risen from Rs.5 to 55 and from 9 to 160 and one person was holding the shares much prior to that start of rise of the share, then how it can be inferred that such person entered into sham transaction few years ago and prepared for getting the benefit after few years when the share will start rising steeply. In present case even there was no reason for such suspicion when the shares were purchased years before the unusual fluctuation in the share price. "

Further, it is submitted that Hon'ble Apex Court held that "the Income Tax Officer is not entitled to make a pure guess and make an assessment without reference to any evidence and material at all. There must be something more than suspicion to support the assessment. Case Laws relied upon; Dhakeshwari Cotton Mills Ltd vs. CIT, 1954, 26 ITR 775 (SC).The same principle is also reiterated in the case of Umacharan Shaw & Bros, vs CIT 37 ITR 271 (SC). It was held that a suspicion however, strong may not take the place of proof. The conclusion which are based on surmises and conjectures, cannot take the place of proof.

Case relied upon:

- CIT vs. Sunita Dhadda (SC) dated 28.03.2018 :

As per the principles of natural justice, the AO has to provide the evidence to the assessee & grant opportunity of cross-examination. Secondary evidences

cannot be relied on as if neither the person who prepared the documents nor the witnesses are produced. The violation of natural justice renders the assessment void.

- Andaman Timber Industries 281 CTR 214 (SC)

The Hon'ble Apex Court has held that denial to the assessee of the right to cross-examine the witness whose statement was made the basis of the impugned order is a serious flaw which renders the order a nullity in as much as it amounted to violation of the principles of natural justice because of which the assessee was adversely affected.

- CIT vs. J.M.D. Communications P. Ltd. 320 ITR (St.) 17 (SC)

If the AO wants to use some statement made before him, then on request by the Appellant, is bound to put the deponent for cross-examination. Kishinchand Chellaram vs. CIT [1980] 125 ITR 713 (SC) "...the department is bound to afford an opportunity to controvert and cross examine the evidence on which the department places its reliance. Opportunity of cross examination must be given."

The summary of submissions is as under:

(i) The appellant does not have any bogus capital gains/loss reflected in the return of income and neither does the appellant have relation with brokers.

(ii) The allegations are false, vague, irrational, baseless & arbitrary and not relevant to the appellant. No reliance should be placed on the same as to the appellant's case. In fact, there is no clarity from the assessment order as to the nature of income for which addition is made. -whether derivative loss / commodities loss or loss shares.

(iii) Not an iota of evidence of any compensatory payments /receipt. The most crucial aspect which could be considered as incriminating in such transactions may relate to a case where compensatory payments are exchanged between us and the seller/ buyer. No evidence has been brought on record to pin point that appellant has made/received any such compensatory payment to/from the buyer/seller.

(iv) Transactions of all purchase and sale are done through recognised Exchanges, and are duly reflected in the books of accounts, bank statements and duly supported by documentary evidences. All the derivatives (F&O)

transactions entered into by the appellant are duly reflected in the books of accounts and return of income.

(v) Onus on appellant is fully discharged. The appellant has duly discharged the onus that lies on it, in establishing the genuineness of the transactions and that being so, it is for the revenue to disprove the claim of the assessee, by bringing on record the evidence to the contrary, as held by the Hon'ble Madras High Court in the case of CIT vs Gobi Textiles Ltd (294 ITR 663). All the details were furnished at the time of original assessment proceedings.

Humble Prayer:- Therefore, on the basis of the above facts, arguments and explanations given as above, the addition of Rs. 1,09,99,289/- which made in the assessment order dated 26-03-2022 and confirmed by the CIT(A) in appellate order dated 19-10-2023 on account of bogus loss ought to be deleted.

(Ground No. 7)

That on the facts and circumstances of the case, the Id. CIT(A) erred in confirming the addition of Rs. 2,19,736/- u/s. 69C of the Act by upholding the AO's findings that the assessee incurred expenditure for arranging fictitious loss. This entire findings of the AO was based on his hypothetical imagination as loss incurred by the assessee in Derivative transactions was real. The CIT(A) failed to record any speaking findings while confirming this addition and there being no consideration to the submissions of the appellant. Hence, order passed by the CIT(A) deserves to be set aside.

