WP-4046-2015

(MALAY SHRIVASTAVA Vs ***THE DEPUTY COMMISSIONER)***

21-04-2016

HIGH COURT OF MADHYA PRADESH PRINCIPAL SEAT AT JABALPUR

W.P. No.4046/2015

Malay Shrivastava

Vs.

The Deputy Commissioner, Income Tax & Ors.

Present: Honâ□□ble Shri Rajendra Menon, J. & Hon'ble Shri S. K. Palo, J.

Shri Kishore Shrivastava, learned Senior Counsel with Shri A. P. Shrivastava and Shri Kunal Thakre, for the petitioner.

Shri Sanjay Lal, learned counsel for the respondents.

O R D E R

(..../4/2016.)

Per: Rajendra Menon, J:

In this writ petition filed by the petitioner assessee under Article 226 of the Constitution, challenge is made to an order Annexure P/1 dated 23.7.2014 passed by the Deputy Commissioner of Income Tax, Bhopal, issuing a notice under Section 148 of the Income Tax Act, 1961 for reopening of assessment for the assessment year 2009-2010 by virtue of the provisions conferred under Section 147 of the Income Tax Act. Challenge are also made to an order dated 19.3.2015 whereby written objection filed by the petitioner to the notice has been rejected and another order issued under Section 142(1) on 19.3.2015 directing the petitioner to submit documents and other material for conducting further assessment proceedings.

2. Facts in brief go to show, that for the assessment year 2009-2010, petitioner submitted his return of income on

24.7.2009, for which he was issued acknowledgment No.03231008092. Records further indicates that at the relevant time petitioner was working as Commissioner, Department of Urban Administration, Government of M.P., Bhopal. It is the case of the petitioner that he worked as Commissioner in the Department of Urban Development and Administration between 13.1.2006 to 11.12.2007, thereafter was posted on deputation with the Government of India, he was relieved from the post of Commissioner, Urban Administration on 11.12.2007 vide Certificate Annexure P/8. Thereafter, he remained on deputation and returned back to his parent department in the State of M.P. only in 2014, where he is presently holding the post of Principal Secretary, Transport Department. However, it is the case of the petitioner that he received the impugned notice Annexure P/1 on 27.3.2014 issued under Section 148 of the Income Tax Act, wherein respondent No.1 indicated to the petitioner that he has â□□reasons to believeâ□□ that petitioner's income with respect to assessment year 2009-2010 has escaped assessment within the meaning of Section 147, therefore, it was proposed to assess/ re-assess the income for the said assessment year. The petitioner was required to submit his return in the prescribed form for the said purpose. In response to the same petitioner vide letter Annexure P/2 on 15.4.2014, requested for certain material. It is said that the petitioner did not receive any reply to the same and when the petitioner was awaiting reply to Annexure P/2, so also the reasons for re-opening of assessment, he received another notice on 13.1.2015 under Section 142(1) calling upon to submit his return to the impugned action/ re-opening the assessment. It

is said that vide Annexure P/4 dated 15.1.2015 petitioner responded and pointed out that originally return has already been filed by him on 24.7.2009 under Section 139(1) for the assessment year 2009-2010 and, therefore, he requested that the same be treated compliance of the notice under Section 148. The petitioner also requested for supply of copies of documents based on which the re-opening of assessment was ordered. It is said that vide Annexure P/5 on 15.1.2015 the reasons for re-opening were communicated to the petitioner and thereafter, petitioner was directed to appear in the office of respondent on 2.2.2015 vide notice Annexure P/6 for getting clarification on certain points. However, on being furnished with the reasons recorded for re-opening of assessment under Section 148 on 15.1.2015, petitioner raised various objections and when his objections were also rejected, the same has been challenged in this writ petition.

