Validity of reopening of assessments

[*Reopening of assessments is valid only on fulfilment of strict conditions as per relevant legal provisions / precedents*]

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There has been prevailing in the Income-Tax Department a very erroneous impression that under the provisions of the amended section 147 of the Income-Tax Act, 1961 (the Act), with effect from 1st April, 1989, the Assessing Officer (AO) has got unbridled powers to assess or reassess income which has escaped assessment. This is so, particularly, in respect of cases where no assessment has been made under section 143(3) of the Act. Such an impression has become widespread in view of a few erroneous judgements which do not represent the correct legal view regarding the scheme of the amended provisions of section 147 of the Act.

In this context, it will be appropriate to have a brief discussion in respect of the amendment of section 147 of the Act.

There has been a major change in the provisions of section 147 after its amendment, vide the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1.4.1989.

By the Direct Tax Laws (Amendment) Act, 1987, a new scheme of assessment has been introduced in the newly substituted section 143 of the Income-Tax Act, 1961, w.e.f. 1st April, 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 AO after the returns are filed, unless the case is picked up for scrutiny and a regular assessment order is passed under section 143(3). The Amending Act, 1987, has, therefore, rationalized the provisions of section 147 and other connected sections to simplify the procedure for bringing to tax the income, which escapes assessment. [Para 5.2 of Circular No. 549, dt. 31.10.1989 – 182 ITR (St) 1, 20]

Under the newly substituted section 147, w.e.f. 1st April, 1989, the AO, 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 re-compute the loss or the depreciation allowance or any other allowance, as the case may be, for the relevant assessment year.

Initially, the words "*has reason to believe*" were omitted from section 147, by the aforesaid amendment. However, a number of representations were made against the omission of words "*has reason to believe*" from section 147 and their substitution by the "*opinion*" of the AO. 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 AO to re-open past assessments, on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to re-introduce the expression "*has reason to believe*" in place of the words "*for reasons to be recorded by him in writing; is of the opinion*". [Para 7.2 of Circular No. 549, dt. 31.10.1989 – 182 ITR (St) 1, 29]

Besides, vide para 7.3 of Circular No.549, dated 31.10.1989, [182 ITR (St) 1, 30], Explanatory Notes have been provided in respect of "*Deemed cases of income escaping assessment*" (*Explanation 2* to section 147). The same is reproduced, as follows:

7.3 ***Deemed cases of income escaping assessment (Explanation 2 to section 147):***

Under the old provisions of Explanation 1 to section 147, income chargeable to tax was deemed to have escaped assessment if it had been under-assessed or assessed at too low a rate or if any excessive relief or loss or depreciation allowance had been allowed. The new provisions in this respect, as contained in Explanation 2 to new section 147, are more elaborate and cover those cases where assessments have been completed (called as scrutiny cases) as well as those cases where no assessments have been completed (called as non-scrutiny cases). Thus, the new Explanation 2 to the section clarifies that the following shall be deemed to be cases of income escaping assessment:

(i) Where no return of income has been furnished by the assessee, although the total income is above the taxable limit.

(ii) Where a return of income has been furnished, but no assessment has been made (i.e., in a non-scrutiny case)- if the assessee is found to have understated his income or claimed excessive loss, deduction, allowance or relief in the return.

(iii) Where an assessment has been made (i.e., in a scrutiny case) – if income chargeable to tax has been under-assessed or assessed at too low a rate or if any excessive relief or loss or depreciation allowance or any other allowance under this Act has been allowed.

From the aforesaid Circular of the CBDT, it is quite evident that no distinction under section 147 is contemplated between the assessment under section 143(3) called as scrutiny assessment and the assessment accepted under section 143(1) of the IT Act.

It must be emphatically stated here that for the initiation of reassessment proceedings, the requisite conditions have got to be strictly followed under different circumstances in relation to the status of the assessment order, sought to be reopened.

The various circumstances relating to reassessment proceedings may briefly be stated as follows :

(a) Where an assessment has been made under section 143(3) / 147, no action shall be taken under section 147, after the expiry of four years from the end of the relevant assessment year.

(b) Where the assessment involves matters which are the subject matter of any appeal, reference or revision.

(c) Where there is no fresh / new material in possession of the AO

(d) Where there has been deficiency in making enquiries before finalizing the assessment.

(e) Where there is mere change of opinion on the part of the AO on the same set of facts.

(f) Where reopening is based on factual position, not showing impact on assessed income.

(g) Where addition is not based on original reasons recorded, vis-à-vis *Explanation 3* to section 147

(h) Where the original assessment is without scrutiny i.e. under section 143(1), even in such cases tangible material is necessary to reopen the assessment.

(i) Relevant aspects relating to issuance of notice under section 148 and disposal of objections against the same

All the aforesaid situations are dealt with as follows :

A. Where notice under section 148 of the Act, is served on the assessee after a period of more than four years from the end of the relevant AY, in view of the first proviso to section 147 of the Act.

In this context, first proviso to section 147 of the Act is relevant which is reproduced as follows :

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147. ***Income escaping assessment.***

> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*
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From the aforesaid **proviso** to section 147 of the Act, it is clear that where an assessment under section 143(3) or under section 147 of the Act has been made for the relevant assessment year (AY), no action shall be taken under section 147 of the Act, after the expiry of four years from the end of the relevant AY, unless any income chargeable to tax has escaped assessment for such AY by reason of failure on the part of the assessee to make a return under section 139 or in response to notice under section 142(1) or section 148 or to disclose fully and truly all material facts necessary for the assessment for that AY.

It may, thus, be seen that the aforesaid **first proviso** places severe restriction on the power of the AO to reopen an assessment order passed under section 143 / 147, after the expiry of four years from the end of the relevant AY, except in cases where assessee has failed to file a return of income under section 139, 142(1) or under section 148 or **has failed to disclose fully and truly all material facts necessary for the assessment for that AY**.

The aforesaid view is further strengthened by the following legal precedents :

1. *ACIT Vs ICICI Securities Primary Dealership Ltd. [2012] 348 ITR 299 (SC) : 78 DTR 153 (SC*)

   In this case, the assessee, a public limited company, was engaged in the business of carrying on various non-banking financial activities. The assessment for the AY 1999-2000, was finalized under section 143(3) of the Act, determining the total income at Rs.27.72 crores. Thereafter, the AO sought to reopen the assessment and the reasons recorded for reopening the assessment disclose that after having another look at the annual accounts, it was noticed that the assessee company had incurred a loss in trading in shares. The AO discussed the various entries appearing in the opening and closing stocks as well as purchases and sales of those

stocks. Thereafter, the AO concluded that there was a loss of Rs.19.86 crores and that the loss was speculative one. He, therefore, came to a conclusion that the income chargeable to tax to the extent of Rs.19.86 crores, had escaped assessment and he, accordingly, passed the order under section 147 of the Act, after the expiry of four years from the end of the relevant AY.

The stand of the assessee before the High Court was that the reasons recorded by the AO under section 148(2) of the Act, were clearly based on the documents which the assessee had already furnished. There was nothing new that had come to the notice of the AO. It was only a different analysis which was done and the conclusion was drawn that its income to the extent of Rs.19.86 crores, had escaped assessment. Therefore, as there was no failure on the part of the assessee to make a true and full disclosure of the relevant facts, such reopening would not be permissible after the expiry of four years in view of the first proviso to section 147 of the Act.

