(2011) 03 GUJ CK 0117

In the Gujarat High Court

Case No : Special Civil Application No. 12853 of 2010 A.Y. 2003-04

Bakulbhai Ramanlal Patel APPELLANT

Vs

ITO RESPONDENT

Date of Decision : 04-03-2011

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1961 — Section 131, 139, 139(1), 142(1), 143(1)

Citation : (2011) 03 GUJ CK 0117

Hon'ble Judges : Harsha Devani, J;H.B. Antani, J

Bench : Division Bench

Advocate : Tej Shah and Dipak Shah, for the Appellant; KM. Parikh, for the Respondent

Final Decision : Allowed

Judgement

Ms. Harsha Devani, J.—By this petition under Article 226 of the Constitution of India, the petitioner has challenged the notice dt. 25-3-2010 issued u/s 148 of the IT Act, 1961 (the Act) reopening the assessment of the petitioner for assessment year 2003-04 as well as the notice dt. 16-6-2010 issued by the respondent u/s 143(2) of the Act proceeding with the reopening.

2. The petitioner, an individual, is engaged in the business of commission agent in transport and also runs a STD/PCO booth. The petitioner was a partner in a firm M/s Shivshakti Petroleum Services receiving remuneration and interest there from. For the assessment year 2003-04, the petitioner filed return of income declaring total income of Rs. 2,18,850 on 27-11-2003 u/s 139(1) of the Act, which came to be assessed and accepted by the AO. Subsequently, after a period of about six years, the impugned notice has been issued along with brief reasons for reopening the assessment.

3. Pursuant to the notice, the petitioner filed return of income on 28-4-2010 declaring total income of Rs. 2,18,850 and vide Letter dated 26-4-2010, the petitioner also requested for a copy of the reasons recorded for reopening the

assessment and also objected to the reopening of the assessment. Upon filing the return of income, the AO issued notice u/s 143(2) of the Act on 16-6-2010 for making further inquiry in connection with the reassessment. In terms of the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. Vs. Income Tax Officer and Others, the petitioner by a Letter dated 28-6-2010 requested for a copy of the reasons recorded before issuance of notice u/s 148 of the Act. According to the petitioner, the AO instead of furnishing a copy of reasons for reopening and without disposing of the objections filed by the petitioner, sought to make further inquiries not connected with the grounds for reopening of assessment by issuing summons u/s 131 of the Act on 28-6-2010. The petitioner complied with the summons vide Letter dt. 12-7-2010 and again requested for a copy of the reasons as well as the date when the permission of the Jt. CIT was obtained as required u/s 151(2) of the Act. It is the case of the petitioner that the AO instead of furnishing a copy of the reasons recorded as approved by the authority, threatened the petitioner with penal proceedings u/s 272A(i)(c) of the Act by a letter dt. 19-7-2010. The petitioner once again by a Letter dated 4-9-2010, objected to the reopening of assessment and requested the AO to dispose of the objections raised before proceeding further with the reassessment proceedings. Reliance was placed on the decision of the Supreme Court in the case of GKN Driveshafts (India) Ltd. v. ITO (supra). Despite repeated requests, since a copy of the reasons recorded was not furnished and the objections were not disposed of, the petitioner has approached this Court by way of the present petition challenging the impugned notice and all proceedings taken pursuant thereto.

4. In response to the petition, an affidavit-in-reply date 15-11-2010 has been filed by Mr. CM. Christian, the AO who had recorded the reasons and initiated the proceedings u/s 147 of the Act for the limited purpose of explaining that the reasons have been recorded on 23-3-2010, however, on account of bona fide mistake, he had failed to mention the date while recording the reasons. Another affidavit-in-reply has been filed by Mr. G.D. Khara, the present AO, wherein it has inter alia been stated that the petitioner filed return of income for assessment year 2004-05 u/s 139(1) of the Act and the return was assessed and processed by the respondent u/s 143(1) of the Act. It is also averred that his predecessor-in-office had recorded reasons for reopening of the assessment for assessment year 2003-04 of the petitioner.