We requests your honour to delete addition of Rs. 2,19,736/- as no alleged expenses/ commission was paid against loss of Rs. 1,09,99,289/-.

(Ground Nos. 8 to 10)

The appellant humbly requests that suitable relief as per law may kindly be provided in respect of ground nos. 8 to 10 above.”

6. The Id. AR of the assessee also filed a detailed paper book in support of the order of the Id. CIT(A) The index of the

document submitted by the Id. AR of the assessee are as under:-

S.NO	PARTICULARS	DATE	PAGE NO
1)	WRITTEN SUBMISSION BEFORE HON'BLE CIT(A)	03.08.2023	1 TO 45
2)	COPY OF ORDER	07.04.2021	46 TO 48
3)	PREMILINARY OBJECTIONS AGAINST ORDER	05.08.2021	49 TO 50
4)	CANCELATION OF TRANSFER OF JURISDICTION	09.08.2021	51 TO 53
5)	SHOW CAUSE FOR CENTRALIZATION	11.08.2021	54 TO 56
6)	REPLY SUBMISSION 16_08_2021	16.08.2021	57 TO 58
7)	SHOW CAUSE NOTICE 06-09-2021	06.09.2021	59 TO 61
8)	PREMILINARY OBJECTIONS AGAINST SCN DATED 06-09-21	07.09.2021	62 TO 65
9)	REJECTION OF OBJECTION	08.09.2021	66 TO 68
10)	ORDER FOR TRANSFER OF JURISDICTION	08.09.2021	69 TO 71
11)	ASST. ORDER. U/S 143(3)	25.01.2016	72 TO 77
12)	NOTICE UNDER SECTION 148	31.03.2021	78
13)	NOTICE UNDER SECTION 143(2)	11.03.2022	79 TO 88
14)	ASST. APPROVAL U/S 151	31.03.2021	89 TO 90
15)	DISPOSAL OF NOTICE U/S 148	20.03.2022	91 TO 95
16)	NOTICE UNDER SECTION 142(1)	21.02.2022	96 TO 105
17)	WRITTEN SUBMISSION OF ALL VERIOUS NOTICES	10.03.2022	106 TO 116
18)	OBJECTION TO ISSUANCE NOTICES 148 SUBMISSIONS	15.03.2022	117 TO 136
19)	WRITTEN SUBMISSION OF ASST. PROCEEDING 148	23.03.2022	137 TO 142
20)	CIRCULAR	14.08.2019	143 TO 144
21)	COPY OF LEDGER -SMC GLOBAL SECURITIES LTD	2012-2013	145
22)	CONTRACT NOTES	2012-2013	146 TO 163
23)	BANK STATEMENTS	2012-2013	164 TO 193
24)	ASSESSMENT ORDER AY 15-16	29.09.2021	194 TO 196

7. On the legal aspect of the case, the Id. AR of the assessee vehemently argued that the assessment of the assessee re-opened after the four years without bringing any thing on record that the there is fault on the part of the assessee and the original assessment was already completed u/s. 143(3) of the Act. All the information for which the re-opening proposed is already on record and there is no new material that is relied by the Id. AO. Thus,

when the revenue cannot prove that the assessee failed to disclose fully and truly all the material the assumption of charge u/s. 147 and 148 is erroneous. To drive home this contention the Id. AR of the assessee relied upon the decision of Sabh Infrastructure Ltd. Vs. ACIT 398 ITR 198 and South Yarra holding vs. ITO 2019(3)TMI 582. Referring to the notice issued u/s. 148 (APB78) the Id. AR of the assessee submitted that the notice which is required to be issued by 31.03.2021 is ultimately issued on 01.04.2021 and the same is time barred and therefore, even on this count the re-opening notice issued is time barred. In support of this contention he has relied upon the decision of Daudee Abhushan Bhandar P. Ltd. Vs. UOI 444 ITR 41(All) and Suman Jeet Agarwal and other Vs. ITO 449 ITR 517(Del) and Decision of apex court in the case of Ashish Agarwal.

