IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

FRIDAY, THE 29TH DAY OF JULY 2016/7TH SRAVANA, 1938

WP(C).No. 16551 of 2016 (T)

PETITIONER(S):

SRI.JOSE THOMAS,
PADINJAREVEETTIL PUTHENVEEDU,
KANNAMCODE, ADOOR P.O.,
PATHANAMTHITTA DISTRICT - 691 523,
PAN : ADCPT9216G.

BY SRI.P.J.PARDIWALLA, SENIOR ADVOCATE.
ADVS. SRI.JOJO ISAAC NEYYARAPALLY,
SRI.RAMESH CHERIAN JOHN.

RESPONDENT(S):
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1. THE DEPUTY COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE, PUBLIC LIBRARY BUILDING,
SASTRI ROAD, KOTTAYAM - 686 001.

2. THE INCOME TAX OFFICER,
WARD -2, AAYAKAR BHAVAN,
NR. KARBALA JUNCTION,
RAILWAY STATION ROAD,
KOLLAM - 691 001.

3. THE ASST. COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE, PUBLIC LIBRARY BUILDING,
SASTRI ROAD, KOTTAYAM - 686 001.

4. THE COMMISSIONER OF INCOME TAX (APPEALS)-III,
POORNIMA BUILDING, MANORAMA JUNCTION,
PANAMPILLY NAGAR, KOCHI - 686 036.

5. THE ASST. COMMISSIONER OF INCOME TAX,
INVESTIGATION CIRCLE, AAYAKAR BHAVAN,
NR. KARBALA JUNCTION,
RAILWAY STATION ROAD, QUILON - 691 001.

BY SRI.P.K.R. MENON, SENIOR COUNSEL.
ADV. SRI.JOSE JOSEPH, SC.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 03/06/2016, ALONG WITH WP(C).NO.16556 OF 2016, THE COURT ON 29/07/2016 DELIVERED THE FOLLOWING:

rs.

WP(C).No. 16551 of 2016 (T)

APPENDIX

PETITIONER'S EXHIBITS:-

P1	TRUE COPY OF THE ACKNOWLEDGMENT OF RETURN FILED FOR THE ASSESSMENT YEAR 2004-05 BEFORE THE INCOME TAX OFFICER, WARD -1, KOLLAM, THE 2ND RESPONDENT.
P2	TRUE COPY OF THE ACKNOWLEDGMENT OF RETURN FILED FOR THE ASSESSMENT YEAR 2008-09 BEFORE THE INCOME TAX OFFICER, WARD -1, KOLLAM, THE 2ND RESPONDENT.
P3	TRUE COPY OF NOTICE DTD. 03.12.2009 ISSUED FOR 2003-04.
P4	TRUE COPY OF JUDGMENT DTD. 12.02.2013.
P5	TRUE COPY OF THE NOTIFICATION DTD. 25.09.2009.
P6	TRUE COPY OF NOTIFICATION DTD. 24.04.1999.
P7	TRUE COPY OF NOTICE UNDER 142(1) DTD. 06.08.2014.
P8	TRUE COPY OF THE LETTER DTD. 06.03.2014.
P9	TRUE COPY OF LETTER DTD. 18.09.2015 CONTAINING THE ORDER SHEET ENTRY.
P10	TRUE COPY OF NOTICE DTD. 21.09.2015.
P11	TRUE COPY OF LETTER DTD. 26.09.2015.
P12	TRUE COPY OF LETTER DTD. 29.09.2015.
P13	TRUE COPY OF LETTER DTD. 20.01.2016.
P14	TRUE COPY OF LETTER DTD. 05.01.2016.
P15	TRUE COPY OF LETTER DTD. 27.01.2016.
P16	TRUE COPY OF LETTER DTD. 29.01.2016.
P17	TRUE COPY OF OBJECTION DTD. 22.02.2016.
P18	TRUE COPY OF LETTER DTD. 07.08.2015.

