Powers of the Assessing Officer to re-open assessment are not plenary or unbridled, even under the amended S.147 of the I.T. Act, 1961.

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By the Direct Tax Laws (Amendment) Act, 1987, a new scheme of assessment has been introduced in the newly substituted S.143 of the Income-Tax Act, 1961 (the Act, for short), w.e.f. 1.4.1989. Under the new scheme, returns filed will now be accepted as such and passing of assessment orders will not be necessary. It follows that in majority of cases there would not be any application of mind by the Assessing Officer (A.O.) after the returns are filed, unless the case is picked up for scrutiny and a regular assessment order is passed U/s143(3). The Amending Act, 1987, has, therefore, rationalised the provisions of S.147 and other connected sections to simplify the procedure for bringing to tax the income which escapes assessment.

Under the newly substituted S.147, w.e.f 1.4.1989, the A.O., —

— if he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year,

has been empowered, subject to the provisions of sections 148 to 153, —

— to assess or reassess —

— such income and

— also any other income chargeable to tax —

— which has escaped assessment and

— which comes to his notice subsequently in the course of the proceedings under section 147, or

— to recompute —

— the loss or

— the depreciation allowance or

— any other allowance, as the case may be,

for the relevant assessment year.

2. There is an erroneous & wide-spread impression that under the amended S.147, the A.O. has unbridled powers to assess or reassess income which has escaped assessment

In view of the aforesaid impression, there is a general belief prevalent in the Income-Tax Circles that action U/s 147 is possible inspite of complete disclosure of material facts. The aforesaid belief is the result of the decisions of Gujarat High Court in the case of **Praful Chunilal Patel Vs A.C.I.T, 236 I.T.R p.832** and Delhi High Court in the case of **Rakesh Aggarwal Vs A.C.I.T, 225 I.T.R p.496.**

However, it may be stated, with due respect, that the aforesaid judgements of Gujarat and Delhi High Courts do not represent the correct view regarding the scope of the amended provisions of S.147 of the Act.

In this context, it is important to note that the primary condition of **reasonable belief** having nexus with the material on record is still operative. Therefore, howsoever wide the scope for taking action U/s 147 r.w.s 148, it does not confer jurisdiction on **change of opinion** on the interpretation of a particular provision earlier adopted by the A.O. The scope of S.147 is **not for reviewing** its earlier order suo motu irrespective of there being any material to come to a different conclusion apart from just having second thoughts about the inferences drawn earlier – **VXL India Ltd Vs A.C.I.T, 215 I.T.R p.295 (Guj) & Birla VXL Ltd. Vs A.C.I.T, 217 I.T.R p.1 (Guj)**

In this context, there is a direct judgement of Delhi High Court in the case of **Jindal Photo Films Ltd. Vs Dy C.I.T, 105 Taxman p.386 (Del).** The relevant parts of the head note are as follows:

(a) "Discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment would constitute a ' reason to believe that the income has escaped assessment ' within the meaning of section 147. Here also such facts which could have been discovered by the assessing authority but were not so discovered at the time of original assessment may not constitute a new information."

(b) "The power to reopen an assessment was conferred by the Legislature but not with the intention to enable the ITO to reopen the final decision made against the revenue in respect of the question that directly arose for decisions in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods."

(c) " Though he had used the phrase 'reason to believe' in his order, admittedly, between the date of orders of assessment sought to be reopened and the date of forming of opinion by the ITO nothing new had happened. There was no change of law. No new material had come on record. No information had been received. "

(d) " While passing the original orders of assessment, the order dated 28-2-1994 passed by the Commissioner (Appeals) was before the Assessing Officer. That order still stood. What the Assessing Officer had said about the order of the Commissioner (Appeals) while recording reasons under section 147, he could have said even in the original orders of assessment. Thus, it was a case of mere change of opinion, which did not provide jurisdiction to the Assessing Officer to initiate proceedings under section 147."

(e) " It was a case of absence of material and, hence, the absence of jurisdiction in the Assessing Officer to initiate the proceedings under section 147 / 148. "

From the aforesaid decision of the Delhi High Court, it is evident that if the A.O. has no fresh material then he has no jurisdiction to initiate proceedings U/s 147 / 148 of the Act. The aforesaid decision of the Delhi High Court is a well-considered and detailed decision. This judgement clearly lays down

that in order to constitute a '**reasonable belief '** for escapement of income, discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment ; is a **must** . Further such facts which could have been discovered by the A.O. but were not so discovered at the time of original assessment may not constitute new information. It was further held that the power to reopen an assessment was conferred by the Legislature not with the intention to enable the A.O. to reopen final decisions in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power of review in the hands of the A.Os depending upon their changing moods.

