

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.3171 of 2019

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Ravindra Kumar (HUF) @ Rabindra Kumar (HUF) son of Late Bhagirath Prasad Kumar @ Bhagirath Kumar a Hindu Undivided Family resident of Jhandapur, District Bhagalpur through its Karta Rabindra Kumar, resident of Radha Rani Sinha Road, P.O. Adampur, P.S. Joskar, Jagdishpur, District-Bhagalpur.

... .. Petitioner/s

Versus

1. Commissioner of income Tax, Bhagalpur.
2. Income Tax Officer, Ward1(2), Bhagalpur.

... .. Respondent/s

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Appearance :

For the Petitioner/s	:	Mr. D.V. Pathy, Adv. Ms. Manju Jha, Adv. Mr. Sadashiv Tiwari, Adv.
For the Respondent/s	:	Mr. Rishi Raj Sinha, Sr. S.C Ms. Shilpi Keshri, J.S.C.

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CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE PARTHA SARTHY
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE JYOTI SARAN)

Date : 06-08-2019

The petitioner by filing this writ petition under Article 226 of the Constitution of India questions the notice dated 22.03.2018 issued by the respondent No.2, Income Tax Officer, Ward 1(2), Bhagalpur in purported exercise of power vested in him under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as 'the Act'). Alongside the petitioner also questions the final order dated 26.12.2018 together with the demand notice issued by the same authority. Copies of the



notice and the assessment order are impugned at Annexures-3 and 10 series respectively to the writ petition.

Mr. D.V. Pathy, learned counsel for the petitioner has appeared for the petitioner. The respondents are represented by Mr. Rishi Raj Sinha, learned Senior Standing Counsel who appears with Ms. Shilpi Keshri, Junior Standing counsel.

A preliminary objection was raised by the learned counsel for the respondents when this matter came up for consideration on 21.02.2019 on the plea of the alternative remedy of appeal available to the petitioner to question the assessment order but since according to Mr. Pathy, the assessment order so passed was de hors the statutory provisions under which it was exercised and also lacked foundation that we allowed the parties to address the issue on merits and when the matter has been heard with the view to final disposal at the stage of admission.

Facts of the case as advanced by Mr. Pathy briefly stated is that the petitioner submitted his returns for the assessment year in question i.e. 2011-12 together with audit report on 30.03.2012, a copy of which is on record at Annexure-1 series to the writ petition. It is the case of the petitioner that since after filing of the return under Section 139 of 'the Act' no



objection was raised by the department and it is after lapse of almost 6 years that a notice was issued on 22.03.2018 by the respondent No.2, the Income Tax Officer, Ward 1 (2), Bhagalpur in purported exercise of powers vested under Section 133 (6) of 'the Act' requiring the petitioner to furnish the information detailed in the notice.

A plain look of the directions present in the notice would confirm that the documents so directed to be produced related to the agricultural income disclosed by the petitioner in his return which is to the tune of Rs.4,85,905/- for the assessment year 2011-12, a copy of which is at Annexure-2. The petitioner did not respond to this notice which was followed by a notice under Section 148 of 'the Act' charging the petitioner of escaped assessment for the reasons to believe in possession of the said officer and thereby proposing to reassess the income/loss for the assessment year 2011-12. A copy of such notice is at Annexure-3 to the writ petition and it is in compliance of the direction that the return was again submitted by the petitioner before the Income Tax Officer vide Annexure-4 to the writ petition which is identical to the one originally filed and placed at Annexure-1 series to the writ petition. The petitioner along side requested for supply of the 'reason' which



led the Income Tax Officer to believe that some part of income had escaped assessment within the meaning of Section 148 of 'the Act' which was supplied by the Income tax Officer and a copy of which is enclosed at Annexure-5 to the writ petition. The petitioner filed his objection to the initiation of the proceedings, a copy of which is at Annexure-6 to the writ petition which was followed by two notices dated 7.12.2018 and 15.12.2018 requiring the petitioner to furnish the information sought through vide Annexure-2 to the writ petition. Copies of such notice is at Annexure 7 and 8 respectively to the writ petition and which was followed by a third notice dated 16.12.2018 to the same effect at Annexure-9. The petitioner did not comply with the directions to produce the documents so directed through the notices under reference and which led to the passing of the order impugned dated 22.06.2018 by the respondent No.2, Income Tax Officer in purported exercise of power vested in him under Section 147 of 'the Act' whereby, the Income Tax Officer while holding the audit report submitted by the petitioner along with his original return at Annexure-1 series, a fabrication, has proceeded to disallow the claim towards agricultural income as well the claim on expenses under the head income from business and profession, to be added to his



total income. It is on computation of the total income that the tax liability has been determined at Rs. 10,73,780/- vide the assessment order at Annexure 10 series and which is followed by a demand notice issued under Section 156 of 'the Act' which accompanies Annexure-10 which is put to question in this writ petition.