5. Mr. Dipak Shah, learned advocate appearing on behalf of the petitioner submitted that section 147 of the Act starts with the words "if the AO has reason to believe", therefore, what is implicit in the section is that the reason to believe must be of the AO of the petitioner and not that of any other authority. It is equally settled that the AO has to apply his mind to the information, if any, collected and must form a belief thereon. It was submitted that in the present case, the reasons stated for reopening the assessment were unfounded and were only a matter of further investigation by the AO. According to the learned advocate, the AO ought to have at the first instance, called for the details of the

matter which was required to be investigated and thereafter on the basis of the evidence on record, if need be, issued a notice for reassessment. It was submitted that the reasons as recorded for seeking approval, clearly show that jurisdiction u/s 147 has been assumed for making roving and fishing inquiries, which is not permissible in law.

6. Inviting attention to the reasons recorded, it was submitted that the respondent himself is not certain as to whether the amount received is loans and advances or trading receipts/trading payments and that, no satisfaction has been recorded as regards any income having escaped assessment. It was submitted that acceptance or repayment of loan/deposit in violation of the provisions of section 269SS or 271B may at best lead to levy of penalty u/s 271D or 271B of the Act, but the same does not in any manner lead to a conclusion that income has escaped assessment. It was urged that disallowance u/s 40A(3) of the Act can be made provided any expenses have been claimed, whereas the petitioner had never claimed any expenses of such magnitude, and, hence, the question of disallowing the same does not arise at all. As regards the other grounds on which the assessment is sought to be reopened it was submitted in all the said cases the AO has referred to certain payments made by the petitioner which according to him are required to be verified or investigated. Inviting attention to the third last para of the reasons it was pointed out that according to the AO in view of the fact stated in the reasons detailed investigation/verification is required and that the petitioner is also required to be brought in tax net. It was submitted that thus, reassessment is initiated for making investigation first before formation of the belief that income has escaped assessment.

7. Mr. Shah further submitted that formation of belief must necessarily precede initiation of reassessment proceedings. For assumption of jurisdiction to reassess the income escaping assessment--firstly, reason to believe has to be formed on the basis of tangible material, and having validly assumed jurisdiction, income escaping assessment may be brought to tax on the basis of further inquiry. It was urged that on the basis of the reasons recorded in the present case, it cannot be said that the initiation of proceedings u/s 147 of the Act is valid or justified in as much as, there is no material to either allege, assume or even conclude much less have a prima facie belief that income chargeable to tax has escaped assessment. It was, accordingly, submitted that the initiation of proceedings u/s 148 of the Act is misconceived and without jurisdiction.

8. The last submission advanced by the learned advocate for the petitioner is that in view of the provisions of section 149 of the Act, which provides for time-limit for issuance of notice u/s 148, no notice u/s 148 can be issued for the relevant assessment year, if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year. Referring to the reasons recorded, it was submitted that there is nothing in the entire reasons recorded to

indicate that the amount of tax which has escaped assessment is more than rupees one lakh. It was submitted that in the circumstances, in the present case, since the notice has been issued beyond a period of four years from the end of the relevant assessment year, the statutory requirements as envisaged under clause (b) of sub-section (1) of section 149 of the Act are clearly not satisfied and hence, the proceedings are without jurisdiction on this count also.

9. In support of his submissions, the learned advocate placed reliance upon the following decisions :

(a) The decision of this High Court in the case of Shankarlal Nagji and Co. and Others Vs. ITO and Another .

(b) The decision of the Supreme Court in the case of P. S. SUBRAMANYAN, Income Tax OFFICER, COMPANIES CIRCLE 1(1), BOMBAY, AND ANOTHER Vs. SIMPLEX MILLS LTD., .

(c) The decision of the Supreme Court in the case of Chhugamal Rajpal Vs. S.P. Chaliha and Others, .

