* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 30.10.2019
Pronounced on: 13.02.2020

\+ W.P.(C) 11302/2019, CM APPL. 46536/2019, CM APPL. 46537/2019& CM APPL. 46538/2019

EXPERION DEVELOPERS PVT LTD. ..... Petitioner

Through: Mr. Ajay Vohra, Senior Advocate with Ms. Kavita Jha and Mr. Vaibhav Kulkarni Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ORS.

..... Respondents

Through: Mr. Ruchir Bhatia, Senior Standing Counsel.

\+ W.P.(C) 11303/2019, CM APPL. 46539/2019, CM APPL. 46540/2019, CM APPL. 46541/2019 & CM APPL. 46542/2019

EXPERION HOSPITALITY PVT LTD ..... Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Ms.Kavita Jha and Mr. Vaibhav Kulkarni Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX & ORS.

..... Respondents

Through: Mr. Ruchir Bhatia, Sr. Standing counsel for Revenue.

CORAM: JUSTICE VIPIN SANGHI
JUSTICE SANJEEV NARULA

J U D G M E N T

SANJEEV NARULA, J

Brief Factual Background

1. The present petitions under Article 226 /227 of the Constitution of India are directed against two separate notices both dated 31.03.2019 issued by respondent No.1 under Section 148 of the Income Tax Act (hereinafter referred to as "the Act"), for the assessment year (AY) 2012-13 and the orders dated 25.09.2019 disposing of the objections filed by the respective petitioners and also the proceedings emanating therefrom. The grounds for reopening assessment in both cases are a result of the very same investigation and inquiry carried out by the DIT (Intell. & Cr. Inv.), New Delhi. The reasons recorded for reopening the assessment in respect of both the petitioners are also similar, except for certain distinguishing facts. Besides, the petitioners raise similar grounds of challenge, and therefore it is considered appropriate to dispose of both the petitions by way of a common judgment.

2. For the purpose of disposal of present petitions, the facts in W.P.(C)11302/2019 are being noted extensively. The essential differences are noted separately.

W.P.(C) 11302/2019

3. Petitioner is a private limited company engaged in the business of construction-development projects. Pursuant to a scheme of amalgamation approved by this Court vide order dated 20.12.2012, M/s. Experion Developers International Pvt. Ltd [hereinafter referred to as 'EDIPL', the erstwhile assessee], amalgamated with M/s. Experion Developers Pvt. Ltd. [hereinafter referred to as 'EDPL', the successor-in-interest and Petitioner

herein] with effect from 01.04.2012. During the financial year relevant to the assessment year under consideration i.e. AY 2012-13, (FY 2011-12) the Petitioner and the erstwhile-assessee, EDIPL, were separate/independently assessable assessees. For the assessment year under consideration, i.e., AY 2012-13, as Petitioner (EDPL) was the only surviving entity, it alone filed return of income declaring loss of Rs.7,82,95,075/-. The return of income was selected for scrutiny and after making certain disallowances, the total income was assessed at Rs. 90,15,239/- and assessment order dated 19.03.2015 was passed under Section 143(3) of the Act. The said order is presently subject matter of a pending appeal.

4. Subsequently, Respondent No.1 issued the impugned notice dated 31.03.2019 under section 148 of the Act along with a copy of the reasons recorded, proposing to reassess the income of the Petitioner for the assessment year 2012-13. In response to the aforesaid notice, the Petitioner filed the letter dated 29.04.2019 submitting copy of return e-filed on 25.04.2019 declaring loss of Rs.7,82,95,075/-. The recorded reasons are primarily based on the ground that the investing / parent company, M/s. Gold Hotels & Resort Pte. Ltd. (also referred to as "Gold Singapore"), had made investment of Rs.36.91 crores in the Petitioner Company (EDPL) and Rs.183 crores in erstwhile EDIPL, though the said investing company did not appear to be carrying out any regular business activities in Singapore and has been floated to act as a conduit to funnel funds into Indian companies. The source of investment in the assessee company raises serious doubts and suspicion regarding the genuineness of investments. The assessee is a beneficiary of these credits and has failed to disclose material

facts earlier. Therefore, there are "reasons to believe" that the Petitioner's income has escaped assessment.

5. Petitioner vide letter dated 10.05.2019 filed legal objections to initiation of the impugned reassessment proceedings, that were rejected vide the impugned order dated 25.09.2019 (received on 25.09.2019).

W.P.(C)-11303/2019

6. The petitioner in this case (Experion Hospitality Pvt Ltd, hereinafter, "EHPL"), also a private limited company engaged in the business of construction/development projects, filed return of income declaring loss of Rs.3,93,181,429/-, for the assessment year under consideration (AY-2012-13). The case was selected for scrutiny and assessment order dated 19.03.2015 was framed under Section 143 (3) of the Act. After making certain disallowances, the total income was assessed as Rs.23,60,539/- and the said order is also presently subject matter of a pending appeal. In this case as well, respondent no. 1 has issued notice dated 31.03.2019 under section 148 of the Act, assuming jurisdiction to reopen the assessment, which forms the subject matter of challenge in the petition.

Reasons for reopening

7. Along with the notice issued under Section 148 of the Act, the respondent also furnished copy of the recorded reasons which disclose that an information has been received from DIT (Intell. & Cr. Inv.), New Delhi on 30.03.2015 regarding funds received by the assessee from a foreign entity. The DIT (Intell. & Cr. Inv.), New Delhi has carried out the investigation and

detailed inquiry regarding the funds received by the Experion Group Company in India from it's parent company which did not have sufficient funds of its own to make such investments. The recorded reasons for reopening the assessment in **W.P.(C) – 11303/2019** are as under;

"1. Brief Details

Inv), New, Delhi on 30.03.2015 regarding funds received by the assessee from foreign entities The DIT has carried out investigation and detailed enquiry regarding funds received by, Experion Group companies in India, From their parent company, which did not have sufficient funds of its own to make such investments. These inquiries were conducted after commercial intelligence was received by Jt. secy. (Ft & TR)- II, CBDT from The First Secretary (Economic) in High commission of India, at Singapore, vide letter dated 31/10/2011, that ***an entity M/s Gold Hotels & Resort Pte. Ltd, a Singapore based company, had made large investments in Indian entity namely, M/s. Experion Developers Pvt. Ltd. and M/s. Experion Developers International Pvt. Ltd. (formerly known as Gold Developers International .Pvt. Ltd.)(Now merged with M/s. Experion Developers Pvt. Ltd.)***

According to the report, it was observed that:
1. ***During the year under consideration, the company M/s Gold Hotels & Resort Pte. Ltd , hereinafter referred as Gold Singapore has made an alleged investment of Rs. 36.910 crores in the assessee company EDPL and Rs. 183 crores in the company that has amalgamated into this company namely, EDIPL****.*

2. As per the information, Gold Singapore is owned by only one share holder M/s Gemwood lnvest Holdings Ltd. having address in British Virgin Island.

3. The Directors of Gold Singapore include the following:

Name	Nationality	Address

Arvind Tiku	Indian	329, River Valley Road, # 25-02, Yong Ann Park, Singapore-238361
Yap Chee Keong Michael	Singapore Citizen	77, Marine Drive, #9-48, Singapore-440077

4. ***The equity of the investing company i.e. M/s Gold Hotels & Resort Pte Ltd., Singapore is around 50,00,000 USD as against the investment made by it of about 180 Million USD over many years, in Indian companies namely Gold Developers Pvt. Ltd*** *(now known as M/s. Experion Developers Pvt. Ltd),* ***Gold Resorts & Hotels Pvt. Ltd*** *(Now known as M/s. Experion Hospitality Pvt. Ltd) and* ***GoldDevelopers International Ltd*** *(Earlier known as M/s. Experion Developers International Pvt Ltd & Now merged with M/s Experion Developers Pvt Ltd). The equity of the company is very small compared to the amount invested.*

5. ***Gold Singapore does not have sufficient funds or creditworthiness to make such investments and its business premises consisted of just one room which vas found closed most of the times.***

6. ***It is stated in the information that the amounts may have been shown as credits. / loans/ share application money raised from other countries mostly tax heavens to form a circuitous route, and on analysis by the Assessing officer, it is actually found that over a period of time, the credits into the books of accounts of the investing entity have been made as share application money or advances and the fact that the share application money remains outstanding over a long time itself is not how a genuine investment is normally made, because shares are normally issued after the application is made, or the amount is refunded back****.*

On the basis of enquiries conducted by DIT (Intell. & Cr. Inv.), New Delhi, the observations are as follows:-

1. The movement in share capital in Gold Singapore shows that in the initial years, the funding came from Darley Investment Service Inc, (Darley) and Merix International Ventures Limited. Darley and Merix. Subsequently transferred their share in Gold Singapore through a complex series of financial arrangments involving many entities finally to M/s. Gemwood Invest Holdings Ltd.