There are a number of other judgements which support the aforesaid view. Therefore, the aforesaid judgements of Gujarat & Delhi High Courts in 236 I.T.R p.832 & 225 I.T.R p.496, respectively do not represent the correct view regarding the powers of the A.O. under the amended provisions of S.147 of the Act and the judgements in these cases have to be treated as confined to the particular facts of these cases.

3. No action U/s 147 is permissible in case of complete disclosure of material facts

As already pointed out in earlier para (2) the decision of Delhi High Court in the case of **Jindal Photo Films Ltd. Vs Dy C.I.T, 105 Taxman p.386** is a direct judgement regarding the powers of the A.O. if there is a complete disclosure of material facts at the time of original assessment.

The aforesaid view is also supported by the decision of Calcutta High Court in the case of **Jay Shree Tea & Industries Ltd. Vs Dy C.I.T, 106 Taxman p.508**. In this case the assessment year (A.Y) involved is 1990-91. The relevant part of the head note on pp.508 & 509 of the Report is reproduced, as follows:

" Assuming but not accepting that there was some mistake in calculation either on the part of the assessee or on the part of the ITO, that did not mean that the assessee had not disclosed fully and truly the material facts regarding his income. If some calculation mistake had been committed for the deduction under a particular section, that could be rectified under section 154 but on that ground no notice under section 148 could be issued. When the notice itself was bad in law, there was no reason to carry on with the futile exercise of completion of reassessment proceedings. Therefore, on both the counts there was no case or justification to issue the notice under section 148, particularly when the ITO could not assume jurisdiction to issue notice under section 148 as per the provisions of the Act and the facts of the case. In the result, the impugned notice issued was to be quashed."

Besides, there is a decision of Bombay High Court in the case of **Smt. Laxmi Bai A.Wagle (Decd) Vs I.T.O., 240 I.T.R p.427;** which also supports the aforesaid view. In this case certain amounts were shown in the returns of income but claimed to be exempt as capital receipts. This claim was accepted at the time of original assessment. The relevant part of the head note on p.428 of the Report is reproduced, as follows:

" Held, that the facts relating to this case were not in dispute. The income which the assessee received from M/s. Zuari Agro Chemicals Ltd. for the sale of water from a source which was situated in the agricultural land, was disclosed. It was contended that they were capital receipts, and hence not taxable. The position was accepted by the Assessing Officer. No fresh information was received by the Assessing Officer regarding the receipts. The notice of reassessment was not valid and was liable to be quashed."

4. It is significant to note that the expression 'reason to believe' is present even in the amended S.147

It is important to note that the condition "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment" is present even in the amended provisions of S.147 of the Act.

The correct import of the expression 'reason to believe' has been explained by the Apex Court in the case of **Calcutta Discount Company Ltd Vs ITO, 41 I.T.R p.191 (S.C.)** The relevant part of the head note is to be found on p.195 of the Report and the same is reproduced, as follows:

" The expression "reason to believe" in section 34 of the Income-tax Act postulates belief and the existence of reasons for that belief. The belief must be held in good faith: it cannot be merely a pretence. The expression does not mean a purely subjective satisfaction of the Income-tax Officer : the forum of decision as to the existence of reasons and the belief is not in the mind of the Income-tax Officer. If it be asserted that the Income-tax Officer had reason to believe that income had been under-assessed by reason of failure to disclose fully and truly the facts material for assessment, the existence of the belief and the reasons for the belief, but not the sufficiency of the reasons, will be justiciable. The expression predicates that the Income-tax Officer holds the belief induced by the existence of reasons for holding such belief. It contemplates existence of reasons on which the belief is founded, and not merely a belief in the existence of reasons inducing the belief ; in other words, the Income-tax Officer must, on information at his disposal, believe that income has been under-assessed by reason of failure fully and truly to disclose all material facts necessary for assessment. Such a belief may not be based on mere suspicion : it must be founded upon information."