(d) The decision of the Delhi High Court in the case of Commissioner of Income Tax Vs. Batra Bhatta Company, .

(e) The decision of the Supreme Court in the case of Sheo Nath Singh Vs. Appellate Assistant Commissioner of Income Tax, Calcutta, .

(f) The decision of the Delhi High Court in the case of Sarthak Securities Co. Pvt. Ltd. Vs. Income Tax Officer, .

10. The petition was resisted by Mr. K.M. Parikh, learned standing counsel appearing on behalf of the respondent. Inviting attention to the averments made in the affidavit-in-reply, it was submitted that the reasons recorded had been supplied to the petitioner and as such, the averments made in the petition to the effect that copy of the reasons was not supplied despite repeated requests, is not correct. As regards the validity of the proceedings u/s 147 of the Act, the learned counsel invited attention to the reasons recorded to submit that there was sufficient material on record on the basis of which, the AO could have formed the belief that income chargeable to tax has escaped assessment.

It was submitted that the court while examining the validity of proceedings u/s 147 of the Act may examine as to whether there is any material available with the respondent authority for holding any belief that the income chargeable to tax has escaped assessment, however, the court cannot go into sufficiency of the reasons recorded and substitute its opinion in place of that of the officer. It was submitted that there being sufficient material on record for the purpose of forming the requisite belief, no case is made out for intervention by this court.

11. In reply to the contention regarding income having escaped not being more than rupees one lakh, the learned counsel placed reliance upon the averments made in para 25 of the affidavit-in-reply filed by the respondent wherein it has

been stated that the income which has, escaped assessment is more than rupees one lakh.

12. In the present case, no assessment has been framed u/s 143(3) of the Act, hence, the only requirement for initiating proceedings u/s 147 of the Act, by issuing notice u/s 148 of the Act, is that the AO should have reason to believe that income chargeable to tax has escaped assessment, which should be recorded by him in writing prior to issuance of the notice. Since the belief is that of the AO, the sufficiency of the reasons for forming is not for the court to judge but it is open to the 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 AO and examine whether there was any material available on record from which the requisite belief could be formed by the AO and further whether that material had any rational connection or a live link for the formation of the requisite belief. (See M/s. Phool Chand Bajrang Lal and another Vs. Income Tax Officer and another, . Since, the assessment is sought to be reopened after a period of four years from the end of the relevant assessment year, in the light of the provisions of section 149(1)(b) of the Act, the reasons recorded should also reflect that the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

13. Keeping the aforesaid position of law in mind, it may be germane to refer to the reasons recorded for reopening of assessment u/s 147 of the Act, which read thus :

Reasons in brief for reopening the assessment in the case of Shri Bakulbhai Ramanbhai Patel of Kheda for assessment year 2003-04.

In this case, the information received from the office of the Addl. CIT, Kheda Range, Nadiad v. Letter dt. 18-6-2009 for further necessary action.

On going through the information, verification of the ledger for the caption assessment year and office records, the following facts are emerged :

(9) The assessee has not filed his return of income for the year under consideration.

(10) During the year under consideration, the assessee has received cash amount of Rs. 57,80,120 in the form of either loans and advances or trading receipts, which needs detailed investigation. In both the cases, the assessee is a defaulter under the provisions of IT Act either u/s 269SS or u/s 271B of the Act or both.

(11) During the year under consideration, the assessee has made cash payment amounting to Rs. 95,88,550 in the form of either payment of loans and advances or trading payments. In both the cases, the assessee is a defaulter under the provisions of IT Act either u/s 269T or u/s 40A(3) of the Act or both.

(12) According to information, the assessee has, during the year under consideration, made payment in cash amounting to Rs. 2,02,050 on account of interest. The source of which is required to be verification.

(13) The assessee has also made payments to contractor for Rs. 80,000 and for purchase of raw materials like bricks, tiles etc. amounting to Rs. 70,660. The source of which is required to be verification.