RESPONDENT'S EXHIBITS:- NIL.

//TRUE COPY//

P.S. TO JUDGE

rs.

A.M.SHAFFIQUE, J

* * * * * * * * * * * * *

W.P.C.Nos.16551 & 16556 of 2016

Dated this the 29th day of July 2016

J U D G M E N T

Since common issues arise for consideration in these writ petitions the same are heard and decided together.

2. Petitioners challenge the assessment orders passed by the Deputy Commissioner of Income Tax, Kottayam Circle, the 1st respondent for the assessment year 2010-11, on the ground that the proposal for assessment and the consequent assessment are illegal.

3. The facts involved in the writ petitions would disclose that consequent to a search conducted on 04/03/2009, the Assistant Commissioner of Income Tax issued separate notices under Section 148 of the Income Tax Act, 1961, to the petitioners to reopen the assessment for the assessment year 2010-2011.

4. In W.P.(C) No. 16551/2016 it is stated that the 1st respondent, by letter dated 18/09/2015 (Ext.P9), furnished a copy of the reason recorded for reopening assessment, as stated in the order sheet. According to the petitioner, without passing any speaking order on the objections filed by the petitioner, he was

served with notice dated 21/09/2015 under Section 143(2) of the Act. Petitioner filed Ext.P11 dated 26/09/2015 and in response to Ext.P9, petitioner submitted Ext.P12 letter dated 29/09/2015. In response to Ext.P12, the first respondent issued reply dated 05/01/2016. The petitioner, by Ext.P15 letter dated 27/1/2016 made a request for the copy of the agreement dated 23/02/2009 which was replied by the 1st respondent as per letter dated 29/01/2016 (Ext.P16). Petitioner again filed objection as Ext.P16. It is contended that without passing any order on the objections, the assessment was completed under Section 143(3) read with Section 147 of the Act as per Ext.P18 order dated 23/03/2016 assessing his total income at Rs.4,90,59,495/-.

5. WP(C) No.16556/2016 also gives rise to similar set of facts. Ext.P2 is the notice dated 28/04/2014 issued by the 3rd respondent under Section 148 of the Act. Ext.P31 is the assessment order for the assessment year 2010-2011 by which the total income of the petitioner had been assessed as Rs.5,04,19,190/-.

6. Petitioners contend that though they objected to the reason recorded for the issue of notice under section 148 of the

Act, without passing a speaking order with reference to the objections raised, the assessment orders are passed. Further it is contended that the 3rd respondent relied upon materials which were not stated in the reasons stated for reopening assessment.

7. The learned Standing Counsel appearing on behalf of the respondents submitted that there is no necessity to consider the writ petitions on merit as separate appeals have already been filed by the petitioners before the Commissioner of Income (Appeals), Kottayam.

8. The learned counsel for the writ petitioner, however, limits their argument to certain jurisdictional issues which had arisen in the matter relating to the proceedings which had culminated in the impugned assessment orders and contends that pendency of the appeal shall not preclude the petitioners to proceed with the writ petitions on such jurisdictional and legal issues involved in the matter.

9. Before proceeding further, it would be useful to consider the facts on which notices under section 148 of the Act had been issued to the petitioners. During the search conducted in the case of Carmel Educational Trust, Adoor on 26/2/2009, an

agreement dated 23/02/2009 was also seized. As per the terms of the agreement, all the eleven trustees decided to hand over the Trust, Engineering College and its entire assets to M/s. Believers Church, Thiruvalla for a consideration of Rs.43.50 Crores. Petitioners were also the trustees whose names and addresses appeared in the first page of the agreement. Their share of consideration was Rs.14.50 Crores each, out of which Rs.9 Crores each were received during the financial year 2010-11. However, in the return, the aforesaid receipt was not disclosed. The 1st respondent has informed the petitioners that the receipts are revenue receipts taxable under the head 'income from other sources' under Section 56(2) of the Act and since the said income is not disclosed in the return, there is reason to believe that the income has escaped assessment within the meaning of Section 148 of the Act.

