



IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2021

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.12358 of 2013

Cairn India Ltd.,
(Formerly Known as Cairn Energy
India Private Limited)
Rep.by its Authorised Signatory,
Mr.Navin Jain,
3rd & 4th Floor, Vipul Plaza,
Suncity, Setor-54, Gurgaon - 122 002,
Haryana.

..Petitioner

vs

Deputy Director of Income Tax-I,
(International Taxation)
Room No.703, IInd Floor,
Annexe Building, Aaykar Bhawan,
121, Mahatma Gandhi Road,
Chennai - 600 034.

..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling for the records of the respondent in respect of PAN No.AAACC3097L and impugned Notice u/s 148 of the Income Tax Act, 1961 dated 29.03.2012 and the consequential Order dated 05.03.2013 passed by the Respondent disposing off the Objections to the initiation of the proceedings u/s 147 of the Act.

For Petitioner : Mr.C.S.Agarwal
Senior counsel
Assisted by Mr.M.V.Swaroop

For Respondent : M/s.Hema Muralikrishnan
Senior Standing counsel
[For Income Tax]

O R D E R

The writ on hand is filed, questioning the legal validity of initiation of reopening proceedings and the disposal of the objections by the respondent.

2. The petitioner being a Company incorporated in New South Wales, Australia was a subsidiary of Cairn Energy PLC based in



Edinburgh and is engaged in the business of exploration and production of oil and gas in India since 1996. By an order of the Bombay High Court dated June 22, 2010 in Company Petition No.155 of 2010, the present petitioner took over the business of Cairn Energy India Private Limited and filed the present writ petition.

3. The petitioner company filed its return of income under Section 139 (1) of the Income Tax Act, 1961 [hereinafter referred to as the 'Act'] on 16.11.2006 for the Assessment Year 2006-07, declaring a loss of Rs.43,95,90,051/-. The petitioner states that the return of income was filed with true and adequate income of the petitioner along with the audited financial statements, Tax Audit Report as required under Section 44AB of the Act. The case of the petitioner was selected for scrutiny. Notice was issued. The petitioner submitted further documents, materials and answered the queries. The case of the petitioner was referred to Transfer Pricing Officer, who in turn, submitted a report on the Arm's length price. After completing the process of scrutiny, the assessment officer passed the final assessment order under Section 143(3) of the Act in order dated 01.03.2010.

4. While so, the respondent issued the impugned notice dated 29.03.2012 under Section 148 of the Act, which was received by the petitioner company on 03.04.2012. In response, the respondent company filed its return of income and requested to furnish reasons. The reasons were supplied to the petitioners. The initiation of reopening proceedings admittedly is beyond the period of four years, but within six years. The petitioner submitted its detailed objections on the reasons furnished and the respondents disposed of the objections by rejecting the same. Thus, the writ petitioner is constrained to move the present writ petition.

5. The learned Senior counsel appearing on behalf of the writ petitioner broadly raised several grounds for assailing the reopening proceedings. It is contended that 'reasons to believe' had been recorded prior to issuance of notice. There is no failure on the part of the petitioner to produce the materials fully and truly. Thus, the requirement contemplated under Section 147 that the Assessing Officer must have 'reason to believe' is not satisfied. It is contended that the Explanation 1 to Section 147 of the Act has no application in the case of the writ petitioner. Thus, the reopening is mere change of opinion. In support of the of the said contentions, the learned Senior Counsel made the following submissions:

(a) It is at this stage submitted the reasons to believe are not plenary but are subject to judicial review. In support, the petitioner seeks to rely on the judgment of the Hon'ble High Court of Delhi in the case of Asoke Kumar Sen Vs.



ITO reported in 132 ITR 707. This judgment has been rendered on a Writ Petition filed by the petitioner, wherein their Lordships of the High Court of Delhi held at Page.710 as under:

"The words "if the Income-tax Officer has reason to believe" used in [s. 147\(a\)](#) suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO may act under this section on direct or circumstantial evidence but not on mere suspicion, gossip or rumour. The powers under this section are not plenary. They are subject to judicial review. The ITO in his affidavit has merely stated his belief but has not set out any material on the basis of which he formed such belief. there is nothing in the affidavit to suggest that the ITO had any material before him that would warrant a belief that a part of the income of the petitioner had escaped assessment by reason of his failure to make a true and full disclosure of the material facts. (See [ITO v. Madnani Engineering Works Ltd.](#) [1979] 118 ITR 1 SC.)

The words "reason to believe" appear in most modern statutes. Words such as "reasonable cause to believe" or "has reason to believe" are commonly found when a Legislature or law-making authority confers powers on a minister or official. As Lord Radcliffe said [1980] 2 WLR 1, 22 (HL) :

"However read, they must be intended to serve in some sense as a condition limiting the exercise of an otherwise arbitrary power. (*Nakkuda Ali v. Jayaratne* [1951] AC 66, 77 (PC))."

These words do not make conclusive the officer's own honest opinion that he had reasonable cause for the prescribed belief.