(14) The assessee has also made payment of Rs. 1,85,001 on 10-6-2002 through his employee, so called benamidar. The source of which is required to be investigation.

(15) The assessee has also made payment of Rs. 21,729 on 10-6-2002 towards stamp duty through his employee, so called benamidar. The source of which is required to be investigation.

(16) The assessee has purchased property for Rs. 1,90,000 in the name of his son Shri Jigar B. Patel as Shri Jigar was aged 20 years and has no source of income.

(17) The assessee has agricultural income amounting to Rs. 99,955.

In view of the above facts and circumstances of the case, detailed investigation/ verification is required and it is also required to bring the assessee in tax net.

In view of the Explanation 2 to section 147 of the IT Act, the case of the assessee is that where cash transaction made is to be verified. Therefore, I have reason to believe that deemed income has escaped assessment by not disclosing the true income relating to assessment year 2004-05. Hence, it is a fit case for issuance of notice u/s 148 of the IT Act.

Submitted for kind perusal and necessary approval for issuance of notice u/s 148 of the Act, if deemed fit.

14. A perusal of the reasons recorded indicates that the assessment is sought to be reopened by recording nine grounds. Examining each ground individually : the first ground is that the assessee has not filed his return of income for the year under consideration. This factual basis for reopening the assessment is admittedly incorrect, in as much as, the respondent has categorically accepted the fact that the petitioner had filed return of income for assessment year 2003-04 u/s 139(1) of the Act and the return was assessed and processed by the respondent u/s 143(1) of the Act in the affidavit-in-reply filed by him.

15. The next ground, which in fact appears to be the first ground for reopening the assessment is that according to the AO, the petitioner has received cash amount of Rs. 57,80,120 in the form of either loan and advances or trading receipts, which needs detailed investigation. Thus, the AO is not sure as to whether the said amount is by way of a loans and advances or trading receipts and is also of the opinion that the matter requires detailed investigation. The AO does not record that the aforesaid amount is income chargeable to tax which has

escaped assessment, but according to him the assessee is a defaulter under the provisions of either section 269SS or section 271B of the Act or both. In this regard, it may also be pertinent to refer to the notice issued u/s 142(1) of the Act by the AO while proceeding further with the reopening (annexed at p. 42 of the petition), wherein in connection with the amount of Rs. 57,80,120 the AO has asked the petitioner to state the nature of the said receipts and its, utilization with supporting evidences as well as the names and addresses of the persons/parties from whom the petitioner had received the said receipts. It is further stated that the onus to prove that the said transactions are genuine and recorded in the books of account is on the petitioner and that, if satisfactory reply is not furnished with supporting evidences, the AO would be compelled to believe that the receipts are made from petitioners income outside the books of account which are not disclosed in the return of income.

16. On a conjoint reading of the reasons recorded and the aforesaid notice u/s 142(1) of the Act, it is apparent that there is no material available with the AO on the basis of which, it can be said that the petitioner has received cash amount of Rs. 57,50,120. The AO appears to have received some information without any supporting evidence which he has assumed to be correct and has called upon the petitioner to submit proof in support of such information by showing that he has recorded such amounts in his books of account. In other words he has called upon the petitioner to submit documentary evidence in support of the information received by him. Similar supporting evidence is called for from the petitioner in relation to the amount of Rs. 95,88,550 mentioned in the third ground as well as the amount of Rs. 2,02,050 alleged to have been paid in cash on account of interest. Further, as noticed hereinabove, according to the AO, the aforesaid cash amount of Rs. 57,80,120 allegedly received by the petitioner requires detailed investigation and that in either case, the petitioner is a defaulter either u/s 269SS or 271B of the Act or both. Thus, it is not the case of the AO that any income has escaped assessment. According to him, if the petitioner has received the aforesaid amount, he is a defaulter under the provisions of section 269SS or 271B of the Act or both. The learned advocate for the petitioner is, therefore, justified in contending that in case the petitioner is a defaulter under either of the said provisions he may at best be liable to penalty under the provisions of section 271D or 271E of the Act, however, the same would not lead to any conclusion that the income chargeable to tax has escaped assessment.