3. According to the petitioner in the two page, reasons furnished to the petitioner for reopening of assessment, it is indicated that the investigation wing of the Income Tax department conducted a search and seizure operation on 21.7.2008 in the premises of one Shri Mukesh Sharma and as a consequence of the search operation a large number of documents including official papers, notings, correspondence related to the department of urban administration, Government of M.P. were found and it is alleged that based on these documents, it was established that Shri Mukesh Sharma was a liasioning agent for award of contract by the department of Urban Administration, Government of Madhya Pradesh and in the award of contracts to two companies namely M/s Nagarjuna Construction Co. Ltd. and M/s Simplex

Infrastructure Ltd., certain loose papers seized in the search operation bearing pages No.55 and 56 and page No.122 of LPS 21 and LPS 26 respectively, indicates that illegal gratification was paid by M/s Nagarjun construction Co. Ltd. to the petitioner. It was said that one Shri A. G. K. Raju, a Director with the Contractor M/s Nagarjuna Construction had admitted about payment of illegal gratification. It was indicated in the reason supplied that in LPS No.1 page 155 in the back side depicts the figure of â□□267â□□ which corresponds to the value of the contract awarded to M/s Nagarjuna Construction Co. Ltd. wherein the following notings were made :-

267 M 6% 16.02
267 P 1.25% 3.33
267 C Â½ % 1.335
267 M 1% 2.67
267 - Â½ % 1.335

4. It was said that listing as indicated herein above depicts the vertical chain of Government hierarchy involved in the allotment of Indore Sewage Project and in this, the figure â□□Mâ□□ denotes for Minister of Urban Development, â□□Pâ□□ the Principal Secretary, Urban Development Department, â□□Mâ□□ the Mayor and â□□Câ□□ is said to be referring to the Commissioner, for Urban Administration. It was further said that in the search conducted in the premises of Mr. Mukesh Sharma, certain documents have further been seized which goes to show that illegal gratification were also paid to the petitioner by M/s Simplex Infrastructure. Indicating that the Deputy Commissioner,

Income Tax has reasons to believe that the petitioner as Commissioner, Urban Administration Development in the year in question, received illegal gratification to the tune of Rs.2.21 Crore which has escaped assessment for the assessment year 2009-2010 the notice was issued. Petitioner denied each and every allegations leveled and raised various grounds in a detailed written objection submitted. The petitioner also sought for documents pertaining to the forming of the opinion which was forwarded to the petitioner vide Annexure P/10 on 2.2.2015 and the documents forwarded to the petitioner are at pages 39, 40, 41 and 42 of the paper book and these documents indicates the hierarchy in the Government as indicated herein above, the payments made and the loose papers also depicts some calculation without any name or other particulars mentioned. According to the documents produced along with Annexure P/10 the only material to implicate the petitioner is the figure â□□Câ□□ appearing in the documents against which a payment of 0.50% is shown and this figure â□□Câ□□ is said to be denoting â□□Commissioner for Urban Administrationâ□□. The petitioner vide Annexure P/11 submitted a detailed reply, wherein it has been pointed out that he was the Commissioner for Urban Administration in the department in question and held charge between January 2006 to December 2007. On 11.12.2007, relinquished his charge and proceed on Central deputation to New Delhi and thereafter returned back to Bhopal (i.e. Government of M.P.) only in December 2014. It was said that during the period 2008-09 when the contract was awarded the petitioner was not posted in the State of M.P. During the entire

period for the financial year 2008-09 when the contract was awarded, the petitioner was on deputation to the Government of India, Ministry of Power, New Delhi. Thereafter, based on the information collected, the petitioner indicates various facts to say that the contract in question was not awarded by the Department of Urban Administration and Development. The contract was for a work given by the Indore Municipal Corporation, as per the Government notification issued in the matter of delegation of power under the provisions of Section 37 read with Section 73 and Section 433 of the M.P. Municipal Corporation Act, 1956, the Mayor-in-Council has been delegated with the full financial power for projects pertaining to Jawahar Lal Nehru Nation Urban Renewal Mission and as the Contract in question is awarded by the Municipal Corporation of Indore after due approval of the Mayor-in-Council, it was said that petitioner had no role to play in award of the contract. Petitioner with facts and figure submitted a detailed objection and when the objection was not decided and notices issued for proceeding with the matter, this writ petition was filed. However, while the writ petition was pending vide Annexure P/13 dated 19.3.2015 objections of the petitioner were rejected and it had been held that petitioner was a key person engaged in controlling the decision making process for award of contract to both these companies and as he was the intermediary between the Municipal Corporation and the Urban Administration Department based on the notings made in the papers seized and reproduced herein above, it is held that figure â□□Câ□□ appearing in the slip denotes the Commissioner, Department of Urban Administration and as petitioner has received illegal gratification

which is nothing but income for the assessment year and as the same has escaped assessment, the proceeding has been held.

