Reopening & Reassessment proceedings u/s 147 of the IT Act

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Agenda

1. Basic provisions of section 147
2. Controversies surrounding section 147
3. Rulings on Writ challenging Reassessment Proceedings
4. Key observations in case of Kelvinator

Reassessment Proceedings

- **Empowers the Assessing officer to reopen the assessment for any assessment year if :**
  - he has **reason to believe** that
  - any income which is chargeable to tax has escaped assessment –

    Phrase "if the **AO has reasons to believe**" stronger than the words "if the **AO is satisfied**" *[Ganga Saran & Sons Pvt Ltd [(1981) 130 ITR 1 (SC)]*
  - Reopening on mere suspicion or rumour - Not justified

- **Scope of reassessment**
  - Can assess or reassess any income which has escaped assessment
  - Can recompute the loss or depreciation allowance
  - Can assess or reassess any other income (which is not the subject matter of any appeal or revision) which has escaped assessment
  - Cannot reduce the income below what has already been assessed in the original assessment

Reassessment Proceedings

- **Full and true disclosure of material facts – Exception to time limit [First Proviso to Section 147]**
  - No action beyond 4 years from the end of the relevant assessment year;
  - If assessment / reassessment has already been made under section 143(3)/ 147;
  - unless the income chargeable to tax has escaped assessment by reason for the failure:-
    - on the part of the taxpayer to file return of income under section 139(1)/142(1)/148;
    - to disclose fully and truly all material facts necessary for his assessment

- **Second Proviso to Sec 147: (inserted by Finance Act, 2012 w.e.f. 1.07.2012)**
  - First proviso not applicable in case of any asset located outside India

- **Third Proviso to Sec 147 :**
  - AO may assess or reassess such income other than the income involving matters which are subject to appeal, reference or revision, which is chargeable to tax and has escaped assessment.

- **Production of books & Accounts - [Expln.1 to sec. 147]**
  - Mere production of books – Does not amount to full and true disclosure of facts
  - Whether disclosed in books/accounts, Return of Income, Notes to Return, Tax Audit report sufficient to demonstrate true & full disclosure?

Reassessment Proceedings

- **Deemed cases of escapement – [Expln. 2 to sec. 147]…….**

(a) No return of income furnished and no assessment made and total income chargeable to tax exceeds the maximum amount not chargeable to tax.

(b) Return filed but no assessment made and :

- Understated the income; or
- Claimed excessive loss or allowances, deduction etc

(ba) Failed to furnished report in respect of international transaction *[Inserted w.e.f. 1.07.2012]*

(c) Assessment under section 143(3) / 144 made but:

- Income is under assessed; or
- Income assessed at a very low rate; or
- Excessive relief given; or
- Excessive loss/depreciation allowance or any other allowance computed

(d) Have any asset (including financial interest in any entity) located outside India *[Inserted w.e.f. 1.07.2012]*

Reassessment Proceedings

- **…….Deemed cases of escapement – [Expln. 2 to sec. 147]**

Amendment by Finance Act 2016- [clause (ca)] w.e.f. 1-6-2016

- On the basis of information or document received from the prescribed authority under section 133C(2), AO notices that :
  - Return is not furnished- the income of the assessee exceeds the maximum amount not chargeable to tax; or
  - Return is furnished and the assessee has :
    - Understated the income; or
    - Claimed excessive loss or allowances, deduction etc.

- **Expln.3 to sec. 147 (inserted by Finance Act (No 2) 2009, w.r.e.f 1-4-1989)**
  - AO 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 proceedings u/s 147;
  - notwithstanding that reasons for such issue have not been included in reasons recorded u/s 148(2)

Reassessment Proceedings-Recording and Furnishing of Reasons

- **Required to record his reasons before the issue of notice under section 148** [Ferrous Infrastructure (P.) Ltd. vs DCIT (2015) 63 taxmann 201 (Del)]
- **Reasons to be furnished** *[GKN Driveshaft (India) Ltd. v/s ITO (2003) 259 ITR 19 (SC)]*
  - **Assessee needs to file a return before requesting for reasons**
  - **AO bound to furnish reasons within reasonable time**
  - **On receipt of reasons, assessee entitle to file objections**
  - **Objections to be disposed by passing a speaking order**
- **Reasons for reassessment not furnished to the assessee before completion of assessment, held reassessment not valid**
  - *CIT v. Videsh Sanchar Nigam Ltd. (2011) 340 ITR 66 (Bom.)*
  - *Tata International Ltd. vs. DCIT (2012) 50 SOT 465*
- **Reassessment framed by the assessing officer invalid and to be set aside**
  - **Without disposing of the objection** – *Rabo India Finance Ltd vs DCIT (2012) 27 taxman 163(Bom)*

