IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4945 of 2021

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OMNI LENS PVT. LTD.

Versus

THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 3(1)(2)

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Appearance:
MR B S SOPARKAR(6851) for the Petitioner(s) No. 1
MR. NIKUNT K. RAVAL, ADVOCATE WITH MRS KALPANAK RAVAL(1046) for the Respondent(s) No. 1

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CORAM:**HONOURABLE THE CHIEF JUSTICE MR. JUSTICE ARAVIND KUMAR**
and
HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI

Date : 12/01/2023

CAV JUDGMENT

(PER : HONOURABLE MR. JUSTICE ASHUTOSH SHASTRI)

[1] By way of this petition under Article 226 of the Constitution of India a challenge is made to the notice issued by the respondent authority under Section 148 of the Income Tax Act, 1961 (for short "the Act") dated 23.03.2020 and has also sought for setting aside the order passed by authority disposing of the objections dated 22.02.2021.

[2] The brief background of facts which has given rise to present proceedings are: Petitioner is a company, dealing with

the business of manufacturing Intra Ocular Lenses and trading in Opthalmic Surgical Instruments. Petitioner filed its return of income on 30.09.2013 for the assessment year 2013-2014 whereby income of Rs.12,56,35,840/- was declared. The case of the petitioner was selected in scrutiny. According to petitioner, a query was raised with regard to details in commodity trading by the petitioner *vide* notice under Section 142(1) of the Act and said notice was dated 02.07.2015. Petitioner is said to have replied to the said notice on 04.08.2015 and later on authority passed an order of assessment on 06.11.2015 assessing the income at Rs.12,62,44,910/-.

[2.1] It is the case of the petitioner that subsequently ADIT (Inv) issued a summons under Section 131(1A) read with Section 131 of the Act on 12.12.2019, *inter alia,* seeking information regarding its Demat Account statements for the financial year 2012–2013 and 2013–2014 and additionally, trade details were also carried out on National Spot Exchange Limited (NSEL) along with ledger of NSEL. In response to the said summons, petitioner replied *vide* letter dated 18.12.2019 giving details

sought for. However, disagreeing with the said submissions, respondent authority issued notice a under Section 148 of the Act on 23.03.2020 for reopening the assessment for the assessment year 2013–2014 and along with that reasons for reopening were supplied on 30.12.2020. The said reasons were also regarding the issue for which notice under Section 133(6) of the Act was issued. According to the petitioner, since the reasons for reopening of assessment were completely misconceived and baseless, petitioner assessee raised several objections on merit before the authority and requested to drop the reassessment proceedings and said objections in detail were submitted on 23.01.2021. However, without considering said objections in its proper perspective an order came to be passed by the respondent authority on 22.02.2021 disposing of objections and as such, under the circumstances, action sought to be initiated was quite in conflict with settled proposition of law and as such petitioner is said to have been constrained to approach this Court by way of present petition under Article 226 of the Constitution of India challenging the issuance of notice under Section 148 of the Act as well as order dated 22.02.2021.

[3] Initially when petition came up for consideration, Co-ordinate Bench of this Court has entertained the petition and passed an order on 15.04.2021 and directed the authority not to pass any final order, which is reproduced hereunder:-

> *"Heard Mr. Saurabh Soparkar, the learned Senior Advocate assisted by Mr. Bandis Soparkar, the learned advocate appearing for the petitioner.*
>
> *What is challenged in this petition under Article 226 of the Constitution of India, is the notice under Section 148 of the Income Tax Act (hereinafter referred to as 'the Act' for short) dated 23.03.2020.*
>
> *Mr. Soparkar, the learned Senior advocate has contended that there are no reasons existing to reopen the assessment, which has already finalized under Section 143(3) of the Act.*
>
> *Hence, notice returnable on 29.04.2021. Meanwhile, the proceedings may go on, however, no final order may be passed. Direct service is permitted."*

[4] After pleadings having been completed, matter has come up for consideration before us and both the learned advocates have requested to hear and dispose of the petition on merits. Accordingly, upon request, we heard the matter, in which, Mr. Bandish Soparkar, learned advocate has represented the

petitioner whereas Mr. Nikunt K. Raval, learned standing counsel has represented the respondent authority.

[5] Mr. Bandish Soparkar, learned advocate appearing on behalf of petitioner has contented that action initiated by the respondent authority is impermissible in view of peculiar background of facts. He would submit merely on the ground simply information is received from DDIT that assessee has taken accommodation entries through the NSEL platform to the tune of Rs.3.15 crores, the case does not become ripe for reopening of assessment. In the absence of new, fresh and tangible material distinct different from what was forming part of assessment proceedings no steps of reopening of the assessment can be undertaken. Here in the instant case, on the basis of material already available during the assessment proceedings, reopening is sought to be undertaken and as such, when the scrutiny is already over and no fresh tangible material is available, such action is impermissible and for that purpose, by relying upon ***Shanti Enterprise*** reported in ***(2016) 76 taxmann.com 184***, he seeks for proceedings being quashed.

