

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO. 14336 OF 2021

Shrikant Phulchand Bhakkad (HUF),
Through its Karta
Shrikant S/o Phulchand Bhakkad,
Age : 45 Years, Occu. : Business,
R/o Ramjeevan Phulchand Bhakkad,
New Mondha Road, Jalna,
Tq. & Dist. Jalna.
PAN No. AAPHS6778C .. Petitioner

Versus

1. Joint Commissioner of Income Tax
Range – 1, Aurangabad.
2. Income Tax Officer,
Ward – 1, Jalna,
Tq. and Dist. Jalna.
3. Income Tax Officer,
National Faceless Assessment Centre,
Delhi. .. Respondents

Shri Raviraj R. Chandak, Advocate for the Petitioner.
Shri Alok Sharma, Advocate for Respondent Nos. 1 to 3.

**CORAM : R. D. DHANUKA AND
S. G. MEHARE, JJ.**

CLOSED FOR JUDGMENT ON : 24.03.2022

JUDGMENT PRONOUNCED ON : 22.04.2022

JUDGMENT (Per : R. D. Dhanuka, J.) :-

. Rule. Shri Alok Sharma, the learned counsel for

respondents waives service. Rule is made returnable forthwith.

2. By this petition filed under Article 226 of the Constitution of India, the petitioner has impugned notice dated 31st March, 2021 issued by the respondent No. 2 under Section 148 of the Income Tax Act, 1961 (for short “I. T. Act”) and also order dated 02nd December, 2021 passed by the respondent No. 3 thereby rejecting the objection filed by the petitioner.

3. Some of the relevant facts for deciding this petition are as under :

It is the case of the petitioner that, on 25th December, 2018, the then Assessing Officer passed the assessment order for the Assessment Year 2016-2017 after considering all the documents regarding derivative transaction and accepted the loss claimed by the petitioner arising out of said derivative transaction. The Assessing Officer accepted the income claimed by the petitioner in his return for assessment year 2016-2017. On 20th October, 2018, the petitioner supplied all the relevant information regarding derivative transaction. On 10th December, 2018, the assessing officer once again called upon the petitioner for the information regarding account statement, demat account, details of broker and contract notes issued by the broker for derivative transaction. It is the case of the petitioner that all the information was duly submitted by the petitioner to the assessing officer on 14th December, 2018. On 31st March, 2021, the respondent No. 2 on the same set of facts issued notice U/Sec. 148 of the I. T. Act and started proceeding of re-assessment

U/Sec. 147 of the I. T. Act.

4. On 19th July, 2021, the petitioner after receipt of copy of the reasons recorded by the assessing officer filed his objection to the said reasons and prayed for dropping of the proceedings on the ground that the assessing officer could not have issued such notice on the ground of change of opinion. On 02nd December, 2021, the respondent No. 3, however, passed speaking order rejecting the objections filed by the petitioner. The petitioner therefore filed this writ petition.

5. Mr. R. R. Chandak, the learned counsel for the petitioner invited our attention to various documents annexed to the writ petition including the income tax return filed by his client for the assessment year 2016-2017 along with computation of income and balance sheet.

6. Learned counsel invited our attention to the assessment order dated 25th December, 2018 passed by the assessing officer for the assessment year 2016-2017 in respect of income tax return filed by the petitioner and would submit that by the said assessment order, after considering the details furnished by the petitioner in respect of the derivative transaction in the said assessment order passed U/Sec. 143(3) of the I. T. Act, the assessing officer accepted the income returned at Rs. 56,92,100/- without making any additions. He submits that, the then assessing officer has deemed to have applied his mind while accepting income returned by the petitioner for the said

assessment year 2016-2017.

7. The learned counsel for the petitioner submits that, pursuant to the notice dated 31st March, 2021 issued by the assessing officer, the petitioner filed E-Return of income on 22nd April, 2021 along with computation of income for the assessment year 2016-2017. The petitioner requested the assessing officer to furnish various details including the reasons recorded for issuing notice U/Sec. 148 of the I. T. Act, copy of sanction taken by the assessing officer from approving authority, copy of relevant tangible material which has been considered by the assessing officer for the reasons to be recorded for re-assessment proceedings.

8. It is submitted by the learned counsel for the petitioner that, the assessing officer thereafter furnished the reasons for initiating proceedings U/Sec. 147 of the I. T. Act for the assessment year 2016-2017 and also the approval granted by the Joint Commissioner of Income Tax, Range – 1, Aurangabad U/Sec. 151 of the I. T. Act. He submits that, the said sanction U/Sec. 151 of the I. T. Act cannot be granted mechanically and without considering the material on record to be placed before the sanctioning authority by the assessing officer. He submits that, from the copy of the sanction produced by the assessing officer U/Sec. 151 of the I. T. Act, it is clear that all the documents alleged to have been possessed by the assessing officer were not produced before the Joint Commissioner of Income Tax while seeking sanction U/Sec. 151 of the I. T. Act.

9. The learned counsel for the petitioner invited our attention to the order dated 02nd December, 2021 passed by the Assessing Officer, Government of India, Ministry of Finance, Income Tax Department, National Faceless Assessment Centre, Delhi rejecting the objection raised by the petitioner and informing that the proceedings U/Sec. 147 of the I. T. Act would be further continued. The petitioner was informed that, notice U/Sec. 142(1) of the I. T. Act was being issued for necessary compliance.

10. The learned counsel for the petitioner submits that, all the information along with ledger of capital account, balance sheet, audit report were already submitted by the petitioner in compliance to the notice U/Sec. 142(1) of the I. T. Act and were already on record before the assessing officer while passing the assessment order for the assessment year 2016-2017 on 25th December, 2018. Issuance of notice U/Sec. 148 of the I. T. Act for re-opening of the assessment order is without any tangible material and is based on suspicion without any genuine 'reasonable belief' that income had escaped. No reasons are recorded by the assessing officer indicating any nexus or live link between any fresh material which is to be the basis for reopening of the alleged escapement of income. He submits that, the belief of the assessing officer must be that of an honest and reasonable person based upon reasonable grounds and cannot be on the basis of mere suspicion, gossip or rumor. The entire proceedings initiated by the assessing officer U/Sec. 148 of the I. T. Act were without jurisdiction. The objections raised by the petitioner are

also not dealt with properly by the assessing officer while passing an order of rejection of objection.