8. On the merits of the case the Id. AR of the assessee submitted that consequent to the search carried out at the premises of Saini, Gupta and Jain the jurisdiction of the case has been transferred from Kolkatta to Ajmer, without considering the objection filed by the assessee and the jurisdiction over the case has been transferred to Ajmer without provide property opportunity

of being heard to the assessee. There is no search carried out at the business premises of the assessee. There is no addition u/s. 153A of the Act as there is no incriminating material found related the case of the assessee in respect of the year covered u/s. 153A and in this case the case is re-opened on a notice which is not legal and the issue which is settled made as unsettled. The Id. AR of the assessee referring to the list of securities listed at page 53 of the written submission submitted all the companies whose shares are traded all are blue chip companies.

9. Per contra, Id. DR relied upon the orders of the lower authority. The Id. DR submitted that on the technical aspect raised by the assessee the relevant finding is recorded in the order of the Id. AO and he has dealt with the related aspect of the matter. Even the Id. CIT(A) has given his finding on these legal ground by him at page of 4 to 6 of his order and he relied upon the finding recorded therein so far as the legal objection taken by the assessee. The Id. DR relying on the version of the broker submitted that the broker has categorically admitted that the bogus loss was provided to the assessee. On the project Falcon the SEBI made enquiry and even the revenue has collected the information from the broker from

where it is found out that the assessee was provided with the fictitious loss. The objection to the effect that the notice is issued on 01.04.2021 and not on 31.03.2021 is raised now and therefore, that objection is not maintainable and even other the assessee based on that notice has already participated the assessment proceeding. On merits the Id. DR relied upon the detailed finding recorded in the orders of the lower authority and summarily submitted that the assessee has within 7 days dealt with 45 transaction and incurred heavy losses and thus the same is not human probability.

10. In the rejoinder the Id. AR of the assessee submitted that there is no details shared with the assessee about the finding of the SEBI with the assessee and there is no whisper in the documents so provided and it is merely an excel sheet found at the time of search. As regards the issue of notice the same being legal in nature can be raised at any stage and therefore, relied upon judicial decision and arguments in support of legal ground raised. As regards the filling of the return of income late being on account of the fact that the jurisdiction of the case has been transferred

from Kolkatta to Ajmer even though the same were objected by the assessee.

11. We have heard both the parties and perused the materials available on record and gone through the legal decision cited by both the parties to drive home to their respective contentions. The brief facts of the case is that the assessee company e-filed its return of income for the AY 2013-14 on 30.09.2013 declaring total income at Rs. Nil. As a matter of fact, as per computation of income, during the year there was net loss of (-) Rs.11,04,719/-. Tax was paid u/s 115JB on book profit of Rs.32,14,608/-. **Original assessment u/s. 143(3) of the Act was completed on 25-01-2016 at Rs. (-) 7,75,356/- by the ITO W-8(3) Kolkata(PB Page72-77).** Thereafter, a notice u/s 148 for the year under consideration was issued on 31/03/2021 (as per online e-proceedings, issue date is 01.04.2021) by ITO, W-14(1), Kolkata to file return in response to such notice(PB Page78). As per assessment order framed u/s 153A for AY 2015-16(PB Page 194-196), a search proceeding were carried out on 13/02/2020 at the residential as well as business premises of "Saini Gupta Jain Group" of Ajmer. No information about such search is available with assessee company

till the date of receipt of order u/s 127 dated 07/04/2021, from the office of PCIT-5, Kolkata(PB Page 46-48), wherein it has been mentioned that during the course of search proceedings at Saini Gupta Jain Group, certain incriminating documents belonging to assessee company was found and therefore, the jurisdiction over the assessee's case was transferred from ITO, Ward-14(1), Kolkata to the ACIT, Central Circle, Ajmer. Aggrieved by the said order, assessee company filed various representation before the Ld. CIT, Kolkata, pursuant to which, Ld. PCIT, Kolkata cancelled its order dated 07.04.2021 transferring the case from Kolkata to Ajmer. However, a fresh show cause Notice was issued in this respect and despite various objections by assessee company, the Ld. PCIT, Kolkata, without providing any information; based on which it can be held that assessee company is part of the group mentioned and covered in the search (as no search warrant has ever been served against the assessee company), again transferred the jurisdiction over the assessee's case to Ajmer (ACIT, Central Circle) from Kolkata (PB Page69-71). Due to technical glitches of the portal, return in response to such notice u/s 148, can be filed on 10/03/2022 only after raising several

