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2024:BHC:OS:1729-DB
MFFRA
J.



**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

WRIT PETITION NO. 804 OF 2015

Godrej Projects Development Pvt Ltd.)
A Company incorporated under the)
Provisions of the Companies Act 1956)
Having its registered office at Godrej)
Bhuvan, Home Street, Fort Mumbai 400001)Petitioner

V/s.

1. Income Tax Officer, 1(1)(4))
Having his office at 531A, Aayakar)
Bhavan, M. K. Road, Churchgate,)
Mumbai 400 020)

2. Addl. Commissioner of Income Tax)
Range 1 (1), having his office at)
Aayakar Bhavan, M. K. Road, Churchgate)
Mumbai 400 020)

3. Union of India, through the Secretary)
Department of Revenue, Ministry of)
Finance, North Block, New Delhi 110001)Respondents

Mr. P. J. Pardiwalla, Senior Advocate, a/w Mr. Jeet Kamdar, i/b Mr. Atul
Jasani for Petitioner.
Mr. Suresh Kumar for Respondents-Revenue

**CORAM : K. R. SHRIRAM &
Dr. NEELA GOKHALE, JJ.
RESERVED ON : 25th JANUARY 2024
PRONOUNCED ON : 1st FEBRUARY 2024**

JUDGMENT (PER K. R. SHRIRAM J.) :

1 Petitioner is in the business of development of real estate and
assessed to Income Tax. For A Y 2009-10, petitioner, filed its return of

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income on 7th September 2009. Petitioner's return of income was scrutinized under Section 143 (3) of the Income Tax Act 1961 (the Act) by respondent no.1 and an assessment order dated 21st December 2011 came to be passed. Prior to passing of assessment order, petitioner received two Communications dated 21st January 2011 and 12th August 2011 under Section 142(1) of the Act calling upon petitioner to provide certain documents and in particular, the details of shareholding pattern of the company. In the cash flow statement filed, petitioner had mentioned that it had received as share premium amount a sum of Rs.215,011,618/- which was used entirely for redemption of preference shares. In fact, in the communication dated 12th August 2011, petitioner was called upon to furnish "in case of securities premium / share premium received, justify charging of the same with supporting documentary evidences". Petitioner, in its reply dated 12th September 2011, stated that petitioner had issued 16730 equity shares of the face value of Rs.10/- each at premium of Rs.12841.86 per equity share to an entity based in Mauritius and that it has taken all necessary permission under Foreign Exchange Management Act (FEMA). Copy of Foreign Inward Remittance Certificate (FIRC) was also filed along with the valuation report. The Assessing Officer (AO) passed the assessment order, in which, of course he has not dealt with the issue of share premium but has accepted the return that petitioner had filed declaring a loss of Rs.87,362/-.

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2 On or about 29th March 2014, petitioner received a notice under Section 148 of the Act for reopening the assessment for AY 2009-10. The reasons for reopening reads as under:

“1. The assessee M/s Godrej Developers Pvt Ltd. Having PAN AACCG8316L is assessed to tax in this Charge. In this case, the return of income was filed on 07.09.2009 declaring total income at (-) ₹ 87,362/-. The assessment was completed u/s.143(3) of the Act on 21.12.2011 assessing the total income at (-) ₹ 87,362/-

2. A letter No. CIT-1/Mum/Share Premium/2013-14 dt. 27.03.2014 has been received in this Charge enclosing the letter No. CCIT/Coord/U-III/Share Premium/2013-14/1786 dt. 27.03.2014 for taking necessary action as the time limit of four years for issue of notice u/s. 148 will expire on 31st March, 2014. This letter also encloses a letter No. DIT(I&CI)E No. 233/ROC/2013-14 dt.26.03.2014 furnishing the data in respect of companies who have received share premium. during FY 2008-09. The name of the assessee is found in this list having received share premium of ₹ 21,48,44,318/-

3 From the records, it is seen that the authorised share capital of the assessee is 10,00,000/- and the paid up capital is ₹ 6,67,300/-. As per the information provided, during the year assessee has issued 16,730 shares of face value of ₹ 10/- and having total face value of ₹ 1,67,300/- at premium of ₹ 12,842/- per share on 09.07.2008. The total share premium received amounts to ₹ 21,48,44,338/- for the previous year relevant to A.Y. 2009-10. The assessee is an unlisted company and the nature of the share application received (the intrinsic value of the share in comparison to the excess premium received) was not substantiated. This amount was utilized for redemption of preference shares. The issue of share premium was not a subject matter of verification by the A.O. and therefore no opinion has been formed on the issue in original assessment u/s 143(3). At the same time, the assessee has also not filed complete details showing the nature of this share premium (justification for the excess share premium received in comparison to the intrinsic value of the share).

