

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16917 of 2018****PURSHOTTAMBHAI BACHUBHAI PITRODA**

Versus

DY. COMMISSIONER OF INCOME TAX, CIRCLE - 3(2)

Appearance:

MR MANISH J SHAH(1320) for the Petitioner(s) No. 1

MRS MAUNA M BHATT WITH MR KARAN SANGHANI, ADVOCATES (174)
for the Respondent(s) No. 1**CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE ILESH J. VORA**Date : 15/03/2021****ORAL ORDER****(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)**

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following relief:-

“(A) This Hon'ble Court be pleased to call for the records of the proceedings, look into them and be pleased to issue a writ of certiorari or any other appropriate writ, order or direction quashing the impugned 148 notice at Annexure-B and the order disposing the objections at Annexure-I.

(B) This Hon'ble Court be pleased to issue a writ of mandamus or any other appropriate writ, order or direction asking the respondent not to proceed further in pursuance of section 148 notice at Annexure-B and the order rejecting the objections at Annexure-I.

(C) Pending the hearing and final disposal of this application, this Hon'ble Court be pleased to stay further proceedings in pursuance of section 148 notice at Annexure-B.”

2. The subject matter of challenge in the present litigation is to the notice of reopening of the assessment issued under Section 148 of the Income Tax Act, 1961 (for short 'the Act') for the A.Y. 2015-2016.

3. It is not in dispute that the return of income was filed for the year under consideration, but no scrutiny assessment under Section 143 (3) of the Act, was made. The return, in such circumstances, was processed under Section 143 (1) of the Act. The reasons assigned by the Assessing Officer to the writ applicant by way of communication dated 20.06.2018 are as under:-

Reasons for reopening :-

"1. The assessee by name Shri Purshottambhai B. Pitroda Prop. Of M/s. J.P.Fabricators had filed his return of income for A.Y. 2015-16 on 30.09.2016 and declared total income of Rs.2,76,15,370/-. The assessee is engaged in business of mining contractors in Prop. Concern of M/s. JP Fabricators.

2. The information has been received vide letter No.DCIT/CC-1(1)/Venus Government Resolution./InOAO/2017-18 dated 09.02.2018 from DCIT, Central Circle-1(1), Ahmedabad regarding involvement of M/s. J.P.Fabricators prop. Concern of Shri Purshottam B. Pitroda in accommodation entry amounting to Rs.1,40,00,000/- through Venus Group in F.Y. 2014-15 i.e. A.Y. 2015-16.

3. On analysis of information received, it is observed that a search u/s. 132 of the Income Tax Act, 1961 was conducted in the case of Venus Group of Ahmedabad on 10.03.2015 at various premises and incriminating documents were seized. Documents related to unaccounted cash transactions of the Venus Group were seized from the Terrace of Crystal Arcade, C.G.Road, Ahmedabad. On analysis of documents seized and their correction, it was found that unaccounted cash transactions were first recorded on cash vouchers. On the basis of recording made on these cash vouchers, the entries were recorded on the day cash book.

On the basis of close examination and collaboration with various documents seized during the course of search it emerges that cash vouchers. On the basis of recording made on these cash vouchers, the entries were recorded on the day cash book.

On the basis of close examination and collaboration with various documents seized during the course of search it emerges that (i) These expenses are incurred as per the dates mentioned on the bills/vouchers issued by the third party for availing goods/services by Venus group/Vaswani