2. When the Directorate issued summons to Sh. Arvind Tikoo the Director and the main person behind the group, the reply was evasive in most of his replies, on the plea that he is an NRI, the foreign assets were not disclosed. His PAN No. is AONPT3527L and he had not filed any return of income in India.

On the analysis of the report received, it can be noted that the Singapore Company (Gold Singapore) apparently does not appear to be carrying out any regular business activities in Singapore and has been floated to act as a conduit to funnel funds into Indian Companies. Therefore, the source of investment into the assessee company (which is wholly owned subsidiaries of Gold Singapore) raises serious doubts and suspicion on the genuineness of these invtesments. A series of transactions have been undertaken through a complex legal arrangements among entities spread across various jurisdictions to fund investments made in India. The origin of fund in the hands of companies located in tax heavens with dubious antecedents and background of shareholders / promoters needs to be further investigated. Moreover, the assessee company is the beneficiary of these credits which have been made in their books of accounts.

*From the above detailed and specific information, pertaining to the assessee company, and independent examination of the entire material available on the record and application of mind**, I have reason to believe that an amount at least of Rs.31.834 Crores has escaped assessment in case the of M/s. Experion Developers Pvt. Ltd. (formerly known as Gold Developers Private Ltd) and amount of Rs.183 crores has escaped assessment in case the of M/s. Experion Developers International Pvt. Ltd. (formerly known***

as Gold Developers International Private Ltd) *(Now merged with M/s. Experion Developers Pvt. Ltd.) for the AY 2012-13 within the meaning of section 147/148 of Income Tax Act, 1961. This information is new material which has been brought on record. As per data on ITD the case of the assessee company was assessed u/s 143(3) of the Act for the A.Y. 2012-13. Since the then assessing officer was not aware of the fact that the investments into the assessee companies has been made from an entity which does not have funds of its own to invest such huge amounts, and that the investing entity has only been used as a conduit to route funds through complex transactions via low tax jurisdiction like Dutch Antilles, British Virgin Islands, Luxemburg etc., the income has escaped assessment due to the failure of the assessee to disclose fully and truly all the material facts necessary for its assessment. Thus, this specific condition for reopening is hereby fulfilled in the instant has failed to disclose such material facts on its own earlier. The case is square & covered under provisions of section 147 of income tax Act, 1961. It is also stated that the reassessment proceedings are proposed to be initiated in the case of Experion Developers Private Limited, for funds received by it as an independent entity as well as the successor in interest of amalgamated company Experion Developers International Private Limited, which in AY 2012-13 was a separate entity.*

In this case, since more than four years have elapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice under section 148 of the act is being obtained separately from Pr. Commissioner of Income Tax, Delhi-03, New Delhi as per the provisions of section 151 of the Act. "

(Emphasis supplied)

8. The recorded reasons in respect of W.P.(C) 11303/2019 are identical, except for the differences noted hereinbelow:

"*1. During the year under consideration, the company M/s Gold Hotels & Resort Pte. Ltd, hereinafter referred as Gold Singapore*

has made an alleged investment of Rs. 5.75 crores in the assesse company M/s Experion Hospitality Pvt Ltd.

2. As per the information, Gold Singapore is owned by only one share holder M/s Gemwood lnvest Holdings Ltd. having address in British Virgin Island.

On the analysis of the report received, it can be noted that the Singapore Company (Gold Singapore) apparently does not appear to be carrying out any regular business activities in Singapore and has been floated to act as a conduit to funnel funds into Indian Companies. Therefore, the source of investment into the assessee company (which is wholly owned subsidiaries of Gold Singapore) raises serious doubts and suspicion on the genuineness of these investments. A series of transactions have been undertaken through a complex legal arrangements among entities spread across various jurisdictions to fund investments made in India. The origin of fund in the hands of companies located in tax heavens with dubious antecedents and background of shareholders/promoters needs to be further investigated. Moreover, the assessee company is the beneficiary of these credits which have been made in their books of accounts.

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From the above detailed and specific information, pertaining to the assessee company, and independent examination of the entire material available on the record and application of mind, I have reason to believe that an amount at least of Rs.5.75 Crores has escaped assessment in case the of M/s. Experion Hospitality Pvt. Ltd. (formerly known as Gold Resorts & Hotels Private Ltd for the AY 2012-13 within the meaning of section 147/148 of Income Tax Act, 1961. This information is new material which has been brought on record. As per data on ITD the case or the assessee company was assessed u/s 143(3) of the Act for the A.Y. 2012-13. Since the then assessing officer was not aware of the fact that the investments into the assessee companies has been made from an entity which does not have funds of its own to invest such huge

amounts, and that the investing entity has only been used as a conduit to route funds through complex transactions via low tax jurisdiction like Dutch Antilles, British Virgin Islands, Luxemburg etc., the income has escaped assessment due to the failure of the assessee to disclose fully and truly all the material facts necessary for its assessment. Thus, this specific condition for reopening is hereby fulfilled in the instant has failed to disclose such material facts on its own earlier. The case is square & covered under provisions of section I47 of income tax Act, 1961.

In this case, since more than four years have elapsed from the end of the assessment year under consideration. Hence, necessary sanction to issue notice under section 148 of the act is being obtained separately from Pr. Commissioner of Income Tax, Delhi-03, New Delhi as per the provisions of section 151 of the Act."

Common submissions of the Petitioners in W.P.(C) 11302/2019 & 11303/2019

9. Petitioners contend that reassessment proceedings have been initiated on the basis of "reasons to believe" that are invalid, without reference to any fresh tangible material and are shorn of independent application of mind. Under the scheme of the Act, the assessing officer can initiate proceedings under section 147 of the Act only if he has "reason to believe" that any income of the assessee has escaped assessment. Such belief has to be arrived at by the assessing officer on the basis of tangible/ reliable information in the possession of the assessing officer. In terms of section 148 of the Act, the assessing officer is required to record the reasons on the basis of which proceedings under section 147 of the Act are initiated. The reasons recorded must, therefore, show application of mind by the assessing officer. It has been alleged that Respondent No.1 proceeded solely on the sketchy, vague,

unsubstantiated information received from the Intelligence Wing, ignoring the response received from the Singapore Tax Authority and without gathering any further tangible material/information and/ or applying his mind to the information received and/ or carrying out any independent investigation/ enquiry of facts, before forming the belief that income of the Petitioner had escaped assessment. Reliance has been placed on the case in ***G.S. Engineering & Construction Corporation v DDIT*** 357 ITR 335 (Del), ***Chhugamal Rajpal v SP Chaliha*** 79 ITR 603 (SC).

10. It is further the case of the petitioners that the present reassessment proceedings are merely a change of opinion and an attempt by respondent no.1 to reappraise the material which was already on record and in respect whereto, after due examination, an opinion was formed in the course of the original proceedings, which is now sought to be substituted. It is alleged that the issue of share application money received from Gold Singapore was not only duly disclosed, but was specifically examined/ gone into by Respondent No.1 during the original assessment proceedings.