17. In relation to the third ground relating to an amount of Rs. 95,88,550, it is stated in the reasons that the petitioner has paid the said amount in cash in form of either payment of loan and advances or trading payments and that in both cases the assessee is a defaulter either u/s 269T or section 40A(3) of the Act. Here also, the AO is not certain about the nature of the payment or as to whether the payment has been made by way of loan and advances or trading payments. As noted in the preceding para the AO by issuing notice u/s 142(1) of the Act has called upon the petitioner to submit evidence in support of the

aforesaid information which he has presumed to be true. Moreover, in respect of this ground also, it is not the case of the AO that any income chargeable to tax has escaped assessment. According to the AO in respect of the aforesaid amount allegedly received by the petitioner, he is a defaulter under the provisions of IT Act either u/s 260T or u/s 40A(3) of the Act or both. The learned advocate for the petitioner is, therefore, justified in contending that if at all the petitioner is a defaulter, he would be liable to penalty u/s 271E of the Act, but that would not give rise to a conclusion that any income has escaped assessment. Insofar as the provisions of section 40A(3) of the Act are concerned, the said provision applies where deduction is claimed in respect of any expenditure incurred otherwise than by an account payee cheque drawn on a bank or account payee bank draft exceeding rupees twenty thousand, in which case no deduction is allowable in respect of such expenditure. In the present case, it is not even the case of the AO that the petitioner has claimed any deduction in respect of any such cash payments so as to invoke the provisions of section 40A(3) of the Act. Moreover, in respect of the grounds on which the reassessment is sought to be reopened, the AO has stated that the same needs detailed investigation or requires to be verified. Thus, the AO is himself not certain that any income has escaped assessment and wants to investigate and inquire into the case to ascertain as to whether in fact any income has escaped assessment.

18. As regards the other grounds for reopening, all that the AO says is that the petitioner has during the year under consideration :

(i) made payment in cash amounting to Rs. 2,02,050 on account of interest;

(ii) made payment to contractor of Rs. 80,000 and for purchase of raw material like bricks, tiles etc. of Rs. 70,660;

(iii) made payment of Rs. 1,85,001 on 10-6-2002 through his employee, so called benamidar;

(iv) made payment of Rs. 21,729 on 10-6-2002 towards stamp duty through his employee, his so called benamidar;

(v) purchased property for Rs. 1,90,000 in the name of his son who has no source of income and

(vi) has agricultural income amounting to Rs. 99,955. In respect of grounds (i) to (v) according to the AO the source of the said amounts either needs to be verified or investigated. As regards agricultural income, the AO has only recorded a statement of fact without stating as to how the same gives rise to escapement of income.

19. For the purpose of invoking the provisions of section 147 of the Act, formation of requisite belief precedes the initiation of the proceedings. In the circumstances, in the light of the provisions of sub-section (2) of section 148, before issuing notice u/s 148 of the Act, the AO is required to record reasons for the formation of belief that income chargeable to tax has escaped assessment. In

the present case, on a plain reading of the reasons recorded, as noted hereinabove no such belief appears to have been recorded by the AO. However, in the penultimate para of the reasons recorded, the AO has recorded thus : "In view of the Explanation 2 to section 147 of the IT Act, the case of the assessee is that where cash transaction made is verified. Therefore, I have reason to believe that deemed income has escaped assessment by not disclosing the true income relating to assessment year 2003-04. Hence, it is a fit case for issuance of notice u/s 148 of the IT Act." This in effect and substance is the only satisfaction recorded by the AO as regards income having escaped assessment. A bare reading of Explanation 2 to section 147 of the Act shows that the same merely lays down the categories of cases which shall be deemed to be cases where income chargeable to tax has escaped assessment. The said explanation nowhere speaks of verification of transactions or of deemed income.