4. The assessee company is engaged in the business of property development. The assessee company is a subsidiary of M/s. Godrej Properties Ltd. It is seen from the records that the assessee is a new company incorporated on 15.03.2007 only. It is not clear that how can a newly corporate company with no proven track record command such a huge share premium in the open market, that too at 1284.2 times of the face value of a share. The intrinsic value of share is in fact much much less than what it has got. As per the Notes to Accounts the Earning Per Share is only ₹ 0.72 for the current A.Y. It is seen from the records that the assessee is a loss making company and the returned

income for the last two A. Years are as under:

<i>A.Y.</i>	<i>Returned Income</i>
<i>2007-08</i>	<i>(-) 9,234/-</i>
<i>2008-09</i>	<i>(-) 2,500/-</i>
<i>2009-10</i>	<i>(-)87,362/-</i>

5. Therefore I have reason to believe that there has been underassessment of income, received in the garb of share application money, has escaped assessment in terms of provisions of section 147 by reason of failure on part of assessee to disclose fully and truly all material facts necessary subject to the provisions of the I.T. Act for its assessment for the A.Y. 2009-10. Therefore, I am satisfied that this is a fit case to issue notice u/s. 148 r.w.s. 147 of the I.T. Act, 1961. The necessary administrative approval of the Addl. CIT, Rg. 1(1), Mumbai u/s. 151(1) has been obtained vide his letter No. Addl.CIT/Rg.1(1)/Appr.148/2013-14 dated 28.03.2014.”

3 Petitioner filed objections through its Chartered Accountant's letter dated 22nd July 2014. Respondent no.1 rejected the objections by an order dated 2nd February 2015. This petition, therefore, came to be filed and by an order dated 4th August 2015, Rule was issued. While granting Rule, the statement of Counsel for Revenue was recorded that the basic issue arising in the present petition is identical to one arising in Writ Petition No.418 of 2015. The order while admitting Writ Petition No.418 of 2015 passed on 4th August 2015 reads as under:

“Heard. Rule.

2 Challenge in this petition is to the reopening notice dated 30 March 2014 under Section 148 of the Income Tax Act, 1961 seeking to reopen the assessment for the Assessment year 2009- 2010.

3 The reasons in support of the impugned notice proceed on the basis that the Assessing Officer has reason to believe that the share premium amount received over and above the intrinsic value of shares, is income which has escaped assessment. It is not the case in the reasons to believe that what has been received as share premium is in fact not share premium. In fact the reasons do proceed on the basis that what has been received is indeed share premium. Prima

facie, we are of the view that the basis of the impugned notice stands concluded by the decision of this Court in Vodafone India Services Pvt. Ltd. Vs Union of India and others 368 ITR page 1(Bom) and also Central Board Circular No.2 dated 29 January 2015 that receipt of share premium being on a capital account and cannot be subjected to tax as income.

4 We were inclined to dispose of the petition at the stage of admission itself after hearing the parties. However, the learned Additional Solicitor General expressed his inability to waive service at this stage. In view of the above, adinterim reliefs in terms of prayer clause (d).

5 At the request of the parties, Petition is placed for final hearing in the week commencing from 19 October 2015.”

4 It is petitioner's case that the return of income having been thoroughly scrutinised and an order under section 143 of the Act having been passed, there is no fresh material for reopening and assessment proceedings are initiated on the same set of facts and, therefore, is based on mere change of opinion. It would amount to a review of the assessment order, which is impermissible.

It is also petitioner's case that the issue sought to be reopened is wholly without jurisdiction since the receipt of share premium at the time of fresh issue of shares by the company does not constitute income chargeable to tax under the Act so as to escape assessment.

It is also petitioner's case that the reasons recorded are vague indicating that there is no material on record whereof a valid belief could be formed that income chargeable to tax has escaped assessment and the reassessment proceedings have been initiated merely to make fishing and roving enquiries which is not permissible under the Act.

It is settled law that if, the jurisdictional conditions are not satisfied, the assessment cannot be reopened.

