* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **ITA No. 2026/2010**

Reserved on: 10th January, 2012

% **Date of Decision: 23rd April, 2012**

Commissioner of Income Tax – VI, New Delhi ....Petitioner

Through Mr. Deepak Chopra, Sr. Standing Counsel

Versus

Usha International Limited …Respondent

Through Mr. Ajay Vohra & Ms. Kavita Jha, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

The present appeal by the Revenue under Section 260A of the Income Tax Act, 1961 (Act, for short) was admitted for hearing on 10th January, 2012 and the following substantial question of law was framed:-

> "Whether the Income Tax Appellate Tribunal was justified in holding that the jurisdictional pre-conditions for reopening under Section 147 of the Income Tax Act, 1961 are not satisfied in the present case?"

2. This appeal pertains to assessment year 2001-02 in the case of Usha International Limited, the assessee.

3. The assessee is engaged in the business of trading in consumer durables, such as sewing machines, kitchen appliances, room heaters, air-conditioners etc. For the assessment year 2001-02, the assessee filed its return of income on 29th October, 2001. The case was taken up for scrutiny by issue of notice dated 28th October, 2002 under Section 143(2) of the Act. The assessment order under Section 143(3) was passed on 30th January, 2004, computing the total income at Rs.7,02,73,350/-, as against the declared income of Rs.6,92,16,132/-.

4. Vide reasons recorded on 30th May, 2005, the assessment was reopened under Section 147 of the Act by issue of notice dated 30th May, 2005, under Section 148 of the Act.

5. The reasons recorded read:-

> "It is from the Notes of accounts that the assessee has received a sum of Rs.173 lakhs as consideration for the transfer of exclusive distribution rights of AC and water cooler. The amount was credited by assessee to the capital reserve account /c and was not treated as income for the year.
>
> The amount was chargeable under the head Capital gains being transfer of distribution rights. The Assessing Officer while completing the assessment has also not added the amount of capital gains and taxed accordingly.
>
> In view of the above, I have reason to believe that amount of Rs.173 lakhs being capital gains has escaped assessment. Notice under Section 148 issued."

6. It appears that the reasons were recorded by the Assessing Officer after audit objection was raised in the report

dated 10th February, 2005. The relevant portion of the said report reads as under:-

> "U/s 45(1) of the Income Tax Act, 1961, any profit or gains arising from the transfer of a capital asset effected in the previous year, shall be chargeable to income tax under "Capital gains" and shall be deemed to be the income of the previous year in which transfer took place. Further Section 2(14) defines a capital asset as property of any kind held by the assessee. This includes not only tangible asset but also intangible rights.
>
> Income tax assessment in case of above assessee for the assessment year 2001-02 was completed in January, 2004 at an income of Rs.7,02,73,350/- after scrutiny. Audit scrutiny revealed that as per notes to account, the assessee received a sum of Rs.173 lakhs as consideration for the transfer of exclusive distribution rights of Air conditioner and water cooler. The amount was credited by the assessee to capital reserve account of the assessee and was not treated by assessee as income for the year. This amount was chargeable under the head capital gains being transfer of distribution rights. Non inclusion of this amount in assessee's total income has resulted in income amounting to Rs.173 lakhs escaping assessment with consequent short levy of tax by Rs.39,09,800/- @ 20% + 13% SC – being tax on capital gains). Reply to above audit memo may please be furnished."

7. For the sake of completeness, it may be noticed that the Assessing Officer completed the re-assessment proceedings vide order dated 29th September, 2006. He made an addition of Rs.1,73,00,000/- as capital gains earned by the assessee on transfer of exclusive distribution rights. The aforesaid order was upheld by the CIT (Appeals) and the challenge to the reopening was dismissed. The Income Tax Appellate Tribunal (tribunal, for short) by the impugned order dated

30th April, 2010, has held that in the reasons recorded by the Assessing Officer as also in the audit objection dated 10th February, 2005, there was no reference to any undisclosed fact or any fresh material or fresh evidence . According to the tribunal, the Assessing Officer had referred in the reasons to the Notes on accounts which were available to the Assessing Officer at the time of original assessment. Thus, it is a case of change of opinion and accordingly the ratio of the decision of Full Bench of this Court in ***CIT vs. Kelvinator of India Ltd.,*** (2002) 256 ITR 1, which has been affirmed by Supreme Court in ***CIT vs. Kelvinator of India Ltd.,*** (2010) 2 SCC 723, is applicable.