11. The learned counsel for the petitioner submits that the so called sanction granted by the Joint Commissioner of Income Tax on 31st March, 2021 itself would indicate that the assessing officer had submitted a proposal for seeking such approval on 31st March, 2021. The reasons of the approving authority while granting such approval also would clearly indicate that all the documents and information were not furnished by the assessing officer to the Joint Commissioner of Income Tax.

12. Learned counsel for the petitioner strongly placed reliance on the judgment of this Court in a case of **Ashok Manikrao Khopade Vs. Principal commissioner of Income Tax 1, Nasik and others** in *Writ Petition No. 8818 of 2018* delivered on **25th March, 2019** and more particularly paragraph Nos. 6 and 14 and would submit that, the erstwhile assessing officer had already considered all the material produced by the petitioner pursuant to the directions issued by the assessing officer regarding derivative transactions and having accepted the income returned by the petitioner after considering such material, the subsequent assessing officer cannot reopen the assessment order already passed based on change of information.

13. The learned counsel for the petitioner placed reliance on unreported judgment of this Court delivered on **21st August, 2019** in a case of **Marico Ltd. Vs. The Assistant Commissioner of Income Tax-**

12(3)(2) and others in *Writ Petition No. 1917 of 2019* and in particular paragraph Nos. 6, 7 and 10 to 12 and would submit that, after adverting to the judgment of the Hon'ble Supreme Court in a case of **CIT Vs. Kelvinator of India Ltd.** reported in *(2010) 320 ITR 561*, this Court held that non rejection of explanation in the assessment order would amount to the assessing officer accepting the view of the assessee, thus taking a view for forming an opinion would be completely without jurisdiction. He submits that, even if assessing officer in the original assessment order had not recorded any specific reasons while dealing with documents and details furnished by the petitioner, which were specifically called for by the assessing officer, reopening of assessment on the same facts is not permissible, otherwise it would amount to review of the earlier order, which is not permissible. He submits that, the Hon'ble Supreme Court has rejected the SLP bearing Diary No. 7367 of 2020 on 01.06.2020 arising out of the said judgment delivered by this Court on 21st August, 2019 in a case of **Marico Ltd. Vs. The Assistant Commissioner of Income Tax-12(3)(2) and others** (supra).

14. The learned counsel for the petitioner relied upon the judgment of this Court in a case of **Aroni Commercials Limited Vs. Dy. Commissioner of Income Tax – 2** reported in *Laws (Bom)-2014-2-43* and in particular paragraph No. 16 and would submit that, while issuing a notice for reopening of the assessment, the assessing officer has to rely upon the tangible material made available after passing of the original assessment order, which tangible material would be factual material and not inference/information

of material already existing and considered during the assessment proceedings. He submits that, this is not a case of any new fact being available by virtue of any internal audit, which could lead to a reasonable belief that income chargeable to tax has escaped the assessment.

15. Mr. Alok Sharma, the learned counsel for respondents on the other hand invited our attention to the averments made in paragraph No. 2 and few other paragraphs of the affidavit in reply filed by respondents. He submits that, the assessing officer has fully complied with the procedure for reopening of the assessment proceedings.

16. It is submitted that, the assessment order dated 25th December, 2018 for the assessment year 2016-2017 U/Sec. 143(3) of the I. T. Act was carried only for limited purpose on the issue whether share capital was genuine and was income from disclosed sources or not. The said assessment was completed after carrying out general nature of verification within the scope of limited issue. The assessing officer in this case has in his possession fresh and specific facts pertaining to the transactions of the petitioner. The reopening has been done on the basis of specific information which was not available at the time of assessment proceedings U/Sec. 143(3) of the I. T. Act. There was thus, no change of opinion while initiating the re-assessment proceedings U/Sec. 147(1) of the I. T. Act as sought to be canvassed by the petitioner.

17. Learned counsel for the respondents tendered a copy of the letter dated 09th December, 2019 and would submit that on the basis of such information received by the assessing officer, notice U/Sec. 148 of the I. T. Act was issued. This information was not available when the earlier assessment order on 25th December, 2018 was passed by the assessing officer. The learned counsel for the respondents placed reliance on Section 147 of the I. T. Act and also to the 1st proviso and would submit that, once notice U/Sec. 148 of the I. T. Act is issued within four years of the completion of assessment, assessment can be reopened. He submits that, reasons are already recorded by the assessing officer before issuance of notice. In support of this submission, the learned counsel for respondents invited our attention to the reasons recorded by the assessing officer at page No. 92 to 94 of the writ petition. He submits that, in the said reasons the assessing officer has clearly provided that, fresh information was received by the assessing officer after completion of the assessment order earlier on 25th December, 2018 and based on fresh information received by the assessing officer, sanction U/Sec. 151 of the I. T. Act was rightly obtained from the Joint Commissioner of Income Tax on 31st March, 2021.

18. Learned counsel for respondents placed reliance on the judgment of the Supreme Court in a case of **Raymond Woollen Mills Ltd. Vs. Income Tax Officer and others** reported in *(1999) 236 ITR 34 (SC)* and also another judgment of the Supreme Court in a case of **Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P Ltd.** reported in *(2007) 291 ITR 500*. He submits that on the basis

of the material information received by the assessing officer after passing of the assessment order in the year 2018, the assessing officer has rightly formed an opinion for reopening of the assessment in view of the earlier order and escaped assessment.

19. The learned counsel for respondents placed reliance on the judgment of this Court in a case of **Ajeet Seeds Pvt. Ltd. Vs. The Union of India through Assistant Commissioner of Income Tax Aurangabad** reported in *(2018) TaxCorp (DT) 71634 (HC-BOMBAY)* and more particularly paragraph Nos. 16 to 18 and would submit that, this Court has laid down the guidelines on the exercise of powers of the Court while dealing with the action on the part of the assessing officer to issue notice U/Sec. 148 of the I. T. Act for opening the reassessment.