5. Shri Kishore Shrivastava, learned Senior Counsel appearing for the petitioner took us into the factual aspects of the matter and pointed out that the contract in question for which the so called illegal gratification is said to have been paid was awarded by the Indore Municipal Corporation. It was the Indore Municipal Corporation which invited the tender on 28.6.2007. As a single tender was received, in response to this notice it was not opened and on 1.10.2007 the second tender was invited by the Indore Municipal Corporation. Initially the date for submission of tender was 27.11.2007, the tender was opened on 24.12.2007 much after the petitioner was transferred on 11.12.2007. It is said that the tender was finalized on 16.1.2008 in the presence of the Minister, Department of Urban Administration and Development, Mayor of Indore, Principal Secretary, Department of Urban Administration and Development, Commissioner, Municipal Corporation, Indore, Chief Engineer, Directorate of Urban Administration and Development, Project Officer and minutes of the meeting has been filed at page 53 of the paper book to say that decision for award of contract was taken much after the petitioner had gone on deputation and the contract itself was finalized after the petitioner had gone on deputation. Referring to the tabulated data available at pages 44, 45 and 46 of the paper book and the documents pertaining to award of the contract, Shri Kishore Shrivastava emphasized mainly on two points:- (1) That the entire contract was awarded for a work in the Indore Municipal Corporation.

(2) The award of the work was done after the petitioner was transferred on deputation to the Government of India and even in the decision making process, there is not a single piece of documents or evidence to show that petitioner ever participated. That apart, Shri Shrivastava by referring to the delegation of power under the M.P. Municipal Corporation Act, tried to point out that even the decision to award the contract is taken by a different authorities wherein the petitioner was not at all involved. He further invited our attention to the documents received by him under the RTI Act, the documents filed by the Revenue to point out that except for certain loose papers filed by the petitioner and by the respondents as Annexure R/1, R/2, R/3 and R/4 showing the figure 267, the alphabet â□□Câ□□ and Â½ % written in the loose papers, there is nothing to indicate that the petitioner was in anyway connected with any award of the contract or the work to the Contractors in question. Shri Shrivastava also invited our attention to Annexure P/15 dated 12.2.2015, the communication made by the Deputy Commissioner of Income Tax to the Principal Secretary, Department of Urban Administration, whereby the Income Tax Department sought for certified copy of the relevant file, figures, order sheet, minutes of the meeting with regard to award of the contract to both the companies M/s Nagarjuna Construction Co. Ltd. and M/s Simplex Infrastructure Ltd., reply of the Government to the same filed as Annexure P/17 dated 18.2.2015 and 19.2.2015, wherein the Government had informed the Income Tax Department that the entire contract is awarded by the Indore Municipal Corporation, records are with the Indore Municipal Corporation, the Urban

Administration and Development Department in the Government of M.P. has got nothing to do with the award of contract, therefore directions were issued by Government of M.P. through the Commissioner, Municipal Corporation to handover all the documents to the Income Tax Department. Taking us through all these aspects of the matter, Shri Kishore Shrivastava argued that in this case there is no document or evidence available on record to show that petitioner was in any way connected with award of the contract in question and therefore, allegations against the petitioner that he has received illegal gratification for award of contract is nothing but a suspicion based on the *ipse dixit* of the officers concerned who have misconstrued certain figures noted in the loose papers to link it with the petitioner.

6. Shri Kishore Shrivastava invited our attention to the provisions of Section 147 and 148 of the Income Tax Act and argued that under Section 147 income escaping assessment can be subjected to assessment or re-assessment, if the Assessing Officer has â□□reasons to believeâ□□ that certain income chargeable to tax has escaped assessment for the assessment year. He emphasized that the words appearing in the said section particularly â□□has reasons to believeâ□□ was subject matter of interpretation by the Supreme Court and various High Courts and difference has been drawn with regard to requirement of â□□reasons to suspectâ□□ and â□□reason to believeâ□□. He says that mere suspicion and surmises of the Officer cannot be a ground for holding it to be â□□reasons to believeâ□□. He argues that the material available with the Income Tax Officer to form the opinion does not come within the category of â□□reasons to believeâ□□ as the material is