8. Section 147 of the Act reads as under:-

> "147. Income escaping assessment.--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.

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.

Explanation 2.--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 no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but--

(i) income chargeable to tax has been under assessed; or

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

(iii) such income has been made the subject of excessive relief under this Act; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

*Explanation 3.— For the purpose of assessment or reassessment under this section, the Assessing Officer may assess 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 this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

9. For reopening an assessment made under Section 143(3) of the Act, the following conditions are required to be satisfied:-

(i) The Assessing Officer must form a tentative or prima facie opinion on the basis of material that there is under-assessment or escapement of income;

(ii) He must record the prima facie opinion into writing;

(iii) The opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.

(iv) Reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.

(v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. Explanation to the Section stipulates that mere production of books of accounts or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to "full and true disclosure of material facts".

10. For the present case, however, the proviso is not applicable as the "reason to believe" for issue of notice were recorded and notice was issued within four years from the end of assessment year.

Therefore, we are not required to examine whether the condition stipulated in the proviso is satisfied in the present case.

11. The tribunal in the impugned order has held that there is a requirement that fresh material must come to the notice of the Assessing Officer after passing of assessment order, in order to show that income has escaped assessment. The tribunal has recorded that no fresh material had come to the notice of the Assessing Officer except the Notes on accounts, which were also available at the time of original assessment. The exact reasoning given by the tribunal reads as under:-

> "9. From the above reasons recorded by the Assessing Officer u/s 147 and also the audit objection, it is seen that there is no mention of any fresh material or fresh judgments behind the reasons recorded by the Assessing Officer to hold that he has reason to believe that the impugned amount of Rs.173 lakhs of capital gain has escaped assessment. In the reasons recorded by the Assessing Officer, he is referring to Notes of accounts and nothing else. These notes of accounts were available before the Assessing Officer at the time of original assessment also. Now, the question is as to whether in the present case, the reopening is on mere change of opinion of not. In our humble opinion, in the present case, the reopening is based on mere change of opinion which is not valid. Our view is based on this factual aspect that no fresh material has come to the notice of the Assessing Officer for holding this belief that income has escaped assessment. In the reasons recorded by him, he has referred only to notes of account and nothing else. The judgment of Hon'ble jurisdictional High Court rendered in the case of Kelvinator of India Ltd. (supra) is squarely applicable in the present case and as per this judgment in the facts of the present case, the reopening is not valide. In the case of Kelvinator of India Ltd. (supra), it was the submission of the counsel of revenue that the reopening cannot be faulted as the same was based on information

derived from the tax audited report. The relevant para of this judgment being para 22 & 23 are reproduced below:-

> "22. We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the Income-tax Officer, but it is another thing to say that such information can be derived by the material which had been supplied by the asses- see himself.
>
> 23.We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said sub- mission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding with out anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.
>
> For the reasons aforementioned, we are of the opinion that answer to the question raised before this Bench must be rendered in the affirmation, i.e. in favour of the assesee and against the revenue. No order as to costs."

10. ……

> 11. Regarding judgment of Hon'ble Apex Court rendered in the case of ALA Firms (supra) we are in agreement with Ld AR of the assessee that this judgment is not applicable in the present case because the facts are different. In that case, the reopening was based on this premise that a binding judgment of Hon'ble jurisdictional High Court was not followed by the Assessing Officer although the same was available at the time of assessment but it was not noticed by the Assessing Officer. In the present case, there is no allegation that any decision of any High Court was not followed by the Assessing Officer in the original assessment. In the present case, in the original assessment no query was raised by the Assessing Officer with regard to this impugned receipt of Rs.173 lakhs and hence, in our opinion, for this failure on the part of the Assessing Officer, the initiation of proceedings u/s 263 by ld CIT being the superior officer of the Assessing Officer could have been justified but the reopening of the assessment u/s 147 cannot be justified. In view of our this decision, the other contentions raised by both sides with regard to invalidity of the re-assessment on the basis that the same is based on audit objection does not call for adjudication. Ground No.1 is allowed."
>
> (emphasis supplied)

