IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 01.09.2021

CORAM

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

W.P.No.12359 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]

ORDER

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 28.10.2005, for the Assessment Year 2005-06, declaring a total income of Rs.91,13,40,000/-. 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 29.12.2008.

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. 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) The petitioner states that the 'reasons to believe' are not preliminary, 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.)
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> 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) :
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> "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)".
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> These words do not make conclusive the officer's own honest opinion that he had reasonable cause for the prescribed belief.
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> 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."

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

(i) There is no allegation that the petitioner had failed to disclose fully and truly all material facts. Indeed, it is an admitted fact, on the contrary that the facts stated in the purported note of satisfaction is from the return of income filed by the petitioner.

(ii) It is further submitted that there has been no failure of the petitioner to have disclosed fully and truly all material facts. Indeed 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 and dealt in para 19 below.

(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 is without jurisdiction and as such deserves to be quashed.

(v) The reasons had been recorded before initiating the proceedings under Section 147 of the Act.

(vi) 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.

(d) 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:

> “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)”

(e) 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. Further, there is not even an allegation to that effect as is also otherwise apparent from Profit & Loss Account, which had been also considered and examined before framing the assessment. In fact, 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 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 reasonable 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:-
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> " 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.

(f) The petitioner is citing below the following judgments, wherein the scope of the provisions of Explanation (1) to section 147 has been explained. It has been held that if there is no failure to disclose fully and truly all material facts, whatever may be the circumstances, the Assessing Officer is not empowered to initiate proceedings under Section 147 and that too, when the proceedings had been initiated beyond the period of four year from the end of the assessment year. Reliance is placed on the following decisions:

i. Techman Buildwell (P) Ltd., Assistant Commissioner of Income Tax [2015] 370 ITR 771 (Delhi)

“In the present case, the “reasons to believe” extracted above nowhere highlight what, if at all, was the material which the Assessing Officer came up or became aware of subsequent to the original assessment. In other words, what triggered the Assessing Officer's curiosity to impel him to reexamine the files and documents pertaining to a completed assessment is unknown. Nor does the materials placed in the assessment show that the petitioner had unjustifiably suppressed valid or relevant information which was otherwise available. The advertence to the disallowance of a provision for an unascertained liability points to the Assessing Officer indulging in what amounts to nothing but a masked review. What appears to have excited the Assessing Officer's mind was that the original assessment order was not framed properly as it overlooked certain materials which led to loss of revenue. The Assessing Officer in the first instance did not perform his job properly for which the assessee cannot be faulted with. In Calcutta Discount Co. Ltd. v. ITO, [1961] 41 ITR 191 (SC) the Supreme Court had pointedly observed that the assessee is required to fairly disclose what is expected of him "the primary facts" while submitting the returns. It is up to the Assessing Officer to draw the necessary inferences. In the present case, the Assessing Officer's omission appears to have been the sole basis for issuing the reassessment notice and, consequently, proceeding to make the impugned demand. "

ii. Indian and Eastern Newspaper Society Vs. Commissioner of Income-Tax, New Delhi, 119 ITR 996 (SC) at page 1004.

"Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT [(1976) 1 SCC 985 : 1976 SCC (Tax) 111 : (1976) 102 ITR 287] where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh v. CIT [AIR 1959 SC 257 : (1959) 35 ITR 1 :1959 Supp 1 SCR 10] , CIT v. Raman & Co. [AIR 1968 SC 49 : (1968) 1 SCR 10 : (1968) 67 ITR 11] and Bankipur Club Ltd. v. CIT [(1972) 4 SCC 386 : 1974 SCC (Tax) 76 : (1971) 82 ITR 831] , and we do not believe that -the law has since taken a different course. Any observations in Kalyanji Mavji & Co. v. CIT [(1976) 1

SCC 985 : 1976 SCC (Tax) 111 : (1976) 102 ITR 287] suggesting the contrary do not, we say with respect, lay down the correct law. ”

iii. Gemini Leather Store Vs. Income-Tax officer, B-Ward, Agra, And others 100 ITR 1 (SC) at page 4.