not co-related to the assessee, the conduct and work of the assessee and has no nexus with the petitioner, the assessee against whom the impugned action is proposed to be taken under the statutory provisions. He took us through the following judgments : **Calcutta Discount Co. Ltd. Vs. Income Tax Officer (1961)2 SCR 241; Union of India Vs. Messrs. Rai Singh Dev (1973)3 SCC 581; The Parashuram Pottery Works Vs. Income Tax Officer â (1977)1 SCC 408; M/s Piyush Infrastructure India Vs. ACIT â 2012 SCC Online ITAT 13463; GKN Driveshafts (India) Ltd. vs. Income Tax Officer â (2003)1 SCC 72; Suraj Mall Mohta Vs. A. V. Vishvanatha Sastri â (1955)1 SCR 448; Central Bureau of Investigation vs. V. C. Shukla â (1998)3 SCC 410; Commissioner of Income Tax Vs. Shri Girish Chaudhary â [2008] 296 ITR 619 (Del); Additional Commissioner of Income Tax vs. Lata Mangeshkar -[1974]97 ITR 696 (Bom); Income Tax Officer Vs. Lakhmani â 103 ITR 437 (SC); Madhya Pradesh Industries Vs. ITO 57 ITR 637 (SC); Madhya Pradesh Industries vs. Income Tax Officer â 77 ITR 268 (SC); Sheo Nath Singh Vs. Appellate Assistant Commissioner â 82 ITR 147 (SC); Arjun Singh Vs. Additional Director Income Tax â (2012) 246 ITR 63 (MP); Raymond Woolen Mills Ltd. Vs. Income Tax Officer â (1999) 236 ITR 34 (SC); G. Sukesh Vs. Deputy Commissioner of Income Tax â (2001) 252 ITR 230 (Ker).**

7. Primarily, to say that â the reason to believeâ which is a prime requirement for initiating the proceeding under Section 147 read with Section 148 being not available in the present case,

the entire proceedings are liable to be quashed. Apart from emphasizing on this aspect, he also made submission with regard to the procedure to be followed, the power of the Income Tax Officer and various other aspects of the matter which we will deal with as and when required at a subsequent stage.

8. Shri Sanjay Lal, learned counsel appearing for the Revenue refuted the aforesaid contentions and argued that at this stage as the assessment proceedings are in progress and when only the return filed by the petitioner is being scrutinized, as certain material has been received in the search and seizure conducted in the house of Shri Mukesh Sharma, inquiries into the matter are being conducted in the assessment proceeding, therefore, at this stage interference into the matter by this Court, exercising its extra ordinary jurisdiction in a petition under Article 226 of the Constitution is not called for. Shri Lal argued that under the statutory provision itself after the assessment proceedings are completed and when the assessment orders are passed, the petitioner has remedy of appeal and revision and as statutory remedy is available to the petitioner, interference into the matter at this stage is not called for. Reference is made to various judgments of Supreme Court and High Courts in the matter of interference at this stage under Article 226. The first and foremost objection of Shri Sanjay Lal was to say that interference at this stage is not called for. Thereafter, it was argued by Shri Sanjay Lal that the material collected by the Revenue, based on search and seizure conducted in the premises of Shri Mukesh Sharma and in subsequent enquiry conducted are certain relevant material which goes to show that undue favor was done to the

Contractor for which illegal gratification was received. This material is sufficient enough to initiate the action impugned. Sufficiency or tenability of the material is not a question to be considered by this Court at this stage. While interfering into the matter, it is said that the evidentiary value of the material seized, its sufficiency or otherwise to hold the petitioner guilty of concealing his income is a matter which is to be enquired into by the Department where the proceedings are going on and at this stage, when the inquiry by the department is in progress, interference in the matter is not called for. It is stated that the assessment order will be passed after the adjudicatory proceedings by the Assessing Officer is completed and therefore, interference by this Court is not permissible. He heavily relies upon a judgment of the Supreme Court in the case of **Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers â (2007) 210 CTR 0030** and argued that in this case the assessment has not been completed, the return filed by the assessee was only processed under Section 143(1) and in the absence of there being conclusion to the assessment proceedings, the question of change of opinion does not arise. It is argued, based on the said judgment that as no assessment order has been passed or as the assessment is not completed, the case in hand is covered by the main provisions of Section 147 and not the proviso to Section 147 and as the condition necessary for bringing the case under the main proviso of Section 147 is in existence and Assessment Officer has formed the opinion based on the material which are available, interference into the matter at this stage is not called for. He relied upon following judgments in support of