5. **Mr Pardiwalla submitted as under:**

(a) It is a well settled principle of law that the existence of a valid "reason to believe" is a sine qua non for the exercise of jurisdiction under section 147 of the Act. The courts have held that the expression "reason to believe" postulates a bonafide belief that there must exist objective reasons for that belief.

(b) The reasons as recorded do not disclose any tangible material on the basis of which a prudent person could have formed a reasonable belief and come to a conclusion that any income has escaped assessment as there is no live link between the reasons as recorded and the material on record for forming a belief that any income chargeable under the Act has escaped assessment.

(c) The issue of shares and the receipt of share premium were examined during the course of regular assessment proceedings by respondent no.1 by raising specific queries. Petitioner furnished all the details relating to the receipt of share premium and the issue of shares during the year in the course of the assessment proceedings and also justified the valuation by producing the report of a valuer. The statutory compliance documents relating to the issue of shares and receipt of share premium were filed during the course of the assessment proceedings with

respondent no.1. The same have been examined in the course of the assessment proceedings and hence, there is no fresh material coming into existence in relation to issue of shares and receipt of share premium. Therefore, the reopening is based on a mere change of opinion. Respondent no.1 has no power of review by engaging in a roving or fishing inquiry under the Act.

(d) The charge of tax under the Act is on income. The receipt of share premium on the issue of fresh shares is on capital account and constitutes a capital receipt, which is not chargeable to tax under the Act. There is no provision under the Act to tax the receipt of share premium for the assessment year under consideration. As held in ***Vodafone India Services (P) Ltd. Vs. Union of India***¹ the amount received on issue of shares is admittedly a capital account transaction not separately brought within the definition of income during the relevant period. Thus, capital account transaction not falling within the statutory explanation cannot be brought to tax.

As held in ***SLS Energy (P) Ltd. Vs. Income Tax Officer***² where a similar situation was considered and the Division Bench of this court came to a conclusion that there was neither any basis for the AO in his reason to believe that income had escaped assessment or there was been any tangible

1 (2014) 50 taxmann.com 300 (Bombay)

2 (2023) 154 tsxmann.com 400 (Bombay)

material, which would have otherwise given jurisdiction to reopen the assessment.

What is tangible material, the Division Bench of this court in *Export Credit Guarantee Corporation of India Ltd. Vs. Additional Commissioner of Income Tax*³ held is something which is not illusory, hypothetical or a matter of conjecture.

(e) A bare perusal of the reasons recorded indicates that it is an admitted position that the re-opening is initiated at the behest of the higher authority and is not based on the formation of a belief by respondent no.1. Respondent no.1 himself has not formed any belief that any income has escaped assessment. As held in *Principal Commissioner of Income Tax -5 Vs. Shodiman Investments (P) Ltd.*⁴ the settled position in law is that reopening notice has to be issued by the AO on his own satisfaction and not on borrowed satisfaction. The reasons indicate that the AO has not applied his mind but has merely issued the reopening notice on the basis of letter dated 27th March 2014 issued by him for taking necessary action as the time limit of four years for issue of notice u/s 148 of the Act will expire on 31st March 2014, and relied on a list in respect of companies who have received the share premium during AY 2009-10.

(f) The AO in the reasons to believe only says that when assessee has been incorporated only on 15th March 2007 and assessee company not

3 (2013) 30 taxmann.com 211 (Bombay)

4 (2018) 93 taxmann.com 153 (Bombay)

having proven track record, could not command such a huge share premium in the open market particularly when it has returned income of (-) Rs.87,362/-. According to the AO, there has been underassessment of income received in the garb of share application money. The AO has not considered the valuation report or the balance sheet of the company and, therefore, the basis to reopen is purely hypothetical or a matter of conjecture or speculative. The reasons to believe does not dispute that this is a share premium that the company received but seeks justification for charging the share premium over and above intrinsic value of the share.

6 **Mr. Suresh Kumar submitted as under:-**

(a) As held in *Commissioner of Income Tax Vs. Sophia Finance Ltd.*⁵ this would amount to cash credit under Section 68 of the Act and whenever the same is found credited in the books of account of assessee, then irrespective of the colour and nature of the sum received which is sought to be given by assessee, the ITO has the jurisdiction to enquire from assessee the nature and source of the amount.

(b) We have to reject this submission because this is not the basis on which the reasons to believe has been arrived at. It is settled law that the reasons to believe cannot be improved upon. In the affidavit in reply opposing the petition also there are no specific denials.