[5.1] Mr. Soparkar, learned advocate has further submitted that if the order under challenge of disposing of the objections as well as the notice under Section 148 of the Act if seen, *prima facie* reflects non application of mind and alleged satisfaction is a borrowed satisfaction which cannot be the base for reopening for assessment. A bare perusal of the order reflects no independent reasons are forthcoming and by referring to page 68 to 79, it has been contended that order under challenge is not sustainable in the eye of law and for that purpose, Mr. Soparkar, learned advocate has relied upon ***Meenakshi Overseas (P.) Ltd., (2017) 395 ITR 677, RMG Polyvinyl (I) Ltd., 396 ITR 5 and Surani Steel Tubes Limited in case of Special Civil Application No.13245 of 2021*** and has reiterated his submission that on basis of borrowed satisfaction, no reopening of assessment is permissible. It has been further contended that here is the case in which the authorities are inclined to reopen the assessment after a period of four years from the end of assessment year and thereto there is no failure on the part of assessee to disclose true and correct facts. All facts regarding NSEL trade transactions were disclosed clearly

by the petitioner assessee before the Assessing Officer during the original scrutiny as well as the DDIT (investigation) and as such, when there is no failure on the part of assessee to disclose reopening is impermissible beyond a period of four years and to substantiate his contentions, Mr. Soparkar, learned advocate has relied upon ***Intercontinental (India), (2016) 73 taxmann.com 232 (Gujarat)*** and ***Jivraj Tea Ltd., (2016) 386 ITR 298***.

[5.2] Yet another contention has also been raised by Mr. Soparkar, learned advocate contending action which is sought to be initiated is on the basis of change the opinion and in view of settled position of law mere change of opinion would not permit such reopening of assessment. Regarding this issue for which reopening is sought, specific questions were already raised before the scrutiny proceedings and the answers were also given in specific terms and all those answers about specific question have been accepted and scrutiny proceedings was concluded by passing assessment order and on the basis of mere change of opinion reopening of assessment is

impermissible and he has made a reference to judgments in the matters of ***Premium Finance (P.) Ltd., (2016) 73 taxmann.com 369*** and ***Gujarat State Board of School Textbooks, (2016) 75 taxmann.com 281***. Mr. Soparkar, learned advocate has also contended that in the peculiar background of facts; when the scrutiny process has already been concluded. Reopening of assessment is impermissible in the absence of any distinguishable material. It is further contended that apart from aforementioned situation, no income has escaped assessment; the purchase and sale of the commodities through NSEL platform has been correctly projected by the assessee and the figures of earned profit have also been indicated being a part of income which was already offered and as such, there is no income that has escaped assessment. When such is the situation, the action initiated now is impermissible. Hence, he prays for relief sought for being granted.

[5.3] To substantiate his contention, a reference is made to judgments reported in ***Ganga Saran & Sons (P.) Ltd., (1981)***

130 ITR 1 (SC), P.G. & W. Sawoo (P.) Ltd., (2016) 385 ITR 60 (SC) and Devesh Metcast, (2011) 12 taxmann.com 458 (Guj) and by referring to these judgments, it has been indicated that action which is sought to be initiated is not sustainable and impermissible in the eye of law. Hence, there is hardly any justification in such step against the petitioner. Hence, he contends relief prayed for may be granted.

[5.4] Additionally, Mr. Soparkar, learned advocate has also pointed out that in the original assessment proceeding every aspect was inquired into by the Assessing Officer and by referring to page 33, he would submit detailed answers were also provided in December, 2019 itself and even taxes have also been paid. It is only after examining such stand, inquiry was closed and even subsequent inquiry undertaken for said purpose referred to in page 35 of the petition compilation has been subsequently dropped and after the entire process having been concluded after fulfledged inquiry / security, authorities surprisingly after unreasonable period has sought to reopen the assessment. When there is no failure on the part of petitioner

assessee to disclose full particulars at this stage, no such step under Section 148 of the Act can be taken and as such by contending aforementioned circumstances, Mr. Soparkar, learned advocate has requested to grant the relief as prayed for in the petition.

[6] As against this, Mr. Nikunt K. Raval, learned advocate appearing for the respondent authority has submitted that no doubt initially the scrutiny has been undertaken, but factum of accommodation entry was not examined in the manner in which it has been projected. In fact, when a specific information was received with regard to bogus accommodation entries and petitioner was found to be part thereof, it was found a necessity for authority to initiate step since assessee has failed to show that sums as indicated in the accommodation entries being part of their income and as such, assessee has not correctly disclosed the material facts and same being the situation, it is always permissible for the authority to reopen the assessment.

