NEUTRAL CITATION
2023:GUJHC:23968-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 18826 of 2021

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ADANI POWER RAJASTHAN LIMITED
Versus
ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1)(1), AHMEDABAD

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
for the Respondent(s) No. 1
MS MAITHILI D MEHTA(3206) for the Respondent(s) No. 1

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CORAM:HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI
and
HONOURABLE MR. JUSTICE J. C. DOSHI

Date : 19/04/2023

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI)

1. By way of this petition under Article 226 of the Constitution of India, the petitioner has challenged the legality and validity of the order dated 10.11.2021 at Annexure-G as well as impugned Notice dated 21.03.2021 at Annexure-A.

2. The brief background of the facts which has led to filing of this petition is that petitioner is a limited company and all the shareholders are citizens of India. The petitioner had filed its return of income for Assessment Year 2017-18 on 24.11.2017

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declaring the total loss of Rs.326,01,10,779/- under the normal provisions and book loss of Rs.6,50,59,839/-. It is the case of the petitioner that the return of the petitioner was processed and case of the petitioner was selected for scrutiny under CASS (Computer-Assisted Scrutiny Selection) and pursuant to this process, a detailed scrutiny was undertaken. Later on, an assessment order came to be passed on 20.12.2019 under Section 143(3) of the Income Tax Act (hereinafter to be referred as the "Act"), accepting the returned loss of petitioner for Assessment Year 2017-18 without making any addition or disallowance of any claim of the petitioner. Despite the aforesaid circumstance, the respondent issued notice under Section 148 of the Act on 21.03.2021 calling upon the petitioner to submit return of income of Assessment Year 2017-18 and without prejudice, the petitioner filed its return of income in response to such notice on 17.04.2021 and sought reasons recorded for re-opening and approval was obtained under Section 151 of the Act. The said request was adhered to and the reasons as well as approval was provided to petitioner on 17.05.2021.

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2.1. It is the case of the petitioner that subsequently the petitioner filed its objections on 24.06.2021 questioning the validity of step of re-opening by issuing notice under Section 148 of the Act. It is the case of the petitioner that however the objections of the petitioner came to be disposed of vide order dated 10.11.2021 and simultaneously on the same day, notice was issued calling upon the petitioner to supply details in relation to re-assessment by 25.11.2021. According to the petitioner, this is a clear violation of guidelines issued by the decision of this Court wherein a clear period is prescribed to be given to the petitioner to challenge notice under Section 148 of the Act after the order disposing of objections is issued. Hence, under the circumstance, the petitioner is constrained to approach this Court under Article 226 of the Constitution of India challenging the notice issued under Section 148 of the Act and the order disposing of the objections as indicated above.

3. After considering the submissions made by Mr. B.S. Soparkar, learned advocate appearing for the petitioner, the co-ordinate Bench while issuing notice recorded submissions in its

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order dated 14.123.2021 and then while issuing notice directed the authority not to pass final order of assessment without permission of the Court and it appears that after completion of the pleadings, the petition has then come up for consideration before this Court.

4. Mr. B.S. Soparkar, learned advocate appearing for the petitioner has submitted that the impugned notice as well as order are patently illegal, contrary to law and in conflict with the fundamental rights guaranteed to the petitioner under Articles 14 and 19(1) (g) of the Constitution of India. It has been submitted that the respondent authority has recorded only substantial one reason to believe that income has escaped assessment. Since the claim under CSR (Corporate Social Responsibility) expenses made by the petitioner of Rs.9,86,34,775/- was otherwise not allowable and as such, the said claim deserves to be disallowed and to that extent, income of the petitioner has escaped assessment and this according to the petitioner is grossly erroneous. In fact the expenditure incurred is voluntarily wholly and exclusively for the purpose of business and as such, no income has escaped assessment.

