HIGH COURT OF DELHI

19

ITC 4 OF 2000

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Date of hearing : 1st February 2002.
% Date of decision : 19th April 2002.

Commissioner of Income-tax, Delhi-II ... ... Petitioner
! ... ... **through :** Mr.R.D.Jolly with
... ... Ms.Premlata Bansal
... ... and Mr.Ajay Jha,Adv.

-VERSUS -

$ M/s. Kelvinator of India Ltd. ... ... Respondent
(Now known as M/s.Whirpool of India Ltd.) ... ...
^ ... ... **through :** Dr.Debi Prasad Pal
... ... Senior Advocate with
.... Mr.Santosh Aggarwal
... ... and Mr.Vinay Vaish
... ... Advocates.

Coram :-

THE HON'BLE MR JUSTICE S.B.SINHA, C. J.
THE HON'BLE MR JUSTICE D.K.JAIN.
THE HON'BLE MR JUSITCE VIKRAMAJIT SEN.

i) Whether Reporters of local papers may be allowed to see the judgment.

ii) To be referred to the reporter or not ? ✓

*** S.B.SINHA,C. J.**

Although it is an application under Section 256(2) of the Income-tax Act, 1961 (in short the `Act') seeking a direction to the Income-tax Appellate Tribunal (for short the `Tribunal') to refer the question set out therein for the opinion of this Court but in view of the

Tribunal and the question raised is a pure question of Law we dispense with a formal statement of facts; treat the petition as a regular reference and proceed to answer the question proposed.

The question posed for consideration of this Larger Bench is, as to whether even for a mere change of opinion by the Income-tax Officer (in short `ITO') action under Section 147 of the Income-tax Act, 1961 can be brought into operation.

With a view to advert to the said question, the factual matrix bereft of all unnecessary details may be noticed:-

The assessment year under reference is 1987-88. The relevant previous year is 1st July 1985 to 30th June 1986. The assessee maintained guest houses in Delhi, Bombay and Faridabad, wherefor it incurred the following expenses:

	Particulars	Amount (Rs.)
1.	Rent	Rs.1,76,000/-
2.	Expenses	Rs. 91,485/-
		Rs.2,67,485/-
3.	Depreciation	Rs. 66,441/-
		Rs.3,33,926/-

A return of income declaring income of Rs.1,62,890/- was filed on 29th June 1987 by the assessee

report, etc. were also filed. As it did not clai deduction for the expenses as enumerated hereinbefore, a revised return was filed on 5th October 1989 along with a letter of the same date, wherein it was contended that rent for a sum of Rs.1,76,000/-; and depreciation for a sum of Rs.66,441/- should be allowed in terms of Sections 30 and 32 of the Act. The said contention was raised relying on or on the basis of a decision of the Bombay High Court in ***Commissioner of Income-tax vs. Chase Bright Steel Ltd. (No.1)(1989) 177 ITR 124.*** Disallowance under Section 37(4) of the Act in respect of the Guest houses was restricted to maintenance expenses of Rs.91,485/-. An order of assessment was passed by the Assessing Officer on 17th November 1989, wherein upon making additions and disallowances the taxable income was determined at Rs.21,14,082/-. A claim of Rs.91,485/- was disallowed in respect of the above accommodations as submitted in the revised computation.

Subsequently, a notice under Section 148 of the Act was issued on 20th April 1990 for reopening of the assessment in terms of Section 147 thereof. The reasons recorded for reopening the assessment are:

> *"M/s.Kelvinator of India Ltd.*
> *Assessment year 1987-88.*
>
> *Assessment was completed u/s.143(3) on 12.11.89 on income of Rs.6,34,225/-. The perusal of the record shows that the assessee maintains the books on mercantile basis. In the year under consideration, the assessee claimed*

years (Sec 140b p(c-3) page 21 of printed balance sheet). This was not allowable expenditure in this year. Further, Tax Audit Report shows that following items were disallowable:

	Disallowable	Disallowed	Less Disallowable
1.Guest House Exp.	2,67,485/-	91,485/-	1,76,000/-
2.Under rule 6B	1,74,098/-	90,795/-	83,303/-
3.Club Expenditure	5,329/-	1,029/-	4,300/-
		TOTAL	2,63,603/-

Total under assessment is to the tune of Rs.43,91,603/-. The case is covered u/s.147. Notice u/s. 148 is issued."