[6.1] Mr. Raval, learned advocate for respondent has further submitted that there was a clear belief on the part of authority

that income of the petitioner chargeable to tax has escaped for the assessment year 2013–2014 and as such authority was constrained to take steps to reopen the same. In fact, the investigations of NSEL Scam have already been carried out pursuant to a coordinated nationwide search survey action undertaken by directorates across the country on 22.08.2013, on various borrowers on the NSEL platform and in respect of the entities located in Ahmedabad, the investigation was undertaken by Unit-2 and survey report was also submitted and based upon such report few facts have surfaced, on the basis of which the action for reopening the assessment came to be initiated against petitioner. In fact, during the course of investigation, with regard to position of stock as shown by NSEL in its website, one Shri Nilesh Patel in his statement has categorically admitted that in fact the physical delivery with regard to purchase and sale of commodities, as shown in the books of assessee group, never takes place and the investors and brokers are very well aware about this fact from the beginning. Only fictitious stock was shown in the NSEL warehouse by creating paper evidence and stock was never in-

existence as can be seen from paragraph 4.2.4 on page 75 of petition compilation.

[6.2] Mr. Raval, learned advocate has also submitted that this entire investigation has indicated that circumstances which are reflecting are clearly indicating that reopening of assessment in fact deserves to be undertaken with regard to petitioner company, a reference in specific has been made on page 77 and in this connection, the assessee was asked to furnish the brief nature of business, source of investment / trade carried out on NSEL platform along with supporting documents and other relevant details. But no satisfactory explanation has been forthcoming and as such, when it was clearly found that NSEL platform was misused and exploited by unscrupulous brokers and traders to launder huge sums of money and when the trade carried out by the M/s. Omni Lens Pvt. Ltd. on NSEL platform during financial year 2012–2013 and 2013–2014, where the counter party member is M/s. N. K. Proteins Pvt. Ltd. was found to be bogus, the Assessing Officer was requested to verify the genuineness of other transactions as well and though the details

in specific forms were sought *vide* summons dated 12.12.2019, petitioner assessee has merely furnished the bank statements reflecting selected transactions and has not explained the source of investment / trades sufficiently and therefore, such unexplained investment / expenditure and the sale consideration are required to be added to the income and therefore on the basis of the inquiry report and upon perusal thereof it was found that assessee company had taken accommodation entries to the tune of Rs.3,15,97,353/- for the assessment year 2013–2014 and such amounts are based upon non-genuine entries. Hence, authority was justified in initiating the steps for reopening of assessment and such satisfaction is based upon minute details cannot be questioned by the petitioner by invoking extraordinary jurisdiction of this Court.

[6.3] Mr. Raval, learned advocate has also submitted that it is not correct on the part of the petitioner to contend that on the very same basis and same material, reopening is sought to be initiated. In fact, judgments which have been relied upon by petitioner are not of any assistance to the petitioner as facts are

altogether different. In fact, a specific remedy is available to the petitioner, even, after completion of proceedings under Section 148 of the Act and to thwart the reopening proceeding at this stage is not justified and therefore, he has requested the Court to dismiss the petition.

[6.4] Mr. Raval, learned advocate has further submitted that merely furnishing the bank statements without explaining in specific form the details which are demanded is no ground to stop the proceedings which are sought to be initiated against the petitioner and when petitioner even after that is not remediless and there is hardly any reason for petitioner to invoke extraordinary jurisdiction of this Court. To strengthen his submission, Mr. Raval, learned advocate has made reference to the following decisions:-

(1) ***Income Tax Officer versus Purushottam Das Bangur*** reported in ***(1997) 224 ITR 362 (SC).***

(2) ***Phool Chand Bajrang Lal versus ITO*** reported in ***(1993) 203 ITR 456 (SC).***

(3) ***Principal Director of Income Tax (Investigation) versus Laljibhai Kanjibhai Mandalia*** reported in ***(2022) 140 taxmann.com 282 (SC).***

(4) ***Spicy Sangria Hotels (P.) Ltd. Versus ITO*** reported in ***(2019) 111 taxmann.com 491 (Bombay).***

(5) ***Raymond Woollen Mills ltd. Versus ITO*** reported in ***(1999) 236 ITR 34 (SC).***

(6) ***Backbone Projects Ltd. Versus ACIT*** reported in ***(2021) 437 ITR 144 (Guj).***

(7) ***Yogendrakumar Gupta versus ITO*** reported in ***(2014) 366 ITR 186 (Guj).***

(8) ***Hemjay Construction Co. (P.) Ltd. Versus ITO, Ward – 2(2)*** reported in ***(2019) 419 ITR 39 (Guj).***

(9) ***Special Civil Application No.15739 of 2021*** in case of ***Jay Krishna Group though Bharvad Navghan Chhaganbhai versus ITO.***

(10) ***PCIT (Central) versus NRA Iron and Steel (P.) Ltd.*** Reported in ***(2019) 412 ITR 161 (SC).***

[6.5] After referring to aforementioned decisions, Mr. Raval, learned advocate has submitted that this is not a fit case, in which, action initiated is to be set at naught and prays this Court should not exercise extraordinary jurisdiction.

