

IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH

ITR No. 81 of 1998
Date of Decision: 3.9.2019

J.K.Beri

.....Appellant

Vs.

The Commissioner of Income Tax, Jalandhar

.....Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: - Mr. Sunil Kumar Mukhi, Advocate and
Mr. Abhay Sethi, Advocate
for the appellant.

Mr. Vivek Sethi, Senior Standing Counsel with
Mr. Varun Issar, Junior Standing Counsel
for the respondent.

AJAY TEWARI, J. (ORAL)

1. This reference relates to the assessment year 1988-89. In this reference, the following questions of law were proposed by the appellant:-

1. *Whether the ITAT was right in law in holding that the proceedings u/s 147 were rightly initiated, without examining the nexus between the material available on the record and the A.O.'s satisfaction about escapement of income of the year under consideration ?*
2. *Whether the finding of the Tribunal that the addition of Rs. 1,35,000/- was vitiated in view of the material placed on record ?*
3. *Whether the Tribunal was right in law in holding the addition of Rs. 1,35,000/- by giving a finding which*

was neither the case of the Assessing Officer, nor the CIT (A) ?

4. Whether the Tribunal was right in law in holding that the issue about the amount advanced to Sh. H.C.Chopra was not before the Assessing Officer at the time of framing the original assessment when the same has been duly discussed in the proceedings u/s 132 (5) ?”

2. After considering all the facts and circumstances and after hearing both the parties, the ITAT as per para 7 page 5 of the paper book referred two questions of law for the opinion of this Court which are reproduced hereinbelow:-

- 1. Whether the I.T.A.T was right in law in holding that the proceedings u/s 147 were rightly initiated by the A.O. ?*
- 2. Whether the I.T.A.T was right in law in holding that in case, no date of advance of loan or date of investment is available, relevant date of investment will be the year in which such document is seized or the seized document is found to be in possession of the applicant?*

3. The brief facts are that a search was conducted in the premises of the assessee on 28.7.1988 and at that time a letter written by the brother-in-law of the assessee was also found in which he has acknowledged that he owed a sum of Rs. 1,35,000/- to the assessee (which had been given to him on various occasions in the past). The Assessing Officer passed an order under Section 132 (5) of the Income Tax Act, 1961 ('Act' for short) on 24.11. 1988. Thereafter the assessee filed his return on 29.5.1989 and the same was processed and the assessment was finalized on 31.1.1991 under Section 143 (3) of the Act. Eight months after that, notice under Section 148 of the Act was issued in which again the assessee was asked to explain the said letter and ultimately the amount reflected in the said letter was

added to the income of the assessee. It is this action which is now before this Court.

4. Learned counsel for the assessee has relied upon ***Commissioner of Income Tax versus Kelvinator of India (2010) 34 DTR (SC) 49*** where in the similar question the Supreme Court has held as follows:-

“4. 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, re-opening 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 1st April, 1989], they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147-- A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

5. His precise contention is that once this letter was taken into consideration at the time of passing of the order under Section 132 (5) and original order under Section 143 (3) of the Act, the subsequent action by the Assessing Officer had to come within the ambit of the phrase 'change of opinion' and not 'reason to believe'. The second argument of the learned

counsel for the assessee is that even penalty under Section 271 (1) (c) of the Act was deleted by CIT (Appeals) in first appeal and was also confirmed by the ITAT in the second appeal wherein it was held that there was no concealment of income by the appellant/assessee which further substantiate the fact that the very initiation of re-assessment proceedings under Section 147 read with Section 148 of the Act was bad in law and led to change of opinion. It was further contended that in the said proceedings the appellant had even requested the Assessing Officer to summon Mr. H.C. Chopra for examination as his testimony was absolutely necessary to decide the issue as on the basis of his letter the impugned notice under Section 148 of the Act was issued, nowhere mentioned either the dates or the amounts sent from time to time but the A.O. never acceded to this request which is against trite law that in case the request of the assessee to summon the creditor is not acceded to by the department, it will not justify the addition on that count. It was further pleaded that the department has accepted this fact and no further reference or appeal was filed before this Hon'ble Court.

6. Learned counsel appearing on behalf of the revenue has not been able to show how and in what circumstances the letter which had already been perused and considered could furnish 'reason to believe' and not 'change of opinion'.

7. In these circumstances, the contention of the learned counsel for the assessee is accepted and the first question of law raised in the reference application referred to this Court by the Income Tax Appellate Tribunal Amritsar Bench in its order dated 28.5.1998 under Section 256(1) of the Act regarding issuance of notice under Section 148 and initiating re-assessment proceedings under Section 147, is answered against the revenue

and in favour of the assessee and is further held that the ITAT was not right in law in holding that the proceedings under Section 147 were rightly initiated by the A.O.

8. As regards second question of law on which the ITAT has sought opinion of this Court, we hold that in the light of details filed, bank account statement produced and explanation given by the appellant right from the proceedings under Section 132 (5), 143 (3) and under Section 147/148 in response to queries raised by the authorities below the impugned amount of Rs. 1,35,000/- mentioned by the brother-in-law of the assessee having received on various dates as due for return by him cannot be construed to be relating to the year in which such document was seized as it does not mention any specific date but the appellant has been able to substantiate various dates with amounts sent from time to time in earlier years. Thus, in the light of above findings and evidence on record of various authorities below, we answer this question also referred for our opinion in the negative i.e. against the revenue and in favour of the appellant and hold that in the light of discussions as above and on perusal of various replies and evidence is produced as discussed in various orders of the authorities below that the ITAT was not right in law in holding that though no date of advance of loan or date of investment is available in the said letter the impugned amount of Rs. 1,35,000/- will be the year in which such document was seized or the seized document is found to be in possession of the applicant. Thus, the impugned addition so made of Rs. 1,35,000/- in the year of reference i.e. A.Y. 1988-89 cannot be upheld and the same needs to be deleted.

9. In the light of above, the reference is allowed and both the

questions referred to by the I.T.A.T. for the opinion of this Court are answered accordingly.

(AJAY TEWARI)
JUDGE

September 03, 2019
Gurpreet

(HARNARESH SINGH GILL)
JUDGE

Whether speaking /reasoned : Yes/No
Whether Reportable : Yes/No