The assessee objected to the said reopening of the assessment. However an order of re-assessment was passed on 24th September 1990 determining the total income at Rs.23,56,523/-, whereby a sum of Rs.2,42,441/- (rent of Rs.1,76,000/- and depreciation of Rs.66,441/-) incurred on the maintenance of guest houses was disallowed and added to the total income. Though the assessment was re-opened on the alleged ground of various disallowable claims but except for the aforenoted disallowance, neither any other claim was disallowed nor any addition was made. In support of his order of re-assessment the Assessing Officer purported to have relied upon the order of the Commissioner of the Income-tax (Appeals) for the assessment year 1986-87, which was passed on 27th July 1990, although the assessment was re-opened on 20th April 1990. The contention of the assessee is that the Assessing Officer could not have taken recourse thereto, particularly,

Tribunal (in short `Tribunal'), on appeal, had allowed similar expenses for the assessment year 1986-87.

The assessee preferred an appeal against the order of re-assessment dated 24th September 1990, whereupon the Commissioner (Appeals) by an order dated 23rd August 1991 quashed the re-assessment proceedings holding that the assessee had disclosed all the facts. It was held that no new fact or material was available with the Assessing Officer, which would come within the purview of the expression "information". It was held that it was mere change of opinion on the part of the Assessing Officer and as such the re-assessment proceedings could not have been validly initiated. On further appeal the Tribunal upheld the afore-mentioned decision of the Commissioner of Appeals. It also held that the amended provision of Section 147 of the Income-tax Act was applicable. It reiterated that it was a case of mere change of opinion. An application filed by the department to refer the following question to this Court was rejected by order dated 27th January 1999:

> *"Whether ITAT was correct in holding that the proceedings initiated under Section 147 of the said Act were invalid on the ground that there was a mere change of opinion"?*

Hence the present petition under Section 256(2) of the Act.

Mr. R.D.Jolly, learned counsel appearing on behalf of the department, has taken us through the provisions of Section 34 of the Indian Income-tax Act, 1922 (in short the "1922 Act") and Section 147 of the Income-tax Act, 1961 as it stood prior to 1st April 1989 and after 1st April 1989. Learned counsel would contend that change of opinion is relevant. Learned counsel would submit that Section 34 of the 1922 Act and Section 147 of the Act as it stood prior to 1st April 1989 were in two parts. The proviso appended to Section 147, is in pari materia with Clause 1(a) of Section 147 as it stood prior to 1st April 1989. Learned counsel would contend that change of opinion is relevant only for the purpose of Clause (b) of Section 147 of the Act. Learned counsel would contend that initiation of re-assessment proceeding is permissible when it is found that the Assessing Officer had passed an order of assessment without any application of mind. Such application of mind, Mr. Jolly would urge, can be found out from the order of assessment itself inasmuch as, in the event, the order of assessment does not contain any discussion on a particular issue the same may be held to have been rendered without any application of mind. Mr. Jolly would urge that, from a perusal of the reasons recorded by the Assessing Officer for re-opening the assessment, it would appear that reliance therefor has been placed upon a tax audit report which would come within the purview of the expression "information" as contained in Section 147 of the Act and thus the order of re-assessment

Learned counsel in support of his afore-mentione contention strongly relied upon the decision of the Apex court in ***Calcutta Discount Co. Ltd. V. Income-tax Officer, Companies District I, Calcutta and Another*** **reported in (1961) 41 ITR 191;** ***Praful Chunilal Patel v. Asst. C.I.T. (Guj.)*** **reported in** ***(1999)*** **236 ITR 832; and** ***Bawa Abhai Singh v. Deputy C.I.T. (Delhi)*** **reported in (2002) 253 ITR 83.**