    IOT Infrastructure and Eng Services Ltd vs ACIT (2010) 329 ITR 547 (Bom)
  - **Without supplying reasons** - *Bhabesh Chandra Panja vs. ITO (2010) 41 SOT 390 (TM) (KOL)*

Reassessment Proceedings-Recording and Furnishing of Reasons

- **Only reasons recorded by Assessing officer considered- not be supplemented with new reasons when challenged before the Court**
  - *Prashant s. Joshi vs. ITO (2010) 324 ITR 154 (Bom)*
  - *Hindustan Lever Ltd. (2004) 268 ITR 332 (Bom)*
  - *Haryana Acrylic vs CIT (2008) 308 ITR 38 (Del)*

- **Conclusive evidence not requisite at the stage of formation of belief, must be based on independent application of mind. In absence of any nexus, whatsoever, between the reasons recorded and factual findings in the assessment order, reassessment held to be invalid.**
  - *Harakchand K Gada vs ITO (2015) ITA No 2810/Mum/2014*

- **Reasons recorded without application of mind, merely on the basis of audit objection, not valid**
  - *Purity Tech Textiles Pvt. Ltd. vs. ACIT (2010) 325 ITR 459 (Bom)*
  - *Jagat Jayantilal Parikh vs DCIT (2013) 32 taxman 161 (Bom)*
  - *N.K. Roadways (P.) Ltd vs ITO (2015) 63 taxman 342 (Guj)*
  - *Adani Developers (P.) Ltd vs ITO (2016) 66 taxman 125 (Guj)*

Reassessment Proceedings-Notice

- **Time limit for issue of notice under section 148**

  (a) If income escaped amounts to or likely to amount less than Rs. 100,000 – Four years from the end of relevant assessment year

  (b) If income escaped amounts to or likely to amount Rs. 100,000 or more – Six years from the end of relevant assessment year

  - *In respect of income in relation to any asset (including financial interest in any entity) located outside India – 16 years [Inserted by Finance Act 2012]*
  - *In respect of agent of a non-resident under section 163 – extended from 2 years to 6 years [Inserted by Finance Act 2012]*

- **Time limit is for 'issue' and not 'service' of notice under section 148 (within 6 years from end of AY): Section 149 [***Mayawati vs. CIT (2010) 321 ITR 349 (Del.)]; R.K.Upadhyaya vs Shanabhai P Patel (1987) 33 taxman 229 (SC)*

- **Participation by assessee in assessment proceedings on receipt of copy of notice can be deemed to be service of notice u/s 148(1)** *[CIT vs Three Dee Exim(P)Ltd.(2012) 20 taxman 146 (Del)]*

- **Notice under section 148 may be issued at any time for the purpose of making an assessment or re-assessment or re-computation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceedings under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law : Section 150(1)**

Reassessment Proceedings

- **May be initiated more than once in respect of the same assessee for the same assessment year –if earlier notice quashed on technical reasons** [R.Kakkar Glass and Crockery House (2002) 254 ITR 273 (P&H)]
- **If assessment under section 143(3) has been annulled by higher authorities, reopening cannot be opened on that ground. Reason to believe must exist**[Deepa Restaurant & Bar (2014) 42 Taxman 452 (Mum Trib)]
- **Initiation of two parallel proceedings on a similar subject matter, cannot sustain. If first proceeding have been validly initiated, then such proceedings must come to an end for making a way for the initiation of another proceedings on the same subject matter.** [Sushil Kumar Jain vs ACIT ITA No 181/Del/2016]
- **Second assessment proceeding cannot be started while the first is pending** [Comunidado of Chicalim (2001) 247 ITR 271 (SC)]
- **Where rectification proceedings had been dropped, reassessment proceedings could not have been started on the basis of same materials and virtually for the same reasons.** [Berger Paints India Ltd vs ACIT (2010) 322 ITR 369 (Cal)]
- **For the benefit of revenue and no additional claims other than made earlier in original assessment proceedings *[Sun Engineering Works P. Ltd. (1992) 198 ITR 297 (SC)]***
  - Claim for deduction of any expenditure in respect of that income which has escaped assessment [*CIT vs. Caixa Economica De God [1994] 119 CTR 250 (Bom),K Sudhakar S. Shanbhang vs. ITO [2000] 241 ITR 865 (Bom.)]*