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Learned advocate Mr. Soparkar has submitted that as per explanation 2 to Section 37 of the Act, any expenditure incurred on the activities relating to Corporate Social Responsibility referred to in Section 135 of the Companies Act, 2013 shall not be deemed to be an expenditure incurred for the purpose of business and as per Section 135 of the Companies Act, at least two per cent of the average net profits made during the three (3) preceding financial years shall be spent towards Corporate Social Responsibility and according to the petitioner, as a matter of fact, the petitioner incurred net loss of Rs.187.67 crores during the three (3) immediately preceding financial years and therefore, the petitioner was not under an obligation to spend any amount towards Corporate Social Responsibility by virtue of Section 135 of the Companies Act and as such, the expenditure incurred by the petitioner are not one that requires disallowance under explanation 2 to Section 37(1) of the Act. The expenditure is incurred out of commercial expediency and as such, is fully allowable and it is not the case of the respondent that expenditure if any for explanation 2 to Section 37 is not allowable expenditure and as such, the fundamental

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belief which the authority carried while coming to the conclusion is basically erroneous and not legally tenable and as such, it cannot be said that income has escaped assessment.

4.1. Learned advocate Mr. B.S. Soparkar has further submitted that the petitioner incurred expenditure of Rs.9,86,34,775/- voluntarily wholly and exclusively for the business purpose only and as such, no claim of the petitioner was wrongly allowed or no income has escaped assessment. Hence, since sanction accorded is in mechanical manner, the same is not a sanction in the eye of law. In fact, learned advocate Mr. Soparkar has further submitted that by virtue of Section 151 of the Act, no notice under Section 148 of the Act shall be issued unless higher authority applied its mind and is satisfied on the reasons recorded by the assessing officer that it is a fit case for issuance of notice. Only under such circumstance upon subjective satisfaction, process can be undertaken here and the said element is completely missing and as such, there is hardly any reason for the authority to re-open the assessment. On the contrary, the sanction is shown to have accorded in less than few hours on the very same day which also can show that the

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higher authority did not apply its mind at all while granting such sanction. This granting of sanction is not merely an empty formality, but it has to be accorded with objectivity and as such, notice under Section 148 of the Act since issued is based upon such mechanical exercise, the same is hardly sustainable in the eye of law.

4.2. Learned advocate Mr. Soparkar has further submitted that the case of the petitioner was selected for scrutiny as indicated above and detailed scrutiny was undertaken and subsequently, a specific order of assessment has been passed without making any addition or disallowance of any claim of the petitioner and as such, now for the very same issue, if re-opening is permitted, the same tantamounts to be based upon changed opinion which is impermissible in view of settled position of law. On the contrary, there is no tangible fresh material available with the authority to arrive at a different opinion since the subject in contemplation is based upon the assessment recorded which was already scrutinized. Hence, in the absence of any fresh tangible material, re-opening is impermissible.

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4.3. Apart from that, learned advocate Mr. Soparkar has further submitted that notice under Section 148 of the Act is issued on the basis of the Audit objections which is not found acceptable by the respondent authority and it is a well settled position of law that the reason to believe needs to be of the Assessing Officer alone and same cannot be substituted by objections received from the audit department and if the Assessing Officer has objected to the audit party's communication then the reasons recorded are not in accordance with law and as such, steps in contemplation is not valid. For this purpose, reliance was placed on few decisions delivered by this Court which are hereunder :-

> *"(1) In the case of Ship Gravures Ltd. [2013] 40 taxmann.com 309 (Gujarat);*
> *(2) In the case of Vodafone West Ltd. [2013] 37 taxmann.com 158 (Gujarat);*
> *(3) In the case of Raajratna Metal Industries Ltd. [2014] 49 taxmann.com 15 (Gujarat);*
> *(4) In the case of Jagal Jayantilal Parikh [2013] 355 ITR 400 (Gujarat);*
> *(5) In the case of Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC)"*

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4.4. Yet another reason which has been submitted for questioning validity of action taken by respondent authority is that the same is not sustainable in view of the fact that in identical situation in the case of ***Adani Power Maharashtra Ltd. v. Assistant Commissioner of Income Tax***, on almost similar issue, rendered in Special Civil Application No. 347 of 2022 vide order dated 20.02.2023 the co-ordinate Bench while dealing has allowed the petition and set aside the notice as well as order disposing of objections and the present case is almost on similar basis and as such, also, the present petition deserves to be allowed.