It was held by the High Court that there was nothing new which had come to the notice of the Revenue. The accounts had been furnished by the assessee when called upon. The assessment was completed under section 143(3) of the Act. Thereafter, on a mere relook, the AO came to a conclusion that the income had escaped assessment. It was further held that it was not something which was permissible under the proviso to section 147 of the Act, which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case was made out on the record. Accordingly, the petition of the assessee was allowed and the notice under section 148 of the Act was quashed.

On appeal before the Supreme Court, it was held that the assessee had disclosed full details in the return of income in the matter of dealing in its 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. The rejection of the objections of the assessee, to the reopening of the assessment, by the AO, vide his order dated 23rd June, 2006, was clearly a change of opinion. In the circumstances, the order of reopening of assessment was not maintainable. Accordingly, the appeal of the I.T. Department was dismissed.

2. *Dy.CIT Vs Simplex Concrete Piles (I) Ltd. [2013] 358 ITR 129 (SC) : [2012] 79 DTR 82 (SC)*

In this case, the assessments of the assessee for the AYs 1984-85 to 1989-90, were sought to be reopened on the basis of the decision of the Supreme Court in the case of *CIT Vs N.C. Budharaja and Co. [1993] 204 ITR 412 (SC)*, by notices, dated July 29, 1994. The High

Court held the reopening not permissible on the grounds that admittedly, there was no allegation that the amounts sought to be made taxable had not been disclosed and that, therefore, it could not be said that there was any omission or failure to disclose fully and truly the materials necessary for assessment.

On appeal before the Supreme Court, it was held that once the limitation period of four years provided under section 147 / 149(1)(a) of the Act, expired, the question of reopening of the assessment by the Department did not arise. In any event, at the relevant time, when the assessment order got completed, the law as declared by the jurisdictional High Court was that the civil construction work carried out by the assessee would be entitled to the benefit of section 80HH of the Act. The subsequent reversal of the legal position by the judgement of the Supreme Court in the case of *CIT Vs N.C. Budharaja and Co. [1993] 204 ITR 412 (SC)*, would not authorize the Department to reopen the assessment, which stood closed on the basis of the law, as it stood at the relevant time.

3. *Voltas Ltd. Vs ACIT [2012] 349 ITR 656 (Bom)*

In this case, a notice under section 148 was based on subsequent decision of the court and legislative amendment. The assessment was made after four years. Besides, there was no allegation of failure to disclose material facts necessary for assessment.

It was held that there was no allegation that the assessee had failed to disclose material facts necessary for assessment. Moreover, the return of income and the material placed on record by the assessee together with the return would make it abundantly clear that the assessee had set forth the basis of its claim and there was no suppression of material facts. The fundamental condition for reopening the assessment beyond a period of four years had not been fulfilled. Therefore, the notice was not valid and was liable to be quashed.

Exactly similar was the judgement passed by the Bombay High Court in the case of *CIT Vs K. Mohan and Co. (Exports) [2012] 349 ITR 653 (Bom)*

4. *Ranbaxy Laboratories Ltd. Vs Dy.CIT [2013] 351 ITR 23 (Del)*

In this case, notice under section 148 of the Act was issued after the expiry of four years. The notice was issued in view of incorrect allowance of :

(i) deduction in respect of royalty received from foreign enterprise;
(ii) deduction in respect of export profits;
(iii) deduction in respect of profits and gains from newly established undertakings; and

(iv) of non-business expenditure

Detailed objections were filed by the assessee explaining each of the reasons. However, the AO did not accept the objections and rejected them.

On a writ petition, it was held that in so far as all the reasons, other than the reason pertaining to club expenses were concerned, specific queries had been raised and the AO had considered the material placed by the assessee before him in the course of the original assessment. As regards the club expenses, it was stated that since no specific query had been raised, *Explanation 1* would get attracted. This could not be accepted because the club expenses were specifically mentioned in the tax-audit report in Form 3CD which was annexed along with the return. This was a clear statutory disclosure on the part of the assessee with regard to the claim of club expenditure. It was not a piece of evidence which was hidden in some books of account and which the AO could have possibly, with due diligence, discovered. On the contrary, this was material which was placed before the AO along with the return which the AO was duty bound to go through before completing the assessment. Therefore, the case could not fall in the category of material which was referred to in *Explanation 1* to section 147.

5. *Atomstroyexport Vs Dy.DIT (I.T.) [2012] 77 DTR 134 (Bom)*

   It was held in this case that reopening beyond four years was not sustainable where the reasons recorded by the AO nowhere stated that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Further, the impugned notice under section 148 was issued merely on account of change of opinion as no fresh tangible material was available with the AO to issue the impugned notice. Therefore, the impugned notice was without jurisdiction and the impugned order was also bad in law and accordingly, the impugned notice as well as the impugned order were respectively quashed and set aside.

6. *Sayaji Hotels Ltd. Vs ITO [2011] 339 ITR 498 (Guj)*

   In this case, the notice under section 148 was issued after four years. Besides, there was no failure to disclose material facts necessary for assessment.

   It was held in the circumstances that it was only a case of successor AO holding a different opinion as regard the computation of book profit than that of the AO who framed the original assessment. The reopening was, therefore, based on a mere change of opinion and as such could not be sustained.

It was also held that section 149 of the Act, merely prescribes the maximum time limit for the issuance of notice under section 148 of the Act, based upon the amount involved. The provision does not in any manner override the proviso to section 147 of the Act which lays down that no action shall be taken under section 147, after the expiry of four years from the end of the relevant AY, unless the conditions stipulated there under are satisfied. Thus, even in those cases falling under section 149(1)(b) of the Act, if the notice under section 148 is issued beyond a period of four years, but within a period of six years from the end of the relevant AY, for the purpose of invoking section 147 of the Act, the requirement of the proviso, namely, that there should be failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, still requires to be satisfied.

7. *Bhor Industries Ltd. Vs ACIT [2004] 267 ITR 161 (Bom)*

In this case, the assessment was made after four years. It was held that there was no allegation of income having escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts, therefore, the notice was not valid.

It was also held that *Explanation 2* to section 147 of the Act is required to be read with section 147 in its entirety, including the proviso. If one reads *Explanation 2* to section 147, including the proviso, then it is clear that in cases where the Department reopens the assessment within a period of four years, it can do so, on the ground of income having escaped assessment. However, in cases of reopening after four years, the AO must have reason to believe that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts.

It may also be stated here that there are a number of legal precedents in the form of High Court judgements which support the aforesaid stand. However, it is not necessary to add all these legal precedents in view of the aforesaid judgements of the Supreme Court.

B. Where the assessment involves matters which are the subject matter of any appeal, reference or revision.

In this context, it will be necessary to refer to the third proviso to section 147 of the Act. For the sake of ready reference, the aforesaid proviso is reproduced as follows :

"*147.* ***Income escaping assessment.***

Provided also *that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment."*

From the aforesaid proviso, it may be seen that the AO may assess or reassess such income which is chargeable to tax and has escaped assessment, other than the income involving matters which are the subject-matters of any appeal, reference or revision. It implies that the reassessment proceedings under section 147 of the Act can not be resorted to in respect of income which is subject-matter of an appeal, reference or revision.