Mr. Jolly would submit that Circular No.549 dated 31st October 1989 issued by the Central Board of Direct Taxes (in short "CBDT") cannot be taken note of for the purpose of construction of Section 147 of the Act, inasmuch as, a Circular can not override the statutory provisions. Mr. Jolly, in this connection, has drawn our attention to a decision of the Apex Court in ***Union of India and Others v. Suresh C. Baskey and Others*** **reported in (1996) 11 SCC 701.**

Dr. Debi Prasad Pal learned Senior Counsel appearing on behalf of the assessee, on the other hand, would contend that the expression "reason to believe" contained in Section 147 of the Income-tax Act denotes that the same must be based on a change of fact or subsequent information or new law. Income escaping assessment, learned counsel would contend, must be founded upon or in consequence of any information which must come in possession of the assessing officer after completion of the original assessment. Dr.Pal would contend that Circular No.549 dated 31st October 1989 issued by the CBDT would

to allay fears of all concerned that prior thereto a arbitrary power was conferred upon the Assessing Officer. According to the leaned counsel, the very fact that the CBDT, who has the authority to interpret the law issued the afore-mentioned Circular, the principles of Contemporania Exposito should govern the case.

Learned counsel would contend that the answer to the question involved in this case stands concluded by a Division Bench decision of this Court in ***Jindal Photo Films Ltd. V. Deputy Commissioner of Income-tax and another*** **reported in (1998) 234 ITR 170.** Dr. Pal would submit that the decisions of the Gujrat High Court in ***Praful Chunilal Patel's case*** *(supra)* and this Court in ***Bawa Abhai Singh's case (supra)*** having been rendered in different fact situation cannot be said to have any application whatsoever in the facts and circumstances of the present case. Our attention, in this connection, has been drawn to the subsequent decision of the Gujrat High Court in ***Garden Silk Mills Pvt. Ltd. V. Deputy Commissioner of Income-tax*** **reported in (1999) 237 ITR 668** as also a decision of the Allahabad High Court in ***Foramer v. Commissioner of Income-tax and Another*** **reported in (2001) 247 ITR 436.**

With a view to answer the question as noticed hereinbefore, it is necessary to notice Section 34 of the 1922 Act and the provisions of Section 147 of the said Act as it stood prior to and after 1st April 1989:

34. Income escaping assessment –

(1) If

(a) The income-tax officer has reason to believe that by reason of the omission or failure on the part of an assessee to make a return on his income under sec. 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gains chargeable to income tax have escaped assessment for that year, or have been under-assessed or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) Notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the income-tax officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to income-tax have escaped assessment for any year, or have been under-assessed, or assessed at too low rate, or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed,

he may in cases falling under clause (a) at any time within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under sub-section (2) of 22 and may proceed to assess or reassess such income profits or gains or recomputed the loss depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice issued under that sub-section:

Provided that-

(i) the income-tax officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the

a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits and gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made is an assessment made or to be made on a person deemed to be a agent of a non-resident person under sec.43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted.

Explanation:- Production before the income-tax officer of account books or other evidence from which material facts could with due diligence have been discovered by the income-tax officer will not necessarily amount to disclosure within the meaning of this section."

Sec 147 of I.T.Act,1961 prior to 1-04-1989

`S.147. Income escaping assessment - If -

(a) The Assessing Officer has reason to belief that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Assessing Officer or to disclose fully and truly all material facts necessary for his assessment for the year, income chargeable to tax has escaped for that year, or

(b) Notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

He may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter

Explanation 1. - For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where income chargeable to tax has been under-assessed; or

(b) where such income has been assessed at too low a rate; or

(c) where such income has been made the subject of excessive relief under this Act or under Indian Income-tax Act, 1922 (XI of 1922); or

(d) where excessive loss or depreciation allowance has been computed.

Explanation 2.- Production before the assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of this section."

Section 147 of the Act as it stands w.e.f. 1st April 1989 reads as follows:

"**147.** If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, 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 this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

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

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.