12. We may notice that Section 147 of the Act underwent substantial amendments w.e.f. 1st April, 1989. Earlier there was a specific provision relating to new/fresh "information" which had resulted in a legal debate and litigation about satisfaction of the said condition. The new provisions do not make any specific reference to new "information".

13. In the Schedule 10 of the balance sheet, the assessee in Note No. 10 had stated as under:-

> "10. A sum of Rs.173 lacs received from M/s Daikin Shriram Airconditioning Private Limited as consideration for the transfer of exclusive distribution rights of Air

> conditioner and Water Cooler has been credited to Capital Reserve Account and out of the consideration of Rs.27 lacs for the transfer of Assets, a sum of Rs.13.32 lacs has been credited to respective assets Account and the balance Rs.14.68 lacs of Profits and Loss Account."

14. In paragraph 11 of the impugned order quoted above the tribunal has stated that in the original assessment proceedings, no query was raised by the Assessing Officer with regard to the impugned receipt of Rs.173 lacs and this was held to be a lapse and failure on the part of the Assessing Officer but it has been observed that it cannot be a ground to reopen the proceedings. Lapse on the part of the Assessing Officer cannot be a justification/cause to reopen assessment. This is a significant finding and the effect thereof has to be examined in the context of the plea of "change of opinion". We may, in this connection, also note the stand of the Revenue before us and what was recorded in the reassessment order by the Assessing Officer. The relevant portion of thereof reads as under:-

> "In this case, since the assessee has relinquish its distribution right which it was earlier holding to M/s Dalkin Shriram Air conditioning Private Limited in consideration of money and under section 2(47), the word transfer includes relinquishment of the asset or the extinguishment of any right thereon. Keeping in view the above, the exclusive distribution right transferred by the assessee to M/s Dalkin Shriram Air conditioning Private Limited would be comprehended within the meaning of the words "any rights". It would thus appear that the expression "any rights therein" is wide enough to take in all kinds of rights-qualitative and quantitative-in the capital asset.

> According to section 211(3A) of the Companies Act, the P&L Account and balance sheet has to comply with the accounting standards where in it is stipulated that the assessee, following mercantile system of accounting should record the income and expenditure in the P&L Accounts. The auditor, in no ambiguous term, has mentioned in para 10 of Schedule 10 of Audit Report – Accounting Polices and Notes to Accounts that the amount of Rs.173 lakh received from M/s Dalkin Shriram Air conditioning Private Limited has been taken directly to its capital reserve. This does not conform to the Accounting Standard nor as per the provision of Income Tax Rules."

15. The respondent assessee has filed a paper book which shows that a detailed questionnaire dated 13th August, 2003, was issued by the Assessing Officer at the time of original assessment, before the assessment order dated 30th January, 2004 was passed. In the said letter, a number of queries and questions were raised on divergent and different issues/aspects. However, it is noticeable that no question or query was raised in respect of Rs.173 lakhs i.e. Note 10. The Assessing Officer did not ask for any detail or justification. Copy of the agreement between the assessee and the third party under which payment of Rs.173 lakhs was made, was not required to be furnished and was not filed.

16. The question and issue is what is the effect of the aforesaid note given by the assessee and whether the Assessing Officer in spite of the said note being furnished along with the original return can initiate re-assessment proceedings? Whether this is a case of change of opinion?

