* **IN THE HIGH COURT OF DELHI AT NEW DELHI**
\+ **Writ Petition (Civil) No. 5988/2008**

Rose Serviced Apartments Pvt. Ltd. & Anr. ....Petitioners
Through Mr. Prakash Kumar, Advocate.

VERSUS

Dy. Commissioner of Income Tax .....Respondent
Through Ms. Prem Lata Bansal, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ?
3. Whether the judgment should be reported in the Digest ?

% O R D E R
25.01.2011

The petitioner No. 1 – Rose Serviced Apartments India Pvt. Ltd. has filed the present writ petition for quashing of the notice under Section 148 of the Income Tax Act, 1961 ('Act' for short) and the re-assessment proceedings. The petitioner No. 1 has also impugned the order dated 15th July, 2008 passed by the Assessing Officer dismissing the objections of the petitioner No. 1 to initiation of the reassessment proceedings.

2. The contention raised by the petitioner No. 1 is that the reassessment proceedings have been initiated on mere change of opinion

as the issue; interest received and interest paid by the petitioner No. 1 examined during the course of the original assessment proceeding albeit no addition was made. It is submitted that the petitioner no.1-assessee has made true and full disclosure of primary facts. And lastly, the assessing officer without application of mind and without verification has issued the reassessment notice on the basis of the audit report.

3. Petitioner No. 1 is a company and it is stated in the writ petition that it is in the business of trading of long term investments and real estate etc. For the assessment year 2001-02, a return declaring loss of Rs.59,43,670/- was filed on 31st October, 2001. On the income side, the petitioner No. 1 had declared income of Rs.52,29,039/- as interest on inter-corporate loans; and under the head of 'Expenditure' interest on loans from Body Corporate of Rs.34,09,398/-, interest paid to banks of Rs.80,90,541/- and interest to other third parties of Rs.2,83,359/- was claimed as a deduction.

4. The petitioner No. 1's return was selected for scrutiny and notice under Section 143(2) of the Act was served on it on 25th October, 2002. By a questionnaire dated 15th January, 2003, the Assessing Officer asked for detailed information with regard to interest paid and interest received by the petitioner No. 1. Points 14 and 15 raised in the said questionnaire read as under:-

> "(14) From the profit & loss account it is seem that in the name of business there is no business activity, only interest on FDR etc. has been shown at Rs. 64 lacs (approx.). Please justify the claim of expenses. (15) Please give details of rate of interest paid to bank and other parties with amount and period."

5. The petitioner No. 1 replied to the said questionnaire on 28th January, 2003. Along with the said letter, annexures giving details of the interest paid were enclosed. Thereafter, the Assessing Officer issued another questionnaire dated 26th February, 2003 seeking further details in respect of interest paid and received by the petitioner No. 1. In this questionnaire, reference was made to the Balance Sheet wherein the petitioner No. 1 had shown interest on inter-corporate loans, FDRs and income tax refund. It was stated that the petitioner No. 1 had taken secured and unsecured loans and had invested in share application money. The petitioner No. 1 was asked to give details of the parties to whom the loans were given, with date, rate of interest and amount of interest. The petitioner No. 1 in their reply dated 11th March, 2003 had stated :-

> "You will kindly appreciate that the assessee company has received during the year a sum of Rs.52.29 lacs as interest on loans given to other parties as detailed in ANNEXURE-A to this reply.
>
> From the perusal of the aforementioned details it will be seen that the assessee had advanced a sum of Rs.3,47,83,959/- as on 31.3.2000 and a further sum

of Rs.1,90,62,332/- was advanced during the year with inter-corporate entities against interest. Out of the aforesaid amounts Rs.1,00,81,763/- was received back and a balance sum of Rs.4,89,93,567/- was still invested by the company in inter-corporate loans. This activity shows that the assessee is regularly and consistently deploying its funds with inter-corporate entities for consideration of interest and the amount of interest received/receivable in this regard has been duly declared as business income of the assessee company during the under consideration.

Similarly a sum of Rs.1,00,00,000/- was invested by the company in fixed deposits with Banks and during the year under consideration a sum of Rs.3,11,409/- was received or receivable as interest on such FDS. Interest on income-tax refund amount to Rs.8,95,700/- is the amount of interest received by the assessee from income tax department being excess amount of tax or TDS or under the other various provisions of Tax Laws. From the amounts received and declared as business income of the assessee as aforesaid, it is further evident that all the aforesaid amounts represent return on investments made by the assessee. In these circumstances, the income received or receivable by the assessee is a business receipt and therefore, be assessed as income from business.