Reassessment Proceedings

- **Reassessment Proceedings can be dropped [Sec 152(2)]**
  - Not filed an appeal or revision application against original assessment order; and
  - Already been assessed at a higher rate than what he would be liable to when escaped income is also taken into account

Particulars	Time Limit (amended by FA, 2016)
Completion of assessment u/s 147	**9 months** from the end of FY in which notice u/s 148 was served upon the assessee
In case of transfer pricing proceedings	**21 months** from the end of FY in which Notice u/s 148 is served.
Where an assessment is made on a partner of the firm in consequence of an assessment made on the firm under section 147 of the Act.	**12 months** from the end of the month in which the assessment order in the case of the firm is passed.

Whether AO is empowered by Explanation 3 to look beyond the matters covered in the notice issued u/s 148?

Relevant Provisions

Section 147

- Reason to believe that income has escaped assessment
- AO may assess or reassess **such income**
- '**and also**' any other income which has escaped assessment
- Which comes to his notice subsequently in the course of the proceedings

Explanation 3 to Section 147 (inserted vide Finance Act(No 2) of 2009 **w.r.e.f 1-4-89:-**

- AO may assess or reassess the income in respect of any issue which has escaped assessment;
- Such issue comes to his notice subsequently in the course of the proceedings under this section;
- Notwithstanding that reasons for such issue have not been included in reasons recorded u/s 148(2)

Judicial Precedents

- **CIT vs. Jet Airways (I) Ltd. (2011) 331 ITR 236(Bom)**
  - The words ‘and also’ as in s. 147 are used in a cumulative and conjunctive sense.
  - If escapement of income which was the basis for formation of reason to believe, is not assessed or reassessed, it would not be open for the AO to independently assess some other issue.
  - In absence of assessment of ‘such income’, the AO cannot independently assess ‘any other income’
  - If he intends to do so, a fresh notice u/s 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee
- **Ranbaxy Laboratories Ltd vs CIT (2011) 12 taxmann 74 (Del)**
  - AO had the jurisdiction to reassess issues other than the issues in respect of which proceedings were initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive.
  - Legislature could not be presumed to have intended to give blanket powers to the AO that on assuming jurisdiction u/s 147, he would keep on making roving inquiry and thereby would include different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction.
  - For every new issue coming before the AO during the course of proceedings, and which he intends to take into account, he would be required to issue a fresh notice u/s 148.

Judicial Precedents

- **PVP Venture Ltd (2016) 65 taxmann 221 (Mad)**
  - Justification for reopening has to be tested only on strength of order recording reasons.
  - Where reopening cannot stand on strength of reasons recorded u/s 148(2), revenue cannot justify reopening by finding some other point or other post-facto after reopening.
  - Any number of reasons indicated in the show cause notice cannot justify reopening.
  - Once the reasons are found to be within the parameters and proceedings are validly commenced, all issues not covered in the original notice will also be subject to scrutiny.

- **N Govindaraju (2015) 60 taxmann 333 (Kar)**
  - Once satisfaction of reasons for the notice is found sufficient, then addition can be made on all grounds or issues (with regard to any other income also) which may come to the notice of AO subsequently during the course of the proceedings even though reason for notice for 'such income' which may have escaped assessment, may not survive.
  - Explanation 3 has been added so as to also bring 'any other income' which may have escaped assessment within the ambit of tax.
  - 'Such income' used in the first part of sec 147 is with regard to which reasons have been recorded u/s 148(2) . 'Any other income' is with regard to where no reasons have been recorded before issuing notice and subsequently comes to notice of the AO during the course of the proceedings.
  - The second part can be assessed independent of the first part even when no addition can be made with regard to 'such income', but the notice is found to be valid.

Where assessment has been completed under section 143(3), whether AO can reopen the assessment in absence of new material?

Issue in detail

Issue in detail

In case, where assessment has been completed under section 143(3) and AO reopens the assessment in absence of new material on the premise that:-

- No specific query was raised in respect to the same and therefore, earlier AO has not applied his mind to specific issues or ;
- There is no discussion in the assessment order, therefore, it can be presumed that AO has not formed an opinion or;
- in light of explanation 2 (c) to section 147, AO is within his jurisdiction to reopen the completed assessment on the plea that income has escaped assessment.

Is the reopening of completed assessments valid in absence of new material?