11. It is also submitted that reassessment proceedings initiated beyond four years from the end of the relevant assessment year are invalid in terms of the proviso to section 147 of the Act as there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Reliance was placed on the decision in ***NuPower Renewables (P.) Ltd. vs. ACIT: 264 Taxman 27***, wherein the High Court has held that when during the course of original assessment under section 14(3) of the Act, the assessee had duly supplied certificate of foreign inward remittance

of funds, tax residence certificate of foreign company, copy of ledger account showing share application money being credited in bank account and source thereof, then initiation of reassessment proceedings to bring to tax the share application money received by the assessee company is liable to be quashed. It is submitted that in respect of EDPL, erstwhile EDIPL as well as EHPL, share application money received from Gold Singapore and subscription to share capital by Gold Singapore is fully disclosed in the audited financial statement and the income tax return form of the relevant financial year. Further, relying on the decision of the Supreme Court in ***CIT vs Kelvinator of India Ltd: 320 ITR 561*** (SC), it is argued by the petitioner that there can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of power. There was no fresh/ tangible material with the AO and for the said reason, too, the assumption of jurisdiction by Respondent No.1 to reopen proceedings for assessment year 2012-13 is invalid and unsustainable.

12. Furthermore, it was submitted that in the present case, sanction has been obtained from 'Additional Commissioner of Income Tax', i.e. respondent no. 2, which is not as per the mandate of section 151 of the Act. In this regard, it was submitted that obtaining sanction from an officer who does not have jurisdiction over the matter is not justified and thus vitiates the legality of the proceedings. Further, the sanction was granted mechanically, without any application of mind, and hence, cannot be regarded as valid sanction as required to be obtained under section 151 and, therefore, proceedings initiated under section 147 of the Act are without jurisdiction, illegal and bad in law. Reliance was placed on decision of this Court in the

case of ***United Electrical Co.Pvt. Ltd: 258 ITR 317*** wherein it has been held as under:

> *"What disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of the said V. K. Jain, perhaps he would not have granted his approval, which was mandatory in terms of the proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. As highlighted above, the Legislature has provided certain safeguards to prevent arbitrary exercise of powers by an Assessing Officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the Assessing Officer. The said power cannot be exercised casually and in a routine manner. We are constrained to observe that in the present case there has been no application of mind by the Additional Commissioner before granting the approval.*
> *For the foregoing reasons, we allow the petition and quash the impugned notice dated April 30, 2002."*

<u>Additional submission of the Petitioner in W.P.(C) 11302/2019</u>

13. The grounds of challenge and submissions of the petitioner in both the petitions, as noted above are exactly the same. However additional grounds are urged in W.P.(C) 11302/2019 to the effect that the impugned notice for reopening of assessment proceedings is bad in law as a common notice has been issued in respect of both EDPL as well as EDIPL, in the name of "Experion Developers Pvt. Ltd", when during the relevant assessment year,

the two existed as unamalgamated/separate entities. It has been argued that for the assessment year 2012-13, (financial year 2011-12), the two entities were separate and distinct having different Permanent Account Numbers (PAN) and had filed separate returns of income and were assessed separately, and thus issuance of a single notice is a jurisdictional error. In the reasons recorded, the name of the assessee is recorded as "M/s. Experion Developers Pvt. Ltd. (Earlier known as Gold Developers Pvt. Ltd.), including its role as successor in interest of Experion Developers (International) Pvt. Ltd. which has amalgamated into M/s Experion Developers Pvt. Ltd." It was argued that pursuant to amalgamation, if the amalgamating company and amalgamated company both are intended to be assessed by the Revenue then, in such case, as per the provisions of section 170(2) of the Act, separate notices are required to be issued viz. one in the name of amalgamated company in its independent capacity and another in the name of amalgamated company as successor in interest of the amalgamating company, so that the same culminate into separate assessment orders, qua the income of amalgamated company and amalgamating company. In this regard, reliance has been placed on the decision of this Court in ***PCIT v Maruti Suzuki India Ltd.*** 397 ITR 681 (Del) and ***CIT v K Adinarayana Murty*** 65 ITR 607 (SC).

Contentions of the Respondent

14. Per contra, learned counsel for the Respondent submitted that if new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply and factual

information or material which was incorrect or was not available with the AO at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. [***Commissioner of Income Tax v Usha International Ltd*** [2012] 348 ITR 485 (Delhi)]. Reliance was also placed upon ***OPG Metals & Finsec Ltd v Commissioner of Income Tax*** [2014] 41 taxmann.com 21 (Delhi) to contend that where information regarding all transactions, including undisclosed investments, was not subject matter of earlier reassessment proceedings and there was fresh material for AO, it would not be a case of change of opinion. He further argued that the onus to establish the creditworthiness of investor companies is on the assessee and the same is not discharged merely because assessee company has filed all primary evidence. [Reliance has been placed on ***Principal Commissioner of Income Tax (Central) -1 v NRA Iron & Steel (P) Ltd.*** [2019] 103 taxmann.com 48 (SC)]. Countering the argument relating to the issue of one notice in respect of reassessment proceedings pertaining to EDPL and EDIPL (now amalgamated into EDPL), he placed reliance on ***Marshall Sons & Co. (India) Ltd. v Income-Tax Officer*** [1997] 223 ITR 809 (SC), to argue that where the court does not prescribe any specific date but merely sanctions the scheme presented to it, the date of amalgamation/date of transfer is the date specified in the scheme as "the transfer date", and not the date of the court order. The plea of requirement of separate notices is misconceived, as on the date of issuance of notice, the only surviving entity was the Petitioner-EDPL.

Analysis & Findings

15. The crucial questions that arise for our consideration are:

(a). Whether the re-assessment proceedings have been initiated without any valid "reasons to believe", without reference to any fresh tangible material and without any independent application of mind. (b) Whether initiation of re-assessment proceedings is merely on the basis of change of opinion which is impermissible in law. (c) Whether initiation of re-assessment proceedings is barred by limitation, as prescribed in proviso to Section 147 of the Act. (d) Whether proper sanction as required under Section 151 of the Act was obtained or not.

16. In addition to the aforesaid questions, in W.P. (C) 11302/2019, an additional question (e) that arises for our consideration is as to whether the common reassessment notice issued in the name of EDPL for reopening of assessment proceedings in respect of both EDPL and EDIPL is bad in law, in as much as whether separate notices were required to be issued in the name of (i) EDPL in its individual capacity and, (ii) EDPL, as successor-in-interest of EDIPL .

17. Having summed up the grounds of challenge, we now proceed to deal with each of them comprehensively.

(a). WHETHER THE RE-ASSESSMENT PROCEEDINGS HAVE BEEN INITIATED WITHOUT ANY VALID "REASONS TO BELIEVE"; WITHOUT REFERENCE TO ANY FRESH TANGIBLE MATERIAL, AND; WITHOUT ANY INDEPENDENT APPLICATION OF MIND

18. We have perused the reasons recorded by the Revenue to re-open the assessment for the assessment year 2012-13; the objections to reopening filed by the assessee/petitioner to the notice for reopening assessment, as well as the order dated 25.09.2019 disposing of the said objections preferred by the petitioner, and also carefully considered the respective submissions of the counsels and the decisions relied upon by them.