[7] In rejoinder to this, Mr. Bandish Soparkar, learned advocate has in substance reiterated his submission and contended that it was not a search, but it was merely survey proceedings and survey was undertaken by an authority and in the entire episode about M/s. N. K. Proteins Pvt. Ltd., petitioner was never involved and as such, he has reiterated that even order of disposing of objections is also suffering from the vice of non application of mind. Accordingly, the petition deserves to

be allowed since no case is made out by revenue to sustain its actions. No other submissions have been made.

[8] Having heard the learned advocates appearing for the parties and having gone through the material placed on record, we are of the opinion that following circumstances are not possible to be unnoticed emerging from records.

[9] The main grievance of the petitioner is that for initiation of proceedings impugned, the authority merely on the basis of information received from the DDIT (Inv), Unit 2(3), Ahmedabad has inferred and formulated an opinion with regard to the trading transactions of the petitioner on NSEL platform. In the context of this, it appears that petitioner was asked to furnish the specific details with regard to trading transactions which the petitioner has undertaken and in response thereto, from the reply given by the petitioner, it appears that details of trading in commodity by assessee namely in prescribed format has been furnished, but it appears that Assessing Officer found that assessee was not able to justify that investment made in mutual

fund is from its own fund or from the funds on which no interest payment is made by the assessee. It has also been found during the process of assessment order dated 06.11.2015, wherein it is mentioned categorically that reply of the assessee found to be not acceptable on certain issues and notice was issued for concealment of income and furnishing inaccurate particulars of income as can be seen from order dated 06.11.2015 on page 30. Later on, petitioner was served with summons under Section 131(1A) read with Section 131 of the Act on 12.12.2019 wherein also authority had called upon the petitioner to furnish details of all bank accounts either personally / jointly held during the financial year 2012-2013 and 2013-2014 and even the Demat Account statement was also asked for the aforesaid period. In addition to it, under the said communication, petitioner was asked to explain the treatment of NSEL transactions in its books of accounts / return of income, to furnish working of profit / loss earned by trading / investment activity carried on by the petitioner on National Spot Exchange Limited (NSEL) for the financial year 2012-2013 and 2013-2014 and tax treatment of the same. Additionally, the details regarding source of

investment / trade carried out on NSEL platform, along with supporting documentary evidence and also the details whether there is any outstanding receivable from National Spot Exchange Limited (NSEL) as on 31.03.2013, 31.07.2013 and 31.03.2014 had been sought for. In response to this, petitioner appears to have replied on 18.12.2019 wherein in Item No.3 on page 33, it has been mentioned that there was no Demat Account for transactions of commodities through NSEL platform and what has been furnished is a copy of Ledger Accounts of the brokers of NSEL and though it has been mentioned that NSEL were backed by the delivery allocation slip in fact in one of the statement which has been conveyed in the present order at later point of time, there was no physical exchange of delivery of stock which the petitioner has traded. In this reply, what has been furnished is the profit in a consolidated form with the income of Intra Ocular Lens and other Ophthalmic products business and accordingly, paid the Income Tax. But the details which were specifically asked for appears to have not been furnished as found by the authority. It is in the said reply conveyed that transactions for commodities of NSEL were

carried through its brokers, namely, Dipal Finance and Chimanlal Popatlal Commodities Brokers Pvt. Ltd and the outstanding in the books, if any, as on 31.03.2013, 31.07.2013 and 31.03.2014 were shown as Sundry Debtors and then figure of Bad Debts is mentioned. In the context of said reply having been furnished, the authority was not satisfied with the same and on such has supplied to the petitioner the reasons for reopening of case for assessment year 2013-2014 *vide* communication dated 30.12.2020 and this has been given on the basis of information received from DDIT (investigation), Unit 2(3), Ahmedabad and said inquiry report has revealed and convinced the authority to reopen the assessment. Gist of the said reasons dated 30.12.2020 deserves to be reproduced hereunder:-

> "*1.Information regarding large scale tax evasion & money laundering (by brokers on the National Spot Exchange Ltd. (NSEL) was received in this office. On the basis of investigations carried out by various investigation agencies and regulatory bodies it is believed that NSEL exchange platform was misused and exploited by unscrupulous brokers and traders to launder huge sums of money.*