20. Learned counsel for respondents placed reliance on the judgment of the Gujarat High Court in a case of **Sanjab Baulal Surana Vs. Assistant Commissioner of Income Tax** reported in *(2021) 111 CCH 193 (HC-GUJARAT)* in support of the submissions that, since the reasons for the formation of the belief by the Assessing Officer in the instant case have a rational connection with or relevant bearing on the formation of belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts, no interference is warranted by this Court in this petition filed under Article 226 of the Constitution of India.

21. Learned counsel for respondents placed reliance on the

judgment of the Gujarat High Court in a case of **Backbone Projects Limited Vs. The Assistant Commissioner of Income Tax, Circle 1 (1)** reported in *(2021) TaxCorp (DT) 85341 (HC-GUJARAT)* in support of the submission that, since the Assessing Officer had issued notice for reopening of the assessment order under Section 147 of the Income Tax Act, 1961 before four years from the end of relevant assessment year, the condition set out in the said provision had been fully satisfied by the Assessing Officer while issuing notice under Section 148 of the Income Tax Act, 1961. He submits that, the Assessing Officer was justified in issuing notice on the basis of the credible information and tangible material found subsequently.

22. Learned counsel for respondents placed reliance on the judgment of this Court in a case of **Chhagan Chandrakant Bhujbal Vs. Income Tax Officer Ward 20 (1) (3), Mumbai, Commissioner of Income Tax-20 Mumbai** reported in *(2021) TaxCorp (DT) 86184 (HC-BOMBAY)* and in particular paragraph no.13 in support of the submissions that, since the petitioner had participated in the assessment proceedings before the Assessing Officer, this Court shall not exercise its extraordinary jurisdiction under Article 226 of the Constitution of India for interfering with the proceedings before the Assessing Officer.

23. Learned counsel for respondents placed reliance on the judgment of the Hon'ble Supreme Court in a case of **ACIT VS. Rajesh Jhaveri Stock Brokers (P) Ltd.** reported in *(2007) 291 ITR 500(SC)* and would submit that, after interpreting '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 belief 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. He submits that, at this stage, the only question that is required to be considered is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the material would conclusively prove the escapement is not the concerned at that stage. He submits that, the formation of belief by the Assessing Officer is within the realm of subjective satisfaction.

24. Learned counsel for respondents distinguished the judgment relied upon by Mr. Chandak, learned counsel for the petitioner. He submits that, the judgment relied by the petitioner in the case of **Principal Commissioner of Income Tax 5 Vs. Shodiman Investments (P) Ltd.** reported in *(2018) 93 taxmann.com, 153 (Bombay)* was passed in Income Tax Appeal and not in Writ Petition. He submits that, in the Income Tax Appeal, the Court has to deal with the issue in the greater detail, whereas in Writ Petition only limited issue arise for consideration. He submits that, in this case there is no case of non-application of mind.

25. Learned counsel for respondents distinguished the judgment in a case of **Assistant Commissioner of Income Tax Vs. Dhariya Construction Company** reported in *Lex (SC) 2010 2 87* on the ground that, in this matter the Assessing Officer had issued notice under Section 148 of the Income Tax Act, 1961 on the basis of the additional information after passing earlier assessment order.

26. Learned counsel for the respondents distinguished the judgment in a case of **CIT Jabalpur Vs. M/s. S. Goyanka Lime and Chemicals Ltd.** in *Income Tax Appeal No.82 of 2012* on the ground that, in that case the Joint Commissioner of Income Tax had passed one line order recording his satisfaction before granting sanction under Section 151 of the Income Tax Act, 1961, whereas in this case, the Joint Commissioner of Income Tax had granted sanction by applying his mind and after considering the material produced by the Assessing Officer before him.

27. Learned counsel for the respondents distinguished the judgment of this Court in case of **Gagan Omprakash Navani Vs. Income Tax Officer** in *Writ Petition No.1601 of 2022* on the ground that, in that case there was complete scrutiny while passing the earlier assessment order under Section 143(3) of the Income Tax Act, 1961, but in this case the assessment was passed on random basis for limited purpose. There was limited scrutiny under CASS.

28. Mr. Chandak, learned counsel for the petitioner in his

rejoinder arguments submits that, for the purpose of reopening assessment, there shall not be change of opinion on the part of the Assessing Officer. If notice for reopening of the assessment is issued after four years and before six years, the Assessing Officer has to satisfy additional requirement prescribed under the said provisions. The Assessing Officer could not have been formed a different opinion on the basis of the same facts and documents. It is not the case of the respondents that, there were any fresh reason for reopening of the assessment. On the contrary, the case of the respondents in that order recording reasons is that, all the documents are already on record. He submits that, purpose of obtaining prior sanction from the competent authority under Section 151 of the Income Tax Act, 1961 is to check unwarranted use of powers under Section 148 of the Income Tax Act so as not to harass the assessee. He submits that, no reasons are recorded by the Joint Commissioner of Income Tax while granting sanction under Section 156 of the Income Tax Act, 1961. He relied upon the judgment of this Court in case of **Principal Commissioner of Income Tax 5 Vs. Shodiman Investments (P) Ltd.** (supra). He submits that, the judgment of the Hon'ble Supreme Court in a case of **Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers P. Ltd.** (supra) has been clarified the said judgment. The Assessing Officer did not submit any investigation report upon the petitioner alongwith Writ Petition.

29. Learned counsel for the petitioner relied upon the judgment of the Hon'ble Supreme Court in a case of **Assistant Commissioner of Income Tax Vs. Dhariya Construction Company** and would submit

that, this case is a case of total non-application of mind and thus interference under Article 226 of the Constitution of India is warranted in this case. He also relied upon the judgment of Madhya Pradesh High court in a case of CIT Jabalpur Vs. M/s. S. Goyanka Lime and Chemicals Ltd. (supra) in support of submission and also in case of Gagan Omprakash Navani Vs. Income Tax Officer (supra).

Reasons and conclusions :

30. The question that arises for consideration of this Court is whether assessing officer had any fresh information for the purpose of issuing notice U/Sec. 148 of the I. T. Act for re-opening of the assessment order for the assessment year 2016-2017 in support of the case of the assessing officer that the income of the petitioner had escaped in the assessment order or not ?