Judicial Precedents

Favourable to assessee		Against the assessee	
Judgment	**Citation**	**Judgment**	**Citation**
CIT v Kelvinator of India Ltd.	(2002) 256 ITR 1 (Del.)(FB)	CIT v. Usha International Ltd	[2012] 25 taxmann.com 200 (Del.) (FB)
CIT v Amitabh Bachchan	[2013] 33 taxman 535 (Bom)	Praful Chunnilal Patel v ACIT	[1999] 236 ITR 832 (Guj.)
Rabo India Finance Ltd v DCIT	[2012] 346 ITR 528 (Bom.)	EMA India Ltd v ACIT	[2009] 226 CTR 659(All.)
Cartini India Ltd. v. ACIT & Ors.	[2009] 314 ITR 275 (Bom)	Eleganza Jewellery Ltd vs CIT& ors	[2014] 52 taxman 46 (Bom)
Ralson India Ltd.v DCIT	[2014] 43 taxman 293 (Del)	CIT v Popular Vehicles & Services Ltd	[2010] 191 Taxman 333(Ker.)
		CIT & Anr. v Rinku Chakraborthy	[2011] 56 DTR 227 (Kar)

Ratio…

Favorable	Against
A) Kelvinator of India (supra) (Del HC, FB) • "…When a regular order of assessment is passed in terms of the said sub-s. (3) of s. 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 cl. (e) of s. 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 purported without application of mind would itself confer jurisdiction upon the AO to reopen 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"	**A) Usha International Ltd (supra) (Del HC) (FB)** • "The presumption raised under illustration (e) to Section 114 of the Evidence Act, means that when official act is proved to have been done, it will be presumed to have been regularly done **but it does not raise any presumption that an act was done for which there is no evidence or proof (see Law of Evidence by Ratan Lal and Dhiraj Lal, 2002 Edition, pages 986-987)**"

Ratio…

Favorable	Against
B) Rabo India (supra) (Bom HC) • ***"..we are not inclined to presume negligence or indifference on the part of an AO in such circumstances. It is reasonable therefore, to presume that the AO had applied his mind to the agreements and matters connected therewith relating to the agreement***. **C) Amitabh Bachchan (Supra) (Bom HC)** • "…Both the Commissioner of Income Tax (Appeal) and the Tribunal have correctly come to the conclusion that ***there was no fresh tangible material before the Assessing Officer to reach a reasonable belief that the income liable to tax has escaped assessment***….the same material was a subject matter of consideration during the proceedings for assessment leading to order dated 29th March, 2005. In the circumstances there could be no basis for the Assessing Officers to form a belief that income has escaped assessment. **It is a settled position of law that review under the garb of reassessment is not permissible**.."	**B) Praful Lal Chunni lal (supra) (Guj HC)** • "The assessee in such cases ***cannot defend the initiation of action on the ground that the facts were already placed on record and that the AO must have or ought to have considered them***….the words "escaped assessment" where the return is filed, are apt to cover the case of a discovery of a mistake in the assessment caused by either an erroneous construction of the transaction or due to its non-consideration, or, caused by a mistake of law applicable to such transfer or transaction even where there has been a complete disclosure of all relevant facts upon which a correct assessment could have been based.." **C) EMA India (supra) (Allahabad HC)** • "**where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the ITO. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority"**

Ratio…

Favorable	Against
D) Ralson India Ltd(Supra) (Del HC) • *"…If the concept of change of opinion is to be removed, as was urged by the Revenue, the AO would be left with unbridled and arbitrary powers…The tangible material that can lead to reasons to believe must be material that is attributable to the assessee and not material that is attributable to a change in the opinion of the Assessing Officer, on the material already available prior to original assessment "*	**D) Eleganza Jewellery Ltd (supra) (Bom HC)** **Since the grounds of reassessment were not the subject matter of original assessment, AO was justified to have a reasonable belief that income chargeable to tax had escaped assessment and the same does not stem from a change of opinion. HC observed that only a prima facie view of AO was necessary to issue notice u/s 148 and not a cast iron case of escapement of income was required.** (Assessee filed an SLP against the Bombay HC order which was dismissed by SC vide 7553/2014 dtd 31st Mar 2014)