1.1 As per exchange record, there are several brokers who have traded in client's accounts without submitting client KYC including PAN. This is enough to suspect involvement of black money and there proxy accounts are used to launder the money. Various modus operandi adopted by various brokers/traders launder the money and tax evasion are as under:

i) Use of proxy (Benami) accounts: In this, the trader is proxy (benami) and lends his name and KYC details to the broker. The broker uses the funds available at his disposal for deploying through such proxy accounts. Such traders are offered to pay only token amount of, say 10%, the amount deployed on NSEL and remaining 90% amount is funded by the broker or by his in-house NBFC company. In this method only 10% gets reflected in the records and 90% of the amount goes unnoticed and unverified. Brokers via their NBFCs misused the fact that NSEL was not the notified exchange for the purpose of AIR or CIB reporting under the Income Tax Department. The source of fund of the broker and their in-house NBFC Company will result in unearthing large sum of unaccounted income,

j) Use of ingenious methods of accounting by traders and brokers: May of the traders/ brokers on NSEL have shown income as income form "other sources" or "arbitrage income" as "net income" as against the "gross trading income" to avoid the provisions of compulsory tax audit and thereby avoiding complete scrutiny as to source of capital and funds.

k) Evaded the provision of Section 44AB of the Act: In many cases the clients have violated the provision of compulsory tax audit under section 44AB of the Income Tax Act

I) Wrongful and unlawful claim of expenses as bad debts: In July 2013 the NSEL operations were halted as per the directions by DCA. This had resulted into a statement in settlement of amounts of unsettled trades. Most of the traders and brokers had claimed such amounts as deduction as "bad debts".

4.2 As mentioned earlier, survey u/s 133A of IT Act was carried out in the case of all the group concerns of the NK Proteins group. Brief findings of this survey as submitted in the Survey Report prepared by ITO(Inv), Mehsana which is quoted in order of assessment u/s. 143 for the A.Y. 2013-14 in the case of M/s. Tirupati Proteins Private Limited are as follows:

4.2.1 Shri Nilesh Patel & Shri Nimish Patel are the main persons of the NK Proteins group. Shri Nilesh Patel is the Managing Director of N.K Proteins Ltd. & N.K. Industries Ltd. & Shri Nimish Patel is the Chairman & Managing Director of N.K. Proteins Ltd & N.K. Industries Ltd. During the course of survey conducted by investigation wing, statement of Shri Nilesh Patel was recorded u/ s. 133A of the Act. In the statement recorded, he explained in detail the trading activities carried out by N.K. Proteins Ltd. as well as its subsidiary concerns on the platform of National Spot Exchange Ltd. He stated that in the year 2008 M/s.

N.K Proteins Ltd. became the member of National Spot Exchange Ltd. The subsidiary concerns of M/ s. N.K. Proteins Ltd., namely M/ s. N.K. industries, M/ s. N.K Corporation, M/ s. Tirupati Retail Pvt. Ltd. Tirupati Proteins P Ltd. and N.K. Corporation (Prop) etc. were involved in the trading activities with NSEL as clients of M/ s. N.K. Proteins Ltd. According to his statement, Shri Amit Mukherjee, Vice President of NSEL, approached him in F.Y. 2008-09 with a request to utilize the newly launched Farmer's Contract by NSEL. As per the said contract, the farmers could directly sell agricultural products through NSEL and N.K. Industries Ltd. can purchase the products through NSEL platform.

For the said purpose, N.K. Industries Ltd. offered its godown and office to NSEL. However, the exchange discontinued the Farmer's Contract and launched a Trade Contract since the farmers could not sell the sufficient quantity of material as per the requirement of M/ s. N.K. Proteins group.

4.2.2 He further submitted that the 'Trade contract' with National Spot Exchange Ltd. was meant for availing finance by executing paper trade on the electronic platform of NSEL. The modus operandi adopted was such that client of M/s. N.K Protein Ltd. say for e.g. M/s. N.K Industries Ltd. (henceforth NKIL) executes a T+3 contract in the electronic platform of NSEL whereby NKIL sells 100 kg. of castor seeds to another prospective investor/ client of another broker of NSEL for Rs. 100/-. The other prospective investor client of NSEL in turn executes a T+36 trade contract on the electronic platform of NSEL

whereby it sells the castor seeds to another client of M/s. N.K Proteins Ltd. such as M/s. N.K Corporation (associate concern) for Rs. 110/-. Thereafter, the associate concern i.e. M/s. N.K. Corporation, carry out intra-group sale back to M/s. N.K. Proteins Ltd. to square off the sale/purchase transaction and to maintain the stock position. All the above three transactions are executed simultaneously . Thus, after the above set off of circular transactions, M/ s. N.K._Proteins Ltd. has to receive the amount on the 3rd day from prospective investor (T+3) and the subsidiary concern of M/s. N.K. Proteins Ltd. has to pay to the prospective investor after 36 days (T+36). To keep the process going a new T+3 contract is executed by with NSEL 2 to 3 days prior to the due date of making payment as per T+36 contracts. The funds receivable from such T+3 contract neutralized the fund outflow needed to settle the initial T+36 contract. In this way, the T+36 contracts are rolled over from one settlement cycle to the next cycle.