"The law laid down in Calcutta Discount Company case has been restated in several subsequent decisions of this Court: CIT, v. Hemchandra Kar [(1970) 1 SCC 780 : 77 ITR 1] , CIT, Gujarat v. Bhanji Lavji [AIR 1971 SC 717 : 79 ITR 582] ; CIT, v. Burlop Dealers Ltd. [(1971) 1 SCC 462 : 79 ITR 609] , to name only a few. In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income Tax Officer discovered. After this discovery the Income Tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inference as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income Tax Officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income Tax Officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147(a) to remedy the error resulting from his own oversight. ”

iv. Chemicals And Fibres of India Limited Vs. M.K.N.Pillai and Another 146 ITR 280 (Bom) at Page 283

"It is clear that the assessee had made a claim on the footing which has been accepted by several judicial tribunals. It had disclosed the primary facts which were necessary for the purpose of making the assessment. If there was any doubt, it was for the concerned officer to make further inquiries. It is impossible to hold or accept the conclusion that the assessee had failed to disclose fully or truly the necessary material facts or had thereby caused the ITO to erroneously accept its claim u/s. 80-I and for higher development rebate. If that be my conclusion, it must follow that the action taken u/s. 148 read with s. 147 of the I.T. Act is improper, incompetent and the notices issued are required to be quashed. Similar result would follow in respect of notices under the Surtax Act. ”

v. Additional Commissioner of Income-Tax vs. Ganeshilal Lal

Chand [1985] 154 ITR 274 [Rajasthan]

"We have heard Mr. Surolia on behalf of the Department and Mr. Ranka on behalf of the assessee. We have perused the reasons recorded by the ITO for reopening the assessment. In our view, the ITO failed to give any reason that there was any failure or omission of the assessee to disclose fully and truly all the material facts at the time of making the original assessment. In the absence of such finding recorded by the ITO, he had no jurisdiction to reopen the assessment under s. 147(a) of the Act. It is well settled that even if there was any oversight or mistake or inadvertence in making the original assessment, it does not empower any ITO to reopen the assessment under s. 147(a) of the Act. A catena of decisions have been cited by Mr. Ranka in support of the view taken above. They are:

(1) Chhugamal Rajpal v. S.P. Chaliha[1971] 79 ITR 603 (SC), (2) CIT v. Burlop Dealers Ltd.[1971] 79 ITR 609 (SC), (3) Sheo Nath Singh v. AAC of IT[1971] 82 ITR 147 (SC), (4) Gemini Leather Stores v. ITO[1975] 100 ITR 1 (SC), (5) Parashuram Pottery Works Co. Ltd. v. ITO [1977] 106 ITR 1 (SC), (6) Indian and Eastern Newspaper Society v. CIT[1979] 119 ITR 996 (SC), and (7) General Mrigendra Shum Sher Jung Bahadur Rana v. ITO[1980] 123 ITR 329 (Delhi)."

vi. ITO Vs. Sirpur Papers Mills Ltd., [1978] 113 ITR 393 (AP)