FINDINGS

7 **Petitioner's case can be split into three parts:-**

5 (1993) 70 Taxman 69 (Delhi)

a) The AO having raised the queries during the course of scrutiny assessment regarding share premium charged and petitioner having explained vide its replies, the issue of share premium, was the subject of consideration during the assessment proceedings even though, it has not been discussed in the assessment order and therefore, re-opening on the same issue of share premium is based on change of opinion.

b) Whether the reasons to believe that income has escaped assessment for exercising power under Section 147 of the Act has to be that of the AO and not based on dictates of superior officers. Since admittedly, it is based on dictates of superior officers respondent no.1 has himself not formed any belief that any income has escaped assessment.

c) Whether the receipt of share premium by issuing fresh shares is on the capital account and constitutes a capital receipt which is not chargeable to tax under the Act?

8 Admittedly, petitioner's case for AY-2009-10 was taken up for scrutiny. During the course of scrutiny assessment, petitioner was called upon by respondent no.1, vide letters dated 21st February 2011 and 12th August 2011, to provide for certified copy of the annual report alongwith balance sheet, profit and loss account schedule and annexures, details of shareholding patterns of the company and securities premium / share premium received and to justify charging of the same with separate documentary evidences. Petitioner, vide its letters dated 19th July 2011 and

12th September 2011, provided all the documents and materials. In its letter dated 12th September 2011, petitioner also stated that it had charged share premium of Rs.12841.86 per equity share of face value of Rs. 10/- each on 16,730 equity shares that was issued to a Mauritius resident. Petitioner also provided the documents relating to Foreign Inward Remittance Certificate and forms filed with RBI. After considering all those documents, the assessment order dated 21st December 2011 came to be passed.

9 As held by the Division Bench of this Court in ***Aroni Commercials Ltd. Vs. Deputy Commissioner of Income Tax2(1)***⁶ the settled law is once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the AO while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. The only requirement is that the AO ought to have considered, the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. In the case at hand, the AO having raised a query and the petitioner having replied to it, it follows that the query raised was subject of consideration of the AO while passing the assessment order dated 21st December 2011. In our view, the re-opening of assessment by the impugned notice is merely on the basis of change of opinion of the AO from that held earlier during the course of assessment proceedings and this change of

6 (2014) 44 taxmann.com 304 (Bombay)

opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment. Paragraph 14 of the *Aroni Commercial Ltd.* (Supra) reads as under:

14) We find that during the assessment proceedings the petitioner had by a letter dated 9 July 2010 pointed out that they were engaged in the business of financing trading and investment in shares and securities. Further, by a letter dated 8 September 2010 during the course of assessment proceedings on a specific query made by the Assessing Officer, the petitioner has disclosed in detail as to why its profit on sale of investments should not be taxed as business profits but charged to tax under the head capital gain. In support of its contention the petitioner had also relied upon CBDT Circular No.4/2007 dated 15 June 2007. (The reasons for reopening furnished by the Assessing Officer also places reliance upon CBDT Circular dated 15 June 2007). It would therefore, be noticed that the very ground on which the notice dated 28 March 2013 seeks to reopen the assessment for assessment year 2008-09 was considered by the Assessing Officer while originally passing assessment order dated 12 October 2010. This by itself demonstrates the fact that notice dated 28 March 2013 under [Section 148](#) of the Act seeking to reopen assessment for A.Y. 2008-09 is based on mere change of opinion. However, according to Mr. Chhotaray, learned Counsel for the revenue the aforesaid issue now raised has not been considered earlier as the same is not referred to in the assessment order dated 12 October 2010 passed for A.Y. 2008-09. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under [Section 143\(3\)](#) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under [Section 148](#) of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original assessment proceedings leading to an order dated 12 October 2010. It would therefore, following that the

reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment.”

(emphasis supplied)

10 In *SLS Energy Ltd.* (Supra) the reasons for reopening were similar. In that case also the balance sheet indicated that the assessee had issued paid up capital of Rs. 77,00,000/- and Charged Security Premium at Rs. 6,79,32,00,000/- during the year under consideration. According to the AO an analysis of the details and information of the balance sheet shows that Share Premium and value of the shares cannot be justified on the basis of 'intrinsic valuation of shares' and 'Net Asset Value Method', *i.e.*, Share Premium charged is found excessive as the worth of the company is not found in that extent. Hence, there was no justification for issue of shares at such a huge premium. In that case also, petitioner had argued that the very basis for reopening was misconceived inasmuch as, the receipt of premium on issuance of shares was not 'receipt of income', but was a 'capital receipt', and, therefore, could never become the basis for reopening on the ground that income had escaped assessment. It was argued that the definition of income as then prevailed did not include capital receipts. It was also submitted that there was no tangible material with the AO which would give him reasons to believe that income has escaped assessment and that the AO was in fact trying to conduct a roving enquiry, which is therefore without jurisdiction. The court came to a finding that the receipt of share capital