family. (ii) The estimate mentioned on the seized cash vouchers are not the estimate but are actual expenses incurred and payments have been made to meet these expenses. (111) The amounts mentioned on the seized documents are in coded form and written by omitting two zeros i.e., 100 times less than the actual amount paid for these expenses. (iv) The dates mentioned on the seized documents are in coded form. They are written in such a way to represent 10 year back period from the actual date of availing goods/services. There are various transactions recorded in the seized documents including the unaccounted cash book seized from Terrace of Crystal Arcade C.G. Road Ahmedabad with the noting as 'Against EC'. The 'Against EC' transactions in the unaccounted day cash book have their relation with the receipt and payment of equivalent amount of RTGS in the bank account. For e.g., if there is cash receipt against EC, it indicates that equivalent amount of RTGS has been paid to the other party through banking channel. It is found that some of the names of 'Against EC' parties/entities along with the concerned person in whose name the 'Against EC' are noted in the seized documents (unaccounted cash book, cash voucher) are also found in the seized material from 901 sapphire Complex, C. G. Road Ahmedabad and these are correlated with evidences seized from Terrace of Crystal Arcade C.G. Road Ahmedabad. The names mentioned on these pages are also mentioned on the other seized evidences like cash voucher, summary sheet of Against EC transactions (page number 2 to 9 of Annexure A-129, seized from the Terrace of Crystal Arcade) and cash book related to 'Against EC' transactions. It has been found that 'Against EC' entries are the cash receipt and cash payment to various parties who are in the need of RTGS/cash. The Venus Group through its concerns like Sunderdeep Builders (SDB), Sanjeet Motor Finance Private Limited (SMFPL) and Greenstone Agro-Products & Infrastructure Private Limited is involved in the business of providing accommodation entries. From the correlation of the bank statements and the transactions recorded in the seized unaccounted cash book and supporting cash vouchers, various beneficiaries have been identified who have transacted in unaccounted cash while dealing with the entities of Venus Group. On this basis, it has been found that Shri Purshottambhai Bachubhai Pitroda Prop. of M/S. J.P.FABRICATORS, PAN : ABWPM6274B has been accepted accommodation entry of Rs.1,40,00,000/through cash payment to the Venus Group in / financial year 2014-15 i.e. A.Y.2015-16.

4. On verification of the information received, it is found that from seized cash voucher's page no. 4,5,48,64,128 & 131 of annexure A-85 which is related to cash paid 'Against EC' through Daskaka for J P Fabricator. The EC entry has been correlated with the bank account of Sanjeet Motor Finance Private Limited and it has been found that there are RTGS transfers to the account of Sanjeet Motor Finance Private

Limited from the account of J P Fabricator.

5. I have reason to believe that an amount of cash payment of Rs.1,40,00,000/- by M/s J P Fabricators to Venus Group from whom accepted accommodation entries of loan by assessee in books of account which, required to be taxed, has escaped assessment in the assessment year 2015-16 in question" By the reason of failure on the part of the assessee to not disclose fully and truly all material facts in return of income necessary for' assessment, hence, I am satisfied that this is a fit case for reopening u/s.147 of the Income Tax Act, 1961.

6. In this case a return of income was filed for the year under consideration but no scrutiny assessment u/s 143(3) of the IT Act was made.' Accordingly, In this case, the only requirement to initiate proceedings u/s 147 is reason to believe which has been recorded above.

It is pertinent to mention here that in this case the assessee has filed return of income for the year under consideration but no assessment was only processed as stipulated u/s 2(40) of the Act was made and the return of income was only processed u/s 143(1) of the Act. In view of the above, provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has escaped assessment.

This case is within four years from the end of the assessment year under consideration. Hence, necessary sanction to issue the notice u/s. 148 has been obtained separately from Addl. Commissioner of Income Tax as per the provisions of Section 151 of the IT Act, 1961."

4. The assessee lodged his objections to the aforesaid reasons, which are as under:-

"1. The learned AO stated in the reasons about the payment of cash to Sanjeet Motor Finance P. Ltd and the assessee has received through RTGS back. This is not correct.

2. The assessee has actually received loan during F.Y. 2011-12 & 2012-13 i.e. A.Y. 2012-2013 & 2013-2014. During A.Y. 2015-2016 the said loan is repaid in installments through RTGS. The assessee has not received any loan from Sanjeet Motor Finance P. Ltd. in cash. It appears that the AO has mainly relief upon the information received without verifying the books of accounts.

3. Since the assessee has paid no payment in cash to Sanjeet Motor Finance P. Ltd. the question of undisclosed income during A.Y. 2015-2016 does not arise, Therefore,

the reopening of the assessment is bad in law. The copy of accounts of Sanjeet Motor Finance P. Ltd. from the books of the assessee is enclosed.

5. The aforesaid objections came to be disposed of by the Assessing Officer vide communication dated 10.09.2018. The relevant paras 5 and 6 respectively reads as under:

“5. Regarding contentions raised by assessee vide para 4, 5, 6 of the letter dated 07.07.2018. It is submitted that that the contention raised by the assessee is on the factual proposition of the issue under consideration that will be examined at the time of reassessment proceedings after giving sufficient opportunities to the assessee. since this order is passed to dispose the objections raised for reopening by notice u/s 148. Further, Assessee will be granted proper opportunities for submitting any submission/clarification as per provision of the IT Act & principal of Natural Justice and assessment will be completed in the judicious manner. Further, assessee is also requested to cooperate in the re-assessment proceeding and submit its explanation/submission within time allowed by Assessing Officer so that Assessing Officer has enough time to consider its submission for the completion of re-assessment proceeding in judicious manner.