The grounds on which the officer acted must be sufficient to induce in a reasonable person the required belief before he can validly reopen a completed assessment under [s. 147\(a\)](#). In England, the majority in *Liversidge v. Anderson* [1942] AC 206 (HL) held that the belief entertained by the officer was not justiciable. Lord Atkin dissented. Now, it had been held by the House of Lords in the recent tax decision of [IRC v. Rossminster Ltd.](#) [1980] 2 WLR 1, 49 (HL), that Lord Atkin was right and that the majority were wrong. Lord Diplock has said :

"..... I think the time has come to acknowledge openly that the majority of this House in *Liversidge v. Anderson* were expediently and, at that time, perhaps, excusably, wrong and the dissenting speech of Lord Atkin was right."



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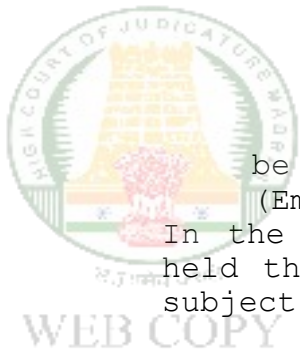
Lord Scarman at p. 104 (of [1980] 1 All ER) said that the ghost of *Liversidge v. Anderson* no longer flutters in the pages of our books and need no longer haunt the law. It was laid to rest by Lord Radcliffe in *Nakkuda Ali v. Jayaratne* [1951] AC 66, 75 (HL) and no one has sought to revive it. It is now beyond recall.

The Supreme Court in a long line of decisions has held that the matter is justiciable. [See *ITO v. Madnani Engineering Works* [1979] 118 ITR 1 SC.] (Emphasis Supplied)"

(b) It would be seen from the aforesaid judgment that the Apex Court in its judgment reported in 118 ITR 1 has held that existence of reason to belief on part of the ITO is a justiciable issue. The same opinion had also been expressed by the Constitution Bench of the Apex Court in the case of *Calcutta Discount Co. Ltd., Vs. ITO*, reported in 41 ITR 191.

(c) The petitioner also seeks to rely on the judgment of Apex Court in the case of *ITO Vs. Lakhmani Mewal Das*, reported in 103 ITR 437 at Pg.448, it has been held as under:

"As stated earlier, the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income-tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income-tax Officer on the point as to whether action should be initiated for reopening assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and far-fetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment. The fact that the words "definite information" which were there in [section 34](#) of the Act of 1922 at one time before its amendment in 1948 are not there in [section 147](#) of the Act of 1961 would not lead to the conclusion that action cannot be taken for reopening assessment even if the information is wholly vague, indefinite, far-fetched and remote. The reason for the formation of the belief must



be held in good faith and should not be a mere pretence.

(Emphasis supplied)”

In the long line of decisions of the Apex Court, it has been held that the power u/s 147 of the Act are not plenary and are subject to the judicial review.

(d) The petitioner thus prays that if the reasons recorded are perused for the sake of convenience which are extracted hereinabove, it would be seen that;

(i) The petitioner has disclosed the complete facts in the return of income/books of account/assessment proceedings and there is no allegation that the petitioner had failed to disclose fully and truly all material facts. Infact, admittedly, reasons to believe has been formed on the basis of the return of income/existing material, without any fresh tangible material.

(ii) It is a case where the AO while framing assessment had considered all such material facts which are the basis for initiating the proceedings u/s 147 of the Act. It thus amounts to review as per the judgment of the Apex Court in the case of ACIT Vs. ICICI Securities Primary Dealership ltd., reported in 348 ITR 299 at Pg.301.

(iii) That no fresh material had surfaced from the date of completion of assessment till the proceedings were initiated.

(iv) It is a case of mere change of opinion and there has been otherwise no escapement of any income. The submission is that the initiation of proceedings are without jurisdiction and as such deserves to be quashed.

(v) The reasons have been recorded on incorrect facts as such, assumption of jurisdiction is bad in law.

(vi) That no reasons had been recorded before initiating the proceedings u/s 147 of the Act.

(vii) To justify the reopening of the assessment, only reasons recorded has to be looked into.

(viii) No sanction as is mandated under Section 151(1) of the Act had obtained by the AO from the Director of Income Tax/Commissioner of Income Tax.

(e) Scope of provisions of Section 147 of the Income Tax Act: The petitioner, at the outset, submitted that the Apex Court in its judgment in the case of Calcutta Discount Co. Ltd., Vs. ITO reported in 41 ITR 191, examined the scope of provisions of Section 34 of the Act and held at Pg.199 as under:



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"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such " under assessment " has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under s. 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years, from the end of the year in question. (Emphasis supplied)"

(f) It is the submission of the petitioner that if the aforesaid tests as laid down by the Hon'ble Supreme Court (which holds good till date) when is applied, would show that the assumption of jurisdiction by the respondent to issue the notice and initiate the proceedings is outside the scope of the provisions of Section 147 of the Act. It had been held as above that before assuming jurisdiction both the conditions are to be satisfied namely: (i) there had to be omission or failure to disclose fully and truly all material facts; and (ii) that the AO is having a reason to believe. In the instant case both the conditions are not satisfied. Indeed even the reasons had not been recorded and also there had been no failure to disclose fully and truly all material facts. Without prejudice, even the reasons recorded and supplied to the petitioner shows that such reasons are merely based on change of opinion. The petitioner further submitted that in the said judgment of Calcutta Discount Co., Ltd., (Supra) at Pg.202-203, the Hon'ble Apex Court has held as under:

"The only nondisclosure mentioned in the report is that the company had failed to disclose " the true intention behind the sale of the shares ". Mr. Choudhury contends that this is not an omission to disclose a material fact within the meaning of s. 34. The question whether sales of certain shares were by way of changing the investments or by way of trading in shares has to be decided on a consideration of different circumstances, including the frequency of the sales, the nature of the shares sold, the price received as compared with the cost price, and several

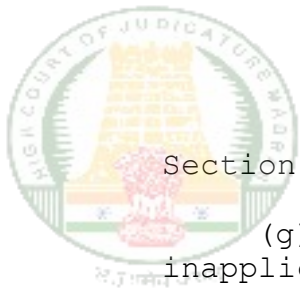


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other relevant facts. It is the duty of the assessee to disclose all the facts which have a bearing on the question; but whether the assessee had the intention to make a business profit as distinguished from the intention to change the form of the investments is really an inference to be drawn by the assessing authority from the material facts taken in conjunction with the surrounding circumstances. The law does not require the assessee to state the conclusion that could reasonably be drawn from the primary facts. The question of the assessee's intention is an inferential fact and so the assessee's omission to state his " true intentions behind the sale of shares " cannot by itself be considered to be a failure or omission to disclose any material fact within the meaning of s. 34. Indeed, an assessee whose contention is that the shares were sold to change the form of investment and not with the intention of making a business profit cannot be expected to say that his true intention was other than what he contended it to be.. Dealing with this question the learned Chief Justice has said:-

" The expression that the Respondent had failed to disclose " the true intention behind the sale of shares " may lack directness, but that deficiency of language is not sufficient to enable the Respondent to contend, in view of the circumstances alleged, that no failure to disclose facts was being complained of. On the facts as stated by the Income-tax Officer, it is clear that there had been a failure to disclose the fact that the Respondent was a dealer in shares and what the Income-tax Officer meant by the language used by him was that the Respondent had not disclosed that the sale of shares had been of the nature of a trading sale, made in pursuance of an intention to make a business profit, and not of the nature of a change of investment, made in pursuance of an intention to put certain capital assets into another form. If that be so, it is equally clear that the Income-tax Officer who, by the way, was a successor to the officers who had made the original assessments, was not merely changing his opinion as to facts previously known, but was taking notice of a new fact." (Emphasis supplied)

The petitioner submitted that Section 34 of Income Tax Act, 1922, which is pari-materia to section 147 of the Income Tax Act only provides special jurisdiction. In the Income Tax Act, there is no concept of any other assessment other than the assessment or reassessment and that too on specified pre-requisite of



Section 147 of the Act.

(g) Explanation (1) to Section 147 of the Act is inapplicable:

It is submitted that in the present case, complete facts in respect of production bonus was disclosed in the books of account and also in the original assessment proceedings and as such, Explanation -1 of section 147 cannot be invoked. It is submitted that in fact, in the original assessment proceedings query in respect of difference between the amount of production bonus claimed and stated in statement was raised which was duly explained in the reply of the petitioner and after being satisfied with the reply/evidence, no adverse view was formed in the order of assessment. As such, it is not a case of mere filing of the details, but is a case, where respondent after due enquiry has accepted the claim. There is no fresh material to take a contrary view. The petitioner has cited below judgments wherein the scope of the provisions of Explanation (1) to section 147 has been explained. It has been held in these judgments that if the details have been filed and in the original assessment proceedings and the issue has been duly examined by the Assessing Officer, then provision of Explanation 1 does not get attracted:

i. CIT Vs. Schwing Stetter India (P) Ltd., [2015] 378 ITR 380 (Madras)

"15. The reliance placed by the learned standing counsel appearing for the Revenue on Explanation 1 to section 147 of the Income-tax Act cannot be pressed into service by the Department in the instant case because the details of such claim has been revealed in the tax audit report and apparently, the same has been considered by the Assessing Officer at the time of passing an order under section 143(3) of the Income-tax Act. Therefore, Explanation 1 does not get attracted to this case. Explanation 2(c)(i) and (iii) to section 147 of the Income-tax Act, which is sought to be invoked in the present case, can arise only in a case where the Department is able to establish that there is income escaping assessment and the proviso to section 147 gets attracted. In this case, we find that the finding of the Commissioner of Income-tax (Appeals) and the Tribunal is that the proviso to section 147 of the Income-tax Act did not get attracted and it is a case of mere change of opinion of the Assessing Officer."

ii. CIT Vs. Baer Shoes (India) (P) Ltd., [2011] 331 ITR 435 (Madras)



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"8. In our considered view, the said explanation also does not apply to the present case on hand. A perusal of the said explanation would show that a mere production of accounts books and other evidence could have been discovered by the Assessing Officer would not amount to disclosure within the meaning of the provision. Therefore, the said Explanation-1 should be considered in the context of the provision, inasmuch as the same is applicable only for the production of the records and other evidence. Hence, we are of the opinion that the same will not be applicable to the case of filing of a return with adequate particulars fully disclosing all the materials for the purpose of assessment."