10. In WP(C) No.16556/2016, the reason for reopening was communicated to the petitioner on 04/11/2014. An objection was filed by the assessee for which the assessing officer had issued a speaking order dated 04/03/2015. Petitioner was given an opportunity to appear and present the case on 28/09/2015.

11. Perusal of Ext.P18 order in W.P.(C) NO.16551/2016, which is substantially the same as Ext.P31 in WP(C) No.16556/2016, would further show that as per agreement dated 23/02/2009, the Trust and their entire assets were handed over to M/s.Believers Church. Though, legally, a Trust cannot be sold, all the 11 trustees relinquished their trusteeship in favour of the appointees in M/s.Believers church. For relinquishment of the trusteeship, the outgoing trustees should be paid a consideration of Rs.37.5 Crores, which ought to be shared between two family groups, which are headed by the petitioner and one Sri.P.J.Paulsose. The consideration so received would constitute taxable income in the hands of the recipient, assessable under the head 'income from other sources'. It is indicated that a draft unsigned agreement dated 23/02/2009 was seized from the residence of Sri.P.J.Paulose. As per the terms of the said agreement, the Trust, Engineering College and its entire asset were to be handed over to M/s.Believers Church for a total amount of Rs.43.50 Crores and one third of which is to be shared between each family group. Further, M/s.Believers Church would purchase a rubber estate measuring 55.15 Acres lying adjacent to

the compound of Carmel Engineering College. The total consideration of the estate would be Rs.6.5 Crores. It is stated that, as per Clause 17 of the agreement, the sale price agreed for the rubber estate is Rs.6.50 Crores. The parties would enhance the registration value and the surplus amount shall be the consideration for handing over operation of the Trust. The surplus amount has to be divided equally by three of the family groups and it will purely be a book adjustment. It is further stated that in the signed agreement dated 10/03/2009, the amount for handing over of the Trust is reduced from 43.5 Crores to 37.5 Crores and the consideration of the rubber estate is increased by Rs.6 Crores. As per the registered sale deed, the rubber estate is transferred for a value of Rs.12.5 Crores. It is also mentioned that those owners who were not trustees were paid only Rs.15 lakhs per Acre, whereas the owners who were trustees were paid Rs.25,40,400/- per Acre. Further, reference is made to Clause 5 of the agreement dated 10.3.2009 which indicates that the parties are to prepare the accounts with the help of Chartered Accountants in order to find out the debt and liabilities within six months in order to clear the liabilities from the aforesaid amount

of Rs.37.50 Crores. The first party, namely M/s.Believers Church agreed to release their funds as per demand. 2nd party also agreed that they will complete the ongoing constructions of building, landscape, hostels, play grounds etc. It is stated that though the attempt was to treat the aforesaid amount of Rs.37.5 Crores for the purpose of clearing the outstanding liability and for completing the ongoing construction, there was no such liability and no such construction was carried out. The Officer further observed that, in the assessment order of the Trust, for the assessment year 2010-11, they have not carried out any construction at all and no such expenditure appears in the final accounts. Another agreement dated 01/06/2010 was executed between M/s.Believers Church and Family groups headed by the petitioners wherein it was stated that Rs.37.5 Crores was paid to the former trustees for clearing and paying the liabilities of the Trust as on 10/03/2009 and the outgoing trustees have agreed to complete the construction. M/s.Believers Church signed another agreement with 2nd family group headed by Sri.P.J.Paulose on 30/11/2009 wherein Sri.P.J.Paulose admitted receipt of Rs.4.5 Crores from M/s.Believers Church. As per clause 5 of the