In this regard, a reference may be made to the following legal precedents :

1. *Prashant Project Ltd. Vs ACIT [2011] 333 ITR 368 (Bom)*

   In this case, the AO passed an order under section 143(3) of the Act and came to the conclusion that the assessee was carrying on manufacturing activity during the FY, relevant to the AY 2002-03. The deduction under section 80HHC was accordingly, recomputed. The issue was carried in appeal by the assessee. The CIT(A) accepted the contention of the assessee that it was not a manufacturer exporter but a trader exporter. Thereafter, the assessment was reopened on the basis that the assessee had claimed special deduction under section 80HHC as a trader, whereas he was a manufacturer.

   On a writ petition to quash the notice under section 148, it was held that as per the second proviso to section 147, the AO may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. Thus, the very issue on which the assessment was sought to be reopened was canvassed in appeal and was determined in the appellate proceedings by the CIT(A). Therefore, the same issue could not lawfully form the basis of the notice for reopening the assessment. Accordingly, the reassessment proceedings were not valid.

2. *CIT Vs Reliance Energy Ltd. [2013] 81 DTR 130 (Bom)*

   It was, *inter-alia*, held in this case that the jurisdiction to reopen the assessment was also absent in view of the fact that the quantum of deduction under section 80-IA, claimed by the assessee in respect of its generation plant, was subject-matter of appeal before the CIT(A) and the Tribunal. Consequently, the order of original assessment had merged with the order of the

appellate authority with regard to the profits earned from the power generation plant on which deduction under section 80-IA was claimed. The jurisdiction to exercise power of reopening an assessment is specifically barred in respect of any matter which has been a subject-matter of appeal by the third proviso to section 147. Accordingly, the appeal of the I.T. Department was dismissed.

It may also be stated here that on analogical basis, reassessment proceedings cannot be initiated in respect of income involving matters which are subject-matter of any appeal, reference or revision, as laid down under the aforesaid third proviso to section 147 of the Act.

C. Where there is no fresh / new material in possession of the AO

It has been held in a number of judgements that the amendment of section 147, with effect from 1st April, 1989, has not obliterated the concept of "*change of opinion*". The words "*reason to believe*" are still very much there in the main provisions of section 147 and therefore, even as per Board's Circular No.549, dt.31.10.1989 [*182 ITR (St) 1, 29*], a mere change of opinion cannot form the basis for reopening the completed assessment. If there is no change of law, no new material has come on record or no information has been received between the date of assessment sought to be reopened and the date of formation of belief by the AO, then it is merely a fresh application of mind by the AO to the same set of facts.

There are a number of judgements of the Apex Court and High Courts which support the aforesaid view. These judgements may be discussed as follows :

1. *CIT Vs Kelvinator of India Ltd. [2010] 320 ITR 561 (SC)*

   It was held in this case that the concept of "*change of opinion*" must be treated as in-built test to check the abuse of power by the AO. Hence, after 1.4.1989, the AO has power to reopen an assessment, provided there is "*tangible material*" to come to the conclusion that there was escapement of income from assessment. The reason must have a link with the formation of the belief.

   In this context, the observations of the Apex Court, on page 564 of the Report, are very relevant, which are reproduced as follows :

   "Therefore, post-1st April, 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 preconditions 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 1st April, 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."

2. *CIT Vs ICICI Bank Ltd. [2012] 349 ITR 482 (Bom) : 74 DTR 251 (Bom)*

   It was held in this case that the *sine quo non* for issue of a notice for reopening of assessments even within a period of less than four years from the end of the assessment year, is reason to believe that income has escaped assessment and this belief should be on the basis of tangible material, otherwise the exercise of power to reopen would be a review of the assessment order. **The mere fact that an assessment order does not deal with a particular claim cannot lead to the conclusion that while allowing the claim the AO had not applied his mind**.

   Accordingly, the reopening of assessment by notice under section 148 was not sustainable in law.

3. *Direct Information (P) Ltd. Vs ITO [2012] 80 DTR 237 (Bom)*

   It was held in this case that the AO was not justified in issuing notice for reopening assessments for assessment years 2006-07 and 2007-08, seeking to withdraw deduction under section 10A on the same grounds on which rejection of deduction for assessment years 2002-03 and 2003-04, were set aside by CIT(A), as AO had **no new tangible material** on record and there was mere change of opinion on the part of the AO.

   Accordingly, notices issued by the AO, purporting to reopen assessments for AYs 2006-07 and 2007-08, were set aside.

4. *NYK Line (India) Ltd. Vs Dy.CIT [2012] 346 ITR 361 (Bom) : 68 DTR 90 (Bom)*

   It was held in this case that in the absence of **new or additional information**, an assessment cannot be reopened on the basis of a mere change of opinion. The test is that there should be tangible material to come to a conclusion that there is an escapement of income from assessment. In other words, there must be **some new facts** which come to light after the

assessment which is sought to reopen. Accordingly, the impugned notice under section 148 of the Act was set aside.

5. *Rabo India Finance Ltd. VsDy.CIT [2012] 346 ITR 528 (Bom)*

It was held in this case that reopening of the assessment was based only on mere difference of opinion. **It was admittedly not on the basis of any new material or provision of law or judgement.**

The reassessment was, accordingly, liable to be quashed.

6. *NDT Systems Vs ITO [2013] 81 DTR 1 (Bom)*

It was held in this case that even in a case of reopening of assessment within a period of four years from the end of the relevant assessment year the AO has to have reason to believe that income chargeable to tax has escaped assessment, on the basis of tangible material. **There being no fresh tangible material** which would warrant taking a view different from the one taken during the regular assessment proceedings, reopening was not sustainable. Accordingly, the writ petition challenging the notice under section 148, as well as the consequent reassessment order, was allowed and the aforesaid notice and reassessment order were quashed.

Same was the view expressed by the Bombay and Delhi High Courts in the following cases :

(i) Moser Baer India Ltd. Vs Dy.CIT [2013] 81 DTR 10 (Del)
(ii) Aventis Pharma Ltd. Vs ACIT [2010] 323 ITR 570 (Bom)
(iii) CIT Vs Jagson International Ltd. [2010] 321 ITR 544 (Del)
(iv) Asteroids Trading and Investments P. Ltd. Vs Dy.CIT [2009] 308 ITR 190 (Bom)

From the aforesaid judgements it may be seen that even in cases of reopening of assessment within a period of four years from the end of the relevant assessment year, **the AO has to have some new or fresh tangible material**, which would warrant taking a view different from the one taken during the regular assessment proceedings. Otherwise, the reopening of the assessment will not be sustainable.

D. Where there has been deficiency in making enquiries before finalizing the assessment.

In regard to the reassessment proceedings it has also to be stated that where the relevant material was available on record, but the AO failed to apply his mind to that material in making the assessment order, the AO cannot take recourse to the provision of section 147 for his own failure

to apply his mind to the material, which according to him, is relevant and which was available on record. It may also be stated here that this will amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.

In support of the aforesaid stand, reliance may be placed on the following legal precedents :

1. *Asian Paints Ltd. Vs Dy.CIT [2009] 308 ITR 195 (Bom)*

   In this case, in the order rejecting the objections filed by the assessee to the notice under section 148, the AO had observed "*verification of the assessment record reveals that the said details were called for but inadvertently the same were not taken into account while framing the assessment and therefore, it cannot be said that there is change of opinion*". Thus, according to the AO, the relevant material was available on record, but he failed to apply his mind to that material in making the assessment order.