iii. Asianet Star Communications (P) Ltd. Vs. Assistant Commissioner of Income-Tax [2020] 422 ITR 47 (Madras)

"Where benefit of proviso is claimed by revenue, it would first have to satisfy condition under proviso and validate assumption of jurisdiction beyond four years and only thereafter revenue can seek application of Explanation to Section 147."

iv. MBI Kits International Vs. Income Tax Officer [2018] 408 ITR 1 (Madras)

"18. Every non disclosure of material facts will not or cannot be a justifiable reason for reopening sustainable under judicial scrutiny. On the other hand, such non disclosure of a material fact must be of such nature that, but for such non disclosure, the income, relatable to such material fact, would not have escaped assessment. In other words, it should lead to an irrebuttable conclusion that by the conduct of the assessee, either by providing wrong or incorrect particulars or by not providing the full and correct particulars, he should have made the Assessing Officer not to bring a particular income to tax, which is otherwise liable to be taxed. If this test is applied to the present case, I am of the view that the Revenue has to fail."

v. CIT vS. Arvind Remedies Ltd., [2015] 378 ITR 547 (Madras)

"Explanation 1 to section 147 of the Income-tax Act cannot be pressed into service by the Department in the instant case because the details of such claim has been revealed during the regular assessment and complete details have been provided before the Assessing Officer. If the Assessing Officer has not considered the same at



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the time of passing an order under section 143(3) of the Income-tax Act, the assessee cannot be fastened with any liability for the same. Therefore, Explanation 1 to section 147 does not get attracted to this case. In this case, we find that the finding of the Tribunal is that the proviso to section 147 of the Income-tax Act does not get attracted since it is clear from the order of the Tribunal that it was failure on the part of the Assessing Officer to consider the material and the assessee had placed all the materials before the Assessing Officer during the regular assessment."

vi. EL Forge Ltd., Vs. DCIT / [2014] 224 Taxman 222 (Madras)

"7. The facts of the case show that there was no denial of the fact that the assessee had disclosed the details as regards the carry forward of the losses as well as the income computed and all these details were very much there before the Assessing Officer; that there is no denial of the fact that there was no failure on the part of the assessee in disclosing the facts necessary for assessment and that there is no such allegation that the escapement of income was on account of the failure of the assessee in not disclosing fully and truly all material facts. In the circumstances, applying the Supreme Court decision referred to above, we have no hesitation in accepting the plea of the assessee that the assumption of the jurisdiction beyond four years is hit by limitation as provided under Section 147 proviso. Even though, on the merits of the assessment, the assessee's case has to fail, yet, on the limited question as regards the jurisdictional time limit as provided for under Section 147 of the Income Tax Act, the assessee is entitled to succeed. Since limitation is the fundamental aspect of the assessment, we have no hesitation in setting aside the order of the Tribunal, thereby allowing the appeal."

vii. Commissioner of Income-tax vs. Sonitpur Selves Ltd., 352 ITR 305 (Gau)

viii. SAK Industries (P) Ltd., Vs. Deputy Commissioner of Income Tax (Judgment of Hon'ble Delhi High Court in WP(C).No.1884/2012 dated 16.07.2012) para 9-13(Del)

ix. Ranbaxy Laboratories Ltd., Vs. Deputy Commissioner of Income-tax [2013] 351 ITR 23 (Delhi)

x. SMCC Construction India ltd., Vs. Assistant Commissioner of Income-tax [2014] 220 Taxman 125 (Delhi) (MAG)

xi. Canon India Private Limited Vs. ACIT WP(C). No.2768/2012 dated 31.07.2012 HC Delhi.



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(h) Change of opinion: The petitioner further submitted that though a statutory amendment had been made in section 148 of the Income Tax Act w.e.f.01.04.1989, however, the Apex Court in 320 ITR 561, while affirming the judgment of Delhi High Court in the case of CIT Vs. Kelvinator of India Ltd., reported in 256 ITR 1 (FB) held as under:

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment 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. 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 fulfilment 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. 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, the 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. We quote hereinbelow



the relevant portion of Circular No. 549 dated 31-10-1989, 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 the 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."

(emphasis supplied)

(i) The petitioner however adds that the Division Bench of High Court of Delhi in its judgment reported in 256 ITR 1 had held as under:

"We, however, may hasten to add that if "reason to believe" of the Assessing Officer is founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act.

We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the Income-tax Officer, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself. We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be



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passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong." (Emphasis supplied)

(j) The petitioner submitted that recently the Apex Court in the case of ITO Vs. Techspan India Pvt limited, reported in 404 ITR 10, in para 12 has held that there would be a change of opinion when either specifically or by necessary implication a re-look is being made. In the instant case this is where the respondent has attempted to.