agreement it is stated that subsequent to verification of accounts, it was found that all liabilities have been cleared and there is no need to pay any further amount to him. It is stated by the first respondent that agreements give an indication that the Trust had a liability of Rs.37.5 Crores and thereafter, when supplementary agreements were executed, it was found that no such liability existed. It is further observed that the petitioners herein and their family members formed M/s.St.Thomas Educational Society and Sri.P.J.Paulose and his family members formed M/s.Christ Educational Society. M/s.Believers Church made a payment of Rs.16 Crores to M/s.St.Thomas Educational Society and Rs.7.97 Crores to M/s.Christ Educational Society. These Trusts were intended for running educational institutions. However, it is stated that not even a single student is admitted into the institution run by such Trust. It was therefore found that the consideration received by the former trustees of M/s.Carmel Educational Trust, in lieu of relinquishment of trusteeship is Rs.37.5 Crores or above which constitutes taxable income in their hands, but was not offered to tax, instead, several agreements were made for the purpose of evading tax which amounts to

colourable devices to escape tax value. Further, on sale of rubber plantation, the trustees, who were owners, were paid at the rate of Rs.25,40,400/- per Acre, whereas the other owners were paid only @ Rs.15 lakhs per acre. The surplus paid was towards the handing over of the Trust. It was, therefore, found that the total income of the assessee for the year 2010-11 was computed by adding Rs.4.5 Crores.

12. The main contention urged by the petitioners is that there is non-compliance of the law laid down by the Supreme Court in **G.K.N.Driveshafts (India) Ltd. v. Income- Tax Officer and Others** *[259 ITR 19]* which was followed by this Court in **Tolins Rubbers v. Assistant Commissioner of Income Tax** *[2004 270 ITR 280]*. The contention is that, when a notice is issued under Section 148 of the Act, the assessee is entitled to seek reasons for issuing such notice, in which event, the Assessing Officer is bound to furnish reasons within a reasonable time. On receiving such reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. It is contended that though in WP(C) No. 16556/2016, such

a method was adopted, in WP(C) No. 16551/2016, the said procedure was not adopted.

13. The Apex Court in **G.K.N.Driveshafts** (supra) held as under:

> *"Heard learned Counsel for the parties.*
>
> *Leave is granted.*
>
> *By the order under challenge, a Division Bench of the High Court at Delhi (see [2002] 257 ITR 702) dismissed the writ petition filed by the appellant challenging the validity of notices issued under Sections 148 and 143(2) of the Income-tax Act, 1961. The High Court took the view that the appellant could have taken all the objections in its reply to the notices and that, at that stage, the writ petition was premature. Accordingly, the writ petition was dismissed on January 31, 2002. Aggrieved by that order, the appellant is in appeal before us.*
>
> *Mr.M.L.Verma, learned senior counsel appearing for the appellant, submits that the impugned notices relate to seven assessment years; that during the pendency of these appeals, in respect of two assessment years, viz., 1995-96 and 1996-97, assessment has been completed against which appeals have been filed. Notices*

relating to the other five assessment years, viz., 1992-93, 1993-94, 1994-95, 1997-98 and 1998-99, are now the subject-matter of these appeals.

We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income-tax Act is issued, the proper course of action for the noticee is to file a return and if he so desire, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.

In so far as the appeals filed against the order of assessment before the Commissioner (Appeals), we direct the appellate authority to dispose of the same, expeditiously.

With the above observations, the civil appeals are dismissed. No costs.”

14. In **Tolins Rubbers** (supra), the petitioner challenged the reasons for issuing the notice. This Court relying upon **G.K.N.Driveshafts**(supra) held that once the assessing authority had furnished the reasons for reopening the assessment, it is for the petitioner to file objections to the same. If any such objection is filed, the assessing officer will consider the said objection and pass a speaking order, which has to be done before proceeding with the assessment, pursuant to the returns filed by the assessee and the decision has to be communicated to the petitioner.