"In our opinion, the last portion of the passage quoted above has a bearing on the facts of this case, viz., that it was not for the assessee to point out the various possible inferences which could be drawn from the primary facts which he had disclosed. His duty is to disclose the primary facts and leave it to the Income-tax Officer to draw the appropriate inference. If, at the time of the original assessment, the Income-tax Officer could have reached a different conclusion, i.e., different from the one which he actually reached on the earlier occasion, it would not be open to him to resort to section 147(a) merely on the ground that subsequently he came to regard as erroneous the conclusion which he had earlier reached. The facts of the case in Poonjabhai Vanmalidas and Sons v. Commissioner of Income-tax, [1974] 95 ITR 251 (Guj) [FB] illustrate this aspect of the legal position. It may be pointed out that, in the recent decision in Parashuram Pottery Works Co. Ltd. v. Income-tax Officer, [1977] 106 ITR 1, the Supreme Court has reiterated the same legal position and it is clear from this latest decision that the legal position is the same as was summarised by the Full Bench of the Gujarat High Court in Poonjabhai Vanmalidas and Sons v. Commissioner of Income-tax, [1974] 95 ITR 251. In Parashuram Pottery Works Co. Ltd. v. Income-tax Officer, [1977] 106 ITR 1 (SC), it was held by the Supreme Court that where, in working out the figures of depreciation for certain items of capital assets, the Income-tax Officer lost sight of the fact that the aggregate of the depreciation, including the initial depreciation allowed under the different heads, could not exceed the original cost to the assessee of these items of capital assets, the assessee cannot be held responsible for the remissness on the part of the Income-tax Officer in not applying the law contained in proviso (c) to section 10(2)(vi) of the Indian Income-tax Act, 1922, and it cannot be said that excess depreciation allowed because of the mistake in the calculation of the depreciation, was allowed and income escaped assessment because of the assessee's omission or failure to disclose fully and truly all material facts and no action can be taken for reopening the assessment under section 147(a) of the Income-tax Act, 1961, on the basis of detection of that mistake alone after the expiry of four years from the end of the assessment year."

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

The Income Tax Officer may, if he is satisfied, that on account of failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment, income has escaped assessment, he may assess or re-assess the income. But when the primary facts necessary for assessment are fully and truly disclosed, he is not entitled on change of opinion to commence proceedings for re-assessment. The Income Tax Officer was apprised of all the primary facts necessary for assessment, and he proceeded to "drop the assessment proceedings". He may have raised a wrong legal inference from the facts disclosed but on that account he was not competent to commence re-assessment proceedings under Section 34(1)(a) for the two Assessment Years 1947-48 and 1948-49."

viii. Mohini Bai M.Sarda Vs. First ITO [1991] 190 ITR 541 [Karnataka]

"On the other hand, the law that is well settled is that the burden is on the Department to show that the escapement has occurred on account of the failure on the part of the assessee to disclose the full particulars of the income. The other aspect of the case is, whether the Income-tax Officer had reason to believe that the escapement had occurred on account of the omission or failure on the part of the assessee. The formation of belief must have a nexus to the failure of the assessee to disclose true and full particulars as held by the Supreme Court in Bhanji Lavji's case[1971] 79 ITR 582. It is sufficient if the assessee has disclosed all the primary facts and any further enquiry or investigation that is called for should be done by the Income-tax Officer. On the facts of the present case, it is clear that the information furnished by the petitioner in Part III of the returns was sufficient for the Income-tax Officer to enquire further into the matter and to take steps to include the income accruing to the minors in the assessment of the petitioner. This was a clear case of failure on the part of the Income-tax Officer rather than the assessee."

(g) 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)

(h) 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 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)

(i) 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 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.
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> We have heard learned counsel on both sides.
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> 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)

(j) 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.

(k) 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 in para 10, are closely read, there has been no failure on the part of the petitioner to have disclosed fully and truly all material fact, available on record of the AO as is mandated by the Apex Court in its judgment above, so obliged to have examined as to whether the tax deducted at source by the petitioner was on such income and was subjected to tax in the hands of the recipient under Section 44BB or under Section 44D of the Act. It is submitted that in so far as the present case is concerned, undisputedly right from the inception i.e., from the assessment year even prior to AY 2002-03, petitioner had been deducting tax at source on income which fell under Section 44BB which had to be accepted by the AO. Incidentally, it is submitted that the Apex Court in its judgment in Oil & Natural Gas Corporation Limited Vs. CIT reported in 376 ITR 306 dated July 01, 2015 has also held that such income is liable to be taxed under Section 44BB of the act and not under Section 44D of the Act as was opined in the reasons, as a result of change of opinion by the respondent. Thus, the law declared by the Apex Court is that such sum which had been remitted by its was only liable to be deducted tax at source under Section 44BB of the Act. That the petitioner had disclosed the amount remitted and the amount of tax deducted at source which has also not been denied by the respondent. In view thereof, without narrating the judgments, the petitioner submitted that there has been no escapement of income and no failure on the part of the assessee to have disclosed fully and truly all material facts and as such the assumption of jurisdiction under Section 147 of the Act by the respondent per-se is without jurisdiction and is thus arbitrary. Indeed, it has not been stated by the respondent that the assessee had failed to disclose fully and truly all material facts. In support, the petitioner relied on the following judgments:

1. New Delhi Television Ltd., Vs. DCIT (2020) 424 ITR 607 (SC)
2. Bharti Infratel Ltd., Vs. DCIT [2019] 101 taxmann.com 285 (Delhi)
3. CIT Vs. City Union Bank Limited (2019) 264 Taxman 204 (Mad) (HC)
4. PCIT Vs. L&T Ltd., (2020) 268 Taxman 390 (SC)

(l) That even if for the sake of an arguments, it is held that an error had been committed by the respondent then too, the same error would not allow the respondent to assume jurisdiction to initiate proceedings under Section 147 of the Act. It has been held in the following judicial pronouncement that any remissness, error, or mistake does not allow 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)

(m) The petitioner further submitted that on identical facts in the case of petitioner alone for the AY 2002-03 on identical reason (pg.310 of Typed Set), 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. It is submitted the reasons to initiate proceeding in the said case are absolutely identical and the facts are also identical. It is thus submitted that the allegation in the reasons to believe that there had been a deduction of tax @ 4% as against the higher rate of taxation may be an opinion of the succeeding AO who is said to have recorded the reasons to believe, but in the said reasons to initiate the proceedings there had been no mention that there is omission to disclose fully and truly all material facts. The facts in the instant case in respect of the remittances made for the services rendered along with the deduction of tax at source had duly been examined as stated above before the Assessing Officer, who had also examined. It is thus a case wherein even no allegation can be made that the assessee had merely disclosed the material and had not been examined by the respondent.

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 2005-06 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 2006-07 and therefore, the implications on tangible material continued for further reopening of proceedings for the Assessment Year 2005-06 also. Thus, it is clear that once the reopening is made for the Assessment Years 2004-05, 2006-07, it necessitated the authorities for reopening of assessment for the Assessment Year 2005-06 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.

> “A) For the A.Y.2005-06, the assessee debited the following amounts in the profit and loss account on payments made towards geological studies, seismic data acquiring and processing and chartered hire charges (drilling preparation, rig mobilization and demobilization) detailed as follows:

A-Y	Geological Studies		Seismic data acquisition & processing		Charter hire charges drilling perpetration /rig mobilization /demobilization
	Exploration	Development	Exploration	Development	
2005-06	Rs. 18,57,16,823	Rs. 1,47,24,949	Rs. 55,24,82,630	Rs. 49,76,571	
Total					Rs. 75,79,00,973

> The total amount of such expenditure is Rs.75,79,00,973/- Tax was deducted at the rate of 4% treating these payments to be within the ambit of section 44BB of the Income Tax Act. However, it may be noted that section 44BB is applicable for non resident assessees who are 'engaged in the business of providing

services or facilities in connection with, or supplying plant and machinery on hire used, or to be used, in the prospecting for, of the non resident assessees who are engaged in the business of providing services or providing facilities in connection with the prospecting for, or extraction or production of mineral oils. Apart from providing such services or facilities, non resident assessees supplying plant and machinery to the oil and gas companies also fall within the category of assessees coming within the ambit of section 44BB.

However, services which are covered by section 44D or section 115A or which fall within the definition of Fee for technical services under section 9(1) (vii) are not eligible for section 44BB and such exception has been provided for in the proviso to section 44BB. In the instant case, payment towards Geological Studies and Seismic data acquisition & processing is in the nature of fees for technical services. Charter hire charges, as decided by the jurisdictional Tribunal in the West Asia Maritime case, is in the nature of royalty. Therefore, the assessee has deducted lesser tax from the payment to the Non-Residents.