"Before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings". (Emphasis supplied)

(k) The Apex Court in its judgment in the case of ACIT Vs. ICICI Securities Primary Dealership Ltd., reported in 348 ITR 299 at Pg.301 has while upholding the judgment of Bombay High Court which reads as under:

"In the facts of the present case, there is nothing new which has come to the notice of the Revenue. The accounts had been furnished by the



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petitioner when called upon. Thereafter the assessment was completed under Section 143(3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to Section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record. In the circumstances, we allow this petition in terms of Prayer (a) and quash and set aside the notice dated 27-3-2006 directing reopening of the assessment for the year 1999-2000.

It thus held as under:

"Leave granted.

We have heard learned counsel on both sides.

The assessee had disclosed full details in the return of income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas, according to the Revenue, the loss incurred was a speculative loss. Rejection of the objections of the assessee to the re-opening of the assessment by the assessing officer vide his order dated 23-6-2006, is clearly a change of opinion. In the circumstances, we are of the view that the order re-opening the assessment was not maintainable." (Emphasis supplied)

(l) It is significant to be noted that their Lordships considered in its judgment that where a petitioner had challenged the initiation of proceedings u/s 148 of the Act and filed objections, the Assessing Officer was required bylaw to consider such objections, to enable the Court to examine whether it is a case of change of opinion or otherwise. It is submitted that if the aforesaid principles of law as laid down is complied, it is evident that an order on objection deserves to be examined by the Court before expressing its discretion under Article 226 of Constitution of India.

(m) It is submitted that there is difference between the concept of inferential facts and material facts. It is submitted that in the instant case if the reasons recorded as extracted above, are closely read, there has been no failure on the part of the petitioner to have disclosed fully and truly all material facts and the reassessment proceedings have been initiated merely on a change of opinion as in the original proceedings, the respondents after duly verifying all the facts had not drawn any negative inference with respect to the production bonus paid by the petitioners.



(n) Reasons to believe has been formed on the basis of wrong facts, as such assumption of jurisdiction is bad in law: It is submitted in the present case, the petitioner had claimed a deduction of Rs.33,95,84,064/- on account of production bonus, whereas in the reasons to believe, the respondent is of the view that the petitioner was entitled to the deduction only to the extent of Rs.20,32,78,482/- and thus, the assessee had claimed excessive liability on bonus in the AY 2006-07 to the extent of Rs.13,63,05,582/-. It is submitted that the petitioner in the objections as well as in the present writ petition have provided the facts relating to the claim of the production bonus. In fact, during the course of the assessment proceedings under section 143(3) of the Act, a specific query regarding the claim of production bonus of Rs.33 crores as against the sum of Rs.10.67 crore debited in the profit and loss account was raised. The petitioner in response to the aforesaid query filed its explanation and clarified the basis of such claim. The respondents being satisfied by the explanation, and books of account, accepted the aforesaid claim. As such, there is no failure to disclose any material facts. In fact, proceedings have not even been initiated on the ground that there was any failure on the part of the petitioner to disclose fully and truly all material facts but has been initiated merely on the ground that petitioner has been allowed excessive production bonus of Rs.13,63,05,582/- and the same has escaped assessment. It is submitted that while forming the reasons to believe, the respondents have committed factual error, which has formed the basis of the assumption that excessive claim of production bonus has been made. It is submitted that it has been assumed that production bonus was claimed in AY 2004-05, whereas the fact of the matter is that no amount was paid in AY 2004-05. It is submitted that petitioner claimed, production bonus only on payment basis, and opening balance of the instant AY was Rs.25,36,29,564/- and addition of production bonus during the year was of Rs.9,21,14,449/- as such total production bonus payable was of Rs.34,57,44,013/- and out of the said sum, a sum of Rs.33,95,84,064/- was paid and remaining sum of Rs.61,59,949/- was carried forward. It is submitted that if the fact that no production bonus was paid in AY 2004-05, if had been correctly noted by the respondent, then he would have been found that there was no escapement of the income. It is submitted that this factual error had led the respondent to assume that there was excessive claim of production bonus during the year. It is submitted that such factual error has been demonstrated in the objections filed by the petitioner, and same has not been even disputed by the respondent in the order, disposing of the objections. It is submitted that if the reasons to believe proceeds on the wrong facts, assumption of jurisdiction is unsustainable in law as has been held in the



following decisions:

i. Akshar Builders & Developers Vs. ACIT [2019] 411 ITR 602 (Bombay)

"6. It is thus emerges from the record that the Assessing Officer has merely acted upon the information submitted to him by the investigation wing that there is material to suggest that Mudra had paid cash amount to AB&D whereas, the material collected during the survey against Mudra prima faice suggests such cash payment to AD. This would demonstrate total lack of application of mind on the part of the Assessing Officer. If he had perused the material supplied to him by the investigation wing, he would have immediately noticed that material referred would suggest cash payment to AD and not AB&D i.e. the present petitioner.