Mr. Pathy, learned counsel for the petitioner has straightway taken this Court to the reasons so supplied to the petitioner by the respondent No.2 to reopen the proceedings under Section 147 of 'the Act', a copy of which is impugned at Annexure-5 to the writ petition. It is submitted that the petitioner has disclosed an income of Rs. 4,85,905/- as his agricultural income in his return which was accompanied with an audit report as well as balance sheet, the profit and loss account etc. It is submitted that the return of the petitioner was not subjected to scrutiny nor an assessment proceeding was held, which would allow the Income Tax Officer to verify the position on agricultural income but having not done so, the law does not permit the Assessing officer to hold an enquiry which should have been done at the stage of filing of the returns. According to Mr. Pathy, in case the Assessing authority is in possession of materials which leads to a reasonable belief that



any part of income had escaped assessment that a proceeding of such kind under Section 147 can be carried out but such power cannot be abused for holding a roving enquiry where the petitioner was being directed to produce evidence against himself. It is submitted by Mr. Pathy, that although the petitioner questioned the authority of the Income Tax Officer to reopen the proceedings but the same has been ignored to result in the order impugned at Annexure-10 series.

Learned counsel has next turned to the satisfaction recorded by the Commissioner on such reopening and the copy of which has been placed on record by the department in its counter affidavit at Annexure- B. According to Mr. Pathy, while Section 151 of 'the Act' casts an obligation on the Principal Chief Commissioner or the Chief Commissioner or the Principal Commissioner or the Commissioner to record satisfaction on the reasons recorded by the Assessing Officer that it is a fit for issuance of a notice, a plain look at the remarks recorded by the Joint Commissioner and the Principal Commissioner of Income tax accompanying Annexure -B would confirm that while the Joint Commissioner of Income Tax has recorded a mechanical satisfaction on the reasons recorded by the Assessing Officer for issuance of notice under Section 148 of 'the Act', the Principal



Commissioner of Income Tax has simply certified it as a fit case for issuing notice.

Learned counsel in support of the submission that the entire exercise of reopening of the assessment is de hors the statutory provisions and the Assessing authority while exercising such jurisdiction cannot force the petitioner to produce documents/records against himself, has relied upon the following judgments

(1) [1961] 41 ITR 191 (SC)](Culcutta Discount Co.Ltd. versus Income Tax Officer)

In reference to the opinion expressed by the Supreme Court at paragraph 11 of the judgment, he submits that the Supreme Court has held that no duty remains on the assessee to produce any record or documents after making full and truthful disclosure of all primary facts. According to Mr. Pathy, the entire disclosure is present in the returns filed which was accompanied with audit report as well as the balance sheet and the profit and loss statement of the petitioner allowing him to hold whatsoever enquiry that the Assessing Officer wanted to do at that stage, but not having exercised such jurisdiction to hold assessment proceedings, when assessee was lawfully obliged to supply the particulars, this jurisdiction



cannot be carried forward to a proceeding under Section 147/148 of 'the Act'

(2) [1976]103 ITR 437 (SC)] (Income Tax Officer versus Lakhmani Mewal Das) placing reliance on the opinion expressed at paragraph 7 of the judgment, it is submitted that the legal position as to the exercise of jurisdiction under Section 147/148 of 'the Act' has been discussed. He submits that the Supreme Court while accepting that a duty is cast upon assessee to make true and full disclosure of the preliminary fact at the time of assessment further goes on to hold that the duty of assessee does not extent beyond such true and full disclosure and once he has done his part then his duty ends for it is no responsibility of the assessee to advise the Income Tax Officer as to the inference that he should draw from the fact so disclosed.

(3) W.P. No. 1000 of 2017 and W.P. No.1001 of 2017 (Zuari Foods and Farms Pvt. Ltd. versus Assistant Commissioner of Income Tax and Ors.).