15. The learned counsel also relied upon a few other judgments, which are as follows:

(i) The Division Bench judgment of Bombay High Court ***WP(C) Nos.2287/2009 and 59/2010*** considered the challenge to the notices issued under Section 148 of the Act. It was held that the question as to whether there is reason to believe within the meaning of Section 147 of the Act must be determined with reference to the reasons recorded by the Assessing Officer, which cannot be supplemented by affidavits. In that case, it was held that there was no basis for the Officer to form a belief that any income chargeable to tax has escaped assessment within the

meaning of substantive provisions of Section 147. That was a case in which the assessee contended that the amounts received on account of the retirement of petitioner from the partnership firm were Capital Receipts and therefore not offered to tax.

(ii) Another judgment relied upon is of a Division Bench of the Gujarat High Court in **M/s.Prakriya Pharmachem Thru its Current Partner v. Income Tax Officer** *[Special Civil Application No.20492/2015]*. Paragraphs 7, 9 and 10 of the said judgment are relevant, which reads as under:

> *"7. We are conscious that in the present case return of the income filed by the petitioner was not taken in scrutiny. No scrutiny assessment was therefore, framed. Return was only accepted under section 143(1) of the Act. In that view of the matter the scope for the Assessing Officer to reopen such assessment on a valid reason to believe that the income chargeable to tax had escaped assessment would be much wider compared to the case where scrutiny assessment has been framed. This would be so since there would be no opinion formed by the Assessing Officer while accepting return under section 143(1) of the Act without scrutiny. Consequently, therefore, the question of change of opinion would not arise. This is in sum and substance held by the*

Supreme Court in the case of Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd. (supra). It is on this ground that the Supreme Court had in the case of Deputy Commissioner of Income Tax and another Vs. Zuari Estate Development and Investment Company Ltd. (supra) reversed the judgment of the High Court. However, even in the case of assessment previously framed without scrutiny which is sought to be reopened by issuance of notice under section 148 of the Act, the principle requirement that the Assessing Officer has reason to believe that the income chargeable to tax had escaped assessment would still survive. Of course, this formation of belief by the Assessing Officer must be prima facie and at the stage when the Court is testing validity of such a notice; it would not be necessary for the Assessing Officer to conclusively establish that the income chargeable to tax had escaped assessment.

9. With this narrow scrutiny permissible at this stage we would examine the reasons recorded by the Assessing Officer for issuing the impugned notice. We may recall that in the reasons provided it is stated that the assessee has transferred 5,30,410 shares during year under consideration whose market value on the date of transfer was Rs. 7.63 crores (rounded off). This transfer had taken place in favour of M/s. Nerka Chemicals Pvt. Ltd. without consideration under

transfer deed dated 26.02.2010. In view of such facts, the Assessing Officer has reason to believe that the income chargeable to tax in excess of Rs. 1,00,000/- had escaped assessment.

10. For multiple reasons we are convinced that these reasons lack validity. The first and foremost, reasons themselves record merely the transaction and nothing more. Quite apart from there not being live link between the first portion of the reasons recorded, namely, by merely duplicating the recording of transaction of transfer of sizable number of shares having considerable market value without consideration and second portion of the reasons where he concluded that the income chargeable to tax had escaped assessment."

iii) In **Varshaben Sanatbhai Patel v. Income Tax Officer** *[Special Civil Application No.12873/2014 and 12875/2014]*. Paragraphs 13 and 15 are relevant which reads as under:

"13. On a plain reading of the reasons recorded, what emerges is that the Assessing Officer, on verification of the details available on record, has noticed that there were bogus purchases. However, there is no assertion as regards on the basis of which material on record he has come to such conclusion. A perusal of the order rejecting the objections raised by

the petitioner,shows that the reopening is based, not upon the material on record, but on the basis of material received from an external source viz., the DGIT (Inv.), Mumbai, pursuant to inquiries made by him (the DGIT). Therefore, the material on the basis of which the Assessing Officer seeks to assume jurisdiction under section 147 of the Act, is the information received from an external source viz., from the DGIT and not the material on record as reflected in the reasons recorded. Under the circumstances, on the basis of the material on record, the Assessing Officer could not have formed the belief that income chargeable to tax has escaped assessment, inasmuch as, the formation of belief of the Assessing Officer is not based upon the details available on record, but on the material made available by the DGIT (Inv.), Mumbai which is an external source. Under the circumstances, it cannot be said that the requirements of section 147 of the Act are satisfied, inasmuch as, the belief of the Assessing Officer is not based upon the material on record, but on some other material from an external source which does not find reference in the reasons. As is clear on a plain reading of the reasons recorded, except for the assertion that there were bogus purchases, the Assessing Officer has not referred to any material on the basis of which he proceeded to invoke the provisions of section 147 of the Act. The assertion