   It was held that since the AO had failed to apply his mind to the relevant material while framing the assessment order, **he could not take advantage of his own wrong and reopen the assessment under section 147 of the Act**.

2. *CIT Vs Kelvinator of India Ltd. [2002] 256 ITR 1 (Del)(FB)*

   It was, *inter-alia*, held in this case that when a regular order of assessment is passed in terms of section 143(3), 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 section 114(e) of the Indian Evidence Act, 1872, 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 AO to reopen the proceedings 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.

3. *Ritu Investments (P) Ltd. Vs Dy.CIT [2011] 51 DTR 162 (Del)*

   It was held in this case that change of opinion cannot clothe the AO with the jurisdiction to initiate the proceedings under section 147 of the Act.

   It was also held that an error of judgement also does not confer such jurisdiction on the AO.

4. *Amrit Feeds Ltd. Vs ACIT [2011] 51 DTR 315 (Cal)*

   In this case it was held that if the AOs had not questioned the entitlement of the assessee to deduction under section 80-IB in the assessment years in question, it was their mistake. All information regarding the alleged manufacturing process of the assessee was

before them. After the time limit for making assessment or reassessment has long expired, the Revenue cannot turn round, take recourse to an extraordinary provision which is section 147 and attempt to reopen concluded assessments. If such exercise is permitted that would be quite contrary to the intention of the Act. In that case, there would be no finality to any assessment. Then, at any point of time after expiry of time the AO can reopen assessments. That would plainly be against the statutory policy. Therefore, the impugned notice and proceedings are quashed and set aside.

5. *Gemini Leather Stores Vs ITO [1975] 100 ITR 1 (SC)*

   It was held in this case that after discovery of the primary facts relating to the transactions evidenced by the drafts it was for the officer to make the necessary enquiries 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 officer did not do. It was plainly a case of oversight and it could not be said that income chargeable to tax had escaped assessment by reason of the omission or failure on the part of the appellant to disclose fully and truly all material facts. **He could not, thereafter, take recourse to section 147(a) to remedy the error resulting from his own oversight**.

6. *ITO Vs Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC)*

   It was held in this case that 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 condition precedent to the exercise of the jurisdiction under section 147, therefore, did not exist.

7. *CIT Vs Hemchandra Kar [1970] 77 ITR 1 (SC)*

   This judgement related to the provisions of section 34(1)(a) of the Indian Income-Tax Act, 1922.

   It was held that because the primary facts were within the knowledge of the Income-Tax Officer when he completed the first reassessment, 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.

8. *Smt. Prabha Rajya Lakshmi Vs WTO [1983] 144 ITR 180 (MP)*

   It was a case relating to the reassessment proceedings under the Wealth-Tax Act, 1957.

It was held that 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.

9. *ITO Vs Sirpur Paper Mills Ltd. [1978] 113 ITR 393 (AP)*

It was held in this case 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 is, thus, emphatically established that the AO cannot take recourse to the reassessment proceedings in order to correct the mistakes on account of lack of enquiry, deficiency in enquiry, total oversight or inadvertence on the part of the AO, while making the assessment sought to be reopened.

E. Where there is mere change of opinion on the part of the AO on the same set of facts

It is a well-settled position in law that reassessment is not permissible on the basis of change of opinion on the part of the AO.

The aforesaid view is supported by a number of judgements of the Supreme Court and various High Courts. In this regard, reliance is placed on the following legal precedents :

1. *ACIT Vs ICICI Securities Primary Dealership Ltd. [2012] 348 ITR 299 (SC) : 78 DTR 153 (SC)*

In this case the assessee had disclosed full details in the return of income for the AY 1999-2000, in the matter of its dealing in stocks and shares. The assessment was reopened after rejecting the assessee's contention that the loss incurred was a business loss and not a speculative loss.

It was held, affirming the decision of the High Court, that rejection of the objections of the assessee to the reopening of the assessment by the AO was clearly a change of opinion and therefore, the order of reopening the assessment was not sustainable.

2. *CIT Vs Usha International Ltd. [2012] 348 ITR 485 (Del)(FB) : 77 DTR 396 (Del)(FB)*

In this case the expression "*change of opinion*" has been discussed in detail. Besides, section 114(e) of the Indian Evidence Act, 1872, has also been discussed and applied.

After detailed discussion of the issue relating to "*change of opinion*" it was held that :

(i) Assessments cannot be validly reopened under section 147 of the Act even within four years, if an assessee had furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made under section 143(3). So long as the assessee has furnished full and true particulars at that time of original assessment and so long as the assessment order is framed under section 143(3) of the Act, it matters little that the AO did not ask any question or query with respect to one entry or note but had raised queries and questions on other aspects.

(ii) Section 114(e) of the Indian Evidence Act, 1872, can be applied to an assessment order framed under section 143(3) of the Act, provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter covered by the disclosure, it would amount to change of opinion.

It was also held that there is no difference between a case where a query is raised by the AO, which is replied to by the assessee with supporting evidence or material, but the opinion of the AO is not recorded in the assessment order and a case where the assessee has voluntarily disclosed full and true particulars and the AO has not expressly recorded his opinion. Presumption under section 114(e) of the Evidence Act is applicable to both types of cases. Thus, section 114(e) of the Evidence Act can be applied to an assessment order framed under section 143(3) of the Act, provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment.

F. Where reopening is based on factual position, not showing impact on assessed income

It may be further stated in the present context that where the reasons recorded under section 148(2) show only the factual position, without bringing on record the impact thereof, on the income assessed, the notice under section 148 of the Act would be incomplete and incomprehensible and accordingly, the same will be invalid.

In support of the aforesaid stand, reliance is placed on the following legal precedents :

1. *G.S. Engg. And Constn. Corpn. Vs Dy.DIT (I.T.) [2013] 357 ITR 335 (Del)*

   In this case the reasons to believe recorded the factual position regarding the income declared, assessment made, projects undertaken and the fact that the assessee was a non-resident company. They also recorded that the turnkey project at Haldia Refinery was awarded to the assessee by the Indian Oil Corporation in September, 2000, and the project required engineering, construction, installation, testing, commissioning, etc. The narrations were mere statement of facts and did not make any reference to or inference regarding the escapement of income. Thereafter, it was stated that "*however, the CDU project through which the assessee earned this income is a permanent establishment as per article 5(3) of the Double Taxation Avoidance Agreement between India and Korea. Considering the above, it is evident that income chargeable to tax has escaped assessment*".

   It was held that from the aforesaid two sentences, no one could gauge or comprehend why and on what basis it was stated that income chargeable to tax had escaped the assessment. The reasons recorded were inchoate, mere surmise and failed to clearly define why the bifurcation of Rs.605.34 lakhs and Rs.436.53 lakhs was relevant and *prima facie* not permissible, or how in view of Article 5(3) of the DTAA, this amount should have taxed differently.

   Thus, the reasons to believe relied upon the Revenue did not show why and for what reasons income chargeable to tax had escaped assessment, because the CDU project through which the assessee had earned income was a permanent establishment as per Article 5(3) of the DTAA between India and Korea. They were silent and did not show any nexus or link between the facts recorded and how and why income chargeable to tax had not been taxed or under-taxed. No reasonable person on reading the reasons could understand the ground why reassessment notice had been issued. In fact, they were incomplete and incomprehensible, as after recording the observation that the assessee had permanent establishment in India, they did not indicate or state why and how the permanent establishment had adversely impacted the tax payable or income assessed in the original assessment made under section 143(3) of the Act.