6. It is also to be noticed that as per section 147 of the I.T. Act, the Assessing “officer is expected to form only a prima facie opinion or belief regarding the applicability of the provision in question at the time of recording of reasons for reopening the assessment, and it is not necessary for Assessing Officer to conclusively establish that his belief or opinion is correct even on the merits. In view of the discussion and reasoning above, objections of the assessee against the re-opening of the assessment u/s.147 for AY 2015-16 on the above grounds are not found tenable and accordingly the objections raised by assessee are hereby rejected and therefore, treated as disposed off.”

6. In such circumstances referred to above, the writ applicant is before this Court with the present writ application.
7. Mr. Manish J. Shah, the learned counsel appearing for the writ applicant vehemently submitted that the order disposing of the

objections is nothing, but an eye wash and could be termed as erroneous in law. Mr. Shah would submit that it is the case of the department that an amount of cash to the tune of Rs.1,40,00,000/- paid by the assessee herein to the Venus Group is required to be taxed as the same has escaped assessment for the assessment year 2015-2016, which has been made the basis for reopening, is factually incorrect because M/s. J.P.Fabricators, in fact, had made the payment by cheque to the Venus Group, while the department records a factually incorrect reason that, M/s. J.P.Fabricators had made cash payment of Rs.1,40,00,000/- to the Venus Group. Mr. Shah vehemently submitted that, while disposing of the objections, the Assessing Officer very conveniently ignored to give any finding much less *prima facie* finding as to why there is no substance in what has been pointed out by the writ applicant in his objections. Mr. Shah further submits that, on receipt of the reasons, the noticee is entitled to file objections to the issuance of notice and the Assessing Officer is obliged to dispose of the same by passing a speaking order. According to Mr. Shah, the order in the case on hand disposing of the objections cannot be termed as a speaking order. Mr. Shah would submit that, though the Assessing Officer had an opportunity at the stage of considering the objections to verify the contention of the assessee, going to the root of the matter, the

Assessing Officer very conveniently turned a blind eye by taking a stance that the contention raised by the assessee being factual in nature, the same would be examined at the time of reassessment proceedings. Mr. Shah clarified that in the memorandum of the writ application, he has also raised the ground as regards the applicability of Section 147 of the Act in view of the insertion of Chapter-XIV-B w.e.f. 01.07.1995 with the heading “Special Procedure for assessment of search cases”. However, according to Mr. Shah, he will not be in a position to make good this submission in view of the judgment pronounced by this very Bench in the case of **Heval Navinbhai Patel Vs. Income Tax Officer, Ward 3(2)(2)**, [SCA/17557/2018 & allied matter, decided on 01.02.2021.

8. In such circumstances referred to above, Mr. Shah prays that there being merit in his writ application, the same be allowed and the impugned notice be quashed and set aside.
9. On the other hand, this writ application has been vehemently opposed by Mrs. Mauna M. Bhatt, the learned Senior Standing Counsel appearing for the revenue. Mrs. Bhatt would submit that, in the case on hand, the return was processed for the relevant assessment year under Section 143(1) of the Act. At this stage, when the Court is concerned with reopening of the assessment,

that too, in a case where the original return filed by the assessee was accepted without scrutiny, the material at the command of the Assessing Officer is sufficient to permit the process of reopening. Mrs. Bhatt seeks to rely on the decision of this Court rendered in the case of ***Kiran Ravjibhai Vasani Vs. Assistant Commissioner of Income Tax, Circle 5(3), reported in [408 ITR 303]*** to make good her submission that the 'reason to believe' cannot be equated with finally established fact that the income chargeable to tax having escaped assessment the additions will invariably be made and further, sufficiency of reasons enabling the Assessing Officer to form a specific belief would not be gone into. The relevant observations are as under:-

“7. At the outset, we may record three settled principles of law which would have some bearing in the present set of cases. First is that in a case where the return filed by the assessee is accepted under Section 143 [1] of the Act without scrutiny, since the Assessing Officer had not formed any opinion, principle of change of opinion would not apply. This has been made sufficiently clear in the case of Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers Private Limited, reported in [2007] 291 ITR 500 [SC] in which it was held and observed as under :-

“One thing further to be noticed is that intimation under section 143(1) (a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1) (a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1) (a) was mandatory. Thus, the legislative intent is

very clear from the use of the word intimation as substituted for assessment that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions intimation and assessment order have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes the computation of income, sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(l)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in *Apogee International Limited v. Union of India* [(1996) 220 ITR 248]. It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise."