5. As against this, Ms. Maithili Mehta, learned advocate appearing for the respondent has vehemently objected initially to the present petition and by drawing attention to the affidavit which has been submitted by the authority has requested the Court not to entertain the petition. It has been submitted that on perusal of the records for the year under consideration, it was found that under Section 37(1) expenses which are incurred wholly and exclusively for the purpose of business of assessee are allowable and as such, Corporate Social Responsibility

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expenses are not allowable and as such, wrong claim of CSR expenses by the petitioner assessee has resulted into escapement of income to that extent and as such, a step has been rightly initiated by the authority. In fact, the learned advocate appearing for revenue authority has submitted that prior to issuance of notice under challenge all statutory requirements have been scrupulously observed and after due application of mind, reasons have been recorded and independent opinion is arrived at and as such, when action sought to be initiated is after proper scrutiny of record and after due application of mind, satisfaction arrived at by the authority for re-opening may not be interfered with in exercise of extraordinary jurisdiction. It has been submitted that guidelines which are prescribed by the Court have also been observed which are laid down in the case of ***GKN Driveshaft (India) Ltd. v. Income Tax Officer*** reported in ***259 ITR 19 (SC)*** and also guidelines laid down by this Court in the case of ***Sahakari Khand Udyog Mandal Ltd., v. Assistant Commissioner of Income Tax*** rendered in *Special Civil Application No. 3955 of 2014 dated 31.03.2014* and as such, in no circumstance,

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according to Ms. Maithili Mehta it can be said that the order as well as notice under Section 148 of the Act is bad or illegal in any way. In fact, according to learned advocate Ms. Mehta, the contention which is tried to be raised is without any basis and not tenable. In fact, from the assessment records, it was found that for the year under consideration, Annual Report for Financial Year 2016-17, relevant to the Assessment Year 2017-18, the assessee company at Note No. 34 of Profit and Loss Account and at Sr. No. 38 of the ITR, 'other expenses' , the assessee had debited CSR to the extent as mentioned above and as can be seen from the computation of income, 'Income from Business or Professions' as well as ITR, Part A-O1 Sr. No. 7(h) of Assessment Year 2017-18, same has not been added back while computing the taxable income as per the Income Tax Act and as such, in view of Section 37(1) of the Act, the explanation (2), any expenditure incurred by the assessee on the activity relating to corporate social responsibility referred to in Section 135(1) of the Companies Act, shall not be deemed to be an expenditure incurred by the Civil Court for the purpose of business or profession and as such, CSR expenses are not

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allowable and as such require to be disallowed. It is a wrong scheme made under the head CSR expense which has in fact resulted into escapement of assessment to the extent of Rs.9,86,34,775/- and as such, the authority has rightly initiated steps.

5.1. Learned advocate Ms. Mehta has further submitted that necessary sanction to issue notice under Section 148 of the Act was already obtained from the Additional Commissioner of Income Tax by virtue of Section 151 of the Act and Additional Commissioner of Income Tax had gone through the reasons recorded by the assessing officer and upon perusal and after satisfaction, approval has been accorded and as such, since issuance of notice under Section 148 of the Act was already obtained from the Additional Commissioner of Income Tax by virtue of Section 151 of the Act and Additional Commissioner of Income Tax had gone through the reasons recorded by the assessing officer and upon perusal and after satisfying, approval has been accorded and as such, since issuance of notice under Section 148 of the Act is after due application of mind and after subjective satisfaction, there is hardly any reason for the

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petitioner to raise any grievance. In fact, according to learned advocate Ms. Mehta, the petitioner is not remediless and if the claim is found to be justified, during the process, necessary order would be passed and in case if any adverse order is passed, then also the petitioner is not remediless, statutory remedies are available to ventilate the grievance and as such, has submitted that at this stage of the proceedings, the petition may not be entertained. It has further been contended that audit objections on the point of fact can be a valid ground for re-opening the assessment and in this regard, reliance is placed on the decision of the Hon'ble Apex Court in the case of ***Commissioner of Income Tax v. Beedies Pvt. Ltd.,*** reported in ***237 ITR 13***, in which it has been propounded by the Hon'ble Apex Court that *"xx xx xx. We are of the view that both the learned Tribunal and the Hon'ble High Court were not in error in holding that the information given by the internal audit party could not be treated as information within the meaning of Section 147 (b) of the Act. The Audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment xx xxx xxx. The dispute as to whether re-*