19. Section 147 of the Act empowers the AO to initiate the proceedings under the said provision to assess or re-assess any income of the assessee that may have escaped assessment. The power to initiate the proceedings under the said provision is not unfettered and unrestricted and the law mandates the AO to comply with the provisions of Sections 148 to 153 of the Act. Identifying and recording of "reasons to believe" is a pre-requisite for the AO to assume jurisdiction under Section 147 of the Act, as per the scheme of the Act. For harboring a belief that there are cogent reasons to reopen the assessment, the AO is necessarily required to have some basis in the nature of tangible/reliable information in his possession. This is ensured by the language of Section 148 of the Act which obligates the AO to record the reasons on the basis whereof the proceedings under Section 147 of the Act are initiated. This is a safeguard mechanism to ensure that the discretion exercised by the AO is not fanciful or without a reasonable cause, and is not based merely on suspicion, conjectures and surmises. The recording of reasons must show application of mind to the relevant and germane facts, on the basis whereof the action initiated under Section 147 of the Act is to be adjudged. The question as to whether it is fair and just to nip the

reassessment proceedings at this stage, arises before us every now and then. There is aversion to reassessment, and that is predictable. No assessee would want the tax authority to reopen what has been closed. Even the Court would not countenance casual, mindless and unjustified original reopening, lest the original assessment proceedings lose their conclusiveness and certainty. Reopening of assessment is time consuming and burdensome for the assessee. Since discretionary power is vested with the AO, the assesees are entitled to challenge the reopening by way of a writ petition. This is a safety measure, to warrant that exercise of power is done with circumspect and with comprehension of facts. This is the precise reason that there is a plethora of judgments on this issue that are cited by both the parties, and we have to repeatedly navigate through the various views expressed by the court.

20. In light of the above judicial principles, the crux lies in the recorded reasons which shed light on the mind of the AO and having perused the same in the instant case, we are not persuaded with Mr. Vohra's submission that the observations of the AO are based purely on conjunctures and surmises, without reference to any tangible material. At this stage, we may refer to our decisions in ***Vedanta Ltd v. Assistant Commissioner of Income Tax*** in W.P. (C) 13036/2019 decided on 20.12.2019 and also in ***RDS Project Ltd***. in W.P. (C) 11274/2019 decided on 23.10.2019 wherein we have extensively examined the case law on this issue.

21. In the above judgments, we have noted the views of the Supreme Court in ***Assistant CIT v. Rajesh Jhaveri Stock Broker Pvt. Ltd***. (2008) 14 SSC

208, wherein it has been held that the expression "reason" in Section 147 of the Act means a "cause" or "justification". The Assessing Officer can be said to have reason to believe that income has escaped assessment, if he has a cause or justification to know, or suppose, that income has escaped assessment.

22. It is also apposite to note the observations of the Supreme Court in ***Sri Krishna Pvt. Ltd v. Income Tax Officer [1996] 221 ITR 538*** wherein, it was emphasized that at this stage, the test is not as to whether there has been any escapement of income, but whether there exist "reasons to believe" that the income chargeable to tax has escaped assessment.

23. There are several judgments of the Supreme Courts and of the High Courts which have extensively deliberated on the construction of the expression "reason to believe" [Ref: ***G.S. Engineering & Construction Corporation v Deputy Director Of Income-tax (International Taxation), Circle -1(2) [2013] 38 taxmann.com 29 (Delhi)***]. The scope of judicial review under Article 226 of the Constitution of India has also now been well recognized. In a nutshell, the Courts have applied the test of reasonableness, holding that the recorded reasons to believe must suggest and disclose that the belief is that of an honest and reasonable person, based on reasonable grounds. The discretion vested under the scheme of the Act has also prompted Courts to put a cautionary note in several judgments that while exercising judicial review, although the Court can examine whether the "reasons to believe" satisfy the conditions, however, the declaration or sufficiency of the "reasons to believe" cannot be investigated.

24. Undoubtedly, there has to be sufficient tangible material on record which justifies the *prima facie* belief of the AO regarding the escapement of taxable income. However, in the facts of the present case, we cannot agree with Mr. Vohra, that there was no basis or material for respondent No.1 to come to this conclusion. Mr. Vohra has argued that there was no evidence/material placed on record to allege that the share application money received from "Gold Singapore" represents money emanating from the coffers of the petitioners, which in turn represents undisclosed income taxable in India. He also emphasized that respondent No.1 has not mentioned in the recorded reasons, any specific provisions of the Act that have been violated by the petitioner. In our opinion, the tangible material in the present case is information received by the AO from DIT (Intell. & Cr. Inv.). It would thus be apposite to refer to the said referred report which has been placed on record. The relevant portion of the said report is extracted herein:-

> "*2. In the report, the First Secretary (Economic) observed that the investment made by the Singapore entity needed to be examined for the following reasons:*
>
> *(i) The equity of the.87 million USD which is very small in comparison to the investment investing company M/s Gold Hotels & Resort Pte. Ltd., hereinafter referred as Gold Singapore is 5 million USD as against the above investment of 163.*
>
> *(ii) Gold Singapore is owned by on share holder M/s Gemwood Invest Holdings Limited having address in British Virgin Island.*
>
> *(iii) The Directors of Gold Singapore are*

Name	*Nationality*	*Address*
Arvind Tiku	*Indian National*	*329, River Valley Road #25-02, Yong Ann Park, Singapore 238361*
Yap Chee Keong Michael	*Singapore Citizen*	*77 Marine Drive #9-48 Singapore 440077*

(iv) Mr. Arvind Tiku is the key person who managed the investments.

(v) It is possible that the amounts may have been shown all credits/ loans raised from other countries mostly tax havens to form a circuitous route.

(vi) Gold had not filed the annual accounts and its business premises consisted of just one room which was found closed most of the times.

(vii) The details of the Indian companies which received investment from Gold Singapore are:

S.No.	*Name of Indian Companies*	*Amount in USD (million)*	*Amount in INR (Cr.)*
1.	*Gold Developers Private Limited*	*88.48*	*411.63* *2.*
2.	*Gold Resorts & Hotels Private Limited*	*46.13*	*191.19*
3.	*Gold Developers International Limited*	*29.26*	*142.42*
		163.87	*745.24*

(viii) It is learnt that the Gold group of companies in India are engaged in the development of real estate including land acquisition construction, trading and other developmental activities having its projects located at Gurgaon, Lucknow, Jaipur, Amritsar, Sonepat,. The group also has interest in hotels & resorts with projects in Hyderabad and other places.

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4. A reply was received from the Inland Revenue Authority (IRA) of the Govt. of Singapore, through the Jt. Secy. (FT&TR), dated 16th March, 2012, wherein they forwarded copies of financial statements from 29th March 2009 till 31st March 2010 and the company profile as per ACRA, Singapore. They also enclosed details of remittances to India in the bank account of Gold Resort & Hotels Pvt. Ltd., maintained in the ING Vysya Bank, Delhi. The information shared by IRA Singapore are summarized as under:

(i) As per the report of IRA Singapore the summary of movement in share capital in Gold Singapore shows that the funding came from Dailey Investment Service Inc. (Darley) and Merix International Ventures Limited. Darley and Merix subsequently transferred their shares in Gold Singapore through a complex series of financial arrangements involving many entitle: finally to M/S Gemwood Invest Holdings Ltd. A chronological summary of movement of funds starting from incorporation of Gold Singapore on 29.03.2006- till the final transfer of its shareholding to M/s Gemwood Holding on 31.01.2010 has been given by IRA Singapore in their detailed report which is enclosed at Annxure-2.

(ii) IRA Singapore expressed its inability to enquire further into the sources of funding of Gold Singapore since both Darley and M/s Gemwood Invest Holdings were located outside Singapore.

(iii) The IRA Singapore has mentioned in its report that a search of the internet showed that Darely is/ was controlled by Kazakhstan billionaire Timur Kulibayev. However, they were unable to comment further upon him since he was not a Singapore entity.

(iv) The IRA Singapore has also given details of remittances made to M/s Gold Resorts & Hotels Pvt. Ltd. For acquisition of its shares as on 31.03.2011 in a statement which is enclosed as per Annexure-3 of this report.