In reference to the opinion expressed by the Bombay High Court at paragraph 6 of the judgment, he submits that the grounds for reopening an assessment has to be recorded before a notice is issued and which reason must disclose live



link between the tangible material in possession of the assessing Officer as well as the reason to believe that income chargeable to tax has escaped assessment. It is submitted that in so far as the present case is concerned, there is no material in possession of the Assessing Officer to reopen a proceeding rather it is to gather material that documents etc. are being directed to be produced as manifest from notice issued under section 133 of 'the Act' impugned at Annexure-2.

(4) (2016) 91 VST 1(SC) (State of Uttar Pradesh versus Aryaverth Chawal Udyog and Ors.)

In reference to the position settled by the Supreme Court at paragraphs 19 to 27 it is submitted by Mr. Pathy that the legal position on reopening of assessment has been settled to hold that unless there is a tangible material in possession of the Assessing Officer for formation of reason to believe that any income chargeable to tax has escaped assessment, such exercise cannot be carried out by holding a roving enquiry as in a case of original assessment.

(5) 235 ITR 219 (Rina Sen versus CIT)

Mr. Pathy in reference to the opinion at para 2 to 7 submits that Assessing Officer while exercising such jurisdiction cannot force an assessee to produce particular information in



his possession.

Summarizing his argument, it is contended by Mr. Pathy that a reopening of assessment under Section 147/148 of 'the Act' is not a mechanical discharge rather the Assessing officer having accepted the return filed by an assessee which became deemed assessed, there had to be some tangible material in possession of the Assessing Officer for the formation of 'reasons to believe' that any part of income of the petitioner has escaped assessment and when any Assessing officer would be well within his jurisdiction to reopen an assessment to carry out reassessment proceeding but in a case of present nature where every disclosure as regarding the Agricultural income was made by the petitioner at the stage of filing of the original return and no steps were taken by the Assessing Officer to doubt the return on its veracity as well as on the disclosure of agricultural income, this failure on the part of the Assessing Officer to carry out an exercise of verification as well as for demand of records in support of the disclosure so made, cannot be extended and stretched to a proceeding under Section 147 of 'the Act'. According to Mr. Pathy the illegality is perpetuated by the Assessing Officer in going beyond the reasons supplied by disallowing the expenses claimed by the petitioner under



various heads to the tune of Rs. 12, 39,000/- to add it to the total income of the assessee, which is beyond the reasons supplied by the Assessing Officer.

The writ petition is resisted by Mr. Rishi Raj Sinha, learned Senior standing Counsel for the Income Tax Department. Defending the exercise and the orders passed thereunder, he submits that the exercise is within the parameters of the statutory provisions and there is neither any default in jurisdiction nor the order is in excess of such jurisdiction. According to Mr. Sinha, the entire argument of Mr. Pathy is resting on preamended provisions of Section 147 of 'the Act' and even the judgments relied upon is in reference to such provision. According to Mr. Sinha, there has been a sea change in the provisions of Section 147 of 'the Act' vide Direct Tax Law (Amendment) Act, 1987 which came into force with effect from 01.04.1989. According to Mr. Sinha, the enunciation of law as found in the judgments relied upon by Mr. Pathy is in consideration of the unamended provisions of Section 147 of 'the Act' but since after its amendment with effect from 01.04.1989, the Assessing officer has been given a wider play field. According to Mr. Sinha, learned Senior Standing Counsel for the Department, a disclosure towards agricultural income



was made by the petitioner in his returns which was not supported with material. He submits that it is in the light of an order passed by this Court on a public interest litigation that an advisory was issued to all Assessing Officers to carefully examine the claim on agricultural income and in cases where the assessment was completed or pending, to verify, whether such income has been rightfully claimed by the assessee. It is submitted by Mr. Sinha, that it is in course of such exercise that the case of the petitioner also was taken into consideration and since the claim was not supported with material that the notice under Section 148 was issued enclosing the reasons. In reference to the letter issued on behalf of the Principal Commissioner, Income Tax dated 20.03.2018 at Annexure B, he submits that approval was granted for such reopening of assessment in the case of 3 assesseees including the petitioner in respect of the agricultural income so declared. It is submitted that since in the course of such examination, it also transpired that the disclosure on agricultural income was not supported with material and certain expenses had been wrongfully claimed by the petitioner that the same, were rejected for being added to his total income.

To differentiate the case laws relied upon by Mr.