grievances on the portal regarding non accepting return in response to notice u/s 148 and after filing of such return of income, reasons recorded prior to issuance of notice u/s 148 were provided along with notice u/s 143(2) by ACIT, CC, Ajmer. Thereafter, objections were raised for issuance of notice u/s 148 which were rejected arbitrarily by the Ld. AO. (PB Page91-95). Irrespective of the fact that there is no concrete evidence other than allegations of escapement, additions were made for Rs. 1,09,99,289/- to the returned income by disallowing loss incurred by the assessee in the genuine transaction on stock exchange which has already been examined in the earlier round of assessment completed u/s. 143(3) of the Act. In the assessment order it has been categorically recorded at page 7 that *“7.6 Reply of the assessee has been considered. So far as request to provide all material is concerned it is not maintainable. Vide show cause letter it was duly informed that an in enquiry was conducted by Investigation wing Mumbai regarding claim of fictitious loss through coordinated and premeditated trading in illiquid stock options. Data related to this company was also collected and found that it has also arranged fictitious loss. Details of such transaction was duly provided to the*

assessee. Nothing more is required to be provided. It is analysis of trade data which is relevant.” Therefore, it can be seen that merely based on detail of transactions available on the platform of stock exchange, which were executed by the assessee, it was held that transaction executed by assessee are not genuine as the result of such transactions are loss. The ACIT, Central Circle, Ajmer completed u/s 143(3)/147 of the Act, vide order dated 26-03-2022 by making addition for Rs. 1,09,99,289/- to the returned income by disallowing loss incurred by the assessee in the transaction on stock exchange and addition of Rs. 2,19,763/- u/s. 69C of the Act by alleging that such expenses ought to be incurred on accommodation entry of loss. The said order of the AO was confirmed by the Id. CIT(A), Jaipur-5, vide order dated 19-10-2023. That the Id. CIT(A), Jaipur-5 has grossly erred in confirming the additions by dismissing submissions (PB Page 1-45) put forward by assessee company. The assessee company denies its liability for the same. Aggrieved with the first appellate authority’s order, the appellant preferred the present appeal raising the various legal ground as well as grounds on merits of the case.

12. Apropos to the legal ground no. 5 raised by the assessee it is submitted that the notice u/s. 148 issued on 01.04.2021 is issued without following the procedure of section 148A of the Act. It is also submitted that even the notice issued u/s. 148 of the Act is not a valid notice as per provisions as exist at the time of recording of the reasons and signing date of the notice. The bench noted from the reasons recorded for reopening of the case that (APB-81-82) in the first para itself it is categorically mentioned that in the first round of litigation the assessment has already been completed as per the provision of section 143(3) of the Act. Even though merely based on the information made available on the insight portal available the case has been reopened and the same is re-opened after four years from the end of the relevant assessment year. The law provides to assume the jurisdiction u/s. 147 of the Act the Id. AO has to substantiate with the reason of the failure on the part of the assessee to make a return u/s. 139 or in response to notice u/s. 142(1) or u/s. 148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year.

13. Thus, the provision of law and reasons recorded in the notice issued u/s. 148 of the Act (APB-78) and the relevant assessment

attained the finality as per the order u/s. 143(3) of the Act has been made (APB-72-77) it is very much clear that in case considering the fact no action shall be taken under section 147 of the Act after the passage of four year unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to make a return u/s. 139 or in response to a notice issued under sub-section (1) section 142 or section 148 or to disclose fully and truly all material fact necessary for his assessment. Thus, in this case once the assessment order is made u/s. 143(3) of the Act and there is no material statement / allegation based on tangible material establishing any failure on the part of the assessee, the initiation of proceeding u/s. 148 is nothing but a mere change of opinion without any tangible material and failure of the assessee. During the original assessment proceeding the details of sales / purchase including the profit/ loss, copy of demate account, statement / confirmation of brokers / ledger account were submitted and after examination of these records the assessment order u/s. 143(3) of the Act was passed on 26.01.2016. Thus, if in the original assessment, the Assessing Officer had formed a view, subsequently, recourse cannot be taken