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opening is permissible after audit party expresses an opinion on the question of law is now being considered by the Larger Bench of this Court. There can be no dispute that audit party is entitled to point out the factual error or omission in assessment, re-opening of the case on the basis of the factual error pointed out by the audit party is permissible under the law. In view of that, we hold that re-opening of the case under Section 147 (b) of the Act in the facts of this case was on the basis of the factual information given by the internal audit party and was valid in law xxx xxx" and as such, by referring to the aforesaid observations made by the Hon'ble Apex Court, it has been submitted that objection raised by the petitioner is not sustainable even on this proposition as well. Hence, overall consideration of the material on record would clearly indicate according to learned advocate Ms. Mehta that the action sought to be initiated is thoroughly justified and permissible in law. Hence, no case is made out to call for any interference.

6. In re-joinder to this, learned advocate Mr. Soparkar has on the contrary reiterated that this very stand has been taken into consideration by the co-ordinate Bench of this Court and as

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such, has stated that already in Special Civil Application 347 of 2022 a decision is already taken and the notice as well as the orders came to be set aside and as such, when the very revenue authority has been examined by the co-ordinate Bench of this Court in the case of *Adani Power Maharashtra Limited (supra)* the stand taken is impermissible and as such, has requested to allow the petition.

7. Having heard learned advocates appearing for the respective parties and having gone through the material on record, few circumstances are not possible to be unnoticed. Before dealing with the controversy involved in the present proceedings, we may deem it proper to quote hereunder the relevant provision i.e. Section 135 of the Companies Act :-

> ***Section 135*** *of the Companies Act deals with Corporate Social Responsibility which indicates that every company having net worth of Rs.500 crores or more or turnover of Rs.1,000/- crores or more or net profit of Rs.5 crore or more during any Financial Year is required to constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors of whom at least one should be an independent director. The Board has also to disclose the composition of Committee in its report. Sub-Section (3) of Section 135 prescribes function of Committee."*

7.1. The further relevant provision is Section 37 of the Income

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Tax Act, 1961 and since same is touching to the controversy, we deem it proper to quote hereunder with explanation :

> **Section 37** : ***General.***
>
> ***37.*** *Any expenditure[1] (not being expenditure of the nature described in sections 30 to 36 [2][***] and not being in the nature of capital expenditure[3] or personal expenses of the assessee), laid out or expended wholly and exclusively[3] for the purposes of the business[3] or profession shall be allowed in computing the income chargeable under the head "Profits and gains of business or profession".*
>
> *[Explanation. 1.]—For the removal of doubts, it is hereby declared that any expenditure incurred by an assessee for any purpose which is an offence or which is prohibited by law[5] shall not be deemed to have been incurred for the purpose of business or profession and no deduction or allowance shall be made in respect of such expenditure.]*
>
> *[Explanation 2.—For the removal of doubts, it is hereby declared that for the purposes of sub-section (1), any expenditure incurred by an assessee on the activities relating to corporate social responsibility referred to in section 135 of the Companies Act, 2013 (18 of 2013) shall not be deemed to be an expenditure incurred by the assessee for the purposes of the business or profession.]"*

8. In light of the aforesaid provision, when the petitioner was called upon to explain, the petitioner has explained vide objections dated 24.06.2021 and inter alia contended that by virtue of explanation 2 attached to Section 37 of the Income

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Tax Act, the assessing officer has erroneously concluded that such CSR expenditure cannot be allowed under Section 37 of the Income Tax Act and to that extent, there is escapement of income, the said conclusion is patently erroneous and as such, the action which is sought to be initiated is impermissible. In fact, as a matter of records, the petitioner has made average net loss of Rs.187.67 crores during three immediately preceding Financial Years and as such, the petitioner was not under obligation to spend any amounts toward CRS by virtue of Section 135 of the Act and as such, the expenditure incurred by the petitioner is not the one which requires disallowance under explanation 2 to Section 37 (1). The expenditure incurred is out of Commercial expenses and is fully allowable and further it is the stand of the petitioner that even it is not the case of revenue that expenditure if any for explanation 2 to Section 37 is not allowable expenditure and as such, the fundamental error appears to have been crept in.