Pathy, learned counsel has placed strong reliance on the judgment of the Supreme Court reported in **(2007) 291 ITR 500 (Asst. CIT versus Rajesh Jhaveri Stock Brokers)**. In reference to the opinion expressed at paragraphs 9, 16 and 17 he submits that the transition in Section 147 has been dealt and even if the preamended provisions of Section 147, gave openings for assessee to question the proceedings, no such plea is entertainable since after the amendment was brought in Section 147 effective from 01.04.1989. Defending the disallowance of expenses, learned counsel refers to Explanation 3 attached to Section 147 to submit that no infirmity exists in the exercise. According to Mr. Sinha, the Assessing Officer was well within his jurisdiction to direct the assessee to produce the records supporting the agricultural income so claimed by the petitioner.

Learned counsel has referred to Section 151 of 'the Act' to submit that a plain look at the letter of the Principal Commissioner enclosed at Annexure- B to the counter affidavit which also encloses the sanction accorded, would confirm that there is absolutely no infirmity in the exercise of reopening of assessment.

Reverting back to provisions of Section 147 it is



submitted that once an Assessing Officer on the materials on record has reasons to believe that any income chargeable to tax has escaped assessment, it is after issuing notice and hearing the assessee that the Assessing Officer can assess or reassess. According to Mr. Sinha, even if the reasons supplied by the Assessing Officer made reference to the disclosure of agricultural income by the assessee but once the assessment is reopened, it allows the Assessing Officer to examine the other claims as well and since the material on record showed that certain expenses had been wrongly claimed by the assessee petitioner that it is within the powers so vested under Section 147 to assess or reassess, the Assessing officer has proceeded to pass the order in respect of the expenses claimed as well and which would suffer no infirmity.

In sum and substance, it is the argument of Mr. Sinha that there is absolutely no infirmity in the exercise complained of which warrants any interference.

Briefly responding to the arguments of Mr. Sinha, Mr. Pathy has made reference to the statutory provisions of Section 143 of 'the Act' to submit that when a return is filed under Section 139 of 'the Act' it is processed in the manner prescribed in Section 142, 143(2) and 143(3) which inter alia



allows the Assessing Officer to satisfy himself on the claim of loss, deduction, allowance or relief etc. and whether it is inadmissible and if he has reasons to believe that the claim is inadmissible then he is at liberty to direct the assessee to produce or cause to be produced any evidence or particulars which may be required in support of such claim. In reference to Sub section (3) of Section 143 he submits that in case on the date fixed, the assessee fails to comply with such notice then the Assessing Officer has all jurisdiction under 'the Act' to put such assessee to notice and make computation of the income/loss to the best of his judgment and also to determine sum payable by the assessee. According to Mr. Pathy, even if the law vests such jurisdiction in the Assessing Officer at the stage of original assessment, this power cannot be stretched once a period of 6 months has lapsed from the end of the financial year for which the return is furnished because even this power has been withdrawn by the legislature under Section 143 of 'the Act' on expiry of such period. According to Mr. Pathy, if the law does not allow the Assessing Officer to put an assessee on notice on his disclosure at the time of original assessment on expiry of 6 months of the end of the financial year to which the returns relates, it cannot be done by resorting to the power for



reopening of such reassessment.

We have heard learned counsel for the parties and we have perused the records.

Although exhaustive arguments have been advanced by either side but it is the following issues which fall for consideration in the present case;

(a) Whether the exercise under Section 147 of 'the Act' is barred by limitation so prescribed under Section 149 of 'the Act';

(b) Whether the Assessing officer in exercise of jurisdiction vested under Section 147 of 'the Act' can compel the assessee for production of records /documents/particulars in respect of any disclosure made in the returns;

(c) Whether there was any tangible material available with the Assessing Officer to reopen the proceedings which was a live link in between the 'reasonable belief' and the order passed under Section 147 of 'the Act'; and

(d) Whether the Assessing Officer could have travelled beyond the reasons to disallow the expenses claimed by the petitioner in his return to add to his total income, by relying on Explanation 3 attached to Section 147.

In so far as the issue of limitation as raised by Mr.



Pathy is concerned, considering the import of Section 149 of 'the Act' that the return were originally filed on 30.3.2012, the notice issued under Section 148 on 22.3.2018 is found to be well within the limitation period and to that extent there is no infirmity in the initiation of the proceedings.

The issue of contest is that the disclosure towards agricultural income made by the petitioner in his return at Annexure-1 of the writ petition has been disbelieved and it is to satisfy himself on this account that an enquiry is initiated by the Assessing officer under Section 133(6) of 'the Act'. No less than 14 documents/records/registers have been demanded by the Income Tax Officer respondent No.2.