8. These principles were reiterated by the Supreme Court in the latter judgment in case of *Deputy Commissioner of Income- Tax & Anr. vs. Zuari Estate Development & Investment Company Limited*, reported in [2015] 373 ITR 661 [SC].

9. *Despite this position, even in a case where the return of the assessee is accepted without scrutiny under Section 143 [1] of the Act, in order to reopen the assessment, the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment. This issue has been discussed at considerable length by this Court in the case of Inductotherm [India] Private Limited v. M. Gopalan, Deputy Commissioner of Income-Tax, reported in [2013] 356 ITR 481 [Guj].*

“13. Despite such difference in the scheme between a return which is accepted under section 143(1) of the Act as compared to a return of which scrutiny assessment under section 143(3) of the Act is framed, the basic requirement of section 147 of the Act that the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment is not done away with. Section 147 of the Act permits the Assessing Officer to assess, re-assess the income or re-compute the loss or depreciation if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year. This power to reopen assessment is available in either case, namely, while a return has been either accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3) of the Act. A common requirement in both of cases is that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment.

16. It would, thus, emerge that even in case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the Assessing Officer would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment. However, as held by the Apex Court in the case of Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd., ((supra)) and several other decisions, such reason to believe need not necessarily be a firm final decision of the Assessing Officer.”

10. *The requirement, thus for reopening of assessment, is “reasonable belief”. This expression is not synonymous with Assessing Officer having finally ascertained the fact by any legal evidence or conclusion. In this context, the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Private Limited [Supra] had observed as under :-*

“Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The

function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147 (a) [as the provision stood at the relevant time] fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)]; Raymond Woollen Mills Ltd. v. ITO (236) ITR 34 (SC)].”

11. In the case of *Raymond Woollen Mills Limited v. Income Tax Officer & Ors. [Supra]*, the Apex Court held and observed as under :

“In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was 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. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority. The appeals are dismissed. There will be no order as to costs.”

12. Lastly, it is well settled that the validity of the notice of reopening would be judged on the basis of reasons recorded by the Assessing Officer for issuance of such notice. It would not be permissible for the Assessing Officer to improve upon such reasons or to rely upon some extraneous material to support his action. Reference in this respect can be made to the decision of this Court in the case of *Aayojan Developers v. Income-tax Officer*, reported in [2011] 335 ITR 234 [Guj].”

10. Mrs. Bhatt invited the attention of this Court to few relevant averments made in the Affidavit-in-Reply filed for and on behalf of

the revenue, wherein, the following has been stated:-

"1. I am respondent in the present petition and having made myself conversant on the basis of the available records, able to depose to the statements and averments made herein.

2. At the outset, I most respectfully submit that the petition is filed at a pre-mature stage inasmuch as only a notice u/s.148 read with section 147 of the Income Tax Act ('the Act' for short) has been issued. In the event, the petitioner's aggrieved by the reassessment, alternative efficacious remedy is available by way of an Appeal to the CIT(A) and thereafter to the Tribunal as per the provisions of the Act. On this ground alone, I humbly submit that the petition is devoid of any merits and be summarily rejected.

3. The facts are that the assessee who is proprietor of J.P.Fabricators had filed his return of income for A.Y. 2015-16 on 30.09.2015 declaring total income of Rs.2,76,15,370/-. The assessee is engaged in business as Mining contractors in prop. concern of M/s. J.P.Fabricators.

4. Subsequently, an information was received vide letter dated 09/02/2018 from DCIT, Central Circle-1(1), Ahmedabad regarding involvement of M/s. J. P. Fabricators prop. Concern of Shri Purshottam B. Pitroda in accommodation entry amounting to Rs.1,40,00,000/- through Venus Group in F.Y. 2014-15 ie. A.Y.2015-16.