9. At this stage, reliance which has been made by the learned advocate appearing for the petitioner about the decision dated 20.02.2023 passed by the co-ordinate Bench of this Court in the

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case of *Adani Power Maharashtra Limited (supra)* where-in also this issue has been the subject matter of consideration and in which notice for re-opening and the order rejecting the objections came to be set aside.

10. Yet another substantial contention which has been taken is that re-opening on the basis of audit party objection is not permissible and the learned advocate appearing for the petitioner has on this issue relied upon the aforementioned decision of the co-ordinate Bench which has dealt with specifically the said issue and after relying upon several other decisions, it was observed that at the instance of audit party, no such exercise is permissible. Here also on the present case on hand, one of the main contention is that audit party had expressed opinion which contention is also not stoutly contradicted. On the contrary, in paragraph 5.6 of the affidavit-in-reply filed by the revenue, justification is tried to be made that re-opening of the case on the basis of the factual error pointed out by the audit party is permissible under the law and as such, objection was not considered.

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11. It further appears from the additional affidavit dated 25.08.2022 which has gone undenied and on the contrary it has been substantiated that the respondent authority has objected to the issue about CSR on the basis of the objection raised by the audit party. It has been submitted that one of the Director of the Company submitted an application under Section 6(3) of the Right to Information Act on 06.12.2021 seeking information as to objection raised by the audit party and the reply of the same was given by assessing officer. The said information was provided in the form of order dated 10.12.2021 issued under Section 7(1) of the Right to Information Act which is attached to Annexure-AA1 on page 117 of the petition compilation, it appears that step of re-opening is on the basis of the objection raised by the audit party as can be seen from paragraph 3 of the said page 117 in the case of this very petitioner and as such, also when the co-ordinate Bench has dealt with the issue as to whether on the strength of audit objections, re-opening of assessment is permissible or not is clearly clinching the issue raised in the present proceedings and hence, we answer in negative against the revenue.

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13. The co-ordinate Bench after analyzing the detailed case law on this subject has considered the issue and as such, we may deem it proper to quote hereunder the relevant observations made in the said judgment precisely paragraph 9 to 12 :-

> *9. This Court made it quite clear that the Assessing Officer himself initiated the reassessment proceedings without his own conviction and only at the instance of the audit party which was termed to be a coulourable exercise of jurisdiction and the same was not sustained.*
>
> *10. The two decisions of the Apex Court which are heavily relied upon will need to be considered at this stage. It is to be noted that this Court in Vodafone West Ltd (supra), has already referred to the Lucas T.V.S. It was a case where the auditor's opinion in regard to the interpretation of law was questioned to be treated by the Assessing Officer as information. The Court, while considering the submissions of both the sides, has held that apart from the information furnished by the audit party, the Assessing Officer had no other information for reopening under Section 147B. The opinion expressed by the audit party in the matter before the Apex Court showed that they had pointed out to the Assessing Officer that he failed to apply the provision contained in Section 35. This, according to the Apex Court, would amount to pointing out the law and the interpretation of the provisions contained in Section 35, which is barred by the decision of the Apex Court in Indian & Eastern Newspaper Society V.CIT [1979] 119 ITR 996. It was a case where the Tribunal has cancelled the order of reassessment and on reference, the High Court held that apart from the information furnished by the audit party, the Assessing Officer had no other information for reopening. The views taken by the*

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Tribunal and the High Court, both were upheld by the Apex Court and the appeals had been dismissed. This would, on the contrary, help the cause of the assessee.