From the aforementioned part of the head note, it is clear that 'reason to believe' has to be based on **information** at the disposal of the ITO. It implies that discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment would constitute 'reason to believe' that the income has escaped assessment within the meaning of S.147. If no new material has come on record or no fresh information has been received, then the A.O. will have no power to reopen the assessment. It may also be stated here that such facts which could have been discovered by the A.O. but were not so discovered at the time of original assessment, may not constitute fresh / new information.

From the aforesaid discussion, it is clear that no action under the amended provisions of S.147 is possible if the assessee has made complete disclosure of material facts. Therefore, the decisions of the Gujarat High Court in 236 ITR p.832 & Delhi High Court in 225 I.T.R p.496, do not represent the correct position of law.

5. Deficiency in making enquiries does not justify action U/s147 of the I.T. Act even as per the amended provisions

Deficiency in making enquiries does not justify action U/s147 of the I.T. Act, even under the amended provisions. For this proposition, before citing the decisions of the Apex Court and High Courts I would like to rely, on the comments of the learned authors viz. Chaturvedi and Pithisaria on p.5116 of Vol.3, fifth – Edition, of their Commentary on I.T. Law. The relevant comments, which are based on a number of High Court decisions including Bombay High Court, are reproduced as follows:

" The duty cast upon the assessee to make a full and true disclosure of all material facts does not absolve the Assessing Officer from performing his duty to apply his mind and make intelligent inquiry, especially when the primary facts were before him on the basis of which he might have pursued the inquiry and found out other relevant facts. The Assessing Officer cannot fall back on section 147(a) to make good his deficiencies in the first completed assessment. It is clearly his duty to exercise due care and caution and to make intelligent inquiries. Failure to make such an inquiry at the time of original assessment, does not justify proceedings for re-assessment."

The other relevant decisions in this context are as follows:

(i) Gemini Leather Stores Vs I.T.O, 100 I.T.R p.1 (S.C)

In this case the I.T.O himself discovered the facts, relating to certain drafts but by oversight did not bring the relevant amounts to tax as the income of the appellant. It was held by the Apex Court that after discovery of the primary facts relating to the transactions evidenced by the drafts, it was for the I.T.O to make necessary inquiries and draw proper inference as to whether the amounts represented by the drafts could be treated as part of the total income of the appellant. This the I.T.O did not do. It was, therefore, further held that it was plainly a case of **oversight** and it could not be said that income chargeable to tax had **escaped** assessment and he could not, thereafter, take recourse to S.147 (a) to remedy the error resulting from his own oversight.

(ii) I.T.O Vs Nawab Mir Barkat Ali Khan Bahadur, 97 I.T.R p.239 (S.C)

It was held in this case that failure to draw inference under Mahomedan Law at the time of the original assessment could not be corrected in re-assessment proceedings U/s 147 (a) of the Act. Earlier the High Court had held that the I.T.O had no jurisdiction to re-open the assessments, since all material facts were before him when he made the original assessments.

The relevant part of the head note on p.240 of the Report is reproduced as follows:

" Having second thoughts on the same material did not warrant the initiation of proceedings under section 147. The law had not changed since the original assessments and it was open to the Income - tax Officer at the time of the original assessments to make the presumption that the three ladies were the legally wedded wives of the assessee. If he should have but did not do so then he could not avail of section 147 to correct that mistake. The conditions precedent to the exercise of the jurisdiction under section 147, therefore, did not exist. " (Under-lining is mine)

(iii) C.I.T. Vs Hemchandra Kar and Others, 77 I.T.R p.1 (S.C)

In this case the High Court held that the notice issued for re-opening the assessment second time was not valid, since it was found that when the first re-assessment was made the primary facts necessary for re-assessment were in the possession of the I.T.O; and that these facts came into his possession not by virtue of any disclosure made by the assessee but were discovered by him otherwise.

The relevant part of the head note on p.2 of the report is as follows:

" Held, affirming the decision of the High Court, that, because the primary facts were within the knowledge of the Income-tax Officer when he completed the first re-assessment, the escapement of income took place by reason of the failure of the Income-tax Officer to include the sum of Rs.1,10,000 in the assessment of the Hindu undivided family when he was in full possession of all the necessary and material facts. In such a situation the requirements of section 34 (1)(a) were not satisfied. "

(iv)Dunlop Rubber Company Ltd. (London) Vs I.T.O, 79 I.T.R p.349 (Cal.)