20. Reading the reasons recorded in their entirety, there is nothing whatsoever to indicate as to which is the income that has not been disclosed by the petitioner or that any income chargeable to tax has in fact escaped assessment. The entire tenor of the reasons recorded indicates that on the basis of some unsubstantiated and vague information, the AO has reopened the assessment for the purpose of making a roving and fishing inquiry to verify as to whether any income has in fact escaped assessment which fact is borne out from the reasons recorded, wherein the AO has categorically recorded thus : "In view of the above facts and circumstances of the case, detailed investigation/ verification is required and it is also required to bring the assessee in tax net." Insofar as bringing the assessee in the tax net is concerned, the petitioner admittedly has filed return of income and has been assessed in respect thereof, the petitioner is, therefore, already within the tax net. Since the reasons recorded do not reflect the requisite belief that income chargeable to tax has escaped assessment, the basic requirements of section 147 of the Act have not been satisfied.

21. This Court in the case of Shankarlal Nagji & Co. & Ors. v. ITO (supra) has held that a completed assessment cannot be reopened merely to make inquiries. That is the domain of regular assessment. From the reasons recorded it is apparent that the AO has reopened the assessment merely to make inquiries.

22. In the case of P. S. Subramanyan, ITO & Anr. v. Simplex Mills Ltd. (supra), the Supreme Court held thus :

It does not seem to us that it is a case where the respondents income was under-assessed or where excessive relief was granted in computing that income. It is a case where tax had been paid in advance and upon subsequent regular assessment for the period for which the tax had been paid it was found that what had been paid was in excess of what was actually due. This is really a case of over-assessment though only provisional and not of under-assessment at all. The payment of interest was in no sense a relief granted in computing income; it was paid at the rate calculated according to the law then in force. No doubt in view of the subsequent amendment of the law and in view of this amended provision being given retrospective operation covering the date when the original assessment had been made, if the interest has to be computed according to the amended law then a smaller sum might have been payable as interest. But when it was computed, the new law was not in fact there and, therefore, the computation had been according to the law then in force. That computation cannot be reopened u/s 34 because it cannot be said that it is a case either of under-assessment or of excessive relief having been granted. It is really a case where the statutory liability of the State to pay interest was reduced from a higher figure to a lower one. Therefore, quite clearly it was not a case within section 34.

23. In the facts of the present case, it is not the case of the AO that any income chargeable to tax has escaped assessment. The case of the AO is that in case the petitioner is a defaulter, under the provisions of the Act, in relation to ground No. 2 either u/s 269SS or section 271B of the Act and in relation to ground No. 3 either u/s 269T or section 40A(3) of the Act. In case of default under the provisions of section 269SS, section 269T and section 271B of the Act, penalty is leviable under the sections 271D, 271E and 271B of the Act respectively. The aforesaid provisions are penalty provisions and even if the petitioner were liable to pay penalty under the said provisions, the same would not give rise to a conclusion that income has escaped assessment.

24. In the case of Chhugamal Rajpal v. S.P. Chaliha (supra), where the AO had while recording reasons mentioned "hence, proper investigation regarding these loans is necessary", the Supreme Court has held that his conclusion was there is a case for investigating as to the truth of the alleged transactions. The court held that it was not the same thing as saying that there are reasons to issue notice u/s 148. Before issuing a notice u/s 148, the ITO must have either reason to believe that by reason of the omission or failure on the part of the assessee to make a return u/s 139 for any assessment year to the ITO or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year or alternatively notwithstanding that there has been no omission or failure as mentioned above on the part of the assessee, the ITO has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year. Unless the requirements of clause (a) or clause (b) of section 147 are satisfied, the ITO has no jurisdiction to issue a notice u/s 148 of the Act.

25. In the present case also it is apparent that the case of the AO is that investigation is required to be made in relation to the vague transactions referred to in the reasons recorded.