   Accordingly, the reassessment notice under section 148 and the impugned order under section 147 of the Act, for the AY 2002-03, were set aside.

2. *CIT Vs Insecticides (India) Ltd. [2013] 357 ITR 330 (Del)*

In this case the reasons recorded for the notice of reassessment under section 148, for the AYs 2002-03 and 2003-04, showed that they were based on the information received by the AO from the DIT (Inv.), that the assessee was involved in giving and taking bogus entries / transactions during the relevant years which actually represented unexplained income of the assessee.

The Tribunal had found that the AO did not mention the details of the transactions that represented unexplained income of the assessee. The information, on the basis of which the AO had initiated proceedings under section 147 of the Act, was vague and uncertain and could not be construed to be sufficient and relevant material on the basis of which a reasonable person could have formed a belief that income had escaped assessment. Consequently, the Tribunal held that the proceedings under section 147 of the Act were invalid and accordingly, the notice of reassessment was liable to be quashed.

On appeal before the High Court, the aforesaid judgement of the Tribunal was upheld and the appeals of the I.T. Department were dismissed.

3. *ITO Vs On Exim P. Ltd. [2013] 26 ITR (Trib) 697 (Del)*

In this case, the assessee had sold certain shares through M/s Aayushi Stock Brokers Pvt. Ltd. and sale proceeds had been duly considered while computing the income of the assessee for the assessment year under consideration. The only information received by the AO from the Investigation Wing was that M/s Aayushi Stockbrokers Pvt. Ltd. was found to be providing accommodation entries in the form of bogus share transactions, bogus share capital, etc. and the assessee had received bogus accommodation entries from such party. The details given were only with regard to the name of the bank, ledger account number and amount.

It was held that the only information received by the AO was that M/s Aayushi Stock Brokers Pvt. Ltd. was found to be providing accommodation entries in the form of bogus share transactions, bogus share capital, etc. and that the assessee had received bogus accommodation entries from such party.

However, the details given were only with regard to the name of the bank ledger account number and amount. Even the nature of the transactions was not given, much less to establish that the aforesaid transactions were in the nature of accommodation entries. Therefore, the reasons did not satisfy the requirement of section 147. Hence, in view of the totality of the factual and legal position, the notice issued under section 148 was not valid and was liable to

be quashed. Consequently, the assessment order passed in pursuance thereof, was also to be quashed.

4. *Dr. J. Mohan and Anr. Vs ACIT [2012] 18 ITR (Trib) 363 (Chennai)*

   It was held in this case that other than the survey under section 133A and the statements obtained in the course of that survey, nothing else was available on record to proceed against the assessees under section 147 of the Act. Therefore, the substratum to give a reason to believe that income chargeable to tax had escaped assessment, was vitiated in these cases. Therefore, the assessments were not sustainable in law and were to be set aside.

   Further, as the assessments themselves had been vitiated, the revision orders passed under section 263 for the AYs 2000-01 and 2003-04, also did not survive.

   In this context, it will be very relevant to state that as per the judgement of Madras High Court in the case of *CIT Vs S. Khader Khan Son [2008] 300 ITR 157 (Mad)*, section 133A does not empower any I.T. authority to examine any person on oath and thus, any such statement has no evidentiary value. Therefore, any admission made in such a statement cannot, by itself, be made the basis for admission. The aforesaid judgement of the Madras High Court was later on affirmed by the Supreme Court in the case of *CIT Vs S. Khader Khan Son [2013] 352 ITR 480 (SC)*

5. *Dy.CIT Vs Indian Syntans Investments (P) Ltd. [2007] 106 TTJ 388 (Chennai)*

   In this case, it was, *inter-alia*, held that where the AO holds the opinion that the income has escaped assessment on account of claim of excessive loss or depreciation, the reasons recorded by the AO must disclose by what process of reasoning he holds the belief that excessive loss or depreciation or any other deduction was wrongly computed in the original assessment. Merely recording that excessive loss or depreciation or other deduction has been computed without disclosing the reasons does not confer jurisdiction to take action under section 147.

   Besides, it was also held where the AO has merely recorded the reasons for reopening the assessment, viz, incorrect computation of deduction under section 80HHC and capital gains, treatment of non-compete fee as capital receipt, etc. without recording any reasons for such belief.

6. *Durga Prashad Goyal Vs ITO [2006] 101 TTJ 1 (Asr)(SB)*

   In this case, the assessments were reopened on the receipt of information from Asstt. CIT indicating that searches conducted on the business and residential premises of Shri Parshotam Dass and its associate concern and other related persons, coupled with allied enquiries made,

revealed that the assessee had received / introduced bogus credits in the name of M/s Ram Kumar Parshotam Dass who was not actually the money lender but was engaged in the racket of name lending only.

It was held that the information was not specific, reliable and relevant. The AO had not mentioned the reasons for the issuance of notice under section 148 that he had reasons to believe that the assessee had failed to disclose fully and truly all material facts necessary for that year. Since no statement of Parshotam Dass was recorded and no report or material was filed on record, the AO merely acted on suspicion and assumption that income chargeable to tax had escaped assessment. It was also held that the AO had initiated reassessment proceedings without application of mind and therefore, he did not validly assume jurisdiction in initiating proceedings under section 147 of the Act.

7. *All India Children Care and Educational Development Society Vs JCIT [2003] 81 TTJ 598 (All)*

In this case, one of the issues before the Tribunal was reassessment proceedings for the AYs 1993-94, 1994-95 and 1995-96. The AO had recorded the following reasons for the issuance of notice under section 148 of the Act :

" *1st Aug. 1997*

It has come to my notice that the assessee runs an institution in the name of All India Children Care Welfare Society, Azamgarh and earns income from it. In addition, the assessee purchased buses etc. and invested huge amount. For this institution, building is also constructed. Since the assessee earns huge income and invested in buses and building, therefore, I have reason to believe that the assessee in the years 1993-94, 1994-95, 1995-96 has concealed the income. Therefore, notice under section 148 of the IT Act is issued for the asst. yrs. 1993-94, 1994-95 and 1995-96".

It was held that no reasons had been mentioned by the AO to come to the conclusion that income had escaped assessment. Reasons recorded by the AO were based on his own imagination, because reasons were not based on facts and figures. Therefore, there were no valid reasons before the AO when the notices under section 148 were issued and therefore the aforesaid notices issued by the AO were invalid.

On the basis of the aforesaid legal precedents, it may be concluded that simply mentioning certain facts without application of mind and without bringing on record the impact thereof on assessed income, will not be sufficient reason to believe that any income chargeable to tax has escaped assessment.

G. Where addition is not based on original reasons recorded, vis-à-vis *Explanation 3* to section 147

In regard to the reassessment proceedings, it was held by some of the courts that the AO has to restrict reassessment proceedings only to the reasons recorded for the reopening of the assessment and he is not empowered to touch upon any other issue for which no reasons have been recorded.

Therefore, in order to articulate the correct legislative intent in the context of conflicting interpretation as to the scope of reassessment proceedings *Explanation 3* to section 147 was inserted by the Finance (No.2) Act, 2009, with retrospective effect from 1.4.1989. The aforesaid *Explanation 3* to section 147 was explained, vide para 47.3 of Circular No.5 of 2010, dated 3.6.2010, providing Explanatory Note to the provisions of Finance (No.2) Act, 2009.