31. The petitioner had filed income tax return for the assessment year 2016-2017 on 29th September, 2016 declaring total income of Rs. 56,92,100/-. The assessing officer had issued a notice for scrutiny assessment of the petitioner for the said return of income filed by the petitioner for the assessment year 2016-2017. On 03rd September, 2018, the assessing officer issued notice U/Sec. 142(1) of the I. T. Act and called upon the petitioner to furnish various information regarding derivative transactions. A perusal of the said notice dated 03rd September, 2018 and more particularly paragraph No. 6 indicates that, in the said notice it was observed by the assessing officer that in the balance sheet the petitioner had debited loss from derivatives trading of Rs.

81,48,469/- and in that connection was called upon to furnish details i. e. (I) statement of purchase and sales of derivatives, (ii) copies of brokers note, (iii) copies of ledger account of broker maintained by the petitioner and (iv) copies of Demat account. In para No. 7 of the said notice it was specifically held that, according to the assessing officer there was no profit and loss account maintained by the petitioner HUF. In the capital account net business income had not been credited/debited. The petitioner was accordingly called upon to show as to why set off of losses of F & O Trading against remuneration and interest earned from partnership firm should not be disallowed and added to your total income of the petitioner. It was made clear in the notice that, if those details were not submitted electronically, non compliance, part compliance or incomplete compliance may entail penal action and/or adverse inference in respect of the said issue and/or taking recourse to rejection of books results and assessment U/Sec. 144 of the I. T. Act without any further reference to the petitioner in that regard.

32. The petitioner, through its Chartered Accountant vide letter dated 20th October, 2018 furnished various details to the assessing officer. The petitioner informed the assessing officer that, the petitioner had incurred loss from derivative trading of Rs. 81,48,470/- in the said assessment year 2016-2017 and submitted statement of derivatives trading along with copy of broker note, ledger account of broker as appearing in books of the petitioner. The petitioner clarified that no Demat account was required for trading in F & O. The petitioner informed that,

during the year under assessment, the petitioner had entered into derivatives, i. e. options trading on recognized stock exchange. The petitioner had prepared derivative account in its financial statement, which was already submitted in its earlier submission. The loss from said derivatives trading was debited to capital account of the petitioner. The petitioner also clarified that transactions of derivative trading were in the nature of business only. The petitioner relied upon clause (d) of Sub section 5 of Section 43 of the I. T. Act in support of the contention that an eligible transaction in respect of trading in derivatives referred to in clause (ac) of section 2 of the Securities Contracts (Regulation) Act, 1956 carried out in a recognized stock exchange, was not to be deemed to be speculative transaction.

33. The assessing officer issued another notice U/Sec. 142(1) of the I. T. Act in continuation of the earlier notice and the reply submitted by the petitioner on 27th November, 2018 and called upon the petitioner to furnish various details. The petitioner was called upon to produce the original contract note of the transactions for verification, to provide copy and details of account opening Form and copies of letter issued by the broker along with account opening fees provided by the petitioner and various documents. The petitioner was also called upon to disclose the reasons for trading done in end of the year. In response to the said notice U/Sec. 142(1) of the I. T. Act, the petitioner through its Chartered Accountant letter dated 14th December, 2018 submitted various documents. The petitioner clarified that the petitioner had done transaction in derivatives.

There was no specific reason to carry out those transactions in the month of March.

34. The assessing officer thereafter completed the assessment on 25th December, 2018 for the said assessment year 2016-2017 and accepted the returned income as furnished by the petitioner in the sum of Rs. 56,92,100/-. A perusal of the said assessment order indicates that, according to the said assessment order, the case of the petitioner was selected for scrutiny under CASS for limited purpose to examine whether the share capital was genuine and from disclosed sources. It was stated in the assessment order that, on verification of return filed and on verification of details and documents filed during the assessment proceedings vis-a-vis reason for selection of case for scrutiny, the assessment was completed. In paragraph No. 4 of the said assessment order it was stated that, on verification of details and documents furnished and on going through the return of income furnished, the total income of the assessee was accepted as declared in the return of income filed as Rs. 56,92,100/-. The said assessment order was passed U/Sec. 143(3) of the I. T. Act.

35. A perusal of the reasons recorded by the assessing officer for initiation of proceedings U/Sec. 147 of the I. T. Act indicates that, according to the assessing officer as per the information received from I.T.O. (I&C), Aurangabad through insight portal, it was seen from the trade activity of the petitioner that, the same scripts had been bought and sold immediately within seconds and huge loss has been booked on such transactions.

The price of the scripts in which the assessee had traded, had recorded abnormal movement within few seconds on the same day so as to enable the assessee to book substantial amount of loss. This loss has been booked with an intention to reduce taxable income due to profit of normal business carried out by the assessee. The assessee had tried to colour its non genuine transaction as genuine trade and had claimed to have booked huge loss amounting to Rs. 81,48,170/- for the assessment year 2016-2017.

36. In paragraph No. 3 of the said reasons, it is mentioned that, during the course of assessment proceedings in this case, it was observed that the assessee had booked loss on call options. The assessee has submitted that it had not exercised the option on the date of the expiry and, thus, total premium paid for purchase of said call option was loss to the assessee. The petitioner had considered the said loss as business loss and reduced it from remuneration and interest received by the assessee from the partnership firm. During the course of assessment proceedings, notice U/Sec. 133(6) of the I. T. Act was issued to the broker of the said transactions, M/s Roopchand Toshniwal of Kolkatta, but no response was received. The petitioner was also unable to produce supporting evidence in that regard. However, as the case of the petitioner was selected for limited scrutiny for different issue, no addition was made. The assessing officer observed that, from the above discussion mentioned in the said reasons and the information available on record, it was clear that assessee had entered into a sham

transaction to obtain loss for the purpose of set-off of his taxable income.

37. The assessing officer found that the petitioner had claimed bogus loss on account of call option amounting to Rs. 81,48,170/- and the same needs to be disallowed and added to the income of the assessee. The assessing officer accordingly mentioned that, he had reasons to believe that the income to the extent of Rs. 81,48,170/- had escaped assessment. In paragraph No. 8 of the said reasons, it is recorded that since the return of income filed by the petitioner was selectd for CASS for limited scrutiny for different reasons, discrepancy was observed, in the return filed by the petitoiner, but no action could be taken and thus only requirement to initiate proceedings in this case U/Sec. 147 was reason to believe which had been recorded in paragraph Nos. 5 and 6 of the said reasons.