The scope and effect of newly substituted Section 147 w.e.f. 1st April 1989 by Direct Tax Laws (Amendment) Act, 1987 as subsequently amended by the Direct Tax Laws (Amendment) Act, 1989 w.e.f. 1st April 1989 as also of Sections 148 to 152 have been elaborated in the departmental Circular No. 549 dated 31st October 1989, which is as under:

> "***Income escaping assessment:7.1*** *Simplification of the provisions relating to assessment or reassessment of income escaping assessment (section 147) - Under the old provisions of section 147 of the Income-tax Act, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed, as follows:-*
>
> *(i) Clause (a) empowered the Income-tax Officer to assess or reassess the income escaping assessment, if he had reason to believe that income had escaped assessment on account of omission or failure on the part of the assesseee to file a return of income for an assessment year or to disclose fully and truly all material facts necessary for assessment for that year.*
>
> *(ii) Clause (b) empowered the Income-tax Officer to reopen an assessment, notwithstanding the fact that there had been no omission or failure, as mentioned in clause (a), on the part of the assessee if the Income-tax*

believe that income had escaped assessment for the relevant assessment year.

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Since under the new scheme of assessment (refer to para 5.1 of these Explanatory Notes), introduced by the Amending Act, 1987, returns filed will now be accepted as such and passing of assessment orders will not be necessary, it follows that in the majority of cases there would not be any application of mind by the Assessing Officer 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, especially in non-scrutiny cases. Thus, the Amending Act, 1987, has substituted a new section 147 which contains simplified provisions as follows:-

(i) *Separate provisions contained in clauses (a) and (b) of the old section have been merged into a single new section, which provides that if the Assessing Officer is of the opinion that income chargeable to tax for any assessment year has escaped assessment, he can assess or reassess the same after recording in writing the reasons for doing so.*

(ii) *The requirements in the old provisions that the Income-tax Officer should have "reason to believe" or "information" in possession before taking action to assess or reassess the income escaping assessment, have been dispensed with.*

(iii) *The existing legal interpretation that once an assessment has been reopened, any other income that has escaped assessment and comes to the notice of the Assessing Officer subsequently during the course of proceedings under this section can also be included in*

incorporated in the new section itself.

(iv) A proviso to the new section provides that an assessment, which has been completed under section 143(3) or 147, i.e. a scrutiny assessment, can be reopened after the expiry of 4 years from the end of the relevant assessment year only if income has escaped assessment due to the failure on the part of the assessee to file a return of income or to disclose fully and truly all material facts necessary for his assessment.

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

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).*

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 a bare perusal of the provisions contained in Section 147 of the said Act, as it stood up to 31st March 1989, it is evident that to confer jurisdiction under Section 147 (a) of the Act two conditions were required to be satisfied viz.; (i) the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either; (a) omission or failure on the part of the assessee to make a return of his income under Section 139 or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. The afore-mentioned requirements of law must be held to be conditions precedent for invoking

assessment under Section 147 of the said Act. It is trit that both the conditions afore-mentioned are cumulative. It is also a well settled principle of law that, in the event, it is found that any of the said two conditions is not fulfilled the notice issued by the Assessing Officer would be wholly without jurisdiction. The expression "reason to believe" finds place both in Clause (a) and (b) of Section 147 of the Act. Sub-section (2) of Section 148 of the Act mandates that before jurisdiction under Section 147 of the Act is invoked by the Assessing Officer he is to record his reasons for doing so or before issuing any notice under Section 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the assessing officer could re-open a completed assessment. Since assessment has been re-opened on 20th April 1990, Section 147 as amended w.e.f. 1st April 1989 would apply.

What would constitute `reason to believe' is no longer res integra.

In ***Calcutta Discount Co. Ltd. (supra)*** the Apex Court clearly held that once the primary facts are before the Assessing Authority he requires no further assistance by way of disclosure. It was observed by the Apex Court that:

> *"It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee- to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is*

given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law - he would draw from the primary facts."

As regards Scheme of the Act, the Apex Court held:

"The Scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under-assessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for reassessment within a period of 8 years; and where he has reason to believe that an under-assessment has resulted from other causes he shall have jurisdiction to start proceedings for reassessment within 4 years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under -assessment has resulted from non-disclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under-assessment has resulted from non-disclosure of material facts, cannot therefore be accepted."