7. Even in a case where the return filed by the assessee is accepted without scrutiny, as per the settled law, the Assessing Officer can issue a notice of reopening of assessment provided he has reason to believe that income chargeable to tax has escaped assessment. The Assessing Officer cannot proceed mechanically and also on erroneous information that may have been supplied to him. In fact, we note that in the present case the Assessing Officer had issued a notice to a wrong person. The impugned notice is, therefore, set aside."

ii. Ankita A.Choksey Vs. ITO W.P.3344 of 2018 dated 10.01.2019 HC (Bom)

"7. Thus, we are of the view that even in cases where the return of income has been accepted by processing under Section 143(1) of the Act, re-opening of an assessment can only be done when the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment. The mere fact that the return has been processed under Section 143(1) of the Act, does not give the Assessing Officer a carte blanc to issue a re-opening notice. The condition precedent of reason to believe that income chargeable to tax has escaped assessment on correct facts, must be satisfied by the Assessing Officer so as to have jurisdiction to issue the re-opening notice. In the present case, the Assessing Officer has proceeded on fundamentally wrong facts to come to the reasonable belief conclusion that income chargeable to tax has escaped assessment. Further, even when the same is pointed out by the Petitioner, the Assessing Officer in its order disposing off the objection does not deal with factual



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position asserted by the Petitioner. Thus, it would be safe to conclude that the Revenue does not dispute the facts stated by the Petitioner. On the facts as found, there could be no reason for the Assessing Officer to believe that income chargeable to tax has escaped assessment."

iii. Mumtaz Hazi Mohmad Memon Vs. ITO 408 ITR 268 (Guj)

"These reasons are interconnected and interwoven. In fact, even if these reasons are seen as separate and severable grounds, both being factually incorrect, Revenue simply cannot hope to salvage the impugned notice."

(o) There is no failure to disclose fully and truly all material facts:

It is submitted that from the facts demonstrated above, that complete facts has been disclosed. Further, on the basis of same facts reasons to believe has been formed and there is no whisper much less any allegation that income has escaped on account of failure on the part of the assessee to disclose fully and truly all material facts, as such in view of first proviso to section 147 of the Act assumption of jurisdiction is contrary to law. In support, the petitioner relied on the following judgments:

i. New Delhi Television Ltd., Vs. DCIT (2020) 424 ITR 607 (SC)

"In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuineness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew. The other facts relied upon by the revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No. 1. However, that cannot lead to the conclusion that there is non-disclosure of true and material facts by the assessee."



ii. Tractors & Farm Equipment Ltd., Vs. ACIT Reported in [2018] 409 ITR 369 (Madras)

iii. S.P.Mani & Mohan Diary Vs. ACIT [2019] 418 ITR 703 (Madras)

iv. Bharti Infratel Ltd., Vs. DCIT [2019] 101 Taxmann.com 285 (Delhi)

v. CIT Vs. City Union Bank Ltd., [2019] 264 Taxman 204 (Mad) (HC)

vi. PCIT Vs. L & T Ltd, [2020] 268 Taxman 390 (SC)

(p) The petitioner submitted that on identical facts in the case of petitioner alone for the AY 2002-03 on identical reason, the Hon'ble Madras High Court by its judgment dated 29.10.2011 (pg.32-43 of case law compilation) had quashed the initiation of proceedings inter-alia on the ground that there had been no omission or failure to disclose fully and truly all material facts and otherwise too, the initiation of proceedings under Section 147 of the Act was beyond jurisdiction. That further, if the issue has been examined in the original assessment proceedings, then any error would also not clothe the respondent to assume jurisdiction to initiate proceeding under Section 147 of the Act. It has been held in the following judicial pronouncement that any remissness, error or mistake does not clothe the respondent to assume jurisdiction under Section 147 of the Act more particularly in the case wherein the proceedings have been initiated beyond a period of four years from the end of the assessment year.

i. CIT Vs. BhanjiLavji 79 ITR 582 (SC)

ii. Mohini Bai M.Sarda Vs. First ITO 190 ITR 541 (Karnataka)

iii. Fenner India Limited. Vs. DCIT 241 ITR 672 (Mad)

iv. CIT Vs. Indian Sugar & General Industries 303 ITR 155 (Delhi)

v. Gordon Woodroffe & Co.Ltd., Vs. ITO 51 ITR 12 (Mad)

vi. Gemini Leather Store. Vs. Income-Tax officer 100 ITR 1 (SC)

vii. Parashuram Pottery Works Co., Ltd. Vs. ITO 106 ITR 1 (SC)

viii. Techman Buildwell (P) Ltd., Vs. Assistant Commissioner of Income -Tax 370 ITR 771 (Delhi)

ix. Indian And Eastern Newspaper Society, Vs. Commissioner of Income Tax, New Delhi - 119 ITR 996 (SC)

x. Chemicals and Fibres of India Limited vs. M.K.N.Pillai and another 146 ITR 280 (Bom)

xi. Addl.Commissioner of Incometax Vs. Ganeshilal Lal Chand 154 ITR 274 (Rajasthan)

xii. ITO Vs. Sirpur Papers Mills Ltd., 113 ITR 393 (AP)

(q) The petitioner submitted that if the scope of provision



of Section 147 are closely read, it is a classic case wherein respondent had proceeded to assume jurisdiction without recording any reasons to believe, without obtaining sanction, and has initiated the proceedings to make roving and fishing enquiry or to re-investigate. In support of the contention that there can be no assumption of jurisdiction under Section 147 wherein the respondent seeks to make roving and fishing enquiry, the petitioner seeks to rely on the following judgments as are stated below:

- (i) Vipin Khanna Vs. CIT, 255 ITR 220 Para 14 (P &H)
- (ii) Assam Co., Limited Vs. UOI, 275 ITR 609, Para 41 (Gau.)
- (iii) I.B.M World Trade Corporation Vs. N.D.Bhatt, IAC, 138 ITR 742 (Bom)
- (iv) Y.Rajan Vs. ITO, 77 ITR 839 (AP)
- (v) CIT Vs. M.P.Iron Traders, 189 CTR 154 (P & H)

(r) Thus, the five judgments of the Supreme Court i.e., Calcutta Discount Co., Ltd., Vs. ITO reported in 41 ITR 191, CIT Vs. Kelvinator of India Ltd., 320 ITR 561 and ACIT Vs. ICICI Securities Primary dealership Ltd., reported in 348 ITR 299, New Delhi Television Ltd., Vs. DCIT (2020) 424 ITR 607 and ITO vs. Techspan India Pvt Ltd., reported in 404 ITR 10 are sufficient to establish and beyond doubt that in the instant case jurisdiction has been assumed without authority of law and is in excess of jurisdiction of the respondent. The petitioner submitted that in the instant case, for the reasons stated above as there is a complete lack of jurisdiction, it is not the requirement of law that once the respondent had issued a notice under Section 148 of the Act, he was in law obliged to frame assessment before he culminate the proceeding. In fact, he ought to have dropped the proceeding instead of having chosen to continue with the proceedings.

6. The learned Senior Standing counsel objected the said contentions raised on behalf of the petitioners by stating that the judgments relied on by the petitioners cannot be disputed. Admittedly, the Hon'ble Supreme Court of India laid down the principles on all these aspects. However, the application of the principles with reference to the facts and circumstances of the petitioner's case is to be considered by this Court. The learned Senior Standing counsel reiterated that in the case of the petitioner, the Assessing Officer has 'reason to believe', in view of the fact that the income chargeable to tax escaped assessment. The conditions stipulated in the Proviso clause to Section 147 is also complied with and thus, the petitioner has to participate in the reopening proceedings. The learned Senior Standing counsel relied on the reasons recorded for reopening and the findings of the authority competent, while disposing of the objections filed by the petitioner. Relying on the said



reasons as well as the disposal of objections, the learned Senior Standing counsel reiterated that the case of the petitioner is falling under the proviso clause to Section 147 of the Act and mere production of books of accounts and material evidences are insufficient and thus, the respondent must be allowed to proceed with the reopening proceedings.

7. Considering the arguments as advanced on behalf of the parties to the lis, notice under Section 148 of the Act was issued on 29.03.2012. The respondents have stated that they have 'reason to believe' that income chargeable to tax for the Assessment Year 2006-07 has escaped assessment within the meaning of Section 147 of the Act. Request is made to furnish reasons. Reasons are furnished in proceedings dated 08.10.2012 and in the present case, the reopening is made, in view of the fact that the reopening of assessment is made in respect of the very same petitioner company for the Assessment Years 2004-05 and 2005-06 and therefore, the implications on tangible material continued for further reopening of proceedings for the Assessment Year 2006-07 also. Thus, it is clear that once the reopening is made for the Assessment Years 2004-05, 2005-06, it necessitated the authorities for reopening of assessment for the Assessment Year 2006-07 also as they have 'reason to believe' that the income chargeable to tax escaped assessment. In this regard, the learned Senior Standing counsel relied on the judgment of Kalyanji Mavji & Co., Vs. CIT [1976] 102 ITR 287 (SC).

8. Let us consider the reasons for reopening of assessment.

"The assessee is a foreign company engaged in the business of oil exploration. For the AY 2006-07, in the scrutiny assessment completed u/s 143(3), the total income of the assessee was determined at a loss of Rs.23,07,81,802/-. However, the books profit of Rs.197,41,29,836 was taxed u/s.115JB.

In the Profit & Loss Account for the year ended March 31, 2006, under Operating Expenses, the assessee debited a sum of Rs.10,67,96,247/- towards production bonus. According to the assessee, the detail of production bonus was as under:-

Name of the Party	Amount Rs.
ONGC (for Ravva blocks)	9,21,14,449
Tata Pettrodyne Limited (CB-OS/2 Block)	1,46,81,798
Total	10,67,96,247

In the statement of computation of income for the AY 2006-07, against the profit as per the Profit & Loss Account, the assessee, interalia, made the following additions and deduction towards bonus with narrations as under:



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Add: In admissible

Production bonus for the year admissible on payment basis

as per clause 17.5(b) of the Ravva Production sharing Contract : Rs.9,21,14,449

Less: Admissible Expenses

Ravva production bonus paid during the year claimed

as per clause 17.5 (b) of the Ravva production sharing Contract : Rs.33,95,84,064