38. A perusal of the sanction/approval granted by the Joint Commissioner of Income Tax on 31st March, 2021 U/Sec. 151 of the I. T. Act indicates that, the assessing officer had sent the proposal for approval of the Joint Commissioner of Income Tax on 30th March, 2021. The approval was granted on 31st March, 2021. In the said approval U/Sec. 151 of the I. T. Act, the Joint commissioner of Income Tax has referred to the reasons to believe as per the annexure to the said approval. In the remarks column, the Joint Commissioner of Income tax observed that, “in view of the details and quantum of undisclosed transactions discussed by the assessing officer in the reasons recorded, I am

satisfied it is a fit case for the issue of notice under section 148 of the Income-tax Act, 1961. Sanction under section 151(2) for the issue of notice under section 148 is therefore accorded in this case.”

39. In response to the reasons recorded by the assessing officer and conveyed to the petitioner, the petitioner vide its Chartered Accountant's letter dated 19th July, 2021 recorded various objections to the reasons and relied upon various judgments of this Court and various other High Courts and requested the assessing officer to drop the proceedings initiated U/Sec. 148 of the I. T. Act. The assessing officer thereafter passed order on 02nd December, 2021 and rejected the objection of the petitioner on the ground that same were devoid of any merits. The petitioner was informed that the proceedings U/Sec. 147 of the I. T. Act will be continued further. The petitioner was informed that during the course of assessment proceedings petitioner would be confronted with material available on record and adequate opportunity would be provided to explain its case on merits and the resultant order would be passed on an objective appraisal of the evidence available. The petitioner was called upon to participate in the assessment proceedings and to provide the information/documents.

40. During the course of argument Mr. Alok Sharma, the learned counsel for respondents tendered a copy of the communication dated 09th December, 2019 received from the office of the Income Tax Officer (I&CI), Aurangabad referred in the

reasons communicated to the petitioner forwarding the information regarding verification of reversal trades making non genuine profit of Rs. 21,96,600/- by Shrikant Phulchand Bhakkad (HUF) during financial year 2014-2015 and 2015-2016. In the said letter, it was stated that information was received under the Special Pilot project from DIT (I&CI), Mumbai regarding Tax Evasion through trading in options derivative through trade reversal. The information was received in the name of Shrikant Phulchand Bhakkad (HUF) for Rs. 21,96,600/- in two pieces along with the approval U/Sec. 133(6) from DIT (I&CI), Pune dated 11th September, 2018.

41. In the said communication it is further stated that, the Securities and Exchange Board of India came across several instances/internal alerts wherein a set of entities were consistently making loss or profit by their trading in options on individual stocks (stock options) which were listed on the Bombay Stock Exchange Limited (BSE). Trading of these entities was found abnormal because they were consistently seen making significant loss or profit by their trades which were reversed with the same counter parties either on the same day or the next day. It was further observed that, there were several entities who consistently made significant loss and others who consistently made significant profit by executing reversal trades in stock options on the BSE.

42. It is further stated in the said communication that, the notice U/Sec. 133(6) dated 26.06.2019 was issued to the assessee.

The Assessee however, did not submit details of stock trading properly. The assessee was once again called upon to submit proper details.

43. In the said communication it is stated that from the trade activity of the assessee it is seen that the same scripts have been bought and sold immediately within seconds and huge loss has been booked on such transactions. It was stated that in so far as script TITAN is concerned, the total transaction was conducted within six seconds showing the loss of Rs. 5,00,000/- on the same day. The assessee had booked a non genuine loss of Rs. 5,00,000/-. The said analysis would show that trade rates were completely out of sync with the movement in the price of underlying asset. One Lac shares were sold on 26th March, 2015 at 11.11.36 @ 0.2 per script for the total sum of Rs. 20,000/- and on the same day 11.11.42 One lac shares were purchased of the same company at Rs. 5.2 per share for total sum of Rs. 5.20,000/-.

44. It is further stated in the said communication that, in case of script of UCO bank also similar transactions were carried out within a span of 23 seconds and a non genuine loss of Rs. 5,04,000/- was claimed and appropriated against other income of the assessee. It is further stated that the assessee has shown a loss of Rs. 21,00,427/- for the assessment year 2015-2016 on account of F and O trading and had shown loss of Rs. 81,48,470/- for assessment year 2016-2017 under the said head. However, as per the information received from DIT (I&CI), Mumbai a total loss booked by the assessee firm was Rs. 21,96,600/- i. e. one

executed on 26.03.2015 and other on 31st March, 2015. It was stated that the said loss had been booked with a view to reduce the profit and abnormal business carried out by the assessee.

45. It was seen that the issue under consideration of the office had not been examined by the assessing officer while passing the assessment order. The transactions entered into by the assessee were non genuine and were carried out with a view to avoid paying tax. The assessee had set off the loss incurred from F & O Trading against profit booked from normal business activity. This is a text book case of tax avoidance. In the said communication it was further stated that, the information was being forwarded to the Pr. commissioner of Income Tax-1, Aurangabad as per the minutes of the Annual Conference of DIT and as proved by the Chairman DBDT, New Delhi, with a request to direct the jurisdictional assessing officer to take necessary remedial action in the case of the assessee for the assessment year 2015-2016 and for the assessment year 2016-2017. The said office had verified only two transactions of trading in script on test check basis. The jurisdictional assessing officer to be requested to verify all the transactions entered into by the assessee for determining the total tax liability of the assessee.

46. A perusal of the record indicates that, based on the said information received from the Income Tax Officer – (I&C), Aurangabad giving details, assessing officer issued notice U/Sec. 148 of the I. T. Act and for the reasons recorded by the assessing

officer, a reference was made to the information received from Income Tax Officer (I&C), Aurangabad from insight portal. Based on the said information and after application of mind, the assessing officer recorded the reasons that as the case was selected for limited scrutiny issue, initially no additions were made. It appears that on the information available on record, assessing officer is of reasonable belief that the petitioner had entered into a sham transaction to obtain loss for the purpose of set off of his taxable income. In our view, there is no substance in the submissions made by Mr. Chandak, the learned counsel for the petitioner that, there was no application of mind on the part of the assessing officer while issuing notice U/Sec. 148 of the I. T. Act.