his contentions to say that at this stage interference into the matter is not called for :- **Commissioner of Income Tax Vs. Vijaybhai N. Chandrani â (2013)85 CCH 0191 ISCC; Joint Commissioner of Income Tax Vs. Kalanithi Maran â (2014) 89 CCH 0152 Chen HC; EMA India Ltd. Vs. Assistant Commissioner of Income Tax â (2009) 226 CTR (All) 659; Bhajan Lal Vs. Commissioner of Income Tax â (2001) 169 CTR 287; W.P. No.8173/2009 â Satish Vishwakarma Vs. Asstt. Commissioner of Income Tax** decided on 13.4.2010; **G. Sukesh Vs. Deputy Commissioner of Income Tax â (2001)169 CTR 0039; Raymond Woollen Mills Ltd. Vs. Income Tax Officer & Ors. - (1999) 152 CTR 0418 & Assistant Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers â (2007) 210 CTR 0030..**

9. Having heard learned counsel for the parties at length, we find that the moot question which was canvassed by Shri Kishore Shrivastava, learned Senior Counsel at the time of hearing was primarily based on the requirement of law as contemplated under Section 147 of the Income Tax Act in the matter of forming, â reason to believe â that income chargeable to tax had escaped assessment. Apart from raising various grounds, the main contention advanced on behalf of the petitioner was to the effect that based on the material available with the Assessing Officer conclusion cannot be drawn nor an opinion formed to say that he has reason to believe that income chargeable to tax has escaped assessment. Shri Kishore Shrivastava, learned Senior Counsel had referred to the requirement of Section 147 and had submitted that the material available with the Assessing Officer

should be such that he has reason to believe. He emphasized that reason to believe is not a mere suspicion or reason to suspect and it is not sufficient enough to initiate proceeding under Section 147 read with Section 148. Most of the judgments relied upon by him were to say that the material available cannot be said to be sufficient enough to come to the conclusion that the Assessing Officer has reasons to believe that income chargeable to tax has escaped assessment. He had said that for recording a finding and to say that the Assessing Officer has reasons to believe the material available should show nexus to the assessee, and the evidence and various other factors are required which is lacking in this case.

10. That being so, it would be appropriate, first examine the legal question with regard to this aspect of the matter as was canvassed by learned Senior Counsel at the time of hearing. The first judgment relied upon was in the case of **Calcutta Discount Co. Ltd.** (supra) decided by Constitution Bench in the year 1961. In this case the provision as it then existed under Section 34 of the Income Tax Act was considered and it was found that normally the well settled principle is that the High Court will have power to issue in a fit case an order prohibiting any executive authority from acting without jurisdiction. The availability of alternate remedy in the income tax act was considered in this case and it was emphasized that the condition precedent for assumption of jurisdiction under Section 34, if not satisfied then there is no reason to refuse a proper relief in a petition under Article 226 of the Constitution. Section 34 was considered in detail and the import and meaning of the words â□□reason to

believeâ was taken note of and the principle laid is that the opinion formed by the Income Tax Officer should be based on cogent and substantial material which makes the Income Tax authority feel that the requirement of the condition precedent is made out. This case was thereafter, again considered in the case of **M/s Rai Singh Dev** (supra), wherein the Hon'ble Supreme Court has emphasized that before issuing a statutory notice under Section 34(1)(a), the Income Tax Officer must have reason to believe that by reasons of omission or failure on the part of the assessee to disclose fully and truly all material fact necessary for assessment for the year in question, some income, profit or gain chargeable to income tax has escaped assessment. It has been held in this case that existence of this pre-condition is a extremely important circumstance which is required to be satisfied to enable exercise of jurisdiction by the Income Tax Officer. Thereafter the case of **Chhugamal Rajpal Vs. S. I. Chaliha & others â (1971)1 SCC 453** is considered by the Supreme Court and it has been held that the Income Tax Officer should have some relevant material before him from which he could draw inference that income has escaped assessment and the same is not based on vague feeling and suspicion of the officer to say that some income has escaped assessment. In the case of **Parashuram Pottery Works Co. Ltd.** (supra) Section 147 of the Income Tax Act is considered and again the requirement of fulfilling the condition i.e. â reason to believeâ as a condition precedent for exercising jurisdiction is considered and it is held that an Income Tax Officer acquires jurisdiction to issue notice under Section 148 if he has reason to believe that income chargeable to tax has