26. In the case of CIT v. Batra Bhatta Company (supra), the Delhi High Court held that the proceedings u/s 147 are not to be invoked at the mere whim and fancy of an AO and it has to be seen in every case as to whether the invocation is arbitrary or reasonable. In the facts of the said case, the court held that

merely because the AO felt that the issue required much deeper scrutiny, was not ground enough for invoking section 147. The court held that it is not belief per se that is a pre-condition for invoking section 147 of the Act but a belief founded on reasons. The expression used in section 147 is "If the AO has reason to believe" and not "If the AO believes". There must be some basis upon which the belief can be built. It does not matter whether the belief is ultimately proved right or wrong, but, there must be some material upon which such a belief can be founded.

27. In the case of Sheo Nath Singh v. AAC (supra), the Supreme Court held that there can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO may act on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The ITO would be acting without jurisdiction if the reason for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court.

28. In the case of Sarthak Securities Co. (P) Ltd. v. ITO (supra), the Delhi High Court held that at the stage of recording reasons, it is not necessary to have the established fact of escapement of income, but what is necessary is that there is relevant material on which a reasonable person could have formed the requisite belief. To elaborate, the conclusive proof is not germane at this stage, but the formation of belief must be on the base or foundation or platform of prudence which a reasonable person is required to apply.

29. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, , the Supreme Court held that the powers of the ITO to reopen assessment, though wide, are not plenary. The words used by the statute are "reason to believe" and "not reason to suspect".

30. In the present case, as noticed hereinabove, from the reasons recorded, it is apparent that the AO did not have any material before him so as to satisfy the requirements of section 147 of the Act in as much as, there is no material whatsoever before the AO on the basis of which a reasonable man would come to the conclusion that any income chargeable to tax has escaped assessment. The reasons recorded reflect that the AO feels that the matter requires detailed investigation and further verification. Thus, it appears that the AO has reason to suspect and not reason to believe that income chargeable to tax has escaped assessment. This, however, is not a valid ground for invoking the provisions of section 147 of the Act. The reason to believe that income chargeable to tax has escaped assessment must be based upon material on record. In the facts of the present case, there is no such material. In the circumstances, in the absence of basic requirements of section 147 of the Act being satisfied, the assumption of jurisdiction by the AO is invalid and as such, the impugned notice u/s 148 of the Act cannot be sustained.

31. As regards the contention that the reasons do not reflect that the income having escaped assessment is more than rupees one lakh or likely to be more than rupees one lakh as laid down under the provisions of section 149(1)(b) of the Act and as such, the assessment is time barred, a perusal of the reasons recorded indicates that nothing has been recorded by the AO to indicate as to what is the amount of income which is alleged to have escaped assessment. In the light of the provisions of section 149(1)(b) of the Act, while reopening the assessment beyond a period of four years from the end of the relevant assessment year, since there is a statutory bar against reopening the assessment in case where the amount of income escaping assessment does not amount to rupees one lakh or more, the AO is also required to record a finding to that effect. In the present case, no such finding has been recorded. Except for a bare averment in the affidavit-in-reply wherein it is stated that the income which has escaped assessment is more than rupees one lakh, there is no material on record to indicate the extent of income which has escaped assessment. In fact, as observed hereinabove, there is nothing to indicate that the AO has reason to believe that any income whatsoever has escaped assessment. In the circumstances, on this count also, the assumption of jurisdiction u/s 147 of the Act is invalid.

32. For the foregoing reasons, the petition succeeds and is, accordingly, allowed. The impugned notice dt. 25-3-2010 issued u/s 148 of the Act (Annexure "A" to the petition) reopening the petitioners assessment for assessment year 2003-04, as well as the impugned notice dt. 16-6-2010 issued u/s 143(2) of the Act, as well as all proceedings taken pursuant thereto, are hereby quashed and set aside. Rule is made absolute, accordingly, with no order as to costs.