As per the aforesaid para 47.3, *Explanation 3* has been inserted in section 147 to provide that the AO may examine, assess or reassess any issue relevant to income which comes to his notice subsequent in the course of proceedings under section 147, notwithstanding that the reason for such issue has not been included in the reasons recorded under section 148(2) of the Act.

Unfortunately, the aforesaid *Explanation 3* to section 147 was thoroughly misused by the AOs in respect of reassessment proceedings. It will, therefore, be necessary to refer to some of the legal precedents which are relevant to the correct interpretation of *Explanation 3* to section 147. The same are discussed as follows :

1. *CIT Vs Shri Ram Singh [2008] 306 ITR 343 (Raj)*

   In this case the Rajasthan High Court had to interpret the provisions of section 147 of the Act.

   It was held that the Tribunal was justified in holding that the proceedings for reassessment under section 148 of the Act were initiated by the AO on the basis of non-existing facts, because ultimately the assessee had been able to explain the income which the AO believed to have escaped assessment.

   It was further held that the AO was justified in initiating the proceedings under section 147 of the Act. But once the AO reached the conclusion that the income which he believed to have escaped assessment, had been explained, the AO did not continue to possess jurisdiction to tax any other income, which came to his notice subsequently in the course of the reassessment proceedings.

2. *CIT Vs Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bom)*

In this case the Bombay High Court was seized of the issue relating to the interpretation of the aforesaid *Explanation 3* to section 147. In this case the Bombay High Court relied on the aforesaid judgement of Rajasthan High Court in the case of *CIT Vs Sri Ram Singh [2008] 306 ITR 343 (Raj).*

It was held that section 147 as it stands postulates that upon the formation of reason to believe that income chargeable to tax has escaped assessment for any assessment year, the AO may assess or reassess such income "*and also*" any other income chargeable to tax which comes to his notice subsequently during the proceedings, as having escaped assessment. The words "*and also*" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by the Parliament. The aforesaid view is supported by the background which led to the insertion of *Explanation 3* to section 147.

It was, therefore, held that though the AO can also assesses other incomes not referred to in the notice of reassessment, he will have power to assess such other income only if income referred to in the notice of reassessment has been assessed. In other words if the income referred to in the notice under section 148(2) is not assessed then the AO will have no power to assess any other income which may come to his notice in the course of the reassessment proceedings.

3. *Ranbaxy Laboratories Ltd. Vs CIT [2011] 336 ITR 136 (Del)*

In this case the Delhi High Court was seized of the interpretation of *Explanation 3* to section 147 of the Act.

In this case the AO was satisfied with the justifications given by the assessee regarding the items of club fees, gifts and presents and provision for leave encashment, but during the reassessment proceedings, he found that under section 80HH and 80-I, as claimed by the assessee, to be not admissible. He consequently proceeded to reduce the claims of the assessee in respect of deductions under sections 80HH and 80-I of the Act.

It was held that the very basis of initiation of reassessment proceedings for which reasons to believe were recorded, were income escaping assessment in respect of items of club fees, gifts and presents, etc., but while these items were not disturbed, the AO proceeded to reduce the claim of income under sections 80HH and 80-I, which was not permissible. The Tribunal was, therefore, right in holding that the AO had jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated, but he was not justified when the reasons for the initiation for those proceedings ceased to survive.

In other words it was held that where the items of income said to have escaped assessment in respect of which reassessment was proposed, were not added, additions on other issues which did not form part of the reasons recorded can not be made.

4. *CIT Vs Mohmed Juned Dadani [2013] 355 ITR 172 (Guj)*

It was held in this case that *Explanation 3* to section 147 of the Act, can not be construed to provide that if the reason on which the assessment is reopened fails, the AO still can proceed to assess some other income which, according to him, has escaped assessment and which came to his notice during the course of the reassessment.

It was further held that if the very foundation of the reopening is knocked out, any further proceedings in respect of such assessment naturally would not survive. *Explanation 3*, thus, does not in any manner, even purport to expand the powers of the AO under section 147. In any case, an *Explanation* can not expand the scope and sweep of the main body of the statutory provision.

In other words, it was held that when on the ground on which the reopening of the assessment was based, no additions were made by the AO, in the order of reassessment, he could not make additions on some other ground which did not form part of the reasons recorded by him.

5. *CIT Vs Living Media India Ltd. [2013] 89 DTR 81 (Del)*

It was held in this case that the notice under section 148 would stand or fall depending upon the reasons prior to the issuance of the notice. Additional reasons can not be provided or recorded subsequent to the issuance of notice under section 148. Further, until and unless there is an addition on the basis of the original reasons, no other additions can be made in view of *Explanation 3* to section 147 of the Act.

6. *CIT Vs ICICI Bank Ltd. [2012] 349 ITR 482 (Bom) : 74 DTR 251 (Bom)*

It was, *inter-alia*, held in this case that while passing the order of reassessment, the AO had taken a ground different from the grounds in the reasons recorded for reopening the assessment under section 148 of the Act. The reasons furnished for reopening the assessment alleged that the non-fund income had been shown in fund based income so as to avail of higher deduction. However, the basis of the order of reassessment was that 20.1 per cent of the gross expenses attributed to non-fund income was excessive and ought to be restricted to only 10 per cent.

Thus, the basis of the reassessment order was completely different from the reasons recorded for reopening the assessment. This was clearly not permissible. Therefore, the Tribunal was

correct in taking the view that the reopening of the assessment by notice under section 148 of the Act was not sustainable in law.

7. *ACIT Vs Major Deepak Mehta [2012] 344 ITR 641 (Chhattisgarh)*

In this case the Hon. High Court was siezed of the issue of interpretation of *Explanation 3* to section 147.

It was held in this case that as per the Supreme Court judgement in the case of *S. Sundaram Pillai Vs V.R. Pattabiraman, AIR 1985 SC 582*, an *Explanation* can not in any way interfere with or change the enactment or any part thereof. *Explanation 3* to section 147 of the Act provides that the AO may assesses or reassess the income in respect of any issue, which has escaped assessment and such issue comes to his notice subsequently in the course of the proceedings under section 147 of the Act, notwithstanding that reasons for such issue have not been included in the reasons recorded under section 148(2) of the Act.

In this case a reference was also made to the provisions of section 152(2) of the Act. Section 152(2) provides that the assessee may claim that the proceedings under section 147 should be dropped on his showing that he had been assessed at a sum not lower than what he would be rightly liable for even if the income alleged to have escaped assessment had been taken into account, or the assessment or computation had been properly made.

In this case, the Hon. High Court agreed with the view taken by the Bombay High Court in *CIT Vs Jet Aiways (I) Ltd. [2011] 331 ITR 236 (Bom)* and the High Court of Delhi in *Ranbaxy Laboratories Ltd. Vs CIT [2011] 336 ITR 136 (Del).*

It was, thus, held that in the light of *Explanation 3* to section 147 and section 152(2), income mentioned in the notice had not escaped assessment and therefore, the reassessment was not valid.

From the aforesaid legal precedents, it may be clearly understood that *Explanation 3* to section 147 can not be construed as to provide that if the reason on which the assessment is reopened fails, the AO can still proceed to assess some other income which, according to him, had escaped assessment and which came to his notice during the course of the reassessment proceedings. Further, if the very foundation of the reopening is knocked out, any further proceedings in respect of such assessment would obviously not survive. Therefore, *Explanation 3* does not in any manner expand the power of the AO under section 147 of the Act, because an *Explanation* can not expand the scope and sweep of the provisions of the main section.