(v) The IRA Singapore has forwarded Financial statements of

Gold Singapore from 29.03.2006 (date of Incorporation) to 31.03.2007 and for the year ended on 31.03.2008, 31.03,2009 & 31.03.2010, As per the statement, Gold Singapore has following subsidiaries in India:

Sl. No.	*Name of the company*	*Director*	*Director*	*Director*	*Director*	*Director*
1	*Gold Resorts and Hotels Pvt. Ltd.*	*Arvind Tiku*	*Jitendra Kumar Jain*	*Suneet Puri*	*-*	*-*
2	*Gold Developers Private Limited*	*Arvind Tiku*	*Hemant Tikoo*	*Rakesh Kaul*	*Sanjay Kumar Bakliwal*	*Basaavaradd i Krishnaradd Malagi*
3	*Gold Developers (International) Pvt. Ltd.*	*Arvind Tiku*	*Sunnet Puri*	*Rakesh Jain*	*-*	*-*

(vi) The following companies in India are wholly owned subsidiaries of Gold Resorts and Hotels Pvt. Ltd.

Sl. No.	*Name of the company*	*Director*	*Director*	*Director*	*Director*
1.	*Gold Resorts and Hotel (Jaipur) Pvt. Ltd.*	*Jitendra Kumar Jain*	*Suneet Puri*	*Sanjay Maheshawar*	*Hemant Tikoo*
2.	*Gold Resorts and Hotels (Chandigar h) Pvt. Ltd.*	*Jitendra Kumar Jain*	*Suneet Puri*	*Sanjay Maheshawari*	*-*
3.	*Gold Resorts and Hotel (Hyderabad) Pvt.*	*Jitendra Kumar Jain*	*Suneet Puri*	*Sanjay Maheshawar*	*-*

	Ltd.				
4.	*Gold Resorts and Hotel (Goa) Pvt. Ltd.*	*Jitendra Kumar Jain*	*Suneet Puri*	*Sanjay Maheshawar*	*-*
5.	*Gold Resorts and Hotel (Taminlnadu) Pvt. Ltd.*	*Jitendra Kumar Jain*	*Suneet Puri*	*Sanjay Maheshawar*	*-*

(vii) The following companies in India are wholly owned subs diaries of Gold Developers Private Limited.

Sl.no.	*Name of the company*	*Director*	*Director*
1.	*KNS Nirman Pvt. Ltd.*	*Arvind Tiku*	*Gaurav Maheshwari*
2.	*KNS Real Estate Developers Pvt. Ltd.*	*Arvind Tiku*	*Gaurav Maheshwari*
3.	*Goldstar Infracon Pvt. Ltd.*	*Not known*	*Not known*
4.	*Gold Town planners & Promoters Pvt. Ltd.*	*Suneet Puri*	*Gaurav Maheshwari*
5.	*Gold Estate Developers Pvt. Ltd.*	*Suneet Puri*	*Gaurav Maheshwari*
6.	*Gold Builders Pvt. Ltd.*	*Suneet Puri*	*Gaurav Maheshwari*

5. Since the information received from the Inland Revenue Authority of the Govt, of Singapore showed that Gold Singapore had received its funds from sources other than Singapore and Sri Arvind Tiku was reported as the key person behind all the transactions leading investment in Indian companies, a notice u/s 131 of Income Tax Act, 1961 was issued to Sri Tiku on 27.07.2012 seeking relevant details regarding source of investment of Gold Singapore in the Indian companies.

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12. In view of the details gathered, ***the Singapore company (Gold Singapore) apparently does not appear to be carrying out regular business activities in Singapore and has been floated to act as a conduit to funnel investments into Indian companies. Therefore, the source of investment into the three Indian entities (which are wholly owned subsidiaries of Gold Singapore) raises serious doubts and suspicion on the genuineness of these investments****. A series of transactions have been undertaken through a complex legal arrangements among entities spread across various jurisdictions to fund investments made in India. The origin of fund in the hands of companies located in tax havens with dubious antecedents and background of shareholders/promoters needs to be further investigated****. The assessment in all the three companies namely 1) M/s Experion Hospitality Pvt. Ltd. (formerly, M/s Gold Resorts & Hotels Pvt. Ltd.) 2) M/ s Experion Developers International Pvt. Ltd. (formerly, M/s Gold Developers International Pvt. Ltd.) 3) M/s Experion Developers Pvt. Ltd. (formerly, M/s Gold Developers Pvt. Ltd.) which have received funds needs to be reopened under section 147 read with section 149(1)(c) of the Income Tax Act, 1961 to investigate the genuineness of such funds and the creditworthiness of the investing entities. The year wise details of investments received by the Indian entities in whose hands the cases are required to be re-opened are given in Annexure-8*."

(Emphasis supplied)

25. This report, whereby it is revealed that "Gold Singapore" does not appear to be carrying out regular business activities in Singapore and the series of transactions undertaken through complex legal arrangements among entities spread across various jurisdictions to fund investments made in India, justifies the AO to form a "reason to believe" to investigate the genuineness of the funds and creditworthiness of the investing entities. The year-wise details of investments received by the Indian entities whose cases are required to be re-opened are given in the report and the same read as

under:

"Annexure-8

Year wise details of investment/ capital received by Indian Companies to be considered for reopening of case u/s 147 read with 149(1)(c)

S. No.	Name of Indian Companies	Address	PAN	Assessment Year	Amount in INR (Cr.)
1	M/s Experion Developers Pvt. Ltd. (Gold Developers Private Limited)	F-9, First Floor, Manish Plaza-1, Plot No. 7, MLU, Sector-10, Dwarka, New Delhi-110075	AACCG8138L	2008-09	142.422
				2012-13	182.944
2	M/s Experion Hospitality Pvt. Ltd. (Gold Resorts & Hotels Pvt. Ltd.)		AACCG5418P	2006-07	18.220
				2007-08	52.383
				2008-09	39.271
				2009-10	40.339
				2010-11	10.067
				2011-12	2.327
				2012-13	5.75
3	M/s Experion Developers International Pvt. Ltd. (Gold Developers International Limited)		AACCG8200B	2008-09	409.581
				2009-10	28.323
				2011-12	31.834
				2012-13	36.910
				2013-14	21.251
				Total	1021.679

In the report, it has been noted that Mr. Arvind Tiku, is the key person behind the transactions and notice under Section 131 of the Act was issued

to him. The DIT (Intell. & Cr. Inv.) has also taken note of the fact that Mr. Arvind Tiku has been evasive in his replies to the said notice. Further, in the report, it has been noticed that the office of Attorney General of Switzerland has opened a criminal investigation in September, 2010 on allegations of money laundering against Mr. Arvind Tiku and Ors. We may also note that Mr. Vohra has argued that the allegations against Mr. Arvind Tiku are contrary to the reasons to be recorded by the respondent No.1, inasmuch as the re-assessment proceedings initiated against him were dropped by Income Tax Department and that the proceedings against him were dismissed by the authority in Switzerland on 27.11.2013. It has been argued that closure happened in 2013 and the department is relying on a report of 2015. However, we are of the opinion that all these aspects ought not be examined at this stage and for us the relevant question is as to whether there is indeed some tangible material having a live link to the "reasons to believe" for arriving at a *prima facie* opinion that the income has escaped assessment. The facts noted above clearly demonstrate that there are indeed such reasons and the test of tangible material is met. The genuineness of the transaction, as also the creditworthiness of the foreign investor is indeed in doubt – an aspect which was not examined by the Assessing Officer during the course of the original assessment proceedings.ithe