47. A perusal of the assessment order dated 25th December, 2018 for the assessment year 2016-2017 clearly indicates that, it is recorded in paragraph No. 2 that the case was selected for scrutiny under CASS for limited purpose to examine whether the share capital was genuine and from disclosed sources. Notices were accordingly issued to the petitioner for seeking various details. In paragraph No. 3 of the said order, the assessing officer in that context recorded a limited finding that the assessee had received share of profit and remuneration and interest on capital. The assessee had offered profit and gains of business or profession of Rs. 57,86,473/- and income from other sources of Rs. 65,631/-. During the assessment proceedings, the assessee had furnished details asked for. However, in view of the case of the petitioner selected under CASS, the assessing officer

could not go into other details furnished by the petitioner. Return of income as filed by the petitioner thus came to be accepted.

48. So far as the issue raised by the petitioner that, the Joint Commissioner of Income Tax Range – 1 while granting approval U/Sec. 151 of the I. T. Act on the proposal submitted by the assessing officer by order dated 31st March, 2021 did not apply mind is concerned, in our view, there is no substance in the submissions made by the learned counsel for the petitioner. A perusal of the said order indicates that, the Joint Commissioner of Income Tax was of the view that, he was satisfied that it was a fit case for issuance of notice U/Sec. 148 of the I. T. Act in view of the details and quantum of undisclosed transactions discussed by the assessing officer in the reasons recorded. The Joint Commissioner of Income Tax accordingly accorded sanction U/Sec. 151(2) of the I. T. Act for issuance of notice under section 148 of the I. T. Act.

49. A perusal of the reasons recorded by the assessing officer, which were disclosed to the petitioner and were brought to the notice of the Joint Commissioner of Income Tax for seeking approval U/Sec 151 of the I. T. Act demonstrates that various reasons were recorded by the assessing officer based on the information received from the Income Tax Officer (I&CI) Aurangabad through insight portal after passing of the original assessment order dated 23rd December, 2018.

50. The Hon'ble Supreme Court in a case of **Raymond Woollen Mills Ltd. Vs. Income Tax Officer and others** (supra) has held that, while dealing with a challenge to the notice U/Sec. 147(A) of the I. T. Act, Court has to only see whether there was prima facie some material on the basis of which department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. The Court did not strike down the reopening of the case in that case. It is held that, it would be open for the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that new facts came to the knowledge of the Income Tax Officer after completion of the assessment proceedings. The Hon'ble Supreme Court did not express any opinion on the merits of the case and left open the question of fact and law to be investigated and decided by the assessing authority. The Supreme Court also granted liberty to the assessee to take all the points before the assessing authority.

51. This Court in a case of **Ajeet Seeds Pvt. Ltd. Vs. The Union of India through Assistant Commissioner of Income Tax Aurangabad** (supra) after adverting various judgments of the Supreme Court including in case of **Raymond Woollen Mills Ltd. Vs. Income Tax Officer and others** (supra), **CIT Vs. Kelvinator of India Ltd.** (supra), **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.** reported in ***(2007) 291 ITR 500 (SC)*** has held that, it cannot be said that reopening of the assessment was only based on change of opinion. The petitioner had failed in his duties to disclose fully and truly the fact and accordingly did not interfere with the notice U/Sec. 148 of the I.

T. Act by exercising jurisdiction under Article 226 of the Constitution of India. In the facts of this case also, the petitioner did not disclose that the petitioner had carried out transaction in various scripts within a span of few seconds on the same day and had adjusted the loss alleged to have been suffered against the other business income.

52. The Gujarat High Court in a case of **Cemach Machineries Ltd. Vs. The Income Tax Officer** (supra) after adverting to various judgments including the judgment in a case of **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd.** (supra) has held that, at the stage of Section 148 of the I. T. Act, what is required is “reason to believe”, but not the established fact of escapement of income. The Gujarat High Court has held that, having regard to the materials on record, the Court was of the view that, the assessing officer had initiated the proceedings not only on the basis of the information received from the concerned department, but based upon his independent satisfaction and other available materials to form a belief with regard to the escaped assessment of income. The assessing officer had acted on specific information and after collecting available material had opened his mind through reasons and formed belief that income had escaped assessment. The Gujarat High Court accordingly did not interfere with the notice issued U/Sec. 148 of the I. T. Act and dismissed the writ petition filed by the assessee.

53. In the facts of this case, also the assessing officer has not issued notice U/Sec. 148 of the I. T. Act only based on the

information received from the Income Tax Officer (I&CI), Aurangabad, but had applied his mind and formed his opinion that there was reason to believe that the income had escaped assessment. In so far as said assessment year 2016-2017 of the petitioner is concerned, we are in respectful agreement with the view expressed by the Gujarat High Court in a case of **Cemach Machineries Ltd. Vs. The Income Tax Officer** (supra), which applies to the facts of this case.

54. The Gujarat High Court in a case of **Sanjab Baulal Surana Vs. Assistant commissioner of Income Tax** (supra) after adverting to various judgments of the Supreme Court including judgment in the case of **Raymond Woollen Mills Ltd. Vs. Income Tax Officer and others** (supra) has held that, the assessing officer had reason to believe that the petitioner was a beneficiary of accommodation entry and basis for formation of such belief was several enquiries and the investigation by the Investigation Wing, and report thereof. The reasons for the formation of the belief by the assessing officer appear to have a rational connection with or relevant bearing on the formation of belief that there had been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. The Gujarat High Court followed the principles laid down by the Supreme Court in a case of **Raymond Woollen Mills Ltd. Vs. Income Tax Officer and others** (supra) that at the time of recording the reasons for satisfaction of the assessing officer, there should be prima facie some material on the basis of which the department could reopen the case. The sufficiency or

correctness of the material is not a thing to be considered at this stage. It will be open to the assessee to prove that the assumption of fact made in the notice was erroneous at the time of assessment proceedings.