escaped assessment, it is held that merely based on the fact that there is some omission or failure on the part of the assessee, action cannot be taken if the omission or failure is not established and the requirement of reason to believe is not fulfilled. In the case of **Lakhmani Mewal Das** (supra) it has been held that the reason which lead to the formation of belief as is contemplated under Section 147(a) of the Act must have material bearing on the question of escapement of income. However, it has been held in this case that the existence of the belief can be challenged by the assessee but not the sufficiency of the reason for the belief. In this case it has been held that the material available for forming this belief should be relevant, should not be vague and indistinct or farfetched. It is held that reason for formation of belief must be held in good faith and should not be mere pretense, there has to be live link or close nexus which should be there in the material and the assessee. Finally a Single Bench of this Court had also considered this question in the case of **Arjun Singh** (supra), after detailed analysis of various judgments, both the questions with regard to exercise of the jurisdiction in a petition under Article 226 of the Constitution, the material available for change of opinion as is permissible under law and the difference between â□□recording of reasonâ□□, â□□reason to believeâ□□ and â□□reason for suspicionâ□□ have been considered and the law laid down is that an order passed adverse to the interest of the assessee should not be based on irrational or irrelevant consideration, it should be based on objective and relevant material and merely on the *ipse dixit* of the officer on vague, farfetched fanciful, remote information or allegation is not

sufficient. It is held that there should be clear nexus between the material and the reason to believe. Accordingly, on a complete reading of the case law *in extensio* cited by Shri Kishore Shrivastava before us, we find that most of the cases deal with two aspects, first, the jurisdiction available to this court in such matters under Article 226 of the Constitution and the principles to be followed for recording a finding to say that the condition precedent for coming to the conclusion that the Assessing Officer has reasons to believe exists are laid down.

11. Accordingly, we find that the question of â□□reasons to believeâ□□ as contemplated under Section 147(a) has to be determined on the basis of the material available on record. Shri Kishore Shrivastava, learned Senior Counsel referred to the material, primarily the noting in the diaries and the loose papers to say that they are not sufficient enough to hold that there are â□□reasons to believeâ□□ in the mind of the competent authority to say that income liable for tax has escaped assessment. However, the Revenue has relied heavily upon the case of **Rajesh Jhaveri Stock Brokers** (supra) and they say at this stage when the assessment is in progress, this Court need not interfere into the matter and relied upon the principle of existence of statutory alternate remedy to say that interference into the writ petition is not called for.

12. Shri Sanjay Lal has stated that apart from the notings pointed out by the Senior Counsel for the petitioner, brought on record, there are other material like statement of Shri A. K. S. Raju, Executive Director of Nagarjuna Construction Ltd., wherein he speaks about grant of illegal gratification, documents and various

seized documents indicating purchase of air tickets in the name of petitioner and his family members which goes to show that he has granted undue favour to the Contractors through their Liaison Officer Shri Mukesh Sharma. He submits that by analyzing all these material when the matter is to be considered by the Assessing Officer, this Court at this stage cannot go into the sufficiency of the material and interfere. That being so, we will consider the judgment rendered by the Supreme Court in the case of **Rajesh Jhaveri Stock Brokers** (supra) as Shri Sanjay Lal had placed heavy reliance on this judgment. In the case of **Rajesh Jhaveri Stock Brokers** (supra) even though as stated by Shri Kishore Shrivastava, learned Senior Counsel, various judgments relied upon by Shri Kishore Shrivastava like the judgment in the case of **Calcutta Discount Co. Ltd.** (supra), **Parashuram Pottery Works** (supra) have not been considered but the question had been considered in the backdrop of the effect of the substitution to Section 147 brought into force upto 1st April, 1998 and in para 13 detailed analysis has been made in the following manner :-

> â13. 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.â□□

(Emphasis Supplied)

Finally, after taking note of the provisions of Section 148 and 147 and its amendment from time to time in para 16, the matter has been dealt with in the following manner :-

â□□16. 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 â□□reasonâ□□ 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 [1999 (236) ITR 34 (SC)].â□□
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> *(Emphasis Supplied)*