The relevant part of the head note on p.350 of the Report is as follows:

" The duty cast upon the assessee to make a full and true disclosure of all material facts does not absolve the Income-tax Officer from performing his duty to apply his mind and make intelligent inquiry, especially when the primary facts were before him, on the basis of which he might have pursued the inquiry and found out other relevant facts.

The Bombay, Madras and Gujarat cases clearly cast the duty on the Income-tax Officer to exercise due care and caution and to make intelligent enquiries. The cases lay down that a failure to make such an enquiry or making a perfunctory enquiry at the time of the original assessment does not justify proceedings for reassessment."

It was also held in this case that there cannot be an omission to disclose what the I.T.O already knows, although it might not have been put in the return of income.(head note p.350)

(v) Smt. Prabha Rajya Lakshmi Vs WTO, 144 I.T.R p.180 (MP)

The relevant part of the head note on p.180 of the Report is as follows:

"Section 17 (1)(a) of the W.T. Act, 1957, does not empower the Revenue to reopen an assessment even though by oversight, carelessness or inefficiency on the part of its officer, proper investigation was not carried out though all the primary facts which the assessee was required to place before him had been so placed. "

(vi) I.T.O Vs Sirpur Paper Mills Ltd., 113 I.T.R p.393 (AP)

The relevant part of the head note on pp.393 & 394 of the Report is as follows:

" Held, that where the assessee discloses all the primary facts to the Income-tax Officer and if the Income-tax Officer does not draw appropriate inference on the facts placed before him and completes the assessment, the assessment cannot be reopened under section 147(a) merely

on the ground that subsequently he came to regard the conclusion he reached earlier as erroneous."

It may be clarified here that the only difference between the erstwhile S.147(a) and the amended S.147 is in respect of "omission or failure on the part of the assessee to disclose fully & trully all material facts necessary for the assessment" ; which is not present in the main provisions of amended S.147. The aforesaid condition of 'full and true disclosure etc' is still present in the proviso to new S.147.

6. When all the material facts are present before the A.O. at the time of the original assessment the notice U/s 148 would amount to a change of opinion which is not permitted even under the amended S.147.

If all the material particulars are available on record or are in the knowledge of the A.O at the time of the original assessment, and inspite thereof the A.O does not dispose of the matter before him or make any addition on account thereof, then it will be presumed / deemed that the A.O has reached a conclusion that no addition is required to be made. Therefore, if the A.O issues a notice U/s 148 under such circumstances then it would amount to nothing but change of opinion on his part, which is not allowed even as per the amended provisions of S.147.

It may be stated here that the expression **'reason to believe'** was brought back in S.147 on the basis of the fear that omission of the same would give arbitrary powers to the A.O. to re-open past assessments on mere change of opinion. This has been explained in para 7.2 of Circular No. 549 dt.31.10.1989. [p.5051 of I.T. Law by Chaturvedi & Pithisaria, Vol-3, 5th Edn] It is thus clear that even after the amendment of S.147 the A.O. does not have powers to re-open an assessment on mere change of opinion.

There are also a number of Supreme Court and High Court judgements, which support the aforesaid view. The same are discussed as follows:

(i) C.I.T. Vs Bhaniji Lavji, 79 I.T.R p.582 (S.C)

The relevant part of the head note on p.583 of the Report is as follows:

" That in regard to years 1947-48 and 1948-49 the respondent had disclosed that the sale proceeds in respect of ghee supplied were received in Bombay and subsequently transferred to Porbandar. No more detailed disclosure was necessary to comply with the requirement that the assessee had fully and truly to disclose all material facts necessary for the purpose of assessment. It was not the respondent's duty to disclose to or instruct the Income-tax Officer that there were " profits embedded in the receipts" of the money at Bombay. The Income-tax Officer might have raised a wrong legal inference from the facts disclosed but on that account he was not competent to commence proceedings under section 34(1)(a)."

" When the primary facts necessary for assessment are fully and truly disclosed to the Income-tax Officer at the stage of the original assessment proceedings, he is not entitled, on a change of opinion, to commence proceedings for reassessment under section 34(1)(a)."

(ii) C.I.T. Vs N Ramakrishnan , 160 I.T.R p.625 (Mad.)