A review of the assessment records of the assessee for the assessment year 2004-05 and 2005-06 revealed that for the AY 2004-05 the assessee had claimed the entire liability on bonus payable in the relevant assessment year itself. For the AY 2005-06, the assessee did debit an expenditure of Rs.12,14,24,477 in the Profit & Loss Account towards bonus. In the statement of computation of income, of the total expenditure of Rs.12,14,24,477 a sum of Rs.11,11,64,033 being the liability on bonus which remained undischarged as on 31.03.2005 was added to the book profit as inadmissible. It was noticed that on payment basis, in accordance with section 43b(c), the assessee had not claimed deduction on the disbursement of bonus in AY 2005-06. So, the undischarged liability relating to production bonus for the AY 2005-06, which was to be carried forward for claim in AY 2006-07 was Rs.11,11,64,033 only. Whereas, it is seen that the assessee had claimed excessive liability on bonus in the AY 2006-07 to the extent of Rs.13,63,05,582 as worked out below:

Production bonus claimed as admissible expenses

In statement of income : Rs.33,95,84,064

Less: Liability of AY 2005-06

: Rs.11,11,64,033

Current year liability

(AY 2006-07)

(discharged before filing

of return : Rs.9,21,14,449 :Rs.20,32,78,482

Excess claim of production bonus Rs.13,63,05,582

The above fact leads to the belief that income chargeable to tax has escaped assessment for the AY



2006-07."

9. The objections filed by the petitioners were considered by the respondents and order is passed, rejecting the objections. The findings of the respondents in impugned proceedings dated 05.03.2013 would reveal that the objections raised by the petitioner and the case was relied upon by them were considered and they have made a finding in Paragraphs 4.3 & 4.4 which reads as follows:

"4.3 Section 147 of the Income Tax Act requires that there is reason to believe that the income has escaped assessment. There is no question of sufficient or insufficient reason to believe but only the existence of reason to believe that income has escaped assessment as per facts on record and as per provisions of IT Act 1961. The belief can be verified, ascertained and confirmed only after verifying various details/factors during the assessment proceedings.

4.4 As regards the change of opinion, it is submitted that the change of opinion arises when the assessing officer forms an opinion that decides not to make an addition and holds that the assessee is correct. The reassessment proceedings under section 147 is pending and the issue can be examined during the course of proceedings only. The submission of the assessee company is incorrect and misleading. This view is supported by the Delhi High Court decision in the case of Dalmia Pvt Ltd., Vs. CIT in which the court has held that "despite specific and pointed queries in section 143(3) assessment, the Assessing officer cannot be said to have formed any opinion if explicit opinion not recorded."

10. In view of the fact that the competent authority made a finding that the submission of the assessee company is incorrect and misleading, the case of the petitioner falls under the proviso clause to Section 147 of the Act as the conditions that the assessee must disclose fully and truly is not satisfied.

11. This Court is of the considered opinion that based on the return of income filed by the petitioner / assessee, the assessment order has been passed and subsequently certain new tangible materials were traced out for the purpose of reopening as the Assessing Officer has 'reason to believe' that income chargeable to tax has escaped assessment. Under these circumstances, the assessee cannot say that he has produced all the material facts and books of accounts etc., Even if such materials are produced, if the authorities formed an opinion that the tax escaped assessment, then they are empowered to initiate reopening proceedings. In the present case, the assessment is reopened beyond a period of four years, but within



a period of six years and therefore, mere availability of tangible material would be sufficient for the purpose of invoking the powers under Section 147 of the Act. This failure on the part of the petitioner was considered for reopening of assessment and the finding is given that the assessee company has misleading the assessing authorities by furnishing incorrect particulars. However, this Court cannot arrive a finding in this regard. It is for the assessee to establish his case during the course of reassessment proceedings. The writ petition is filed, challenging the reopening proceedings. Thus, objective satisfaction would be sufficient for the purpose of allowing the Assessing authority to proceed with the reopening proceedings. Once, the materials are available and such materials were not taken into consideration by the original assessing authority, or any findings are given in the assessment order, which would be sufficient for the purpose of reopening of assessment and once such reopening is made based on tangible materials, then the assessee has to defend his case by furnishing further particulars or explanations or documents during the course of reopening proceedings. High Court cannot form any opinion in respect of such findings to be made. Only endeavour of the High Court is to ensure that, whether the conditions stipulated and the process adopted for the purpose of reopening of assessment in consonance with the provisions of the Act and in accordance with the Directives of the Hon'ble Supreme Court of India in the case of GKN Driveshafts (cited supra) are not. If the conditions are fulfilled, then it is for the assessee to defend their case in the manner known to law.

12. As discussed in the aforementioned paragraphs, the reasons furnished in the case of the petitioner would be sufficient for the purpose of reopening of assessment as the case of the petitioner is initiated beyond a period of four years, but within a period of six years and therefore, the petitioner is bound to participate in the reopening proceedings for the purpose of defending their case by availing the opportunities to be provided by the authorities in accordance with law.

13. With these observations, the writ petition stands dismissed. No costs.

Sd/-
Assistant Registrar(CO)

//True Copy//

Sub Assistant Registrar

Kak



To

The Deputy Director of Income Tax-I,
(International Taxation)
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Chennai - 600 034.

+lcc to M/s.Hemamuralikrishnan, Senior Standing Counsel,
S.R.No.43877

W.P.No.12358 of 2013

LN(CO)
RGA(21/09/2021)