26. In ***RDS*** (supra), we have extensively referred to the recent decision of the Supreme Court in ***Principal Commissioner of Income Tax (Central)- I v. NRA Iron & Steel Pvt. Ltd., (2019) 412 ITR 161 (SC)*** decided on 05.03.2019. In the said decision, Supreme Court also took note of its earlier

decision in ***Kale Khan Mohammad Harif v. CIT, (1963) 50 ITR 1 (SC)***, and ***Roshan Di Hatti v. CIT, (1977) 107 ITR (SC)***, wherein it had laid down that the onus of proving the source of money found to have been received by the assessee, is on the assessee. Once the assessee has submitted the documents relating to identity of the payer, genuineness of the transaction, and creditworthiness of the payee, then the AO must conduct an inquiry and call for more details before invoking section 68. If the assessee is not able to provide a satisfactory explanation of the nature and source of investment made; the genuineness of the transaction, and; the creditworthiness of the payer, it is open to the revenue to hold that such investment is the income of the assessee, and that there would be no further burden on the revenue to show that the income is from any particular source. The Supreme Court also observed that with respect to the genuineness of the transaction, it is for the assessee to prove the same by cogent and credible evidence, since the investment was claimed to have been made in the share capital of the assessee company, it was for the assessee to establish that it was a genuine investment, since the facts are exclusively within the assessee's knowledge. Merely providing the identity of the investors does not discharge the onus of the assessee, if the capacity or creditworthiness has not been established. The Supreme Court also took note of the decision of the Calcutta High Court in ***Shankar Ghosh v. ITO, (1985) 23 ITJ (Cal)***, where the assessee failed to prove the financial capacity of the person from whom he had allegedly taken the loan. The said loan amount was held to be the assessee's own undisclosed income. The principles culled out by the Supreme Court have been summarized in para 11 of the said judgment, which is reproduced as follows:

> *"11. The principles which emerge where sums of money are credited as Share Capital/Premium are:*
>
> *i. The assessee is under a legal obligation to prove the genuineness of the transaction, the identity of the creditors, and credit-worthiness of the investors who should have the financial capacity to make the investment in question, to the satisfaction of the AO, so as to discharge the primary onus.*
>
> *ii. The Assessing Officer is duty bound to investigate the credit-worthiness of the creditor/subscriber, verify the identity of the subscribers, and ascertain whether the transaction is genuine, or these are bogus entries of name-lenders.*
>
> *iii. If the enquiries and investigations reveal that the identity of the creditors to be dubious or doubtful, or lack credit-worthiness, then the genuineness of the transaction would not be established. In such a case, the assessee would not have discharged the primary onus contemplated by Section 68 of the Act."*

27. The live-link between the said material information and the formation of the belief that taxable income has escaped assessment is the fact that EDPL received Rs. 36.910 crores and EDIPL received Rs. 183 Crores, while EHPL received Rs.5.75 Crores, as capital investment from Gold Singapore, which – to the assessing officer, appears to be bogus entity for the reasons recorded by him. This live-link is actionable as it was found and acted upon within the period of limitation under the proviso to Section 147 of the Act.

28. Mr. Vohra has also attempted to demonstrate that the information provided in the report is merely based on internet searches, and argues that it is whimsical, unsubstantiated allegations, without an iota of evidence to

show that the share capital received by the petitioner can be taxed as income in the hands of the petitioner company.

29. We do not agree with this submission of the Petitioner. There is sufficient material disclosed in the investigation report to say that the creditworthiness of the investor company is doubtful. Moreover, the responses of Mr. Arvind Tiku also appear to be evasive. We cannot lose sight of the fact that apparently, the parent company itself, does not have sufficient funds to invest such huge amounts in Indian subsidiaries, and the funds are routed through a web of entities spread across various jurisdictions, mostly in tax havens. The investments so made, are required to be investigated and the credit worthiness of the investing company is in jeopardy, in view of the information received from the investigation wing. This exercise can be undertaken during the re-reassessment proceedings to finally determine if the amounts represent undisclosed income of the petitioner company which is required to be taxed in their hands. As noticed above, at the stage of re-opening, only a reason to believe should exist with regard to escapement of income. Definite conclusion would be drawn after raising queries upon the assessee in the light of Section 68 of the Act.

30. There cannot be any doubt from the reasons recorded, that the petitioner companies are beneficiaries of the funds received from “Gold Singapore”. If indeed, the investing entities do not have any creditworthiness to make such huge investments into the petitioner company, in our view, there would be sufficient cause or justification for the AO to attribute the income to the petitioner. Thus, at this stage, there are sufficient "reasons to believe" that

such income has escaped assessment and to reopen the assessment proceedings. Since there is relevant material to form reasonable belief in the background of the facts noted above, at this stage of the proceedings, where the AO has yet to finally adjudicate the issues, it is not for this Court to deal with the questions as to whether the reopening of the assessment would ultimately result in creating further demand.

31. We are therefore of the opinion that the AO had sufficient tangible materials and was justified in issuing the notice for assessment.

(b) WHETHER INITIATION OF RE-ASSESSMENT PROCEEDINGS IS MERELY ON THE BASIS OF CHANGE OF OPINION WHICH IS IMPERMISSIBLE IN LAW

32. In the Full Bench decision of this Court in ***Commissioner of Income Tax v Usha International***, ***[2012] 348 ITR 485 (Delhi)***, the principle of "change of opinion" was discussed extensively:

> *"**16.** Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order.* ***If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of***

reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression 'material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

17. *Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. Decision of this Court in Dalmia (P.) Ltd. v. CIT [2011] 202 Taxman 372/ 14 taxmann.com 106 and decision of Bombay High Court in Indian Hume Pipe Co. Ltd. v. Asstt. CIT [2012] 204 Taxman 347 /[2011] 16 taxmann.com 190 are two such cases. In the first case, the Assessing Officer in the original assessment had made additions of Rs. 19,86,551/- under Section 40(1) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details etc. were not furnished, were to the extent of Rs. 52,84,058/- and not Rs. 19,86,551/-. In Indian Hume Pipe Co. Ltd. (supra), after verification the claim under Section 54-EC was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not*

appreciate the implications or did not apply the correct law. The second category will be a case of "change of opinion" and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interest of the Revenue, can be made subject matter of adjudication under Section 263 of the Act.

18. *In New Light Trading Co. v. CIT [2002] 256 ITR 391/[2011] 117 Taxman 741, a Division Bench of this Court had referred to decision of the Supreme Court in CIT v. P.V.S. Beedies (P.) Ltd. [1999] 237 ITR 13 / 103 Taxman 294 and the following observations were made:-*

"In the case of P.V.S. Beedies (P.) Ltd. [1999] 237 ITR 13, the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee."

19. *As recorded above**, the reasons recorded or the documents available must show nexus that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income. At the same time, it is not the requirement that the Assessing Officer should have finally ascertained escapement of income by recording conclusive findings. The final ascertainment takes place when***

the final or reassessment order is passed. It is enough if the Assessing Officer can show tentatively or prima facie on the basis of the reasons recorded and with reference to the documents available on record that income has escaped assessment."

(Emphasis supplied)

33. As already discussed above, in the present case, *new facts, material or information* have come to the knowledge of the Assessing Officer by way of the report of DIT (Intelligence and Criminal Investigation) with regards to the doubtful source of the investments made into the petitioner companies. At the time of original assessment, the Assessing Officer was not aware of or in possession of information which could have indicated that the introduction of share capital from outside India has been routed through a doubtful entity. DIT (I&CI) Delhi had also made detailed enquiries regarding origin of funds which were used for introduction of share capital and premium. This information was received much later after the original assessment had been completed, and is germane and relevant to the subjective opinion formed by the AO in regard to escapement of income. In the present case, the AO's reasons to believe are fortified with the tangible material in the form of specific information received by the Investigation Wing. Thus, the AO is downright justified in issuing the notice for reassessment. It is revealed from the said material available on record that a reasonable belief was formed by the Assessing Officer that income of the petitioner has escaped assessment and therefore, once the reasonable belief is articulated and expressed by the AO on the basis of cogent tangible material, he was not expected to arrive at a final conclusion

thereon at the stage of issuance of notice. At this stage, having regard to the scope of section 147 as also sections 148 to 152, we are of the opinion that AO's decision is to be governed by the mandate of the statute that requires him to have "reason to believe", and not to conclusively establish the fact of escapement of income. Therefore, even if scrutiny assessment has been undertaken in the first place, if significant new material is found in the form of information, the assessing officer can form a belief that the income of the petitioner has escaped assessment, and reopen assessment. It is also trite law that for cases relating to *inter alia*, share application money, three vital aspects have to be considered by the Assessing Officer, namely (i) the identity of the investors; (ii) the credit worthiness of the investors; and (iii) the genuineness of the transaction. Ex-facie, the order of assessment which was passed by the Assessing Officer under Section 143(3), does not indicate that all these aspects were gone into. Today, there is serious doubt relating to credit-worthiness of the share applicant/investor, in view of the investigation report noted above and clarity can only come in by way of reassessment. Therefore, the recorded reasons are not mere change of opinion.