The relevant part of the head note on p.626 of the Report is as follows:

"The Tribunal also proceeded on the basis that all particulars were already before the Income-tax Officer at the time of the original assessment. The question as to whether all the necessary material particulars were before the Income-tax Officer at the time of the original assessment was a question of fact and when the Tribunal had given a finding ,the High Court could not proceed merely on the basis of a contention raised on behalf of the Department that the share income of the minors had not been disclosed by the assessee in his returns. Further, the fact that the Income-tax Officer had made separate assessments on the share income of the minors showed that the Income-tax Officer had perused the partnership deed at the time of the assessment and was aware of the existence of the minors and the share income arising to them . Therefore, the Income-tax Officer reopened the assessments on a mere change of opinion and hence he had no jurisdiction to reopen the assessment."

(iii) M H Mafatlal & others Vs N Rama Iyer, I.T.O, 159 I.T.R p.515 (Bom.)

The relevant part of the head note on p.516 of the Report is reproduced as follows :

" Held, that there was no concealment of income by the petitioners. Each of the petitioners had submitted that their share in the income of the estate was not liable to assessment in their hands pending administration of the estate. If the Income-tax Officer was of the view that this was not the true legal position, he could have asked for particulars of the one-fifth share in the income of the estate. The absence of these particulars did not mean that there was no full and true disclosure of all material facts. It was only a mere change of opinion which was no ground for reopening an assessment. Therefore, the notices for reopening the assessment were invalid."

(iv) Dr. H K Mahatab Vs I.T.O, 111 I.T.R p.900 (Ori.)

The relevant part of the head note on p.900 & 901 is as follows:

"All the materials were before the revenue authorities and, with reference to them, investigation had once been made and, on the assessee's explanation, assessment was completed. This was a case where, on change of opinion, the Income-tax Officer tried to reopen the assessment. It was not a case of any new material which was not before the Income-tax Officer on the earlier occasion. The court will not permit second thoughts on the same material for initiation of an action under section 147 of the Act. It must, therefore, be held that the notice under section 148 was bad **; ITO v. NAWAB MIR BARKAT ALI KHAN BAHADUR [1974] 97 ITR 239 (SC) and PARASHURAM POTTERY WORKS CO. LTD. v. ITO [1977] 106 ITR 1 (SC)** Relied on."

(v) V X L India Ltd. Vs ACIT, 215 I.T.R p.295 (Guj.)

In this case the assessment year involved, was 1989-90 wherein the amended provisions of S.147 were applicable. The relevant part of the head note on p.295 of the Report is as follows:

" However wide the scope for taking action under section 148 of the Income-tax Act, 1961, it does not confer jurisdiction on mere change of opinion on the interpretation of a particular provision. In

a case where the Assessing Officer holds the opinion that because of excessive loss or depreciation allowance income has escaped assessment, the reasons recorded by the Assessing Officer must disclose by what process of reasoning he holds such belief. Merely saying that excessive loss or depreciation allowance has been computed is not sufficient. There must be material to support the belief that there has been excessive allowance of loss or depreciation."

(vi) Birla V X L Ltd. Vs ACIT, 217 I.T.R p.1 (Guj.)

In this case also the assessment year involved was 89-90.

The relevant part of the head note on p.1 and 2 of the Report is as follows :

"Howsoever wide the scope for taking action under section 148 of the Act be, it does not confer jurisdiction upon a change of opinion on the interpretation of a particular provision from that earlier adopted by the assessing authority."

7. Conclusion

In the light of the aforesaid reasons, it is evident that it is erroneous to hold a view that under the amended S.147, the A.O. is empowered to reopen an assessment inspite of complete disclosure of material facts by the assessee at the time of the original assessment.

Besides, it is also important to note that the A.O. must have new / fresh information at his disposal which was not present at the time of the original assessment. In other words, only discovery of new and important matters or knowledge of fresh facts which were not present at the time of original assessment, would constitute "reason to believe that the income has escaped assessment" within the meaning of S.147. It is also important to note that such facts which could have been discovered by the A.O. but were not so discovered at the time of original assessment, may not constitute a new / fresh information.

In view of the aforesaid reasons, it is clear that the power of the A.O. to reassess income which has escaped assessment, though very wide but is not plenary or unbridled even under the amended S.147 of the I.T. Act, 1961.

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