made by the Assessing Officer is a bare one, without any reference to the material on the basis of which he made such assertion.

15. Adverting to the facts of the present case, the returns filed by the assessee have been processed under section 147(1) of the Act. The Assessing Officer in the reasons recorded for the purpose of reopening the assessment has placed reliance upon the record of the case. As noted hereinabove, there is no assertion as regards on what basis the Assessing Officer has stated that the assessee had made claim in respect of bogus purchases in the trading and the Profit and Loss Account as expenditure. The Assessing Officer has stated that on verification of the details available on record, it has been noticed that the assessee has made bogus purchases; however, no specific averments are made as regards which details available on record reflected such bogus purchases. It is evident that the Assessing Officer for the purpose of reopening the assessment has placed reliance upon the material from an external source which does not form part of the record. However, the said aspect is not reflected in the reasons recorded. On behalf of the Assessing Officer, the learned counsel is not in a position to point out any material on the record on the basis of which the Assessing Officer could have formed such belief. What is now sought to be stated

by way of the order rejecting the objections as well as the affidavit-in-reply filed in response to the averments made in the petitions is that the formation of belief is based upon the information which is received from the DGIT (Inv.), Mumbai. It is settled legal position as held by a catena of decisions that the substratum for formation of belief that income liable to tax has escaped assessment has to form part of the reasons recorded. In the present case, the substratum for formation of belief, as indicated in the order rejecting the objections as well as the affidavit-in-reply, is the information given by the DGIT (Inv.), Mumbai, which got no relation with the reasons recorded, which are stated to be based upon the material available on record. Under the circumstances, the Assessing Officer, on the basis of the material on record, could not have formed belief that there was any escapement of income chargeable to tax so as to validly assume jurisdiction under section 147 of the Act. As held by the Supreme Court in a catena of decisions, the reasons recorded cannot be supplemented in the affidavit or by the order rejecting the objections. The material, on the basis of which, the belief that income chargeable to tax has escaped assessment has been formed, has to find place in the reasons itself."

iv) Further reference has been made to judgment in **Aroni Commercials Ltd. v. Deputy Commissioner of Income-Tax and Another** *[2014 362 ITR 403 (Bom)]* wherein also it is held that the reasons for reopening an assessment have to be tested or examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act. The reasons cannot be improved or supplemented or substituted by affidavits or oral submissions.

v) Judgment of the **Delhi High Court in Northern Exim P.Ltd v. Deputy Commissioner of Income-Tax** *[(2013) 357 ITR 586 (Delhi)]* wherein also the Delhi High Court, after referring to various earlier judgments, held that the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction.

16. On the other hand, learned Standing Counsel appearing on behalf of the respondents, while submitting that the

writ petitions are not maintainable on account of the petitioners having already preferred appeals, submits that the facts involved in the case do not warrant any interference as far as the jurisdictional issue or legality is concerned, as the respondents have complied with the statutory provisions in letter and spirit. It is submitted that in **G.K.N.Driveshafts**(supra), the Supreme Court did not interfere with the impugned orders. That was a case in which the challenge was to the validity of notice issued under Section 148(2) of the Act. High Court held that the writ petition was premature and accordingly, the writ petition was dismissed. It was submitted before the Court that the notices related to seven assessment years and during the pendency of the appeals, the assessment has been completed with respect to two assessment years 1995-96 and 1996-97, against which appeals have been filed and the issue was only with reference to notices to other five assessment years. The Apex Court observed that there is no reason to interfere with the order under challenge. It was only by way of a clarification that the Apex Court observed that when a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file a

return and if he so desires, to seek reasons for issuing notice. If reasons are sought for, Assessing Officer is bound to furnish the reasons within a reasonable time. Thereafter, the assessee gets an opportunity to file objections, which is to be disposed of by a speaking order. In WP(C) No. 16551/2016, petitioner has not sought for reasons whereas in WP(C) No.16556/2016, reasons have already been furnished when there was a request and therefore, there is no basis for the aforesaid contentions.