From a perusal of the aforesaid principle of law laid down by the Supreme Court, we find that the expression â□□reason to believeâ□□ cannot be read to say that Assessment Officer should have finally ascertained the effect by legal evidence or conclusion. At the stage when the matter is pending, the final outcome of the proceeding is not relevant. At the stage when only notice has been issued, the only consideration would be as to whether there was reasonable material available based on which a prudent man approach can be adopted to form a requisite belief. Whether the material would conclusively prove the escapement or not is not of concern at this stage. If this be the principle of law as laid down by the Supreme Court with reference to the matter, we have no hesitation in holding that objection raised by the revenue in the matter of interference at this stage has much force. In fact, in the judgment rendered in the case of **Rajesh Jhaveri Stock Brokers**

(P) Ltd. (supra), the words â□□intimationâ□□ and â□□assessmentâ□□ used under Section 143 in different places is considered to be with reference to different context and in the judgment the final conclusion is that if the assessment has not been completed, accuracy and sufficiency of the material should not be examined. This also is the principle laid down in the case of **Raymond Woolen Mills Ltd.** (supra) relied upon by Shri Sanjay Lal. The Kerala High Court in the case of **G. Suresh**, the Punjab & Haryana High Court in the case of **Bhajan Lal** have also laid down identical principle. In fact in para 8 of the judgment rendered by the Punjab & Haryana High Court in the case of **Bhajan Lal** (supra), reference is made to a judgment of Supreme Court in the case of **Phoolchand Bajrang Lal Vs. ITO â□□ (1993)113 CTR (SC) 436** and the following principles have been laid down :-

> â□□8. The ambit and scope of ss.147 and 148 of the Act was considered by the Supreme Court in Phool Chand Bajrang Lal Vs. ITO (1993) 113 CTR (SC) 436 : (1993) 203 ITR 456 (SC) : TC 51R.825. After reviewing several judicial precedents on the subject, a two Judges Bench of the Supreme Court held as under :-
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> â□□From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by

reason of omission or failure on the part of the assessee to make a true ana full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which where not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income-tax Officer

at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if one the basis of subsequent information, the Income-tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment..... â

One of the purpose of s.147 appears to us to be to ensure that a party cannot get away by willfully making a false or 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 would be a travesty of justice to allow the assessee that latitude.â

(Emphasis Supplied)

13. If we analyze the facts of the present case in the backdrop of the aforesaid legal principle, we find that the petitioner wants this Court to hold that the material collected by the Department and relied upon, namely the entries/ notings made as indicated in the loose slip has no nexus to the petitioner and therefore, the entire proceeding should be quashed. Whereas, the Revenue wants this Court to hold that if these loose papers are considered and if they are read along with the statement of the officer of the Contractor and

certain other material collected, particularly in the matter of purchase of tickets by Mahesh Sharma in the name of petitioner and his family members an enquiry into the matter is called for, which should not be stopped at this stage in a petition under Article 226 of the Constitution. When we analyze the material available on record, we find that it is a case where the enquiry into the matter by the Income Tax Department is still in progress and considering the fact that the Revenue has indicated that the petitioner was a key person having control over the decision making process, it is not appropriate for this Court to hold that material produced are not sufficient enough or reliable enough to proceed in the matter. On the contrary, when the law says that sufficiency or correctness of the material is not to be looked into at this stage by a Writ Court, this Court has to leave everything to the Assessment Officer, who, after considering each and every aspect of the matter including the judgments relied upon by the petitioner and the objections to be raised to decide the matter. The judgment relied upon by Shri Kishore Shrivastava, learned Senior Counsel in the peculiar facts and circumstances of the present case cannot be applied in this case to quash the proceedings.

14. Even though in the judgment relied upon by Shri Kishore Shrivastava, certain distinction is carved out in the matter of fulfilling the requirement of â□□reason to suspectâ□□ and â□□reason to believeâ□□ and cognizance to be taken of loose paper and the nexus between the material collected and the assessee etc. but all those cases were decided in the context

of legal principle applicable mostly after orders of assessment were passed or assessment were re-opened after they had been concluded, unlike in this case wherein in view of law laid down in the case of **Rajesh Jhaveri Stock Brokers** (supra), we have to hold that assessment process is still in progress and therefore, question of change of opinion or reopening of assessment already concluded will not arise. That being the difference between those cases and the present case, we are not inclined to accept the submissions made by Shri Kishore Shrivastava, learned Senior Counsel.