The services in the subject case are different which do not fall within the ambit of section 44BB of the Act. Providers of such technical service are therefore are not entitled to lower deduction of tax and proportional disallowance under section 40(a)(i) is called for. However, the expenses so claimed have been allowed fully in the assessment. These excess deduction has resulted in escapement of income chargeable to tax.

B] It is seen from the statement of computation of Income that the assessee was computing the income from the business of oil exploration in terms of section 42 of the Income Tax Act. In the computation statements, against the loss of Rs.33,02,33,500 as per the Profit & Loss Account, the assessee added a sum of Rs.154,73,86,700 being the expenditure relating to Exploration and Development-depletion & write off and in lieu deducted a sum of Rs.3,09,81,422 pertaining to Exploration and Development expenditure (Schedule 4 to the CEIPL Financials). But, the deduction of Rs.3,09,81,422 claimed in the statement of computation did not agree with the expenditure booked in schedule 4 to the financials and no separate details for claim of Rs.3,09,81,422 towards Exploration and Development expenditure in respect of each project was available.

Further, during the previous year relevant to AY 2005-06, a portion of participating interest in

Block/Oil & Gas Field, KG/DWN-98/2 was also assigned. For the assignment of the interest in the contract areas, the assessee received a consideration of Rs.382,34,82,330. In the financials for the previous year relevant to AY 2005-06, the above sum was adjusted as reduction of expenditure on exploration. It was seen that for the purpose of Income Tax, the assessee used to deduct the entire expenditure on exploration and development in the statement of computation of income. As such, the assessee had no unallowed expenditure in respect of the said Block/Oil & Gas fields assigned, to claim as deduction in the previous year relevant to AY 2005-06. Apart from the above consideration of Rs.383,34,82,330, the assessee was in receipt of a surplus arising from cost centre's carrying value due to assignment of a portion of participating interest in the Block/Oil & Gas Field, KG/DWN-98/2 amounting to Rs.94,20,22,786. In the Profit & Loss Account, the above surplus was netted off against Depletion and Cost Written off. The netting off of the sum of Rs.94,20,22,786 against Depletion and Cost Written off, in the Profit & Loss account, which was realized as surplus on the assignment of a portion of participating is not in order and has to be brought to tax in terms of Section 42(2)(b) of the Income Tax Act."

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, 4.1, 4.2, 4.3, 4.4, 5, 6 & 7, which reads as follows:

"4. The objection raised by you and the case laws relied upon by you in your favour has been considered and is not acceptable for the following:

4.1 The Hon'ble Supreme Court in the case of Honda Siel Power Products Ltd., has held that The Revenue authorities were justified in initiating reopening proceedings based on the Delhi High Court ruling that failure on the part of the tax payer to fully and truly disclose all material facts was not restricted only to disclosures made at the time of filing of the return of income but also extends to assessment proceedings.

4.2 Further, the Delhi High Court in the case of Consolidated Photo and Finvest Ltd., has also held that even where the tax official could have on investigation got necessary information from the records available with him, it cannot be said that the tax payer has been full and true disclosure of material facts.

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."

5.The assessee has relied on case laws on the issue of payments towards geological studies, seismic data acquiring and processing and chartered hire charges. The applicability of other case laws relied upon by the assessee company with respect to the merits of the issues need not be verified during the assessment proceedings only and need not be considered at this point of time.

6. The other issues regarding the difference in exploration and development expenditure and the taxability of consideration received on assignment of the assessee's stake in KG/DWN and the merits of the same will be ascertained during the assessment proceedings.

7. In the light of the above discussion of the reasons recorded and the objections raised by the assessee company, it is concluded that the objections raised by the assessee company is non sustainable legally and factually and the arguments raised by the assessee company in this regard is hereby stands rejected."

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 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 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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S.R.No.43878

W.P.No.12359 of 2013

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