17. On a perusal of the materials placed on record, I do not find any infirmity in the proceedings initiated by the respondent authorities. Section 147 of the Act reads as under:

> *"147. Income escaping assessment.—If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in*

> *Sections 148 to 153 referred to as the relevant assessment year):"*

18. Section 148 relates to issuance of notice where income escaped assessment.

> *"148. Issue of notice where income has escaped assessment.— (1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:"*

19. The petitioners are virtually contending that the reason to believe as envisaged under Section 147 of the Act cannot be based on an unsigned agreement which is nonest in the eye of law. Ext.P7 dated 06/08/2014 is the notice issued to the petitioner in WP(C) No. 16551/2016 under Section 148 of the Act

wherein he was asked to give certain clarifications and he was asked to appear on 24/09/2014. There is no explanation as to whether he had actually appeared or filed any objection. However, Ext.P8 is seen produced which is a letter dated 06/03/2014 (an apparent mistake regarding date, it might be 06/03/2015) wherein he had requested for a copy of notice dated 28/04/2014. He also informed that the return for the assessment year 2010-11 has to be treated as return pursuant to the notice. Further he requested for the reasons recorded for reopening in view of the judgment in **G.K.N.Driveshafts**(supra)). It is pursuant to Ext.P8, that letter dated 18/09/2015 was issued by the first respondent referring to the notice dated 28/04/2014 wherein the reasons has been recorded for reopening assessment. It was therefore apparent that when notice dated 28/04/2014 was issued, petitioner did not object to the reason recorded for reopening, whereas when a 2nd notice was issued as Ext.P7, he had replied by Ext.P8. It is thereafter that Ext.P12 was issued again requesting for a copy of the agreement. The Officer had, by Ext.P14 dated 05/01/2016, called for objections to the reasons for reopening. By Ext.P15, petitioner informed the 1st

respondent that, without providing a copy of the agreement, further proceedings shall not be taken. In Ext.P16 petitioner was informed that the reason to believe was based on a tangible instrument which is a draft agreement and therefore the Officer is justified in proceeding further.

20. Perusal of the facts in WP(C) No. 16556/2016 would further show that similar notices were issued to the petitioner on 06/08/2014 (Ext.P5) wherein a reply was sent on 13/08/2014 placing reliance on **G.K.N.Driveshafts**(supra). However, she was offered that the reasons for reopening assessment will be provided on the petitioner complying with the requirements in notice under Section 148 of the Act. The reasons for reopening assessment has been supplied to the petitioner under cover of letter dated 04/11/2014 (Ext.P12). Petitioner filed a reply dated 03/02/2015 (Ext.P13) requesting for a copy of the agreement which was supplied as per Ext.P14 dated 18/02/2015. Petitioner filed further objections Ext.P15 dated 25/02/2015 and the order passed is Ext.P16. Therefore it is evident that in the case of the petitioner in WP(C) No. 16556/2016, there is strict compliance of the judgment in **G.K.N.Driveshafts**(supra).

21. As far as WP(C) No.16551/2016 is concerned, the petitioner did not care to seek the reasons to believe as envisaged under Section 147 of the Act, immediately on receipt of notice under Section 148 of the Act and he cannot claim the benefit of the judgment. Only at a later stage he had asked for the reasons which was supplied. At that stage, there was no further obligation to pass another order. However, it could be seen that there is substantial compliance of the statutory provisions. All materials available, which have been relied upon, has been given to the petitioner.