17. The aforesaid questions arise in context that the re-assessment proceedings have been initiated on the basis of audit objections that "non-inclusion of this amount i.e. Rs.173 lacs in the assessee's total income has resulted in income amounting to Rs.173 lacs escaping assessment with consequent short levy of tax by Rs.39,09,800/- @ 20% + 13% SC – being tax on capital gains." Under the earlier provisions assessment would be reopened on basis of subsequent information. However, the Supreme Court in ***Indian & Eastern Newspaper Society Vs. Commissioner of Income Tax,*** *(1979) 119 ITR 996 (SC),* had held that audit objection on a point/opinion of law does not constitute "information" for reopening. It is submitted by the assessee that the object behind the principle of finality and the doctrine of change of opinion is that assessment should not be disturbed when there is no fault of the assessee. Thus, when an assessee is not to be blamed and has furnished full and true particulars, reopening is abuse of said power. Further once a note or specific entry is mentioned in the return/documents enclosed with the return of income, then it is for the Assessing Officer to complete the assessment after looking into and examining all the material placed before him. It can be presumed that he has examined all aspects. It would be farfetched and wrong to state that the Assessing Officer did not examine the question of taxability of

Rs.173 lacs. Moreover, in the present case, the Assessing Officer was required to examine the taxability of income under MAT provision. Thus, the presumption is that the Assessing Officer would have necessarily gone into the said question. Reliance is placed on the judgment of the Full Bench of this Court in the case of ***CIT vs. Kelvinator of India Ltd.,*** *(2002) 256 ITR 1 (FB)(Del)*. In the said case, which relates to the assessment year 1987-88, the amended Section 147 with effect 1st April, 1989 was examined. Decision of the Gujarat High Court in ***Praful Chunilal Patel vs. Makwana (M.J.)/Asst. CIT*** (1999) 236 ITR 832 (Guj.) was referred and dissented. It was held as under:-

> "We are, with respect, unable to subscribe to the aforementioned 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 the slightest pretext or otherwise would be entitled to reopen the proceeding. Assessment proceedings may be furthermore reopened 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…
>
> ….An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised

> to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

18. Referring to the decision of the Supreme Court in Kelvinator (supra), it is submitted that the words "tangible material" appearing therein would clearly show that there should be something new which should come to the knowledge of the Assessing Officer. It is submitted that in terms of the decision of the Supreme Court in ***Indian and Eastern Newspaper*** (supra), opinion of the audit party on a legal issue cannot be ground/reason to reopen. It is, accordingly, stated that notice under Section 147/148 cannot be issued even within a period of four years and is valid only if the following three conditions are satisfied:-

(i) Full and true particulars have not been filed at the time of original assessment.

(ii) Original assessment order does not show application of mind, and

(iii) The Assessing Officer had not raised queries to show application of mind. The queries need not specifically relate to point in issue, but can relate to other aspects. In such cases, the observations of the Full Bench of the Delhi High Court in the case of Kelvinator will apply.

19. On the other hand, the Revenue has submitted that change of opinion necessarily postulates and requires application of mind and formation of opinion at the first instance in the original proceedings. If the Assessing Officer by mistake or lapse does not examine a particular entry or a note in the return and overlooks it, there is no application of mind and thus it is not a case of mere change of opinion. Reliance is placed on the decision in the case of ***ACIT vs. Rajesh Jhaveri Stock Brokers Pvt. Ltd.,*** (2008) 14 SCC 208, in which the Supreme Court has held as under:-

> "**20.** As observed by the Delhi High Court (*sic* the Supreme Court) in *Central Provinces Manganese Ore Co. Ltd.* v. *ITO* for initiation of action under Section 147(*a*) (as the provision stood at the relevant time) fulfilment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is "reason to believe", but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the

escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction [see *ITO* v. *Selected Dalurband Coal Co. (P) Ltd.*; *Raymond Woollen Mills Ltd.* v. *ITO*].

21. The scope and effect of Section 147 as substituted with effect from 1-4-1989, 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."

20. With effect from 1st April, 1989, the provisions of Section 147 underwent substantial changes. It is agreed that the provisions have been widened, but still do not include mere change of opinion. The

cases wherein Assessing Officer has specifically examined the material and referred to the same in the assessment order, pose no difficulty. Delhi High Court in the case of ***CIT vs. Eicher Ltd.*** (2007) 294 ITR 310 (Del.) has observed that if the entire material has been placed by the assessee before the Assessing Officer during the original assessment and the Assessing Officer had applied his mind and accepted the view canvassed by the assessee, then merely because this is not expressly stated in the assessment order, is not a ground to conclude or hold that there was no application of mind. Such cases also fall under "change of opinion". It has been held that merely because the Assessing Officer has not specifically referred to the material on record in the assessment order but has accepted the stand of the assessee without making reference in the assessment order, does not indicate or give a ground to hold that the Assessing Officer did not apply his mind.