11. So far as the P.V.S.Beedies (P) Ltd. (supra) is concerned, it was a case of reopening of assessment because in the original assessment, the donation made to a charitable trust were held by the Assessing Officer to be eligible for deduction under Section 80G. It was pointed out by the internal audit party that the recognition which had been granted to the trust had expired on 22.9.1972. Since it had expired before 1.4.1973, for the assessment year 1974-75 and 75-76, the trust was not recognized charitable trust and therefore, the donation to the trust did not qualify for deduction under Section 80G as a donation made to a recognized charitable trust. The audit party had pointed out a fact that had been overlooked by the Assessing Officer in the assessment. When the Tribunal and the High Court held that the information given by the internal audit party could not be treated as information within the meaning of Section 147B, the Court held that the factum of the recognition granted to the charitable trust since had expired on 22.9.1972 was not noticed by the Assessing Officer. It was not a case of information of question of law. The dispute as to whether the reopening is permissible after audit party expresses an opinion on a question of law was considered by a larger Bench of the Apex Court in the case of Lucas T.V.S.Ltd. (supra) wherein, the Court held that the reopening of the case on the base of a factual error pointed out by the audit party is permissible under the law and there can be no dispute that the audit party is entitled to point out such factual error or omission in the assessment.

12. Here is a case where, admittedly, audit party had expressed the opinion on a question of law. It had also pointed out to the Assessing Officer and that information which had been given was on question of law. This has been dealt with in Lucas T.V.S. Ltd. and even otherwise, the facts of the instant case clearly make out that when

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the audit party had pointed out to the Assessing Officer, it not only was disagreeing with the information given on the law point, it had completely disagreed after examining the objections raised by the audit party. In paragraph 3 and paragraph 6, it has said that after carefully examining, the objections are not acceptable and they need to be dropped. The Assessing Officer, without any conviction, when has issued the notice, this surely is not a case where the reopening of the case is on the basis of any factual error pointed out by the audit party so as to be covered by the decision of the P.V.S.Beedies (P) Ltd. On the contrary, it is covered by those decisions which have been discussed in reopening on the part of the Assessing Officer essentially on the audit party opinion and not on the basis of his own conviction. There is no material worth the name emerging that to indicate any independent application of mind could be noticed. On the contrary, there are glaring facts which have been pointed out that the Assessing Officer had no subjective satisfaction while issuing the notice of reopening. Therefore also, in this background, it is a settled law that any notice of reopening issued by the Assessing Officer without any independent application of mind would laid the validity. Accordingly, this petition is allowed. Notice dated 21.3.2021 along with the order dated 25.10.2021 are quashed and set aside."

14. Yet another circumstance which is also not in a position to be overlooked is that re-opening of the assessment is on the basis of the change of opinion as well since the main step is sought to be initiated upon perusal of the assessment record for the year under consideration which can be seen from the reasons for re-opening reflecting on page 58 of the petition compilation and as such, it appears that there is no application

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of mind while issuing impugned notice as well as disposing of objections. In fact, detailed scrutiny was undertaken and after satisfying himself, the assessing authority has passed an order of assessment wherein neither there is any addition or disallowance of any claim is made and as such, on the basis of the same records, issuance of notice under Section 148 of the Act tantamounts to be on the basis of the change of opinion which is impermissible and since the said issue is now well settled, we may not overburden the present order by incorporating the case law on the subject. On the contrary, we also found from the contents of the objection that all details are consisting to computation of income, profit and loss figures and also tax audit report which are forming part of the assessment records, still in the absence of any tangible material, the respondent authority is trying to take a different view despite the original scrutiny of assessment is done. Under the circumstance, the action sought to be initiated is impermissible and we are of the considered opinion that a case is made out by the petitioner to call for interference.

15. In view of the aforesaid discussion and in view of settled

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proposition of law and in consideration of the decision delivered by the co-ordinate Bench of this Court, we are of the opinion that case is made out by the petitioner to quash and set aside the impugned notice dated 21.03.2021 as well as impugned order dated 10.11.2021.

16. Accordingly, petition is allowed. The impugned notice dated 21.03.2021 as well as order dated 10.11.2021 are quashed and set aside. With no order as to costs.

(ASHUTOSH SHASTRI, J)

(J. C. DOSHI,J)

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