It is rather fairly informed by Mr Sinha that such exercise was initiated in view of an advisory issued which had the approval of the Principal D.G.I.T. (S) New Delhi. Such advisory contained in a letter dated 10.3.2016 was issued in the light of an order passed by this Court on a public interest litigation and required verification of agricultural income for the periods, which also included the assessment year in question. The advisory directs the Assessing Officer to verify whether there is any data entry error in the returns filed; to provide feedback where assessment is complete and in cases where



assessment is pending, to thoroughly verify the claims on agricultural income.

We are persuaded to take notice of the advisory issued, a copy of which was handed over during the course of the proceedings, because, in case it is the said advisory which lies at the foundation of the reopening then the entire exercise is fit to be struck down on this score because this does not constitute an information or live link in between the materials available and 'the reasons to believe' formed by the Assessing Officer for the reopening of the assessment. In fact, two letters have been handed over by Mr. Sinha during the course of argument, each having the approval of Principal D.G.I.T(S), New Delhi and they have been circulated in reference to the judgment of this Court in respect of claims towards agricultural income. Paragraph 2 of the letter dated 10.03.2016 takes notice of the assessee who has declared income of more than 1 Crore as agricultural income in their returns filed for the assessment year 2011-12 to 2013-14. The writ petitioner does not come within this category because his claim towards agriculture income is Rs. 4,85,905/- which is less than 1 crore. Paragraph 4 of the letter dated 10.3.2016 accepts that a disclosure towards agricultural income is only for rate purposes.



Paragraph 5 of the letter issues directions to the Assessing Officer to verify any error in data entry, to provide feedback based on such score where assessment is completed and to verify the claims where assessment proceeding is pending.

Paragraph 6 again mentions about a list of cases in which agricultural income exceeding Rs. 1 crore has been claimed.

We completely fail to appreciate as to how this advisory can lay the foundation for such exercise especially where there is no direction in the advisory to reopen any proceeding. Perhaps, the Assessing Officer in his exuberance has got misled by such advisory to issue notice for such proceeding and unfortunately even the Principal Commissioner has defaulted in not appreciating whether at all the case was a fit case for reopening especially where the Assessing Officer had failed to satisfy himself on the reasons for the belief that any part of income chargeable to tax had escaped assessment.

Much reliance has been placed by Mr. Sinha to contest the proposition advanced by Mr. Pathy in reference to the parameters drawn for exercise of power vested in the Assessing Officer under Section 147 of 'the Act' by submitting



that the proposition canvassed may be good under the preamended provision of Section 147 of 'the Act' but since after its amendment with effect from 01.04.1989, this argument would not hold good for extensive powers has been vested in the Assessing Officer to reopen assessments where he has reasons to believe that any income chargeable to tax has escaped assessment and in such exercise, the Assessing Officer can also direct for production of the documents/records needed for the purpose. It is also his argument that in this course, the Assessing Officer can also go beyond the reasons supplied, to comment upon any other matter that may arise during such exercise under Explanation 3 attached to Section 147.

In our opinion the argument advanced on behalf of the department is fallacious. The transitory provision of Section 147 came up for consideration in the case of **Commissioner of Income Tax versus Kelvinator of India** reported in (2010)2 SCC723. The Supreme Court after taking note of the preamended provision of Section 147, its amendment vide Amendment Act, 1987 as well as the Amendment Act, 1989 has observed thus in paragraphs 5,6 and 7:

“5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be



done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4- 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of “mere change of opinion”, which cannot be *per se* reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words “reason to believe”, Parliament reintroduced the said



expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the Assessing Officer.”

The Supreme Court taking note of the transitory change in Section 147 has in paragraph 7 concluded that a power to reopen would vest in the Assessing Officer only if, there is tangible material in his possession for coming to a conclusion that there was an escapement of income chargeable to tax, from assessment and the reasons with the Assessing Officer must have a live link with the formation of belief. Testing the case in hand in the backdrop of the position so settled in the judgments relied upon by Mr. Pathy as well as on the transitory change as clarified in the judgment of **Kelvinator of India** (supra), it is to be seen whether the case in hand would pass the test.

The reasons in possession of the Assessing Officer finds mention in the enclosure to Annexure -B to the counter affidavit and runs under.

“The assessee has not produced concrete evidence like land adanga register, nature of crop cultivated expenses incurred to whom the agricultural produce was sold, who cultivated the land and how the income was derived. In the absence of any material produced to substantiate the receipt an agricultural income therefore, I have reason to believe that the quantum of agriculture income as claimed in ITR for the A.Y.2011-12 is not his agricultural



income. Accordingly, the same is treated as the income from undisclosed source which escaped for assessment.