including the premium was on capital account and gave rise to no income and, therefore, there was neither any basis for the AO for reason to believe that income had escaped assessment, nor was there any tangible material which would have otherwise given jurisdiction to re-open the assessment even when the re-opening was sought to be made within a period of four years. Paragraphs 24 to 30 of *SLS Energy* (Supra) read as under:

“24. In the present case neither the reasons recorded nor the order disposing of the objections in any manner reflects that there was any doubt with regard to existence of the entities in whose favour the allotment of shares had been made upon receipt of share money as also the amount of premium paid on the said shares.

25. By virtue of the impugned notice dated 23rd March, 2015, the assessing officer seeks to reopen the assessment for the assessment year 2010-11, which is within a period of four years. Admittedly, no scrutiny assessment under section 143(3) of the Act has taken place in the present case. Even in a case where no scrutiny assessment has taken place, reassessment can be ordered only if the assessing officer has reason to believe that income chargeable to tax had escaped assessment. The Apex Court in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd. [2007] 161 Taxman 316/291 ITR 500 (SC) has clearly held that notice for reopening an assessment under section 148 of the Act could only be justified if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment.

26. The reason for the assessing officer to reopen the assessment is his belief that the share premium charged by the Petitioner was excessive and further that the transaction of the so called share premium was not established. In other words, the assessing officer apart from questioning the excessive share premium also is doubting the transaction, whereby the share premium had been received. Whether in the aforementioned facts the assessing officer could be said to have his reason to believe that income had escaped assessment and whether the material with the said assessing officer could be said to have any tangible material justifying the reopening is the issue that falls for our consideration.

27. There is no dispute that in Vodafone India Services (P.) Ltd.'s case (supra) it stands concluded that receipt of share capital including the premium was on capital account and gave rise to no income. The amendments incorporated in the definition of income under section 2(24)(xvi) and Section 56(2)(viib) of the Act were amendments which were to apply only from 01st April, 2013 i.e. assessment year 2013-14. The amendment to Section 68 by incorporation of the first

proviso also came into effect by virtue of the Finance Act, 2012 w.e.f. 1st April, 2019 and was to apply for the assessment year 2013-14 and onwards, and, therefore, since the amendments were not applicable to the assessment year in question i.e. 2010-11, there would be no basis for the assessing officer's reason to believe that income had escaped assessment for the said assessment year. From the record it can also be seen that the preference shares allotted to M/s. Pony Infrastructure & Contractors Ltd. (formerly known as M/s. Dynamix Balwas Infrastructure Pvt. Ltd.) was assessed under section 143(3) of the Act and an order of assessment dated 22nd February, 2013 was passed.

28. Reassessment proceedings were initiated against the said entity and the appeal allowed vide order dated 11th October, 2018. We therefore agree with the contention of Mr. Shridharan, learned Counsel for the Petitioner that this was not a case where there could be any suspicion with regard to the factum of transaction having taken place between two companies. In any case the assessing officer appears to have not been in doubt regarding the transaction having taken place between the said two companies with regard to allotment of preference shares and receipt of the share premium amount inasmuch as what was sought to be questioned, was not in fact the transaction, but only the receipt of the share premium amount which was said to be excessive and much beyond the intrinsic value of the shares of the Petitioner company.

29. This can be guessed from the fact that the assessing officer had only flagged the share premium amount of Rs.6,79,32,00,000/- which according to him was chargeable to tax that had escaped assessment and did not question the amount of Rs. 68 lakhs received by the Petitioner company representing the value of Rs. 68 lakhs shares of the face value of rupee 1 per share. Had the Assessing Officer any real doubts regarding the transaction itself, then there was no justification for him to question only the transaction with regard to the extent of the amount of premium charged for the said shares.

30. We therefore of the opinion that there was neither any basis for the assessing officer for his reason to believe that income had escaped assessment nor was there any tangible material which would have otherwise given jurisdiction to reopen the assessment even when the reopening was sought to be made within a period of four years."