H. Where the original assessment is without scrutiny i.e. under section 143(1), even in such cases tangible material is necessary to reopen the assessment.

It may be further stated that even in a case where assessment has been made under section 143(1) without scrutiny, a tangible material is necessary to reopen such assessment.

In this connection, a reference may be made to the Explanatory Notes on the provisions of the Direct Tax Laws (Amendment) Act, 1987, contained in Circular No. 549, dt. 31.10.1989, issued by the CBDT [*182 ITR (St) 1*]. Para 7 of the aforesaid Circular deals with income escaping assessment.

As per para 7.2, amendment was made in section 147 by the Amending Act, 1989, to re-introduce the expression "*reason to believe*", in section 147 of the Act. Further, para 7.3 of the aforesaid Circular deals with deemed cases of income escaping assessment (*Explanation 1* to section 147). *Explanation 2* to section 147 is more elaborate and cover those cases where assessments have been completed (called as scrutiny cases) as well as those cases where no assessments have been completed (called as non-scrutiny cases). **As per the aforesaid *Explanation 2,* no distinction has been made between the cases where assessment has been made after scrutiny and those cases where no assessment has been made viz. cases where assessment has been made under section 143(1) only.**

From the aforesaid Circular of the CBDT, it is quite evident that no distinction under section 147 is contemplated between the assessment under section 143(3) called as scrutiny assessment and the assessment accepted under section 143(1) called as non-scrutiny assessment.

Therefore, a tangible material is necessary to reopen even an assessment made without scrutiny under section 143(1) of the Act. In support of the aforesaid stand, reliance is placed on the following legal precedents :

1. *Ratna Trayi Reality Service P. Ltd. Vs ITO [2013]356 ITR 493 (Guj) : 215 Taxman 650 (Guj)*

   In this case, previously no scrutiny assessment was framed. Subsequently the AO issued a notice under section 148 of the Act in order to reopen the assessment.

   It was held in this case that merely because an assessment was not previously framed after scrutiny, that would not give unlimited right to the AO to reopen the assessment by merely issuing a notice without valid reasons.

   In this case a reference was made to the observations on pages 489 and 492 of the judgement of Gujarat High Court in the case of *Inductotherm (India) Pvt. Ltd. Vs M. Gopalan, Dy.CIT [2013] 356 ITR 481 (Guj)*, wherein the judgement of the Supreme Court in the case of *ACIT*

Vs Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC) and other judgements were referred to. As per the aforesaid observations, even in the case of reopening of an assessment which was previously accepted under section 143(1) of the Act without scrutiny, the AO would have power to reopen the assessment, provided he had some tangible material on the basis of which he could form a reason to believe that income chargeable to tax had escaped assessment.

In the light of the aforesaid reasons, it was further held that the impugned notice under section 148 of the Act was invalid and therefore, the same was quashed.

2. *CIT Vs Orient Craft Ltd. [2013] 354 ITR 536 (Del) : 87 DTR 313 (Del)*

In this case the original assessment which was accepted under section 143(1), was sought to be reopened by the issuance of a notice under section 148 of the Act.

It was held in this case that even where the proceedings under section 147 are sought to be initiated, with reference to an intimation under section 143(1), the ingredients of section 147 have to be fulfilled. There should exist "*reason to believe*" that income chargeable to tax has escaped assessment. The language employed in section 147 makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore, it is not permissible to adopt different standards while interpreting the words "*reason to believe*" *vis-à-vis,* section 143(1) and section 143(3). An interpretation which makes a distinction between the meaning and content of the expression "*reason to believe*" in cases where assessments were framed earlier under section 143(3) and cases where intimations were issued earlier under section 143(1), may well lead to an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be avoided. **In the present case there is no whisper in the reasons recorded, of any tangible material which came into possession of the AO subsequent to the issuance of the intimation under section 143(1). It reflects an arbitrary exercise of the power conferred under section 147 of the Act.**

In other words, it was held that even where proceedings under section 147 are sought to be initiated, with reference to intimation under section 143(1), the ingredients of section 147 have to be fulfilled. Therefore, there should exist "*reason to believe*" that income chargeable to tax has escaped assessment. Accordingly, in the absence of any tangible material in possession of the AO, subsequent to the intimation under section 143(1), the reopening was not sustainable.

3. *Inductotherm (India) P. Ltd. Vs M. Gopalan, Dy.CIT [2013] 356 ITR 481 (Guj) : [2012] 77 DTR 1 (Guj)*

   In this case for the AY 2002-03, assessee's return was processed by the AO by sending intimation under section 143(1). Thereafter, a notice under section 148 of the Act for the AY 2002-03, was issued to the assessee.

   It was, *inter-alia*, held that the power to reopen an assessment is available either in a case where a return has been accepted under section 143(1) of the Act or a scrutiny assessment has been framed under section 143(3) of the Act. A common requirement in both the cases is that the AO should have reason to believe that any income chargeable to tax has escaped assessment. There should be tangible material to come to the conclusion that there is escapement of income from assessment. The reasons recorded must have a live link with the formation of the belief.

4. *Indivest Pte. Ltd. Vs Addl. DIT [2013] 350 ITR 120 (Bom) : [2012] 69 DTR 369 (Bom)*

   In this case, for the AY 2006-07, the assessee received intimation under section 143(1) on 28.3.2008. Thereafter, a notice was issued under section 148 on 16.3.2011, proposing to reopen the assessment.

   It was held that on the basis of the reasons recorded, there was absolutely no tangible material on the basis of which the assessment could have been reopened. There was a disclosure clearly made by the assessee that it was a body corporate incorporated in Singapore, the principal business of which was to invest in Indian securities. It was also disclosed that the assessee was a tax-resident of Singapore and the profits which the assessee realized from its transactions in securities constituted its profits from business which were not liable to tax in India. The only basis on which the assessment was sought to be reopened was on the assumption that the provisions of section 115AD would stand attracted though on assessee's clarification the AO accepted that section 115AD was not attracted. The succeeding AO had clearly attempted to improve upon the reasons which were originally communicated to the assessee, which was not permissible.

   Clearly, the notice under section 148 was not valid and was liable to be quashed.

5. *ACIT Vs Malli Chand Baid [2006] 99 TTJ 1016 (Nagpur)*

   It was held in this case that the AO having failed to verify the return by making an enquiry by issuing notice under section 143(2) within the time allowed, he could not take recourse to the provisions of section 147 for that purpose. The AO having no information on the basis of which he could entertain a "*reason to believe*", the CIT(A) was justified in annulling he reassessment.

On the basis of the aforesaid legal precedents, it is clearly established that even where the proceedings under section 147 of the Act are sought to be initiated with reference to an intimation under section 143(1), the ingredients of section 147 are required to be fulfilled. Therefore, even in such a case there should exist "*reason to believe*" that income chargeable to tax has escaped assessment. **Hence, in the absence of any tangible material in possession of the AO, subsequent to the intimation under section 143(1), the reopening will not be sustainable**.

In other words, even an assessment under section 143(1), in the form of an intimation, can not be reopened under section 147 unless some new / fresh tangible material comes into possession of the AO, subsequent to the intimation under section 143(1) of the Act.