In ***Indian & Eastern Newspaper Society v. C.I.T. (S.C.)*** **reported in (1979) 119 ITR 996** three Judges Bench of the Apex Court held that although disclosure of a new fact therein may be an information within the meaning of the afore-mentioned provisions this opinion of law would not be as regard a contention on the part of the Revenue that the expression information in Section 147(b) refers to realization by the ITO that he has committed an error while making original assessment. The Apex Court said:

"that he has committed an error when making the original assessment. It is said that,

been committed in the original assessment, the discovery of the mistake would be "information" within the meaning of s.147(b). The submission appears to us inconsistent with the terms of s. 147(b). Plainly, the statutory provision envisages that the ITO must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realization that income has escaped assessment is covered by the words "reason to believe", and it follows from the "information" received by the ITO. The information is not the realization, the information gives birth to the realization."

This has been the settled position in law althrough. However, the question which requires consideration is whether any change in law has been brought about on account of amendment of Section 147 with effect from 1st April 1989.

In ***Jindal Photo Films Ltd. (supra)*** R.C.Lahoti, J. (as His Lordship then was) observed:

"The power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision 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."

It was further held by the Bench that:

"Reverting back to the case at hand, it is clear from the reasons placed by the Assessing Officer on record as also from the

that he was not right in allowing deduction under section 80-I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28,1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under section 147 of the Act.

It is also equally well settled that if a notice under section 148 has been issued without the jurisdictional foundation under section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under section 147/148 of the Act."

Thus, the Court held that even under the newly substituted Section 147, with effect from 1st April 1989, an

opinion. Yet again in ***Foramer's cases (supra)*** a Divisio Bench of the Allahabad High Court has held that if a notice under Section 147/148 was issued after the coming into force of the amended Act, the latter shall be attracted. However it is observed that:

> *"Although we are of the opinion that the law existing on the date of the impugned notice under section 147/148 has to be seen, yet even in the alternative even if we assume that the law prior to the insertion of the new section 147 will apply even then it will make no difference since even under the original section 147 notice for reassessment could not be given on the mere change of opinion as held in numerous cases of the Supreme Court, some of which have been mentioned above. Since the Tribunal in the appeal relating to the assessee-company had considered the Tribunal's earlier decision in Boudier Christian's case, it will obviously amount to mere change of opinion, and hence the notice under section 147/148 would be illegal"*

We may also notice that a Division Bench of the Gujrat High Court in ***Garden Silk Mills Pvt. Ltd. (supra)***, while expressing similar views observed:

> *"The reasons recorded by the Assessing Officer which led to the belief about the escapement of assessment disclose that the present case is nothing but mere change of opinion on the facts which were already before the Assessing Officer while making the first assessment to which conscious application of mind is reflected from the proceedings, and allowed in the computation and which has not been disputed by the Revenue."*

Although the referring Bench had prima facie agreed with the decision of this Court in ***Jindal Photo***

revenue in view of a decision of the Gujrat High Court in ***Praful Chunilal Patel's case (supra)***. Therefore let us now consider the decision of the Division Bench of Gujrat High Court in the said case, wherein it was held:

> *"It will thus be seen that in the proceedings taken under section 147, the Assessing Officer may make an assessment or reassessment, or recomputation, as the case may be. The word "assess" refers to a situation where the assessment was not made in the normal manner while the word "reassess" refers to a situation where an assessment is already made, but it is sought to be reassessed on the basis of this provision.*
>
> *In cases where the Assessing Officer has not made an assessment of any item of income chargeable to tax while passing the assessment order in the relevant assessment year, it cannot be said that such income was subjected to an assessment. In the assessment proceedings, the Assessing Officer would ascertain on consideration of all relevant circumstances the amount of tax chargeable to a given taxpayer. The word "assessment" would mean the ascertainment of the amount of taxable income and of the tax payable thereon. In other words, where there is no ascertaining of the amount of taxable income and the tax payable thereon, it can never be said that such income was assessed. Merely because during the assessment proceedings the relevant material was on record or could have been with due diligence discerned by the Assessing Officer for the purpose of assessing a particular item of income chargeable to tax, it cannot be inferred that the Assessing Officer must necessarily have deliberated over it and taken it out while ascertaining the taxable income or that he had formed any opinion in respect thereof. If looking back it appears to the Assessing Officer (albeit within four years of the end of the relevant assessment year) that a particular item even though reflected on the record was not subjected to assessment and was left out while working out the taxable income and the tax payable thereon, i.e., while making the final*

question of non-disclosure of material facts by the assessee."