(emphasis supplied)

11 Even in the case at hand, the reasons recorded for reopening does not dispute that during the year assessee had issued 16730 shares of face value of Rs.10/- at premium of Rs.12842/- per share. The AO is only questioning the excessive share premium but not doubting the transaction itself

whereby the share premium had been received. On this ground alone, the impugned notice and order on objections have to be quashed and set aside.

12 In any event, the amendments incorporated in the definition of income under section 2(24)(xvi) and Section 56(2)(viib) of the Act were amendments which were to apply only from 1st April, 2013, *i.e.*, assessment year 2013-14. The amendment to Section 68 of the Act by incorporation of the first proviso also came into effect by virtue of the Finance Act, 2012 w.e.f. 1st April, 2019 and was to apply for the assessment year 2013-14 and onwards. Therefore, since the amendments were not applicable to the assessment year in question, *i.e.*, 2009-10, there would be no basis for the AO to form a reason to believe that income had escaped assessment for the said assessment year.

13 Moreover, if one considers the reasons recorded, the AO simply says how a company with no proven track record incorporated on 15th March 2007 command such a huge share premium. The AO has not bothered to read the balance sheet or the valuation report. AO's reason to believe, therefore, is purely hypothetical and a matter of conjecture. That cannot be a tangible material for arriving at reason to believe escapement of income. In view thereof, the jurisdictional requirement of Section 147 of the Act also is not fulfilled and hence, the proposed reopening is without jurisdiction.

14 Further, as held in *Shodiman Investments (P) Ltd.* (Supra) there is clear breach to the settled position in the law that reopening notice has to

be issued by the AO on his own satisfaction and not on borrowed satisfaction. Admittedly, notice has been issued in view of a communication received from his superior officer. It is rather obvious that the AO has not applied his mind and arrived at his own satisfaction but on borrowed satisfaction. Paragraphs 12 to 14 of *Shodiman Investments (P) Ltd.* (Supra) read as under:

“12. The re-opening of an Assessment is an exercise of extra-ordinary power on the part of the Assessing Officer, as it leads to unsettling the settled issue/assessments. Therefore, the reasons to believe have to be necessarily recorded in terms of Section 148 of the Act, before re-opening notice, is issued. These reasons, must indicate the material (whatever reasons) which form the basis of re-opening Assessment and its reasons which would evidence the linkage/nexus to the conclusion that income chargeable to tax has escaped Assessment. This is a settled position as observed by the Supreme Court in S. Narayanappa v. CIT [1967] 63 ITR 219, that it is open to examine whether the reason to believe has rational connection with the formation of the belief. To the same effect, the Apex Court in ITO v. Lakhmani Merwal Das [1976] 103 ITR 437, had laid down that the reasons to believe must have rational connection with or relevant bearing on the formation of belief i.e. there must be a live link between material coming the notice of the Assessing Officer and the formation of belief regarding escapement of income. If the aforesaid requirement are not met, the Assessee is entitled to challenge the very act of re-opening of Assessment and assuming jurisdiction on the part of the Assessing Officer.

13. In this case, the reasons as made available to the Respondent-Assessee as produced before the Tribunal merely indicates information received from the DIT (Investigation) about a particular entity, entering into suspicious transactions. However, that material is not further linked by any reason to come to the conclusion that the Respondent-Assessee has indulged in any activity which could give rise to reason to believe on the part of the Assessing Officer that income chargeable to tax has escaped Assessment. It is for this reason that the recorded reasons even does not indicate the amount which according to the Assessing Officer, has escaped Assessment. This is an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax has escaped assessment.

14. Further, the reasons clearly shows that the Assessing Officer has not applied his mind to the information received by him from the DDIT (Inv.). The Assessing Officer has merely issued a re-opening notice on the basis of intimation regarding re-opening notice from the

DDIT (Inv.) This is clearly in breach of the settled position in law that re-opening notice has to be issued by the Assessing Office on his own satisfaction and not on borrowed satisfaction.

(emphasis supplied)

15 In the circumstances, the Rule is made absolute in terms of prayer clause (a) which reads as under:

“(a) this Hon’ble Court may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records of the Petitioner’s case and after examining the legality and validity thereof quash and set aside the undated notice (received on 29th March 2014) (Exhibit A) issued by respondents under Section 148 of the Act seeking to reopen the assessment for the assessment year 2009-10 and the order rejecting the objections (Exhibit O) dated 2nd February 2015.”

16 No order as to costs.

(Dr. NEELA GOKHALE, J.)

(K. R. SHRIRAM, J.)