21. In the case of ***CIT vs. Batra Bhatta Company*** (2010) 321 ITR 526 (Del.), a Division Bench has observed that the Assessing Officer cannot reopen the assessment by recording that much deeper scrutiny than the one undertaken by the Assessing Officer is required. There must be some material upon which belief of the Assessing Officer should be founded. Thus, in cases where questionnaire is issued and the assessee

is asked to offer explanation, but the Assessing Officer does not make addition or make disallowance in the order, it can be stated that the Assessing Officer had applied its mind on the said aspect or issue. In such cases also re-assessment proceedings would be invalid on the ground of mere change of opinion.

22. However, there can be cases when the Assessing Officer does not refer to a particular aspect in the assessment order or did not raise any written question or query during the course of original assessment proceedings. To what extent in such cases, doctrine of "mere change of opinion" is applicable and will bar re-assessment proceedings when assessment is completed under Section 143(3), is the issue or question raised. There can be different aspects/factual matrix in which this question may arise. There can be cases where the Assessing Officer could not have completed the assessment without noticing or examining the aspect/fact. There can be cases where the entry/claim is a repetition and has been allowed and considered in earlier years. There can also be cases where the note/entry in the returns/accounts is there but there is nothing to indicate that the Assessing Officer examined/considered the entry/note. To what extent the presumption under Section 114 (e) of the Evidence Act would apply is the issue. The

contention/question is whether the presumption is rebuttable and when the presumption is rebutted. Further, whether the said presumption only applies to procedural aspects or even to substantive assertions relevant to the assessment.

23. Having considered the matter in depth, we feel that the matter should be examined by a larger Bench. We may note that the decision in the case of ***Rajesh Jhaveri Stock Brokers Pvt. Ltd.,(supra)*** relates to processing of returns under Section 143(1)(a) and not to regular assessment under Section 143(3). The Supreme Court in their decision ***CIT vs. Kelvinator of India Ltd. (supra)*** has not specifically referred to Section 114 of the Evidence Act and has also not specifically disapproved or approved the observations of the Full Bench of Delhi High Court with reference to the said Section. The Supreme Court in ***Indian & Eastern Newspaper Society*** (supra) had examined their earlier decision in ***Kalyanji Mavji & Co. Vs. CIT*** *(1976) 102 ITR 287 (SC)* and observed as under:-

> "It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the ITO discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to

reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power."

24. Referring to these decisions, another three Judges Bench of the Supreme Court in ***ALA Firm Vs. CIT*** (1991) 189 ITR 285 (SC) observed:-

" We have pointed out earlier that Kalyanji Mavji [1976] 102 ITR 287 (SC) outlines four situations in which action under section 34(1)(b) can be validly initiated. Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has only indicated that proposition (2) outlined in this case and extracted earlier may have been somewhat widely stated ; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji.'s case [1976] 102 ITR 287 (SC). The facts of the present case squarely fall within the scope of propositions (2) and (4) enunciated in Kalyanji Mavji's case [1976] 102 ITR 287 (SC). Proposition (2) may be briefly summarised as permitting action even on a "mere change of opinion". This is what has been doubted in Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Mavji and Co. [1976] 102 ITR 287 (SC). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which the Income-tax Officer had not earlier been conscious of. To give a couple of illustrations ; suppose an Income-tax Officer, in the original assessment which is a voluminous one involving several contentions accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently, he finds, in the forest of

papers filed in connection, with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the Income-tax Officer derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose an Income-tax Officer accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law, he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under section 147(b) by virtue of proposition (4) of Kalyanji Mavji [1976] 102 ITR 287 (SC). The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there, would not affect the position because the information that such facts or decision existed, comes to him only much later.