We are, with respect, unable to subscribe to the afore-mentioned view. If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the Assessing Officer. The Assessing Officer who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to re-open the proceeding. Assessment proceedings may be furthermore re-opened more than once. It is now trite that where two interpretations are possible, that which fulfils the purpose and object of the Act should be preferred.

It is well settled principle of interpretation of statute that entire statute should be read as a whole and the same has to be considered thereafter Chapter by Chapter and then Section by Section and ultimately Word by Word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in Section 154 of the Act. The power of rectification of mistake conferred upon the ITO is circumscribed by the provisions of Section 154 of the Act. The said power can be exercised when mistake is apparent. Even mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income-tax Appellate Tribunal has limited jurisdiction

Officer or Tribunal has considered the matter in detail an the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the ITO does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of re-assessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.

In ***Bawa Abhai Singh's case (supra)*** a Division Bench of this Court of which one of us (D.K.Jain,J.) is a Member, clearly held:

> *"The crucial expression is "reason to believe". The expression predicates that the Assessing Officer must hold a belief … by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran and Sons P. Ltd. V. ITO (1981) 130 ITR 1 (SC), the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons*

court that the expression "reason to believe" in section 147 does not mean purely a subjective satisfaction on the part of the Assessing Officer, the belief must be held in good faith; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, the action of the Assessing Officer in initiating proceedings under section 147 can be challenged in a court of law."

It was further observed:

"Up to March 31, 1989 two conditions were required to be fulfilled to confer jurisdiction on the Assessing Officer to act under section 147(b). They are (1) he must have information which comes into his possession subsequent to the making of the original assessment order, and (2) that information must lead to his belief that income chargeable to tax has escaped assessment, or that it has been under assessed or assessed at too low a rate or has been made the subject of excessive relief.

After April 1, 1989, the position is somewhat different. Section 147 with effect from April 1, 1989, provides that where the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of section 148 to 153. He may assess or reassess the income which has escaped assessment. It is to be noted that section 147 as it stands with effect from April, 1989, not only merges clauses (a) and (b) of the pre-amended section 147 but also brings about a significant change in the preliminary requirement of certain conditions mandatory in character before reassessment proceedings should be initiated in the pre-amended section. The conditions precedent for initiation of action under section 147(a) or 147(b) of the pre-amended situation, is high-lighted above. The amended provisions are contextually different and the cumulative conditions

in the amended provision. ***The only condition for action is that the Assessing Officer should have reason to believe that income has escaped assessment,*** which belief *can be reached in any manner and is not qualified by a pre-condition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended section 147(a) of the Act and the Assessing Officer can under the amended provisions legitimately reopen the assessment in respect of an income which has escaped assessment. Viewed in that angle the power to reopen assessment is much wider under the amended provision and can be exercised even after the assessee has disclosed fully and truly all the material facts. To similar view were the conclusions of this court in Rakesh Aggarwal v. Asst.CIT (1997) 225 ITR 496. it is to be noted at this juncture that the twin conditions must be fulfilled if the case is one which is covered by the proviso to section 147 operative with effect from April 1, 1989." (emphasis supplied by us).*

It is evident from the afore-extracted position of the decision that it is not an authority for the proposition that a mere change in the opinion would also confer jurisdiction upon the Assessing Officer to initiate a proceeding under Section 147 of the Act as was contended by Mr.Jolly.

A decision as is well known, is an authority for the proposition that it decides and not what can logically be deduced therefrom. A point not raised nor argued at the bar cannot be said to be the ratio of the decision.