u/s. 148 for formulation of a different view on the same set of facts. There should be some tangible material with the assessing officer to come to the conclusion that there is an escapement of income. There is no new material which has come in the possession of the A.O. indicating income escaping assessment. There is no independent enquiry done or material found against the assessee. This further goes to prove that the reasons recorded for reopening the assessment is without application of mind. The bench also noted that though reference about receipt of information from investigation wing has been given, no reference has been provided about the nature of information, nature of investigation carried on by the investigation wing and the basis of the allegation, which leads to conclusion that the transaction executed by assessee company which are recorded and disclosed in the return and books of accounts are fictitious and manipulated. In absence of any concrete material which has been considered by the Ld. AO while recording reason of escapement of income, such reasons cannot be considered as valid belief of escapement as required under the statutory provisions, when the same subject matter has already been dealt with as per provision of section 143(3) of the

Act. We also take note that with reference to the allegation of fictitious transactions the assessee company executed such transactions and incurred loss. By no means, merely because transactions executed wherein loss incurred, same can be declared as fictitious. We also take note that neither there is no reference of any tangible material that is referred in the order of the assessment till framing assessment nor the Id. AO through the Id. DR brought any material before us which suggest that the allegation made has any substantive basis or not. Thus, in absence of any discussion about any nature and content of supporting material based on which a judicious person can reach to the conclusion that transaction executed by assessee company were not real but fictitious formation of belief by the Id. AO by recording reason and approval by Ld. Pr. CIT on such reason, entire proceeding of issuance of notice u/s 148 is not sustainable. In absence of any discussion of any supporting material it cannot be said that same was considered by the Ld. AO while recording reason of escapement and by the Ld. Pr. CIT while granting permission for issuance of notice u/s 148. In such circumstances initiation of proceeding u/s 147 is merely based on allegation of

escapement of income, without there being any tangible material based on which a judicious person can frame reason of belief of escapement. Thus, neither along with formation of belief nor during assessment proceeding any concrete evidence other than allegation of evasion of tax has been put on record based on which any belief of escapement can be framed or while framing the assessment it can be held that income has been escaped. The contention of the Id. AO is that since it was recorded in the reasons that information received from investigation wing, it is not enough proof of application of mind. Ld. AO want to lay that since in the reason allegation made based on information received from investigation wing it is not required to communicate about the nature of information received from investigation wing and what kind of investigation undertaken by investigation wing. It was recorded that since reasons recorded are self-explanatory there are enough material available with Pr. CIT for granting approval and it cannot be said that approval granted in mechanical manner without due application of mind. It was held that mentioning clause (b) of Explanation 2 was typographical error. Instead of clause (c), clause (b) mentioned. Objection of the assessee that supporting

evidence based on which it can be alleged that transactions executed by assessee are fictitious were not provided has been rejected on the finding that an excel sheet provided with notice u/s 142(1) dated 21/03/2022 (correct date is 21/02/2022) (PB Page 96-105), wherein detail of transaction executed by assessee company through broker M/s SMC Global Securities Limited were provided. But the fact remain in question that how detail of transaction which in fact executed by assessee can held as supporting evidence for allegation without any material based on which it can alleged that such transactions were not real but fictitious. So far as regards the observation of the AO that mentioning of clause (b) instead of clause (c) of the Explanation 2 of section 147 in the reason was typographical error, if considered correct, non-observation of such serious typographical error by two senior officers i.e. (i) Range Head forwarding reason to approval authority with recommendation for approval and (ii) Pr. CIT, approving Authority. Non observation of such serious typographical error led to the conclusion that reason recorded by the Ld. AO not examined properly the higher authorities. Further in clause (b) there is no sub clause whereas in clause (c) there are four sub

clauses. Non mentioning of sub clause of clause (c) proves that mentioning clause (b) was not a typographical error but same has been recorded by the Ld. AO as he wishes to invoke such provision. Thus, the law provides that following conditions are required to be fulfilled before issue of notice u/s 148:

- a. AO to has reason to believe that income has escaped assessment; and
- b. There is failure on part of the assessee to make a return u/s 139(1) or in response to a notice u/s 142(1) or section 148 or
- c. Failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment;