4.2.3 For the above purpose, NSEL has maintained a Settlement Account with HDFC Bank in the name of N.K. Proteins Ltd. All the pay-in and pay-out transactions with National Spot Exchange Ltd. have taken Place through this account only. For the purpose of carrying out transactions with NSEL, they used to keep 3 to 5% of the value of the transaction as margin money in this account which is released only after the transaction is over. Likewise, for each and every transaction, sufficient margin money is required to be maintained in this account. In other words, trading through NSEL is possible only if there is sufficient margin money in the settlement account. In the case of

N.K. Proteins Ltd. the settlement account is being maintained at HDFC Bank, Account No. 00990680014847. From this account, the assessee transfers the money to its Current account and Clients account, as per the requirement which are also maintained with HDFC Bank.

4.2.4 Regarding the position of stock as shown by NSEL in its website, Shri Nilesh Patel in his statement categorically admitted that in fact, physical delivery with respect to the purchase and sale of commodities, as shown in the books of assessee group never takes place and the investors and brokers are very well aware of this fact form the beginning. Only fictitious stock, was shown in the NSEL warehouse by creating paper evidence (Emphasis supplied). Since all the transactions were financial transactions and NSEL treated the profit on sale of commodities as interest in their books, on account of accrued interest, in the books of NSEL, the position of N.K. Industries Ltd. (NKIL) kept on increasing with every settlement cycle. As NKIL made no payouts, the said position was shown by NSEL as having been covered by stock, which was non-existing. In this way, the warehouse stock position in the books of NSEL kept on building up. As the transactions were primarily of financing in nature, there was no question of such transactions/ traders being supported by any physical stock and delivery thereof. The trades to be executed from the electronic platform of NSEL were also decided by NSEL and all such trades were executed from the Kadi office of NSEL which was in the premises of M/s. N.K. Industries Ltd.

4.2.5 In answer to question No. 13 of his statement as to whether any stock belonging to N.K. Group is lying in the accredited godown of NSEL, Shri Nilesh Patel submitted that a lease agreement was entered into in the year June, 2013 with NSEL, according to which, the warehouse of N.K. Industries Ltd. was given on lease to NSEL. However, the N.K. Group companies never kept any stock in the accredited godowns of NSEL and the lease agreement was entered into just for the purpose of fulfilling the procedure as laid down by FMC. It is also pertinent to mention here that in answer to question No. 15 in this regard, Shri Nilesh Patel stated that the storage capacity of washed cotton seed oil in the NSEL accredited warehouse is only 2000 MT and the storage capacity of Cotton Seed is 10000 MT.

4.2.2 All the above facts dearly establish the fact that N.K. Proteins Ltd. is the registered member of National Spot Exchange Ltd, and the group concerns of N.K. Proteins Ltd. namely, N.K. Industries Ltd. N.K. Corporation, Tirupati Retail (India) p Ltd. and Tirupati Protein P Ltd. had become the clients of M/s. N.K. Proteins Ltd. for carrying out the trading activities on the platform of National Spot Exchange Ltd and no outside independent third party ever became the client of M/s. N.K. proteins Ltd. In other word, all trades executed by M/s. N.K. Proteins Ltd. on behalf of its so--called client on the electronic platform of NSEL were meant for the benefit of the N.K. Proteins Group itself.

4.2.7 Further, Shri Nilesh Patel, has categorically admitted in their statement recorded on 22.08.2013 that they

started trading on the platform of NSEL in the year 2008-09 and the transactions used to take place only on paper as per the directions of the NSEL and there was no physical delivery of goods. The above facts clearly show that the profit/losses booked by the assessee in their respective books of account and declared in the returns of income during the above period are based on only paper transactions and there was no physical delivery of goods at any point of time. The entire gamut of transactions was not real transactions and institutionalized shape of the entire transactions was given to obtain funds from the investors on short term basis. These investors were assured for a handsome interest rate. The entire scheme collapsed when there was default on the part of the NSEL with the active connivance of the borrowers like M/s. N.K. Proteins Ltd.

4.3 As discussed above, the transactions carried out by NK Proteins (and other such similar defaulters) on NSEL platform were mere paper transactions without any physical transfer of goods. On account of severe payment crises, the operations on NSEL platform were first suspended and then stopped on 31.07.2013. Subsequently, various regulatory and law enforcement authorities (including Mumbai Police, EOW, FMC) have undertaken the investigation of the scam. The Forward Market Commission (FMC), which was the main regulator of commodities market at that point of time, vide its order no. 4/5/2013-MKT-I/B dated December 17, 2013 has also confirmed the various irregularities (discussed above) related to NSEL transactions, (copy of order available in public domain)."