5. Upon analysis of information, it was observed that a search u/s 132 of the Income Tax Act, 1961 was conducted in the case of Venus Group of Ahmedabad on 10.03.2015 at various premises. Several incriminating documents were seized. Documents related to unaccounted cash transactions of the Venus Group were seized from the Terrace of Crystal Arcade, C G Road, Ahmedabad. On analysis of documents seized and their correlation, it was found that unaccounted cash transactions were first recorded on cash vouchers. On the basis of recording made on these cash vouchers, the entries were recorded on the day cash book.

Moreover, analysis of seized documents revealed that (i) these expenses were incurred as per the dates mentioned on the bills/vouchers issued by the third party for availing goods/services by Venus group/Vaswani family. (ii) The estimate mentioned on the seized cash vouchers were not the estimate but were actual expenses incurred and paid to meet these expenses. (iii) The amounts mentioned on the seized documents were in coded form and written by omitting two zeros i.e., 100 times less than the actual amount paid for these expenses. (iv) The dates mentioned on the seized documents were in coded form. They were written in such a way to represent 10 year back period from the actual date of availing goods/services.

There were various transactions recorded in the seized documents including the unaccounted cash book seized from Terrace of Crystal Arcade C.G. Road Ahmedabad with the noting as 'Against EC'. The 'Against EC' transactions in the unaccounted day cash book had their relation with the receipt and payment of equivalent amount of RTGS in the bank account. For e.g., if there was cash receipt against EC, it indicates that equivalent amount of RTGS was paid to the other party through banking channel. It was found that some of the names of 'Against EC' parties/entities along with the concerned person in whose name the 'Against EC' were noted in the seized documents (unaccounted cash book, cash voucher) also found in the seized material from 901 Sapphire Complex, C. G. Road Ahmedabad and these were correlated with evidences seized from Terrace of Crystal Arcade C.G. Road Ahmedabad. The names mentioned on these pages were also mentioned on the other seized evidences like cash voucher, summary sheet of Against EC transactions (page number 2 to 9 of Annexure A-129, seized from the Terrace of Crystal Arcade) and cash book related to 'Against EC' transactions. It was found that 'Against EC' entries were the cash receipt and cash payment to various parties who were in the need of RTGS/cash. The Venus Group through its concerns like Sunderdeep Builders (SDB), Sanjeet Motor Finance Private Limited (SMFPL) and Greenstone Agro-Products & infrastructure Private Limited was involved in the business of providing accommodation entries.

From the correlation of the bank statements and the transactions recorded in the seized unaccounted cash book and supporting cash vouchers, various beneficiaries were identified who had transacted in unaccounted cash while dealing with the entities of Venus Group. On this basis, it was found that Shri Purshottambhai Bachubhai Pitroda Prop. of M/S. J.P.FABRICATORS, PAN : ABWPM6274B had accepted accommodation entry of Rs.1,40,00,000/through cash payment to the Venus Group in financial year 2014-15 i.e. A.Y.2015-16.

7. Therefore, the Assessing Officer had reason to believe that an amount of cash payment of Rs.1,40,00,000/- by M/s J P Fabricators to Venus Group from whom it accepted accommodation entries of loan in books of account which required to be taxed, has escaped assessment in the assessment year 2015-16. By the reason of failure on the part of the assessee to disclose fully and truly all material facts in return of income necessary for assessment, the A.O. is satisfied that it is a fit case for reopening u/s.147 of the Income Tax Act, 1961.

8. It is submitted that in the present case return of income was filed for the year under consideration but no scrutiny assessment u/s 143(3) of the IT Act was made. Therefore, the only requirement to initiate proceedings u/s 147 is reason to believe which was recorded. Moreover, there was no opinion formed on the subject issue in the original assessment.

It is pertinent to mention here that in this case the assessee had filed return of income for the year under consideration but no assessment as stipulated u/s 2(40) of the Act was made and the return of income was only processed u/s 143(1) of the Act. In view of the above provisions of clause (b) of explanation 2 to section 147 are applicable to facts of this case. It is reiterated that in the present case in absence of any scrutiny assessment, no opinion is formed by the Assessing Officer at the original assessment stage. Further, the reopening is done within the period of 4 years from the end of the relevant assessment year. Therefore the only required is the satisfaction of A.O. that income chargeable to Tax has escaped assessment which is evident from the reasons recorded.

In this case reopening is done within four years from the end of the relevant assessment year under consideration. Hence necessary sanction to issue the notice u/s 148 was obtained separately from Addl. Jt. Commissioner of Income Tax as per the provisions of section 151 of IT Act, 1961.”