55. In our view the opinion formed by the assessing officer being based on the new information available to the assessing officer after passing of the original assessment order alleging large scale transactions carried out by the assessee thereby adjusting the loss shown out of such derivative transactions with a view to adjust such loss with other business income, but also on the personal belief based on the enquiry made by the assessing officer. This Court is not thus required to enter into the arena of merit or correctness of such reasonable belief of the assessing officer for the purpose of reopening of the assessment. The petitioner will have full opportunity before the assessing officer to prove his case and to disprove that the belief of assessing officer for the purpose of reopening of the assessment was not just and proper.

56. The Gujarat High Court in a case of **Backbone Projects Limited Vs. The Assistant Commissioner of Income Tax, Circle 1 (1)** (supra) after adverting to various judgments of the Supreme Court has considered a situation where assessing officer had received the reports from the investigating teams that the petitioner was the beneficiary of the accommodation entries and since there was no true and full disclosure on the part of the assessee with regard to the said entries in its books of accounts,

there was an escapement of income during the assessment year under consideration. The Gujarat High Court has further held that the assumption of jurisdiction on the part of the assessing officer is since based on clear information specific, reliable and otherwise sustainable under law, the challenge to reassessment proceedings cannot be entertained. The Gujarat High Court rejected submission made by the assessee that the petitioner had produced all the relevant and material documents before the assessing officer at the time of scrutiny assessment and it was not open for the subsequent assessing officer to reopen the assessment under the guise of having received the information from the invetigatint teams. It is held by the Gujarat High Court that, mere production of the books of accounts or the documents along with return of income could not be said to be full and true disclosure of all material facts, more particularly when it was subsequently found, on the basis of credible information and tangible material that the petitioner was the beneficiary of the accommodation entries provided by the entry provider.

57. The Gujarat High Court also considered the judgment of the Supreme Court in a case of **Phool Chand Bajrang Lal Vs. Income Tax Officer** reported in (1993) 203 ITR 456 (SC), in which it was held by the Supreme Court that, acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment proceedings, the two situations are distinct and different. Thus,

where the transaction itself on the basis of subsequent information is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings cannot be said to be a disclosure of the 'true' and 'full' facts. It is held that, the income tax officer would have the jurisdiction to reopen the concluded assessment in such a case.

58. The Supreme Court also held in the said judgment that one of the purposes of Section 147, appears to be to ensure that a party cannot get away by wilfully making a false and untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing." It is held that, it would be travesty of justice to allow the assessee that latitude. The Gujarat High Court also considered the judgment of the Supreme Court in a case of **Ess Kay Engineering Co. (P) Ltd. Vs. Commissioner of Income Tax** reported in ***247 ITR 818 (SC)*** in which it was observed that the assessing officer is not precluded from reopening the assessment of an earlier year on the basis of fresh material discovered subsequently during the course of assessment of next assessment year. In our view principles laid down by the Gujarat High Court in a case of **Phool Chand Bajrang Lal Vs. Income Tax Officer** (supra) squarely apply to the facts of this case. We are in respectful agreement with the view expressed by the Gujarat High Court.

59. This Court in a case of **Chhagan Chandrakant Bhujbal Vs. Income Tax Officer** (supra) after adverting to the judgment of the

Supreme Court in various matters including in the case of CIT Vs. Kelvinator of India Ltd. (supra) has held that, the test to be applied is whether there was reason to believe that income had escaped assessment and whether the assessing officer has tangible material before him for the formation of that belief. Once tangible basis has been disclosed for re-opening the assessment, it would not be appropriate for this Court to prevent an enquiry whatsoever by the assessing officer. This Court was of the view in that case that the reasons indeed disclosed what was that tangible material. This Court also considered the arguments whether order passed by the Commissioner granting approval U/Sec. 151 was mechanical or not. This Court held that there was nothing to indicate that there was non application of mind on the part of the Commissioner while granting such approval. It is held that, merely because information was received at 5.47 p.m. and the notice was issued by 10.49 p.m. would not mean that there has been non application of mind.

60. In the facts of that case, this Court found that the petitioner had filed detailed information asked for by the assessing officer U/Sec. 142(1) and 143(2) of the I. T. Act and had participated in the assessment proceedings. This having been done, it was not open for the assessee to now contend that this Court should exercise its extra-ordinary jurisdiction and prohibit the authorities from proceeding further with the impugned notice. This Court accordingly did not interfere with the notice U/ Sec. 148 of the I. T. Act while exercising extra-ordinary jurisdiction under Article 226 of the Constitution of India and to

prohibit the authorities from proceeding further in the matter. In our view principles laid down by this Court in a case of **Chhagan Chandrakant Bhujbal Vs. Income Tax Officer** (supra) apply to the facts of this case.

61. In our view, the judgment of this Court in a case of **Ashok Manikrao Khopade Vs. Principal commissioner of Income Tax 1, Nasik and others** (supra) relied upon by the learned counsel for the petitioner would not assist the case of the petitioner in view of the fact that, the erstwhile assessing officer had not considered the material produced by the petitioner pursuant to the directions issued by the assessing officer regarding derivative transactions, but had passed the said order under CASS for a limited purpose to examine whether the share capital was genuine and from disclosed courses or not.

62. Similarly the judgment of this Court in a case of **Marico Ltd. Vs. The Assistant Commissioner of Income Tax-12(3)(2) and others** (supra) relied upon by the learned counsel for the petitioner would not assist the case of the petitioner on the ground that the said scrutiny assessment was under the CASS for limited purpose. In our view, there is no change of opinion by the assessing officer while issuing notice U/Sec. 148 of the I. T. Act as sought to be canvassed by the learned counsel for the petitioner. Since the said original assessment was under CASS for limited purpose, though the petitioner had produced certain documents in response to the query raised by the then assessing officer, those documents were not considered or in any event

were not required to be considered in view of the limited enquiry. There is no dispute about the proposition of law that notice U/Sec. 148 of the I. T. Act cannot be issued if the assessing officer has changed his opinion. Since there was no adjudication or consideration of the documents produced by the petitioner in case of derivative transactions in view of the assessment of the petitioner was under CASS for limited purpose, the notice issued U/Sec. 148 of the I. T. Act by the assessing officer would not amount to review of the earlier order on the same facts or same documents as sought to be canvassed by the learned counsel for the petitioner.