As evident from the facts, that the assessee filed return u/s 139(1) and also in response to notice u/s 148. Thus, there is no failure on part of the assessee with respect to return filing. For a valid reopening u/s 148, both the conditions must be fulfilled i.e. there must be reason to believe that income has escaped assessment and there must be failure on part of the assessee to disclose fully and truly all material facts necessary for assessment. On the similar facts of the case the co ordinate bench has decided the

similar issue in the case of DCIT Vs. Ponia Wines in ITA no. 141/JPR/2023 wherein the co-ordinate bench after considering the judgment of the apex court in the case of ACIT Vs. CEAT Ltd. [449 ITR 171 (SC)] held that

12. Thus it is evident from the above submission that the issue on depreciation and interest payment has already been verified in the original assessment proceedings and the Id. Assessing Officer has already considered the claim of the assessee based on the submission placed before him. We also take note of the fact that in the reasons recorded in this case is that assessee has paid interest payment of TCS and claim on higher rate of depreciation is already decided based on the submission made by the assessee. Therefore, reopening is done merely based on the same material already on record. We find from the order of the Id. CIT(A) that the assessee has challenged the reopening of the case before the Id. CIT(A) in ground No. 1. But the Id. CIT(A) has not decided this ground for the reasons best known to him even through there is a submission of the assessee challenging the proceeding initiated u/s 147 of the Act. The Bench noted that the Id. AR of the assessee has relied upon the decision in case of **Joint Commissioner of Income Tax and Another v. Cognizant Technology solutions India Pvt. Ltd.** (supra). Similar view is taken by the apex court on re-opening of the case in the case of ACIT Vs. CEAT Ltd. 449 ITR 171(SC) wherein the apex court has held that

“It is not in dispute that the assessment was sought to be reopened beyond four years. Therefore, all the conditions u/s. 148 of the income tax act for reopening the assessment beyond four years are required to be satisfied. Having gone through the reasons recorded for reopening, we are of the opinion that the conditions precedent for reopening of the assessment beyond four years or not satisfied. The assessment was on change of opinion. There are no allegations of suppression of material facts. Under the circumstances, no error has been committed by the High Court in setting aside the reopening notice under section 148 of the income tax act. We are in complete agreement with the view taken by the High Court. The special leave petition stands dismissed.”

Since, the facts that the case as decided by the Hon'ble Apex Court with that case in hand, wherein the issue has already been examined by the AO in the original assessment proceedings and from the

reasons so recorded there is no allegation of suppression of material facts by the assessee and while reopening the case of the assessee, there is no new material placed on record. Considering this fact reopening of the case is bad and illegal and in the same is quashed consequently, the ground no. 1 raised by the assessee in their cross objection is allowed.

On being consistent to the finding so recorded and considering the fact of the case that in the case of the assessee the issue which is raised in the reasons for recorded has already been examined by the Id. AO in proceedings u/s. 143(3) of the Act the same cannot be again raised again u/s. 148 of the Act without there being allegations of suppression of material facts by the assessee. The assessee in this case has already disclosed all the facts and placed on record all the details and therefore, we see no reason to hold that the notice u/s. 148 issued by the Id. AO is in accordance with the law and therefore, respectfully following the various decisions relied upon by the Id. AR and on being consistent to the finding recorded by the co-ordinate bench in the case law relied upon by the assessee the ground no. 5 assessee is allowed.

14. Since we have considered the technical grounds of appeal raised by the assessee the other grounds on merits are not considered for adjudication as the same remains educative in nature.

In the result, the appeal filed by the assessee is allowed.

Order pronounced in the open Court on 08/03/2024.

Sd/-

Sd/-

(डा० एस. सीतालक्ष्मी)
(Dr. S. Seethalakshmi)
न्यायिक सदस्य / Judicial Member

(राठौड़ कमलेश जयन्तभाई)
(Rathod Kamlesh Jayantbhai)
लेखा सदस्य / Accountant Member

जयपुर / Jaipur

दिनांक / Dated:- 08/03/2024

*Santosh/Ganesh Kumar

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

1. अपीलार्थी / The Appellant- Lovely Promoters Pvt. Ltd. Kolkata.
2. प्रत्यर्थी / The Respondent- ACIT, Central Circle, Ajmer.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File { ITA No. 770/JPR/2023 }

आदेशानुसार / By order

सहायक पंजीकार / Asst. Registrar