[10] In the said reasons, the details regarding petitioner company has also been incorporated and it was categorically found by the authority that petitioner assessee was asked to furnish the brief nature of business, source of investment / trade carried out on NSEL platform along with supporting documents and other relevant documents, still the assessee has failed in its reply to furnish the same. After taking out summary from the commodity transactions made by the petitioner for the financial year 2012-2013 and 2013-2014, it has been clearly opined that at many instances, the counter party member of the commodity transactions carried out by the assessee on NSEL platform is M/ s. N. K. Proteins Pvt. Ltd and out of total 148 sale transactions M/s. N. K. Proteins Pvt. Ltd. is counter party member in 48 transactions and in the same manner out of 124 sale transactions M/s. N. K. Proteins Pvt. Ltd. is a counter party member in 41 transactions and therefore, it was clearly found by the authority that NSEL platform was misused and exploited by unscrupulous brokers and traders to launder huge sums of money and undisputedly petitioner has traded through brokers.

It has also been found *prima facie* by an authority that trade carried out by petitioner on NSEL platform for the relevant year as indicated above, where counter party member is M/s. N. K. Proteins Pvt. Ltd and trades are bogus and as such veracity and genuineness of the same deserves to be examined and it has been found that though summons dated 12.12.2019, the assessee was categorically asked to furnish the details of source of investment along with supportive documents, it had just merely furnished bank statements of selected transactions with the broker and had not explained the source of investment / trades sufficiently. Therefore, it was opined clearly that trades carried out by the petitioner on NSEL platform deserves to be added to its total income. The accommodation entry which has been stated to be of huge amount and the cumulative effect has satisfied the authority to reopen the assessment of the petitioner for the year 2013-2014, as indicated, and such opinion is generated on the basis of specific information and documentary evidence furnished by petitioner having found to be inadequate and on the basis of unexplained and unfurnished details by the petitioner respondent has formulated its opinion

for reopening the assessment and in our considered opinion it cannot be said to be unjust or improper in any way more particularly when petitioner's unexplained particulars has resulted in respondent authority forming opinion to reopen the assessment.

[11] In furtherance of this, the record indicates that order of disposal of objection, which has been passed is also a reasoned one. It cannot be said in any form that there appears to be any non application of mind or there being erroneous approach. It was categorically found by an authority that investor as well as brokers were well aware about the modus operadi of the firm in question namely of M/s. N. K. Proteins Pvt. Ltd. and as such the question of full disclosure of true and material facts was bound to arise and that assessee having not disclosed in its explanation, authority had formulated an opinion which in our considered opinion cannot be said to be perverse in any form. It is not a mechanical exercise of power, it is on the basis of cumulative and critical analysis of the explanation offered by the petitioner as well as detail of report of DDIT and certain

admissions reflecting from the report of M/s. N. K. Proteins Pvt. Ltd. has led to reopening. When this was the serious apprehension of respondent authority, it was incumbent upon petitioner to make full disclosure and it ought not to have just supplied mere statements of account, balance-sheet without supplying in specific terms the particulars which were demanded. At this stage, it had clearly reflects from the record that undisputedly petitioner had traded through the brokers and as per the DDIT reports brokers had misused the platform of NSEL and it was categorically found on the admitted version of one Shri Nilesh Patel that physical delivery with respect to purchase and sale of commodities had never taken place and the investors and brokers were very well aware of this fact from the beginning. When that be so, the explanation which has been tendered by the petitioner was found to be not worthy of acceptance by the authority and in our opinion it has rightly resolved to reopen the assessment. A further fact is also noticed from the records that what has been supplied by petitioner is a mere Ledger Accounts extract of the brokers of NSEL and there was no Demat Account of transactions of

commodities through NSEL platform and in addition thereto, the figures of profit and loss which has been indicated is in a consolidated form with income of Intra Ocular Lens & Trading of Opthalmic Surgical products and business. Hence, in such circumstance when authority clearly opined that case deserves to be reopened for assessment, this Court sitting in extraordinary equitable jurisdiction is not expected to either make a roving inquiry or accept the stand of petitioner by microscopic scrutiny of facts. The fact finding authority who is invested with the specific power is free to examine the issue and constitutional courts would not exercise the jurisdiction which otherwise is in the domain of the respondent authority. Hence, peculiar background of these facts lead us to a situation of not exercising extraordinary jurisdiction.

[12] It is trite law that extraordinary equitable jurisdiction would not be exercised to usurp the discretion of a statutory authority unless it is found that statutory authority would be unable to adjudicate. On account of any genuine reason if this Court finds that authority who is invested with the power has

arrived at a particular satisfaction without any basis or contrary to material on record then would exercise its power. However, the satisfaction that is arrived at does not deserve to be substituted simply because petitioner has a different opinion or view. The authority is required to be given a free hand to examine and adjudicate the issue relating to this and there is no distinguishable case made out by the petitioner to allow the Court to invoke extraordinary jurisdiction. In the considered opinion of this Court, when petitioner is not remediless and right now has questioned the issuance of notice, petitioner would be under statutory obligation to cooperate with the authority in the adjudicating process. It is needless to state that when the authority is ultimately passing any adverse order, the entire remedy created under the special statute is very much available to the petitioner. Hence, the process undertaken by the respondent authority is not required to be intercepted by this Court. Hence, no case is made out by the petitioner.