63. In our view, judgment of this Court in a case of **Aroni Commercials Limited Vs. Dy. Commissioner of Income Tax – 2** (supra) relied upon by the learned counsel for the petitioner also would not assist the case of the petitioner. There is no dispute about the proposition of law that the assessing officer has to rely upon the tangible material while issuing notice U/Sec. 148. The tangible material would mean factual material and not inference/opinion on material already in existence and considered during the assessment proceedings. However, in the facts of the present case, the assessing officer issued notice U/Sec. 148 of the I. T. Act based on the tangible material made available from the information given by the Income Tax Officer (I&C), Aurangabad through insight portal and on the basis of satisfaction of the assessing officer.

64. In our view, the judgment of this Court in a case of

Principal Commissioner of Income Tax 5 Vs. Shodiman Investments (P) Ltd. (supra) will also not assist the case of the petitioner. The facts before this Court in the said judgment were totally different. In that case this Court was of the opinion that at the time of reopening of the assessment, the assessing officer did not provide the reasons recorded in support of the reopening of the notice in its entirety to the assessee. This Court in the said judgment held that, mere obtaining of material by itself does not result in reason to believe that income has escaped assessment. In this case, the assessing officer formed the belief independently in the context of the material obtained when there was an escapement of income. The reasons recorded by the assessing officer indicated the material which formed the basis of reopening of assessment which would evidence linkage/nexus to the conclusion that income chargeable to tax has escaped assessment after applying his mind to the information received by him from the Income Tax Officer (I&C). The assessing officer was fully satisfied that the income chargeable to the tax had escaped assessment. This Court, therefore, cannot interfere with the satisfaction and reasonable belief derived after applying his mind by the assessing officer that income chargeable to assessment has escaped assessment.

65. In so far as judgment of this Court in a case of **Gagan Omprakash Navani Vs. Income Tax Officer** (supra) relied upon by the learned counsel for the petitioner is concerned, this Court in the said judgment has not considered the effect of assessment under CASS carried out for a limited purpose. In view of the

said scrutiny assessment under CASS for limited purpose, there was neither any discussion, nor any consideration of the details furnished by the petitioner on the derivative transactions. The earlier assessment order would clearly indicate that assessment was under CASS for limited purpose. In our view, in the said judgment this Court on the basis of facts formed an opinion that notice U/Sec. 148 of the I. T. Act issued by the assessing officer was mainly on the basis of change of opinion of the assessing officer. In our view, the said judgment of this Court in case of **Gagan Omprakash Navani Vs. Income Tax Officer** (supra) would not assist the case of the petitioner.

66. In so far as judgment of the Madhya Pradesh High Court in a case of **CIT Jabalpur Vs. M/s S. Goyanka Lime and Chemicals Ltd.** (supra) is concerned, the Madhya Pradesh High Court had interfered with the notice U/Sec. 148 I. T. Act on the ground that in that matter the Joint Commissioner Income Tax had only recorded, “Yes, I am satisfied” while granting approval U/Sec. 151 of the I. T. Act on the proposal submitted by the assessing officer for sanction before reopening of the assessment of the assessee. In this case, the Joint Commissioner of Income Tax has applied his mind on the proposal submitted by the assessing officer. The said judgment would not apply to the facts of this case.

67. In so far as the judgment of the Supreme Court in a case of **Assistant Commissioner of Income Tax Vs. Dhariya Construction Co.** (supra) relied upon by the learned counsel for the petitioner is

concerned, the Supreme Court rejected the special leave petition filed by the revenue on the ground that the department had sought information of the assessment based on the opinion given by the District Valuation Officer and held that the information of the District Valuation Officer per se was not an information for the purposes of reopening assessment under Section 147 of the I. T. Act. In this case, the information is given by the Income Tax Officer (I&C) and said information given formed the basis for issuing notice U/Sec. 148 of the I. T. Act after obtaining sanction from the Joint Commissioner of Income Tax, U/Sec. 151 of the I. T. Act. The said judgment in a case of **Assistant Commissioner of Income Tax Vs. Dhariya Construction Co.** (supra) would not assist the case of the petitioner.

68. In our view, the petitioner/assessee will have full opportunity to prove his case before the assessing officer in the proceedings of reopening of the assessment U/Sec. 148 of the I. T. Act. The opinion expressed by the assessing officer U/Sec. 148 of the I. T. Act is only a prima facie view taken by the assessing officer for the purpose of further enquiry which can be changed after giving an opportunity of being heard and to demonstrate as to how the belief of assessing officer that the income of the petitioner had escaped assessment was incorrect.

69. In our view, no case is thus made out for interference with the impugned notice issued by the assessing officer. The petition is devoid of merit.

70. We accordingly pass following order.

ORDER

- a. The writ petition is dismissed.
- b. Rule is discharged.
- c. There shall be no order as to costs.
- d. Parties to act on authenticate copy of this judgment.

[S. G. MEHARE, J.]

[R. D. DHANUKA, J.]

71. At this stage Mr. Chandak, learned counsel for the petitioner seeks continuation of the ad-interim protection granted by this Court for a period of four weeks.

72. In paragraph no.68 of this judgment this Court has taken a view that, the petitioner/assessee will have ample opportunity to prove his case before the assessing officer in the proceedings of reopening of the assessment U/Sec. 148 of the I. T. Act. The opinion expressed by the assessing officer U/Sec. 148 of the I. T. Act is only a prima facie view taken by the assessing officer for the purpose of further enquiry which can be changed after giving

an opportunity of being heard and to demonstrate as to how the belief of assessing officer that the income of the petitioner had escaped assessment was incorrect.

73. In view of the above clarification already issued in the paragraph no.68 of the judgment, we are not inclined to continue the ad-interim protection granted by this Court in favour of the petitioner. The request of the learned counsel for the petitioner for continuation of ad-interim protection is accordingly rejected.

[S. G. MEHARE, J.]

[R. D. DHANUKA, J.]

bsb/April 22