Another aspect of the matter cannot be also lost

Section 119 of the said Act. It is trite that th Circulars which are issued by the CBDT are legally binding on the Revenue (see **UCO Bank vs.C.I.T. (1999) 237 ITR 889)**. Recently in **C.I.T. Mumbai vs. Anjum M.H.Ghaswala & Ors. Reported in JT 2001 (9) SC 61**, the Apex Court following the said decision observed:

> *It is true that by this press release the board had interpreted the provisions of the Act in a particular manner. Be that as it may, we would like to make it clear that every clarificatory note* or press release issued by the board does not have the statutory force like the circulars issued by the board under section 119 of the Act. It is only those circulars issued by the board under the provisions of section 119 of the Act, will have the statutory force and will be binding on every income-tax authorities. Therefore, the press release relied upon by Shri Ramamurti not being a circular issued under section 119 of the Act will not be of any assistance to the respondents in support of their contentions."

It further observed that:

> *Learned Solicitor General has pointed out that by virtue of the power vested in the board under section 119(2)(a) of the Act, the board has issued circulars by notification no.F.No.400/234/95-IT(B) dated 23.5.1996. As per this circular, it has empowered that the chief commissioner of income tax and director general of income-tax may waive or reduce interest charged under sections 234A, 234B and 234C of the Act in the class of cases or class of incomes specified in paragraph 2 of the said order for the period and on conditions which are enumerated therein. He submitted that in view of the said circular, the same authority can be exercised by the commission since the said circular would amount to relaxation of the rigor of sections 234A, 234B and 234C of the Act. We are in unison with this submission of the learned*

central board of direct taxes are legally binding on the revenue. (See UCO Bank v. Commissioner of Income-tax (1999) 237 ITR 889). Since these circulars are beneficial to the assesses, such benefit can be conferred also on the assesses who have approached the settlement commission under section 245C of the Act on such terms and conditions as contained in the circular. In our opinion, it is for this purpose that section 245F of the Act has empowered the settlement commission to exercise the power of an income-tax authority under the Act. We must clarify here that while exercising the power derived under the circulars of the board, the commission does not act as a subordinate to the board but will be enforcing the relaxed provisions of the circulars for the benefit of the assessee in the process of settlement."

The Board in exercise of its jurisdiction under the afore-mentioned provisions had issued the Circular on 31st October 1989. The said Circular admittedly is binding on the Revenue. The Authority, therefore, could not have taken a view, which would run counter to the mandate of the said Circular. Clause 7.2 as referred to hereinbefore is important.

From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out i.e. only with a view to allay the fears that the omission of the expression "reason to believe" from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion.

It is, therefore, evident that even according t the CBDT a mere change of opinion cannot form the basis for re-opening a completed assessment.

The submission of Mr. Jolly to the effect that the said Circular cannot be construed in such a manner whereby the jurisdiction of the statutory authority would be taken away is not apposite for the purpose of this case. In ***Union of India and Others (supra),*** whereupon Mr. Jolly had placed strong reliance, the Apex Court was dealing with an administrative instructions whereby no right was conferred upon the respondents to have the house rent amount included in their emoluments for the purpose of computing overtime allowance. The Apex Court held that otherwise also the Government's instructions have to be read in conformity with the provisions of the Act. Therein the Apex Court was not concerned with the statutory powers of a statutory authority to issue binding circulars.

Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra vires Article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favoured.

In the event it is held that by reason of Section 147 if ITO exercises its jurisdiction for

change of opinion, the same may be held to b unconstitutional. We are therefore of the opinion that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate re-assessment proceeding upon his mere change of opinion.

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

We are unable to agree with the submission of Mr.Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself.

We also cannot accept submission of Mr.Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing

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

For the reasons afore-mentioned we are of the opinion that answer to the question raised before this Bench must be rendered in the ~~negative~~ affirmative, i.e. in favour of the assessee and against the Revenue. No order as to costs.

CHIEF JUSTICE

(D.K.JAIN)
JUDGE

(VIKRAMAJIT SEN)
JUDGE