What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Mavji [1976] 102 ITR 287 (SC). The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the Income-tax Officer initiates reassessment proceedings in the light of "information" obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier, e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the Income-tax Officer having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian

and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC), it also ropes in cases of a "bare or mere change of opinion" where the Income-tax Officer (very often a successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor Income-tax Officer) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji [1976] 102 ITR 287 (SC). The second paragraph from the judgment in Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) earlier extracted has also reference only to this situation and insists upon the necessity of some information which makes the Income-tax Officer realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas [1968] 21 STC 326 (SC). Even making allowances for this limitation placed on the observations in Kalyanji Mavji [1976] 102 ITR 287 (SC), the position as summarised by the High Court in the following words represents, in our view, the correct position in law (at p. 629 of 102 ITR) :

> "The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently came by the material from the record itself, then such a case would fall within the scope of section 147 (b) of the Act."

Let us now examine the position in the present case keeping in mind the narrow but real distinction pointed out above. On behalf of the assessee, it is emphasised (a) that the amount of surplus is a very substantial amount, (b) that full details of the manner in which it had resulted had been disclosed, (c) that the profit and loss account, the profit and loss adjustment account and statement made before the Income-tax Officer had brought into focus the question of taxability of the surplus, and (d) that the decision in G. R. Ramachari's case [1961] 41 ITR 142 (Mad), had been reported by April 10, 1962. No Income-tax Officer can be presumed to have completed the assessment without looking at all of this material and the said decision. No doubt, some doubt had been thrown as to whether a statement had been given at the time of original assessment that the amount of surplus was not taxable as income or as a capital gain but the case has proceeded on the footing that such a statement was there before the officer. This, therefore, is nothing but a case of "change of opinion". On the other hand, the authorities and the Tribunal have drawn attention to the fact that the return, the section 143(2) notice and assessment were all on the same day and counsel for the Revenue urged that, obviously, in his haste, the Income-tax Officer had not looked into the facts at all. It is urged that no Income-tax Officer who had looked into the facts and the law could have failed to bring the surplus to tax in view of the then recent pronouncement in G. R. Ramachari's case [1961] 41 ITR 142 (Mad). Dr. Gauri Shankar submitted that the Tribunal has found that the Income tax Officer "had acted mechanically in accepting the return without bringing his mind to play upon the entry in the statement with reference to the distribution of the assets". He pointed out that there is no evidence of any enquiry with reference to this aspect and that, the amount involved being sufficiently large, the Income-tax Officer, if he had been aware of the existence of the entry would certainly have discussed it. He urged that the question whether the Income-tax Officer had considered this matter at the time of the

> original assessment or not is purely a question of fact and the Tribunal's conclusion thereon having been endorsed by the High Court, there is no justification to interfere with it at this stage.
>
> We think there is force in the argument on behalf of the assessee that, in the face of all the details and statement placed before the Income-tax Officer at the time of the original assessment, it is difficult to take the view that the Income-tax Officer had not at all applied his mind to the question whether the surplus is taxable or not. It is true that the return was filed and the assessment was completed on the same date. Nevertheless, it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It is not as if the assessment record contained a large number of documents or the case raised complicated issues rendering it probable that the Income-tax Officer had missed these facts. It is a case where there is only one contention raised before the Income-tax Officer and it is, we think, impossible to hold that the Income-tax Officer did not at all look at the return filed by the assessee or the statements accompanying it. The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee's contention that the surplus was not taxable....".

25. Looking at the aforesaid decisions and the nature of controversy, we feel that the following substantial questions of law should be referred to a larger Bench for elucidation and examination. This is necessary as we have to examine the decision and observations made by the Full Bench of this Court in ***Kelvinator (supra)***:-

"(i) What is meant by the term "change of opinion?

(ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?

(iii) Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?

(iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?"

26. This order will be placed on the administrative side before Hon'ble the Acting Chief Justice for constitution of a larger Bench.

-Sd-
(SANJIV KHANNA)
JUDGE

-Sd-
(R.V. EASWAR)
JUDGE

April 23, 2012
kkb