22. A contention had been raised that an unsigned agreement can never be the basis of a reason to believe. In these writ petitions, it was clearly indicated that the reason to believe is stated to be on the basis of the contents of agreement dated 23/02/2009. The agreement indicates that there is a consideration paid for vacating the post of trustees. The assessee's receipt for the assessment year 2010-11 is Rs.9 Crores. This amount had escaped the assessment. It is therefore apparent that the reason to believe that the income of the assessee for the year has escaped assessment within the

meaning of Sec.148 of the Act is the agreement dated 23/02/2009. True that the agreement is not signed by the parties. But, the Department proceeds on the basis that the subsequent materials proves the fact that the terms of the said agreement was the actual arrangement between the parties.

23. The position of law in this regard is well settled. The reason to believe that the income has escaped assessment, for failure on the part of assessee to fully and truly to disclose all material facts is also amenable to writ jurisdiction. However each case depends upon its own facts and circumstances. In ***S. Ganga Saran & Sons (P) Ltd. v. ITO, [(1981) 3 SCC 143]*** the Apex Court held as under:

> *"6. It is well-settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under Section 147(a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice*

issued by the Income Tax Officer would be without jurisdiction. The important words under Section 147 (a) are "has reason to believe" and these words 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. The court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the belief, but the court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under Section 147(a). If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid."

In ***ITO v. Selected Dalurband Coal Co. (P) Ltd., [(1997) 10 SCC 68]*** it is held that:

> *"3. It is well settled by various decisions of this Court that the notice under Section 148 read with Section 147 can be issued only where the Income Tax Officer has reason to believe that the income, profits or gains chargeable to tax had been underassessed or escaped assessment and further that such escapement or underassessment was occasioned by reason of the failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year. [We are not concerned with clause (b) of Section 147 here but only with clause (a).] In other words, there must be relevant material before the assessing officer upon which he must reasonably and rationally form the requisite opinion (belief). The question, therefore, is whether the letter of the Chief Mining Officer aforesaid does not constitute relevant material upon which the Income Tax Officer could have formed the requisite belief? It must be remembered that the formation of belief by the Income Tax Officer is essentially within his subjective satisfaction.*
>
> *4. xxxxxxxxxx It may well be that the assessee may be able to establish that the facts stated in the said letter are not true but that conclusion can be arrived at only after making the necessary enquiry. At the*

> *stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on, we do not and we ought not to express any opinion on merits.*"

In ***CIT v. Rajesh Jhaveri Stock Brokers (P) Ltd., (2008) 14 SCC 208,*** it is held as under:

> "*19. Section 147 authorises and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the*

assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers.

20. As observed by the Delhi High Court (sic the Supreme Court) in Central Provinces Manganese Ore Co. Ltd. v. ITO for initiation of action under Section 147(a) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within

the realm of subjective satisfaction [see ITO v. Selected Dalurband Coal Co. (P) Ltd.; Raymond Woollen Mills Ltd. v. ITO].

21. The scope and effect of Section 147 as substituted with effect from 1-4-1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(a) two conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these

> *conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under Section 148 read with Section 147 (a) but under the substituted Section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso.*"

Viewed in the light of the declaration of law by the Apex Court and various other High Courts, I find that the reason for reopening the assessment is well justified.

24. I do not think that I should be called upon to consider the manner in which the assessment proceedings had been completed especially on account of the fact that appeals have been filed and I do not intend to go into the merits of the contentions raised. It is for the appellate authority to decide such

issues.

25. Having said so, I do not find any jurisdictional error on the part of the respondents nor any illegality in proceeding with the assessment.

26. Therefore, it is for the petitioners to agitate the factual disputes on merits before the appellate authority. Reserving the said right and leaving open the contentions urged, these writ petitions are dismissed.

(sd/-)

(A.M.SHAFFIQUE, JUDGE)

jsr