[13] In the aforesaid peculiar background of facts at this stage, the perusal of judgments which have been cited are no doubt

propounding well settled principles but the ratio laid down in the decision is always to be read and understood in its factual details as discussed hereinabove. The background of the present case is altogether distinct and peculiar in nature and as such in a straightjacket formula, the ration laid down in the decision is not possible to be extended to the facts of the case. Hence, we are of the opinion that judgments cited by the learned advocate appearing for the petitioner are of no assistance.

[14] Here as can be seen from the background that assessment proceedings were undertaken earlier in a background which later on found by the authority inadequate and as such called upon the petitioner to furnish the details, but then when the specific report has unearthed the *modus operadi*, the authority found it necessary to reopen the assessment and as such the proposition which has been canvassed by the learned advocate that it is borrowed satisfaction or the order passed is without application of mind are not worthy of acceptance. In fact, petitioner has not truly and fully disclosed the material as has

been demanded and as such it is always open for the respondent authority to reopen the assessment when the case is based upon a peculiar background or material unearthed subsequently. This is not even a case of change of opinion, but in fact, the detailed discussion undertaken herein before has led us to the situation where this Court is not finding safe to accept the stand of the petitioner in exercise of extraordinary jurisdiction and this Court is of the clear opinion that authority is specifically seized with the power and it is examining the process which would not call for interference and we have absolutely no reason to interfere and so no reason as to why authority would not apply its independent mind while examining the issue and scrutinise the stand of petitioner. Hence, this Court is not inclined to interfere with the discretion being exercised by respondent authority. We have gone through the judgments which have been relied upon by petitioner in detail. We are of the opinion that background of facts is quite distinct and peculiar in nature to the present case on hand which would not permit us to just apply in a routine manner or as a straightjacket formula and as such, the judgments cited are of no assistance of the petitioner.

[15] At this stage, on the well recognized principle on exercise of extraordinary jurisdiction, we deem it proper to refer the proposition of law laid down by the Hon'ble Apex Court in the case of ***D. N. Jeevaraj versus Chief Secretary, Government of Karnataka and Others*** reported in ***(2016) 2 SCC 653*** which is profitable to be taken note of. Hence, following are the observations which has led us to believe that this is not a fit case in which extraordinary jurisdiction deserves to be exercised.

> *"41. This Court has repeatedly held that where discretion is required to be exercised by a statutory authority, it must be permitted to do so. It is not for the courts to take over the discretion available to a statutory authority and render a decision. In the present case, the High Court has virtually taken over the function of the BDA by requiring it to take action against Sadananda Gowda and Jeevaraj. Clause 10 of the lease-cum-sale agreement gives discretion to the BDA to take action against the lessee in the event of a default in payment of rent or committing breach of the conditions of the lease-cum-sale agreement or the provisions of law.[8] This will, of course, require a notice being given to the alleged defaulter followed by a hearing and then a decision in the*

matter. By taking over the functions of the BDA in this regard, the High Court has given a complete go-bye to the procedural requirements and has mandated a particular course of action to be taken by the BDA. It is quite possible that if the BDA is allowed to exercise its discretion it may not necessarily direct forfeiture of the lease but that was sought to be pre- empted by the direction given by the High Court which, in our opinion, acted beyond its jurisdiction in this regard.

43. To this we may add that if a court is of the opinion that a statutory authority cannot take an independent or impartial decision due to some external or internal pressure, it must give its reasons for coming to that conclusion. The reasons given by the court for disabling the statutory authority from taking a decision can always be tested and if the reasons are found to be inadequate, the decision of the court to by-pass the statutory authority can always be set aside. If the reasons are cogent, then in an exceptional case, the court may take a decision without leaving it to the statutory authority to do so. However, we must caution that if the court were to take over the decision taking power of the statutory authority it must only be in exceptional circumstances and not as a routine. Insofar as the present case is concerned, the High Court has not given any reason why it virtually took over the decision taking function of the authorities and for this reason alone the mandamus issued by the High Court deserves to be set aside, apart from the merits of the case which we have already adverted to."

[16] In the aforesaid background and in view of discussion made hereinbefore, we are of the opinion that petitioner has not made out any case calling for interference. Accordingly, petition stands dismissed with no order as to cost. Notice is discharged. Interim relief stands vacated forthwith.

Sd/-
(ARAVIND KUMAR, C.J.)

Sd/-
(ASHUTOSH SHASTRI, J.)

DHARMENDRA KUMAR