It is further submitted that you have also observed and admitted in the query itself "that these receipts are business receipts and in addition to this there is no business activity carried on by the company."

It is, however to bring to your notice, that in addition to the investment business the assessee is also engaged in the real estate activity which is also the main business activity of the assessee and has made various investments in earlier as well as in the year

under consideration for acquisition of properties as detailed in ANNEXURE B to this reply.

There was a scheme for permitting broadcasting business by the Govt. to private entrepreneurs, specially incorporated for this purpose. In the broadcasting business huge investment is required to be made in properties. The management of the company considered such investment as viable investment for furtherance of its objects. Therefore, the company through its nominees made investment in the incorporation of such companies. These companies filed applications in different states seeking permission of the broadcasting business. Out of these companies only Hind Broadcasting Co. Pvt. Ltd., Bollywood Broadcasting Co. Pvt. Ltd.,. were required to make further deposits with the Govt. for seeking licence. Ultimately licenses were granted for the broadcasting business in favour of Hindustan Broadcasting Co. Pvt. Ltd. and Bollywood Broadcasting Co. Pvt. Ltd. Maratha Broadcasting Co. Pvt. Ltd. has also made investment for acquisition of property in Pune.

In these circumstances, it is evident that all these payments/advances were made by the company for the furtherance of its business activities only. Activities in these companies are still going on and it is expected that ultimately huge surplus as income will be earned by the company.

From the aforesaid it is evident that out of loans of Rs.14,27,16,407/- whether secured or unsecured raised by the company, have been totally invested by the company as detailed above for the furtherance of its business activities.

In view of the aforesaid facts & circumstances and the business activities of real estate as well as

> investments being carried on by the assessee, it is evident that the expenses claimed by the assessee have been incurred wholly & exclusively for the purpose of business and therefore, are allowable business expenses."

6. Along with the said letter, the petitioner No. 1 had enclosed details of parties from whom interest was received as well as full details of the investments with the amounts, the reasons for the purpose of investment and full details of loans and advances to corporate bodies with justification. The same were enclosed as Annexures A to D.

7. By another reply dated 26th March, 2003, the petitioner No. 1 justified their claim why interest paid to the banks should be treated as revenue expenditure and not capital expenditure. The petitioner No. 1 also answered the query on the rate of interest keeping in view the rate of interest being charged on loans given by the petitioner No.1 and the interest being paid by it on loans taken from others. It was stated as under:-

> "2. With respect to your query on the rate of interest being charged on loans given @ 11.5% and 16% whereas, the interest is being paid @ 18% & 21% on loans raised, it is submitted that the assessee company had raised loans from Splender Finance Ltd. in earlier years @ 21% for payment of advances for acquisition of properties for real estate business. This loan was squared up during the year out of further loan raised from Bank @ 13% p.a.(average).

> Similarly, in the earlier years loan was raised from Supreme Holdings Ltd. @ 18% for business purposes. Part of this loan was also repaid by the company out of interest generation of income and efforts are being made to repay the balance immediately so that burden of interest on the company be reduced.
>
> The assessee company out of funds received from its shareholders or other inter-corporate bodies/directors etc., without any interest, paid the same against interest @ 16% p.a. to Energy Infrastructures India Limited. Such loans were also reduced during the year substantially.
>
> Another loan given during the year was to Asian Hotels Ltd. @ 11.50% p.a. This loan was in fact given on 28.3.2001 and as such no interest was accrued/received during the year.
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> The assessee submits that since loans received were utilized for business purposes, such loans cannot be considered similar to loans given by the company out of its surplus funds. The loans were given to earn additional income whereas loans received and utilized for business were raised considering that these were utilized for acquisition of stock in trade i.e. property and that such stocks shall be re-sold at an earlier date on profits and thus assessee company will be able to earn profits on the one hand and on the other hand will be able to retain other funds."

8. The Assessing Officer passed an assessment order on 28th March, 2003 accepting the returned income.

9. As stated above, notice under Section 148 of the Act dated 28th March, 2008 was issued for reassessment. The petitioner No. 1 furnished

their return of income on 21st April, 2008. By an earlier letter dated April, 2008, the petitioner No. 1 had asked the Assessing Officer for furnishing of reasons recorded for initiating proceedings under Section 147 of the Act. On 9th May, 2008, the petitioner No. 1 was provided with reasons for reopening of assessment. The reasons read:-

> "Reasons for the belief that income has escaped assessment. On perusal of the assessment record, it reveals that the following income has escaped taxation within the meaning of Section 147 of the Act. These are :
>
> (i) Return declaring a loss of Rs.59,43,670/- filed on 31.10.2001 was assessed under the provisions of section 143(3) of the I.T. Act, 1961 at returned loss on 28.3.2003.
>
> (ii) Audit scrutiny pointed out that interest on loans advanced by assessee to companies was not charged though interest paid on loans taken was allowed which resulted in under assessment of the income to the tune of Rs.55.40 lacs."