15. During the course of hearing it was indicated by Shri Kishore Shrivastava, learned Senior Counsel that the entire process of awarding the contract and its finalization was undertaken after the petitioner had left on deputation to the Government of India. This aspect of the matter has been considered by the Revenue in the detailed reason given for proceeding further in the matter and they have indicated in the said reasons that when the petitioner was holding the post of Commissioner Urban Administer and Development in M.P., various process in pursuance to the tender earlier issued and subsequently issued on modification took place and shortlisting of the two contractors namely M/s Nagarjun Construction Company, Hyderabad and M/s Simplex Infrastructure Ltd., Calcutta and after declaring them to be qualified till the stage of technical bid was undertaken by modifying the terms and conditions of the tender documents and certain process was also undertaken for eliminating the other companies and this process played a vital role in the

ultimate award of contract. It is indicated by the Revenue that by following these process a final decision provisionally was already taken for awarding the contract to these parties and as all major decision except exclamation of project cast was undertaken, while the petitioner was holding the key post of Commissioner, Urban Administration and Development. It is indicated by the Revenue that the petitioner played a key role in controlling the decision making process which ultimately led in eliminating all other Companies, shortlisting the two companies in question and it has been held that by acting as intermediate between Nagar Nigam and Commissioner of Urban Administration and Development, petitioner was indicated in various steps pertaining to award of contract. Therefore, merely, because it is said that petitioner had gone on deputation he cannot be exonerated of the charges levelled. That being the reason which weighed with the revenue authorities to proceed further in the matter, therefore, it is not appropriate for a writ Court exercising limited jurisdiction in a petition under Article 226 of the Constitution at this stage to interfere as enquiry into various aspects of the matter which was the prime consideration which weighed with the Revenue for proceeding in the matter may be required. The Revenue on a just and proper consideration has taken the decision and therefore, we are not inclined to accept this contention advanced by Shri Kishore Shrivastava.

16. On the contrary, it is a fit case where the department should be granted liberty to proceed in the matter and thereafter

take a decision after evaluating each and every aspect of the matter. This is also the principle laid down by the Supreme Court in the case of **Vijaybhai N. Chandrani** (supra) relied upon by the learned Counsel for the Revenue. In the said case, the Hon'ble Supreme Court has held that the assessee cannot be permitted to invoke writ jurisdiction of the High Court at the first instance without exhausting the statutory remedy available under the Income Tax Act. It was held by the Hon'ble Supreme Court in the said case that in the stage of assessment of the proceeding the High Court ought not to have entertained the writ petition, instead should have directed the assessee to appear before the AO, permit him to take a decision and after framing of assessment order, the assessee should seek indulgence into the matter. In para 16 and 17 of the said judgment, Hon'ble Supreme Court has dealt with the matter in the following manner :-

> â□□16. In the present case, the assessee has invoked the Writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the Writ Petition and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act.
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> 17. In view of the above, without expressing any

> opinion on the correctness or otherwise of the construction that is placed by the High Court on Section 153C, we set aside the impugned judgment and order. Further, we grant time to the assessee, if it so desires, to file reply/objections, if any, as contemplated in the said notices within 15 days' time from today. If such reply/objections is/are filed within time granted by this Court, the Assessing Authority shall first consider the said reply/objections and thereafter direct the assessee to file the return for the assessment years in question. We make it clear that while framing the assessment order, the Assessing Authority will not be influenced by any observations made by the High Court while disposing of the Writ Petition. If, for any reason, the assessment order goes against the assessee, he/it shall avail and exhaust the remedies available to him/it under the Act, 1961. â□□

17. Keeping in view all these factors and the totality of the facts and circumstances of the case, we are of the considered view that at this stage it is not appropriate for us to interfere into the matter and quash the proceedings initiated. Instead the petitioner should appear before the AO, raise all objections and thereafter it is for the Assessing Officer to examine all aspects of the matter and take a decision in accordance with law. If the petitioner has any grievance still existing after such a decision is taken, i.e. after the amount is finalized, petitioner can challenge the same in accordance with law. In the present set of circumstances we are not inclined to interfere into the matter because for interfering

into the matter we will be required to assess the material available on record and say that they are not sufficient enough to proceed in the matter and we find that when the assessment proceedings are still on discharging this function at this stage by this Court in a petition under Article 226 of the Constitution is not warranted.

18. The petition is therefore, dismissed.

(Rajendra Menon) **(S. K. Palo)**
Judge **Judge**

mrs.mishra

(RAJENDRA MENON)
JUDGE

(SUSHIL KUMAR PALO)
JUDGE