11. In such circumstances referred to above, Mrs. Bhatt prays that there being no merit in this writ application, the same may be rejected.
12. In response to the aforesaid Affidavit-in-Reply filed on behalf of the revenue, the assessee has filed rejoinder stating as under:

“4. In para 2 of the Affidavit-in-Reply, the Respondent states that the petition has been filed at a premature stage as only a notice u/s.148 has been issued and further states that in any event if the petitioner is aggrieved by the reassessment, the petitioner has an alternative efficacious remedy by way of appeal to C.J.T.(Appeals), and thereafter to the Income Tax Appellate Tribunal as per the provision of Income Tax Act, 1961. In this regard, I state that the contentions of the Respondent that the petition has been filed at a premature stage and there is alternative efficacious remedy are devoid of any merit and also contrary to the settled law that notice u/s.148 can be challenged before the Hon'ble jurisdictional High Court by preferring writ petition under article 226 of the Constitution of India. The reference may be made to the judgment of Hon'ble Supreme Court in case of Calcutta Discount Company (1961) 41 ITR 191 and the judgment of this Hon'ble Court in the case of Parixit Industries Ltd vs. ITO (2013) 352 ITR 349.

5. In para 3 to 6 of the Affidavit-in-Reply, the Respondent merely states the facts of the case and further repeats what

the Assessing Officer has stated in the reasons recorded. In this regard I state that I have made my stand clear in the petition filed before this Hon'ble Court and in the objections filed before the Respondent, and hence, to remain brief I again rely on my petition and objections raised before the respondent.

6. In para 7 of the Affidavit-in-Reply, the respondent states that M/s. J.P. Fabricators has made payment of Rs.1,40,00,000/- to Venus Group from whom J.P. Fabricators has accepted accommodation entry of loan in books of accounts. Further, the Respondent states that I have not disclosed fully and truly all material facts in the return of income, and hence, it is fit case . for reopening of assessment u/s.147 of the Income Tax Act, 1961. In this regard, I state and clarify that I have not accepted any loan from Venus Group in the year under consideration which I have already stated in my objections against the reasons and again emphasised in my petition before this Hon'ble Court. On the contrary, I have repaid by RTGS in AY 2015-16 (i.e. year of impugned 148 notice) the loan taken in Asst. Years 2012-13 and 2013-14. I further restate that I have not made any cash payment to Venus Group in the year under consideration as stated by the respondent in para 7. I deny the allegation that I have not disclosed fully and truly all material facts in the return of income necessary for the assessment.

7. In para 8 of the Affidavit-in-Reply, the Respondent states that as in present case, no scrutiny assessment u/s.143(3) has been made, the only requirement to initiate the proceeding u/s.147 is reason to believe and further states that no opinion was formed on the impugned issue. In this regard, I state that though no scrutiny assessment u/s. 143(3) has been made in the year under consideration but to initiate proceedings u/s.147 there must be valid reason to believe to initiate proceedings u/s.147, which is clearly absent in the present case as repayment by cheque of loan taken and accepted in earlier years can never become reason to believe for escapement of income in the year of repayment. I further state that in absence of valid reason to believe, provision of clause (b) of Explanation-2 to Section 147 is not applicable on the facts of the present case. I am under the bona fide belief that Additional/Joint CIT has granted mechanically sanction to the notice u/s. 148 of the IT Act, 1961 and mandate of provisions of Section 151 of the IT Act has not been followed in proper spirit and perspective."

13. Having heard the learned counsel appearing for the respective parties and having gone through the materials on record, the only question that falls for our consideration is, whether the impugned

notice of reopening issued under Section 148 of the Act should be quashed and set aside ?

14. Keeping the aforesaid legal principles in mind, we may revert to the facts of the case on hand.
15. The writ applicant is an individual assessee. For the assessment year 2015-16, the writ applicant filed his return of income on 30.09.2015 showing the total income of Rs.2,76,15,370/-. The writ applicant is in the business of mining contracts. It is the case of the department that it is in receipt of specific information that the writ applicant is involved in the accommodation entries through the Venus Group. It appears that a search under Section 132 of the Act was conducted in the case of Venus Group of Ahmedabad on 10.03.2015 and from the various premises owned by the Venus Group, few incriminating documents were seized. The stance of the writ applicant before the Assessing Officer while putting forward his objections to the impugned notice was that the writ applicant had actually received loan during the F.Y. 2011-12 and 2012-13 i.e. A.Y. 2012-13 and 2013-14. During the A.Y. 2015-16, the said loan was repaid in installments through the RTGS. It is also the stance of the writ applicant that he had not received any loan from Sanjeet Motor Finance Pvt. Ltd. and that he had not made any payment to Sanjeet Motor Finance Pvt. Ltd.

in cash. The writ applicant also requested the Assessing Officer to look into the copy of the accounts of Sanjeet Motor Finance Pvt. Ltd. from his books.