Hence income chargeable to tax to the extent of Rs. 4,85,905/- has escaped assessment within the meaning of Sec. 147 of the Act, 1961. Proposal for issuing notice u/s 148 of the Act may be approved accordingly.”

A plain look at the reasons so assigned would confirm that no tangible material was in possession of the Assessing Officer which could constitute any reasons which led to a belief that any part of income chargeable to tax had escaped assessment rather it is in search of such tangible material that the proceedings had been reopened.

The Income Tax Officer fairly mentions in the ‘reasons’ so supplied that the assessee had not produced certain evidences in support of agricultural income and in absence of which the claim towards agricultural income could not be substantiated. We completely fail to appreciate as to how such admission by the Assessing Officer regarding absence of material, could lead to a formation of belief that the disclosure was incorrect and chargeable to tax under Section 147 of ‘the Act’. The reason is two fold. Firstly such opportunity was much available to the Assessing Officer at the stage of filing of the returns when in exercise of powers under Section 142/143, such directions could have been issued for production of records and



a failure of the petitioner to satisfy the Assessing Officer on such count could have led to a best judgment assessment under Section 144 at the stage of original assessment but having not done so, such recourse cannot be adopted by relying upon the statutory provisions of Section 147 of 'the Act'. Secondly such enabling powers is only to be exercised only where there is tangible material available at the hands of the Assessing Officer and not in absence thereof. The judgments relied upon by Mr. Pathy has been contested by Mr. Sinha on grounds that they relate to the preamended provisions of Section 147 but in our considered opinion, in view of the position settled by the Supreme Court in the case of **Kelvinator of India** (supra) after taking note of the transitory change in Section 147, the legal position as to the prerequisites for such exercise, has not undergone a change and which is that, there had to be tangible material at the disposal of the Assessing Officer for reopening of such proceedings and which power cannot be exercised for initiating a roving enquiry.

Even if the judgments rendered by the Supreme Court in the case of **Calcutta Discount Co. Ltd. and Lakhmani Mewal Das** is relatable to preamended provisions of Section 147, in view of the legal position settled by the



Supreme Court in the judgment rendered in the case of **Kelvinator of India**(supra), whatsoever doubts that may be present are in the mind of the department is set at rest. In this contest we are persuaded to reproduce the opinion of the Division Bench of this Court recorded in the case of **Rina Sen** (supra) relied upon by Mr. Pathy, which not only relates to the period after amendment to Section 147 but also discusses the extent of power exercised by an Assessing Officer under Section 147 when it records at page 226 as under:

“.....It is well settled that the object of Section 147 of ‘the Act’ is not to make a roving or fishing enquiry. While it is open to the authority in an appropriate case to make an enquiry confidentially or otherwise -in order to obtain information or verify facts disclosed to him by the assessee or coming to his notice, before reaching the stage of reasonable believe, he cannot compel the assessee to associate himself in such roving or fact finding enquiry. The assessee can be required to appear only after the Assessing Officer has come to the conclusion as to the reasonable believe within the meaning of Section 147 of ‘the Act’.....”

The discussions above would answer the issues relating to the power in the Assessing officer to compel production of records in the negative. A corollary to such conclusion is that there was no tangible material in possession of the Assessing officer for formation of belief of escaped



income chargeable to tax

For the reasons and discussions that we have made above and in view of the clear fact situation available on the record where such reopening is simply founded on the advisory dated 10.03.2016 issued by the department and where the reasons so present for the formation of belief is not resting on any tangible material, in possession of the Assessing officer as confirmed from the discussions above, in our opinion, the entire exercise is illegal and dehors the provisions of Section 147/148 of 'the Act'.

Since the entire exercise is held de hors the statutory prescriptions, we do not consider it necessary to express our opinion on the expanded scope of Explanation 3 attached to Section 147 and leave it open for discussion in an appropriate case.

The issues so taken note of above are answered accordingly.

In result, we quash the entire proceedings including the notice dated 22.03.2018 impugned at Annexure-3 together with the final order dated 26.12.2018 and the demand notice issued thereunder impugned at Annexure 10 series passed by the respondent No.2 Income Tax Officer which are accordingly set



aside.

The writ petition is allowed but with no order as to costs.

(Jyoti Saran, J)

(Partha Sarthy, J)

Bibhash/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	16.08.2019
Transmission Date	NA