10. Petitioner No. 1 filed detailed objections questioning and stating that the reassessment proceedings were not justified and amount to mere change of opinion. It was further stated that there was no failure on the part of the petitioner No. 1 to disclose fully and truly all material facts, which is a precondition for initiating of reassessment proceedings after a

period of 4 years from the end of the assessment year. Reliance was p on several judgments including a Full Bench decision of this Court in the case of ***CIT vs. Kelvinator,*** *(2002) 256 ITR 1 (Del).* Reference was made to the questionnaire and the responses given by the petitioner No. 1 during the original assessment proceedings.

11. By order dated 15th July, 2008, the Assessing Officer rejected the objections raised by the petitioner No.1 and has recorded the following reasons for doing so:-

> "1. Section 149/151(1) states that if there is a reason to believe that income of the assessee has escaped assessment, notice u/s 148 can be issued with the prior approval of CIT if four years but not more than six years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.
>
> 2. In the instant case notice u/s 148 was issued on 28.03.2008 and sent through registered post on 28.03.2008. Another copy of the notice was served by hand on 31.3.2008 at 6.30 P.M. upon one Shri Raj Kumar of the assessee company. The service of the notice was therefore valid as it was served before the expiry of six years from the end of the relevant assessment year.
>
> 3. There was a reason to believe on the basis of information received from the audit scrutiny that your income had escaped assessment and the quantum was much more than Rs. 1 lacs.

> 4. Reasons were recorded for obtaining the prior approval of Ld. CIT, Delhi-V before issuing the notice.
>
> 5. From the above facts it is evident that all the legal and technical conditions were satisfied before issuing notice u/s 148 and the notice was not issued in absence of jurisdiction.
>
> The notice u/s 148 may therefore be treated as valid and proceedings u/s 143(2) be complied with accordingly.

12. Mere reading of the aforesaid order shows failure on the part of the Assessing Officer to deal with the contentions, issues and objections raised by the petitioner No.1. The order dated 15th July, 2008, is a cryptic and a general order, not specifically dealing with the factual position and the objections raised by the petitioner No.1.

13. The reasons for reopening of the assessment have been quoted above. It is recorded that audit scrutiny had indicated that interest was not charged, though interest on loans taken was allowed as a deduction. It is clear from the correspondence exchanged, questionnaire raised and the answers given by the petitioner No.1 that the question of interest received as well as the charge was specifically examined by the Assessing Officer before passing of the first/original assessment order. This question did not escape the notice of the Assessing Officer. He raised the issue and applied

his mind as is clear from the questionnaire and the answers given accepted the assessee's contention. (See paragraphs 4 to 7 quoted above, wherein the questionnaire, replies by the petitioner have been quoted and considered). We are not concerned and need not examine at this stage whether the original decision of the Assessing Officer was correct or incorrect. Incorrect decision by an Assessing Officer does not confer jurisdiction to reopen assessment even after the amendment of Section 147/148 of the Act with effect from 1st April, 1989. The said question is no longer res integra and was answered by Delhi High Court in the case of ***Jindal Photo Films Ltd. Vs. Commissioner Income Tax*** *(1998) 234 ITR 170* , in which it has been held as follows:-

> "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."
>
> ……
>
> Reverting back to the case at hand, it is clear from the reasons placed by the Assessing Officer on record as also from the statement made in the counter affidavit that all that the Income-tax Officer has said is 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 assessments ought to be re-opened 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 Officer 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."

14. The said reasoning was affirmed and adopted by a Full Ben Delhi High Court in ***Commissioner of Income Tax Vs. Kelvinator of India Ltd.*** *(supra).* This decision of the Delhi High Court was approved by the Supreme Court in ***Commissioner of Income Tax Vs. Kelvinator of India Limited*** *(2010) 2 SCC 723*, elucidating the law and observing as follows:-

> "5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1-4-1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.
>
> 6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf

of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer.

8. We quote herein below the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression `reason to believe' in Section 147*.--A number of representations were received against the omission of the words `reason to believe' from Section 147 and their substitution by the `opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, `reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended

> Section 147 to reintroduce the expression `has reason to believe' in 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.""

15. In the present case there is also no allegation that there was fault or failure on the part of the assessee to disclose true and full facts. The questionnaire and answers given have been mentioned above. True and full facts were given and furnished to the Assessing Officer. In the present case notice of reassessment was issued after end of four years from the end of the assessment year, therefore, the first proviso to Section 147 applies. The said section and its proviso read as under:-

> "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 recompute 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 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:
>
> Provided further 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."