(c) WHETHER INITIATION OF RE-ASSESSMENT PROCEEDINGS IS BARRED BY LIMITATION AS PRESCRIBED IN PROVISO TO SECTION 147 OF THE ACT

34. The first proviso to section 147 provides that where an assessment under sub-section (3) of section 143, or this section, 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 under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 *or to disclose fully and truly all material facts necessary for his assessment*, for that assessment year. The Explanation 1 to the proviso to section 147 is also relevant and reads as follows:

> *"Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."*

35. From a bare reading of the proviso, it is clear that reassessment proceedings under section 147 may be initiated after the expiry of a period of four years from the end of the relevant assessment year if there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. This Court in ***NTPC Ltd. v. Deputy Commissioner of Income-tax [2013] 29 taxmann.com 421 (Delhi)*** discussed the limitation period as provided for in the proviso in the following terms:

> *"The proviso is couched in negative terms. It states that where an assessment, inter alia, under Section 143(3) 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." There is, however, an exception and that begins with the words "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 under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that*

assessment year." Therefore, no action under Section 147 can be taken beyond the said period of four years unless and until the conditions precedent mentioned in the proviso are satisfied. The first condition is that income chargeable to tax must have escaped assessment. ***The second condition is that such escapement from assessment must be by reason of failure on the part of the assessee to, inter alia, disclose fully and truly all material facts necessary for his assessment for that assessment year.*** *If either of these two conditions is missing, the exception to the bar setup in the proviso, does not get triggered. The consequence being that the assessment cannot be re-opened."*

(Emphasis supplied)

36. The expression "fully and truly disclose all material facts" has been discussed in multiple decisions of this Court as well as the Apex Court. In ***Honda Siel Power Products Ltd v. Dy. CIT [2012] 340 ITR 53 (Delhi)***, it was explained as to what is the meaning of the expression "disclose fully and truly all material facts" appearing in Section 147 of the said Act. In that decision, this Court observed as under:-

"12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse affect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of assessee. The latter confers jurisdiction to reopen assessment."

37. Explanation 1 to the proviso to section 147 elaborates on the meaning of the phrase “disclosure” as mentioned in the proviso. Reference may be made to the decision of this Court in ***Rose Serviced Apartments (P.) Ltd. v.***

Deputy Commissioner of Income-tax [2011] 9 taxmann.com 199 (Delhi), wherein it was observed that from a reading of the said Explanation, it is clear that that mere production of books of account or other material from which the Assessing Officer could, with due diligence, have discovered escapement of income, does not bar reassessment proceedings. "*Yet at the same time if the proviso applies and the assessee has fully and truly disclosed all the material facts necessary for assessment for that assessment year, reassessment proceedings cannot be initiated.* " In the present case, however, the mere disclosure of the identity of the investor (*as being* holding company of assessee) in the return of income and the audited financial statements of the assessee as the source of share application money received, is not sufficient to constitute "disclosure" under the proviso to section 147. Therefore, the assessee cannot be said to have made true and complete disclosure. Hence, the notice for reassessment is justified.

38. From a reading of the reasons recorded, it is clear that there is fresh tangible material in the hands of the Assessing Officer with respect to the dubious nature of the source of investments made into the assessee company, which fact had not been fully and truly disclosed at the time of the assessment. The factum of shareholding and business activity of the investor, i.e., Gold Singapore had not been disclosed at the time of assessment proceedings. Mere disclosure of the identity of the investor could not translate into a satisfaction with regard to creditworthiness of the investor. We have perused the audited financial statement and the return of income filed by the petitioners. In the case of ***Phool Chand Bajrang Lal v. ITO [1993] 203 ITR 456*** it was held by the Supreme Court that "*where the*

transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of the "true" and "full" facts in the case and the Income Tax Officer would have the jurisdiction to reopen the concluded assessment in such a case". In the present case, the return of income merely lists Gold Singapore as the holding company and the Notes to the audited financial statement merely mention that securities application money has been received from the Holding Company, being Gold Singapore. The genuineness of this transaction as also the creditworthiness of the investor are doubtful in the present case and, therefore, mere mention of the said transaction does not amount to "full" and "true" disclosure. Therefore, this amounts to the fulfilment of the second condition, that is, failure to disclose fully and truly all material facts, relevant for his assessment in that assessment year.

39. Thus, on fulfilment of the second condition, the bar to reopening of proceedings after expiry of four years from the date of final assessment order, under the proviso, does not apply and the initiation of proceedings is not barred by limitation.

(d) WHETHER PROPER SANCTION AS REQUIRED UNDER SECTION 151 OF THE ACT WAS OBTAINED OR NOT

40. It is a requirement for issuance of notice for reopening of assessment proceedings under section 151 of the Act that the Principal Chief Commissioner or Chief Commissioner or Principal Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer,

that it is a fit case for issuance of such notice.

41. In the recorded reasons also, it has been noted that "*necessary sanction to issue notice under section 148 of the Act is being obtained separately from Pr. Commissioner of Income Tax, Delhi-03, New Delhi as per the provisions of section 151 of the Act*". In its reply on this issue, in the order dated 25.9.2019 dismissing objections of the petitioners to the notice under section 148, it has been pointed out that the approval of the competent authority was obtained vide note sheet entries dated 31.3.2019 and the same was enclosed along with the order. However, the same has not been annexed to the present petitions. It has been argued that obtaining approval of the Additional Commissioner of Income Tax is not provided for under section 151 and therefore, the same is not justified. However, in the present case, approval/sanction has been obtained from both, the Addl. Commissioner of Income Tax as well as Principal Commissioner of Income Tax, which is the appropriate authority for issuance of such sanction, as noted in ***Commissioner of Income-tax-8 (Erstwhile CIT-III) v. Soyuz Industrial Resources Ltd*** [2015] 58 taxmann.com 336 (Delhi).

42. Further, it is the case of the petitioner that there was no independent application of mind by the sanctioning authorities for according approval. Whilst it is the settled position in law that the sanctioning authority is required to apply his mind and the grant of approval must not be made in a mechanical manner, however, as noted by the Division Bench of the Calcutta High Court in ***Prem Chand Shaw (Jaiswal) v Assistant Commissioner, Circle-38, Kolkata*** [2016] 67 taxmann.com 339 (Calcutta),

the mere fact that the sanctioning authority *did not record his satisfaction in so many words would not render invalid the sanction granted under section 151(2) when the reasons on the basis on the basis of which sanction was sought could not be assailed and even an appellate authority is not required to give reasons when it agrees with the finding unless statute or rules so requires*. The decision in ***United Electrical Co. Pvt. Ltd.*** (supra), as relied upon by the petitioner is distinguishable from the present case, as in the said case, there was no material on record to provide foundation for Assessing Officer's reasons to believe. Therefore, it was held that the recording of the satisfaction by the AO was unjustified and without independent application of mind. However, there is no requirement to provide elaborate reasoning to arrive at a finding of approval when the Principal Commissioner is satisfied with the reasons recorded by the AO. Similarly, in ***Virbhadra Singh v Deputy Commissioner, Circle Shimla*** [2017] 88 taxmann.com 888 (Himachal Pradesh) where the competent authority was in agreement with the reasons assigned by the Assessing Officer, so placed before him, which came to be considered and sanction accorded with proper application of mind, by recording "*I am satisfied that it is a fit case for issuance of notice u/s 148*", the issuance of notice under section 147/148 was held to be valid.

43. Therefore, it is clear that necessary sanction for issuance of notice under section 148, as required under section 151 had been obtained.