I. Relevant aspects relating to issuance of notice under section 148 and disposal of objections against the same

In the present context, it will also be necessary to deal with certain aspects relating to the supply of the reasons recorded before the issuance of notice under section 148 and the disposal of the objections against such notice. These aspects are dealt with as follows :

1. Reasons recorded under section 148(2) before the issuance of notice under section 148 must be communicated along with the notice under section 148

As regards the initiation of the reassessment proceedings, the AO is first of all required to issue a notice under section 148 of the Act.

In most of such cases the AO does not supply the reasons recorded under section 148(2) of the Act before the issuance of the notice under section 148.

In this regard, the judgement of Allahabad High Court in the case of *Mithlesh Kumar Tripathi Vs CIT [2006] 280 ITR 16 (All)*, is very relevant. It was, *inter-alia*, held in this case that the reasons recorded under section 148(2) of the Act, must be communicated to the assessee along with the notice under section 148, in view of the principles of natural justice.

It was also held that section 148(2) expressly requires "*recording of reasons*" which has a definite purpose and is not a mere formality on paper. Section 148(2) is silent regarding communication of the aforesaid reasons. The provision has to be interpreted in a manner which makes it meaningful and purposive. In addition, the very act of giving notice backed by

good and valid reasons under section 148(2) of the Act is a quasi-judicial function and this will obviate unnecessary harassment to the assessee as well as avoid unnecessary litigation.

2. *The AO is required to dispose of the objections against the notice under section 148 by passing a speaking order, before proceeding with the reassessment.*

In this context, the judgement of the Supreme Court in the case of *GKN Driveshafts (India) Ltd. Vs ITO [2003] 259 ITR 19 (SC) : 179 CTR 11 (SC)*, is very relevant.

In this case, in the first place, it has been laid down that when a notice under section 148 of the Act is issued, the proper course of action for the assessee is to file the return and if he so desires, to seek reason for the issuance of the notice under section 148. The AO is bound to furnish reasons within a reasonable time. On receipt of reasons, the assessee is entitled to file objections to the issuance of notice under section 148 and the AO is bound to dispose of the same by passing a speaking order.

It was further held by the Apex Court that the AO has to dispose of the objections, if filed, by passing a speaking order **before proceeding with the assessment**.

It clearly implies that after the objections to the notice under section 148 have been filed by the assessee, the AO is required to dispose of the same by passing a speaking order, before proceeding with the reassessment.

The aforesaid legal position has been further elaborated by the various High Courts in the following legal precedents :

(i) Allana Cold Storage Ltd. Vs ITO [2006] 287 ITR 1 (Bom)

In this case it was held by the Bombay High Court that it was difficult to understand as to why the AO did not decide the objections to the notice under section 148 separately, which he was duty bound to decide. The whole idea in laying down the law in the case of *GKN Driveshafts India Ltd*., by the Apex Court, is to give an opportunity to the assessee to know as to what is the decision on his objections, which decision has also to be arrived at after giving an opportunity to the assessee. In the present case, the assessee has been denied this opportunity.

It was further held that not only that, but, in the first three writ petitions a common order has been passed on the objections as well as for reassessment. In the fourth matter, the

assessment order did not disclose any decision on the objections at all and undoubtedly no such decision has been given separately on the objections.

Therefore, the orders challenged were clearly against the law laid down by the Apex Court. That being so, all the aforesaid petitions were allowed and the reassessment orders passed in all the four cases were quashed and set aside.

It may, however, be stated here that the AO was allowed to pass fresh orders in the aforesaid cases in accordance with the law laid down by the Apex Court.

(ii) Smt. Kamlesh Sharma Vs B.L. Meena, ITO [2006] 287 ITR 337 (Del)

In this case the AO without passing a speaking order in respect of the objections to the notice under section 148, straightaway passed an assessment order simultaneously, rejecting the contentions of the assessee.

It was held that in view of the judgement of the Supreme Court in the case of *GKN Driveshafts (India) Ltd.,* the AO should have rejected the objections, if he thought it appropriate to do so, before passing the final order and not simultaneously. Under the circumstances, the assessment order was liable to be set aside and the AO directed to deal with the objections filed by the assessee by passing a speaking order.

(iii) IOT Infrastructure and Energy Services Ltd. Vs ACIT [2010] 329 ITR 547 (Bom)

It was held in this case that the AO had not complied with the directions of the Supreme Court in *GKN Driveshafts (India) Ltd. Vs ITO [2003] 259 ITR 19 (SC).* There was absolutely no reason or justification for the AO not to deal with the objections filed by the assessee to the reopening of the assessment, particularly in view of the binding principle of law laid down by the Supreme Court in that regard. Therefore, the order of the reassessment was to be set aside and the order issued by a noting, dt. 21.12.2009, disposing of the objections of the assessee was to be quashed and set aside. The AO was directed to pass a fresh order on the objections raised by the assessee to the proposed reassessment in accordance with law.

(iv) Vishwanath Engineers Vs ACIT [2013] 352 ITR 549 (Guj)

In the first place it was held in this case that the AO is bound to disclose the reasons for reassessment within a reasonable time and on receipt of the reasons, the assessee is entitled to raise objections and if any such objections are filed, the objections must be

disposed of by a speaking order before proceeding to reassess in terms of the notice given earlier.

It was further held that the AO failed to dispose of the objections and instead of that, straightaway passed the order of reassessment. Therefore, the order of reassessment was not valid.

3. *Other relevant aspects relating to the procedural matters*

We may also discuss the other procedural aspects to be followed by an assessee, after the receipt of notice under section 148 of the Act. The same are as follows :

(i) After the receipt of notice under section 148, if the assessee is confident that there is no escapement of income, whatsoever, for the relevant AY, then he should write a letter to the AO in response to the notice under section 148, to the effect that "*The return of income already filed for the assessment year……, on ……, may be treated to have been filed in response to the notice under section 148, dt……."*

Besides, in the same letter the assessee should also make a request to the AO to provide him with a copy of the reasons recorded under section 148(2) of the Act.

(ii) After the receipt of the reasons recorded under section 148(2), the same should be carefully examined and if the reasons do not justify the issuance of the notice under section 148 of the Act, then detailed written submissions should be furnished before the AO, challenging the notice under section 148 of the Act.

In this connection, the discussion in the preceding paragraphs must be kept in view.

(iii) The assessee should not furnish any other details called for by the AO, till the aforesaid objections against the notice under section 148 are disposed of by him, by passing a speaking order.

(iv) If the AO drops the re-assessment proceedings, then nothing further is required to be done.

However, if the AO passes an order justifying his action under section 147, vide the notice under section 148, then such an order should be challenged in appeal before the CIT(A), along with the order passed by the AO, under section 143(3) of the Act.

(v) After the AO passes an order justifying his action under section 147, the assessee may furnish the various details and information called for by the AO.

J. Conclusion :

From the discussion in the preceding paragraphs, it is clearly established that the reopening of the assessments is valid only on the fulfilment of a number of conditions, as laid down in the relevant provisions of the Act, as well as the legal precedents.

The relevant provisions of the Act, as well as the legal precedents have already been discussed in detail in the preceding paragraphs.

The assessee or his Income-Tax Advisor may follow the aforesaid guidelines while handling the re-assessment proceedings, after the issuance of a notice under section 148 of the Act.

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