16. The aforesaid first proviso has to be read with explanation 1 to Section 147, which reads as under:-

> *"Explanation 1*.—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 the foregoing proviso."

17. Reading of the explanation 1 of the proviso makes it clear that mere production of books of accounts or other material from which the Assessing Officer could, with due diligence, have discovered escapement of income, does not bar reassessment proceedings. Yet at the same time if the proviso applies and the assessee has fully and truly disclosed all the material facts necessary for assessment for that assessment year, reassessment proceedings cannot be initiated. Way back in 1961, The

Supreme Court in the case of ***Calcutta Discount Co. Ltd. Vs. CIT (*** *41 ITR 191* has observed as under:-

> "……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 remembered that people often differ as regards what inferences should be drawn from 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."
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> ……..
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> ……The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an underassessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for reassessment within a period of eight 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 four years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been underassess-ment and (ii) his having reason to believe that such 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 four 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

underassessment has resulted from non-disclosure of material facts, cannot therefore be accepted."

18. Following this judgment in ***Income Tax Officer, Calcutta and Ors. Vs. Lakhmani Mewal Das*** *(1976) 103 ITR 437 (SC)* it was observed as follows:-

> "7. .....Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account book or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax . Officer with regard to the inference which he should draw from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.
>
> 8. The grounds or reasons which lead to the formation of the belief contemplated by Section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment

> because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the Court to investigate. The sufficiency of grounds which induce the income-tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason 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 formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a Court of law (see observations of this Court in the case of Calcutta Discount Co Ltd. v. Income-tax Officer [1961]41ITR191(SC) and Narayanappa v. Commissioner of Income-tax. [1967]63ITR219(SC) while dealing with corresponding provisions of the Indian Income-tax Act. 1922).”

19. The decision above holds good even after the amendment with effect from 1st April, 1989 as has been observed by a Division Bench of this Court in ***IPCA Laboratories Ltd. Vs. Gajanand Meena*** *(2001) 251 ITR 461* wherein it has been observed as under:-

> "The position of law after 1st April, 1989, is not in dispute. By virtue of a proviso to Section 147, no action can be taken for reopening after four years unless the AO has reason to believe that income has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In the present case, the affidavit and the reasons disclosed indicate that the Department has purported to reopen the assessment only on the basis of change of opinion. This position is, in fact, conceded vide para 3 of the affidavit-in-reply dt. 13th march, 2001. The reasons also do not spell out failure on the part of the assessee to disclose fully and truly all material facts.... We are satisfied on the facts of the present case that reopening is sought on the basis of change of opinion. Further, even in the reasons, there is nothing to indicate that reopening is sought on the ground of the failure on the part of the Petitioner to disclose fully and truly all material facts."

20. In **Haryana Acrylic Manufacturing Company Vs. The Commissioner of Income-tax IV and Anr.** *(2009) 308 ITR 38* it has been observed :-

> "Viewed in this light, the proviso to Section 147 of the said Act, carves out an exception from the main provisions of Section 147. If a case were to fall within the proviso, whether or not it was covered under the main provisions of Section 147 of the said Act would not be material. Once the exception carved out by the proviso came into play, the case would fall outside the ambit of Section 147.
>
> Examining the proviso [set out above], we find that no action can be taken under Section 147 after the expiry of

four years from the end of the relevant assessment year if the following conditions are satisfied:

(a) an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year; and

(b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee:

(i) 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

(ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under Section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out 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. This is clearly not the case here because the petitioner did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If it is also found that the petitioner had disclosed fully and truly all material facts necessary for its assessment, then no action under Section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the petitioner had made a full and true disclosure of all material facts.

> In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to Section 147. If this condition is not satisfied, the bar would operate and no action under Section 147 could be taken.

21. The Supreme court in ***Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Ltd***. *(2007) 291 ITR 500* has expounded and explained :-

> "The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied : firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied

> before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."
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> (emphasis supplied)

22. We are not examining the contention relating to the audit objection, effect thereof and the alleged non-application of mind by the Assessing Officer. The said question is left open.

23. In view of the aforesaid reasoning, the present writ petition is allowed and a writ to certiorari is issued quashing the notice under Section 148 of the Act dated 28th March, 2008 and the order dated 15th July, 2008. Reassessment proceedings for the assessment year 2001-2002 are also quashed. There shall be no order as to costs.

SANJIV KHANNA, J.

CHIEF JUSTICE

JANUARY 25, 2011/ KKB