(e) WHETHER NOTICE ISSUED IN THE NAME OF EXPERION DEVELOPMENT PVT. LTD. (EDPL) IS BAD IN LAW AS SEPARATE NOTICES WERE REQUIRED TO BE ISSUED TO EDPL IN ITS INDIVIDUAL CAPACITY AND AS THE SUCCESSOR-IN-

INTEREST OF EDIPL

44. Petitioner has placed reliance on ***Principal Commissioner of Income Tax-6, New Delhi v Maruti Suzuki [2017] 85 taxmann.com 330 (Delhi)*** where two entities namely, Suzuki Powertrain India Ltd. (SPIL) and Maruti Suzuki India Ltd (MSIL) had amalgamated into MSIL and assessment order under section 143 (3) had been passed in the name of SPIL, which entity had ceased to exist on the date of the assessment order. In these circumstances, the Court held the said assessment order to be without jurisdiction. The relevant portion of the said judgment is extracted as under:

> *"**13.** The question whether, for the purposes of Section 170 (2) of the Act, the defect of passing the assessment order in the name of an non-existent entity is a mere irregularity was answered by this Court in Dimension Apparels (P.) Ltd. (supra), where in paras 6 and 7 it was held as under:*
>
> *'6. Sections 170(1) and 170(2) of the Act do not assist the revenue in their case. The revenue does not contest that in a case of amalgamation, the predecessor (being a dissolved company) "cannot be found". Consequently, Section 170(2) applies. This provision clarifies that where the predecessor cannot be found,*
>
> *"the assessment of the income of the previous year in which the succession took place up to the date of the succession and of the precious year preceding that year shall be made on the successor in like manner and to the same extent as it would have been made on the predecessor." (Emphasis Supplied)*
>
> *7. The revenue seems to argue that the assessment is justified because the liabilities of the amalgamating company accrue to the amalgamated (transferee) company. While that is true, the question here is which entity must the assessment be made on. The text of Section 170(2) makes it clear that the assessment must be made on the successor (i.e., the amalgamated company).'"*

The petitioner has also placed reliance on the decision in ***Commissioner of Income Tax v K. Adinarayana Murty [1967] 65 ITR 607 (SC)***. The relevant portion of the said judgment is extracted hereunder:

> *"Under the scheme of the Income Tax Act the 'Individual' and the "Hindu Undivided Family" are treated as separate units of assessment and if a notice under Section 34 of the Act is wrongly issued to the assessee in the status of an 'individual' and not in the correct status of "Hindu Undivided Family" the notice is illegal and all proceedings taken under that notice are ultra vires and without jurisdiction. It was contended by Mr S.T. Desai on behalf of the assessee that the return was filed by the assessee in response to the first notice in the character of "Hindu Undivided Family". But the submission of the return by the assessee will not make any difference to the character of the proceedings in pursuance of the first notice which must be held to be illegal and ultra vires for the reasons already stated. We are therefore of the opinion that the Income Tax Officer was legally justified in ignoring the first notice issued under Section 34 of the Act and the return filed by the assessee in response to that notice and consequently the assessment made by the Income Tax Officer in pursuance of the second notice issued on February 12, 1958 was a valid assessment.*

45. On the basis of the aforenoted judgment, challenge whereto by the Revenue before the Supreme Court resulted in dismissal, and further relying upon Section 170 (2) of the Act, Mr. Vohra has contended that separate notices are required to be issued viz. one in the name of amalgamated company in its independent capacity and another in the name of amalgamated company as successor-in-interest of an amalgamating company. We are not impressed with Mr. Vohra's contentions. In ***Maruti Suzuki*** (supra), this Court while relying upon its earlier decision in

Dimension Apparels (P) Ltd. (supra), has dealt with Section 170 (1) and 170 (2), on an entirely different issue, which is clearly discernible from the portion of the judgment extracted herein above. In ***Dimension Apparels (P) Ltd*** (supra), the Court has held that the text of Section 170 (2) makes it clear that assessment must be made on the successor (i.e. the amalgamated company) in the event, the predecessor cannot be found. The factual situation in the present case is different from that in the case of ***Maruti Suzuki*** (supra). ***Maruti Suzuki*** (supra) dealt with the validity of an assessment order under section 143(3), whereas in the present case, notice for reassessment under section 148 is under challenge. In the present case, pursuant to the scheme of amalgamation, approved by this Court vide order dated 20.12.2012, EDIPL was amalgamated with EDPL with effect from 01.04.2012. Thus, the income of EDIPL merged with the income of EDPL with effect from 01.04.2012. On the date of the reassessment notice, therefore, EDIPL and EDPL existed as a single common entity, for the relevant AY 2012-2013, i.e. beginning on 01.04.2012, which is the date of the amalgamation. Petitioner contends that the common notice for reassessment issued in the name of EDPL is bad in law as separate notices are required to be issued in the name of EDPL in its own capacity and in the name of EDPL, as successor-in-interest of EDIPL separately since during the relevant time, i.e., AY 2012-2013, they existed as separate entities. There is no dispute that in the present case, the amalgamating company does not exist on the date of issuance of notice and accordingly, the assessment had to be made in the name of amalgamated company i.e. the petitioner. However, we cannot construe Section 170 (2) of the Act in the manner, the petitioner has urged. The aforesaid provision nowhere requires that two

separate notices and separate assessment order are to be passed. On the contrary, the petitioner as a successor would also be liable for the income of the previous year in which the succession took place upto the date of the succession. We are therefore unable to understand as to what purpose would be served by two separate assessment orders. Pertinently, as of now, we are only concerned with the requirement of issue of two separate notices under Section 147/148 and we cannot find any such requirements emanating from Section 170 (2) of the Act.

46. Similarly, in the case of ***K. Adinarayana Murty*** (supra), notice was wrongly issued on an HUF in the status of an "individual" while the entity was being assessed in the status of an HUF. In the present case, there is no infirmity in the name and status of the entity in whose name the notice has been issued.

47. This Court in ***BDR Builders & Developers (P) Ltd. V Assistant Commissioner of Income Tax [2017] 85 taxmann.com 146 (Delhi)***, has considered the question of issue of notice in the context of amalgamation. In the said case, a company VBPPL amalgamated with the petitioner company therein (BDR Builders & Developers) on 01.04.2012 and notice for reopening of assessment under section 148 was issued in the name of VBPPL on 03.04.2012. It was held that on the date of said reassessment order, VBPPL had ceased to exist as an entity and therefore, notice issued in the name of VBPPL was void. Thus, once, the amalgamating company has merged with the amalgamated entity, it ceases to exist in its individual capacity. In the present case also, on the date of issue of reassessment

notice, i.e. 31.03.2019, EDIPL had ceased to exist as a separate entity (w.e.f. 01.04.2012). Therefore, for reopening of assessment proceedings in respect of EDIPL, now merged with EDPL, a notice can only be issued in the name of the merged entity. There is no requirement to issue two separate notices in the name of amalgamated company (i) as successor-in-interest of the amalgamating company and (ii) in its individual capacity, as the amalgamated company (EDPL) has taken over the liabilities of the amalgamating company (EDIPL) and the notice mentions the liabilities of EDIPL as it accrued pre-amalgamation in its individual capacity.

48. We are therefore, of the opinion that the notices for reopening of assessment proceedings under section 148, are valid and the Assessing Officer has sufficiently showcased that there are "reasons to believe" that the income of the assessee(s) may have escaped assessment, with tangible material on record.

49. Accordingly, petitions are dismissed. Interim order dated 24.12.2019 stands vacated. We make it clear that the observations made hereinabove have been made to consider the pleas raised by the petitioner. The Assessing Officer shall not be influenced by them and shall pass the Assessment order on merits after considering all the materials/evidences and submissions in accordance with law. All pending applications are also disposed of. No order as to costs.

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SANJEEV NARULA, J

VIPIN SANGHI, J

FEBRUARY 13, 2020/*Pallavi*