16. To the aforesaid, the Assessing Officer while disposing of the objections stated that the objections raised by the writ applicant would be examined at the time of reassessment proceedings. The Assessing Officer failed to assign any good reason why there was no merit in any of the objections raised by the writ applicant to the notice of the reopening. We are of the view that the Assessing Officer failed to exercise his jurisdiction vested in him for the purpose of dealing with the objections raised by the writ applicant.

17. In the aforesaid context, we may remind ourselves of the observations of the Supreme Court in the case of **GKN Driveshafts (India) Ltd. Vs. Income Tax Officer & Ors. [259 ITR 19]**, wherein, the Supreme Court observed thus:

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

years.”

18. Thus, on receipt of the reasons, the noticee is entitled to file his objections and the Assessing Officer, in turn, is obliged to dispose of the objections by passing a speaking order. Though the Assessing Officer had an opportunity at the stage of dealing with the objections to verify the contention of the writ applicant, which went to the root of the matter, he very conveniently ignored the issue by taking a stance that the factual proposition would be examined at the time of reassessment proceedings after giving sufficient opportunity to the assessee. Such stance of the Assessing Officer leads this Court to *prima facie* believe that the Assessing Officer had no good reason to issue the impugned notice for reopening. Had the Assessing Officer been more proactive, he would have realized upon looking into the objections raised by the writ applicant that issuing notice for the assessment year 2015-16 could be a mistake.
19. Therefore, the aforesaid aspects *prima facie* leave us to note that the Assessing Officer had no material to suggest that the writ applicant had made payment in cash to Sanjeet Motor Finance Pvt. Ltd. and thereafter, received the same amount back through the RTGS.
20. In the aforesaid context, we may also refer to and rely upon the observations made by a Coordinate Bench of this Court in the

case of ***Pal Gram Hindu Sarvajanik Trust Vs. Income Tax Officer (E)***, reported in ***[(2016) 19 taxmann.com 44 (Gujarat)]***.

We quote the relevant observations:

“14. Insofar as assessment year 2008-09 is concerned, there is an additional factor which renders the impugned notice unsustainable. As pointed out by the learned counsel for the petitioner, for assessment year 2002-03, the petitioner had filed computation showing surplus of Rs.95,917 only and for this it had filed Form No.10. Evidently, therefore, the Assessing Officer has not properly verified the facts from the record of assessment. This court in Sagar Enterprises v. Assistant Commissioner ((supra)) has held that when the officer concerned has taken into consideration an irrelevant fact, it cannot be said with certainty as to which factor would have weighed with him for the purpose of arriving at the belief that income chargeable to tax has escaped assessment and to what extent the decision is vitiated. The Assessing Officer, having taken into consideration facts which are contrary to the record for the purpose of forming the belief that income chargeable to tax has escaped assessment, for this reason also it cannot be said that he could have formed the belief that income chargeable to tax has escaped assessment so as to assume jurisdiction under section 147 of the Act.”

21. In view of the aforesaid, we are of the view that we should quash and set aside the order disposing of the objections passed by the Assessing Officer and remit the matter to the Assessing Officer for fresh consideration of the objections raised by the assessee.
22. In view of the above, this writ application succeeds in part. The order passed by the Assessing Officer disposing of the objections dated 10.09.2018 is hereby quashed and set aside. The matter is remitted to the Assessing Officer for fresh consideration of the objections in accordance with law. The Assessing Officer shall decide the objections in accordance with law by passing a speaking order. Let this exercise be undertaken within a period of

four weeks from the date of receipt of this order. In the event, if the order is adverse to the assessee, then it shall be open for the assessee to take r-ecourse available to him in law within a period of four weeks from the date of receipt of the fresh order that may be passed by the Assessing Officer.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

SUCHIT