Possible Pleas

Possible Pleas

- ***Clause (e) of s. 114 of the Indian Evidence Act,*** provides that the judicial and official acts have been regularly performed. (i.e. Once an assessment is made a presumption can be drawn that the AO has applied his mind on all the material before him)
- To reopen the case AO needs **Tangible/new material and not old material** already with him. Technically speaking, one can reopen the assessment by virtue of explanation 2(c) of section 147 but it is well settled position that expl. cannot go beyond the main provision. Therefore, reopening on same material would amount to review which is not permissible under the powers of reassessment.
- ***If AO chose not to apply his mind***, later on ***he cannot benefit from his own wrong and reopen the assessment.***
- ***Practically, it is not feasible*** for AO to record the findings in respect to all items. Therefore, presumption can made in view of aforesaid clause of Evidence Act that AO has applied his mind to the material on record and formed an opinion. (**Usha International observed that there has to be some material to suggest that AO have examined the subject matter in original proceedings**)
- If the contention of revenue is accepted, then all succeeding AO will have right to reopen assessment within a period of 6 years, thereby making the time limit of assessment redundant.

Where case was not selected for scrutiny and only intimation u/s 143(1) was passed, whether reopening of the assessment is permissible within four years in absence of new material as the time limit to issue notice under 143(2) has been expired?

Judicial Precedents

Favourable		Against	
Judgment	**Citation**	**Judgment**	**Citation**
CIT v Orient Craft Ltd.	[2013] 29 taxman 392 (Del)	ACIT v Rajesh Jhaveri Stock Brokers (P) Ltd	(2007) 291 ITR 500 (SC)
Bapalal & Co. Exports v JCIT	[2007] 289 ITR 37 (Mad.)	DCIT vs Zuari Estate Development & Investment Co. Ltd	(2015) 373 ITR 661 (SC)
Shipra Srivastava & Anr. v ACIT	[2009] 319 ITR 221 (Del.)	Plethora of negative judgments post Rajesh Jhaveri decision	
CIT v Ved & Co	[2007] 302 ITR 328 (Del.)		
Telco Dadajee Dhackjee Ltd v DCIT	[ITA No 4613/M/2005] Dated 12 May 2010		
HV Transmissions Ltd v ITO	[ITA no 2230/M/2010] Dated 7 Oct 2011		
Aipita Marketing P. Ltd. v ITO	[2008] 21 SOT 302 (Mum.)		
CIT vs Shri Atul Kumar Swami	ITA no 112 of 2014 (Del)		

Ratio

Favorable (Post Considering Rajesh Jhaveri)	Against
A) Bapalal (supra) (Mad HC) • "…***in the absence of any new material, the AO is not*** empowered to reopen an assessment irrespective of the fact whether it is made under ***s. 143(1) or s. 143(3)*** of the Act." **B) Orient Craft (supra) (Del HC)** • the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. **This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in CIT vs. Kelvinator (supra).**	**A) Rajesh Jhaveri Stock Brokers (2007) 291 ITR 500 (SC)** • "***there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise……So long as the ingredients of s. 147 are fulfilled, the AO is free to initiate proceeding under s. 147 and failure to take steps under s. 143(3) will not render the AO powerless to initiate reassessment proceedings even when intimation under s. 143(1) had been issued***."

…Ratio

Favorable (Post Considering Rajesh Jhaveri)	Against
C) HV Transmissions (Supra) (ITAT, Mum) "..***it is still open to an assessee*** to challenge the notice under section 148, in a case where the return was earlier processed under section 143(1), on the ground that there was no tangible material before the Assessing Officer to enable him to entertain a prima belief that income chargeable to tax has escaped assessment…" • "...As is clearly evident from the reasons recorded by the AO, there was ***no new material*** coming to the possession of the AO on the basis of which the assessment completed u/s 143(1) was reopened and this position has not been disputed even by the learned DR…In our opinion, the Third Member decision of the Tribunal in the case of ***Telco Dadaji Dhackjee Ltd. (supra) is squarely applicable in the present case*** and respectfully following the same, we hold that the initiation of reassessment proceedings by the AO itself was bad in law	

…Ratio

Favorable (Post Considering Rajesh Jhaveri)	Against
D) Shri Atul Kumar Swami (supra) (Del HC) 18-03-14 ***"..a valid reopening of assessment has to be based only on tangible material to justify the conclusion that there is escapement of income. In the present case the note forming part of return clearly mentioned and described the nature of the receipt under a non-compete agreement….. The Court is of the opinion that mere conclusion of the proceedings under section 143(1) ipso facto does not bring invocation of powers for reopening the assessment."***	

Possible pleas

- **Possible pleas**

- Where the time limit for issuance of notice u/s 143(2) had lapsed, AO will use reassessment as tool to scrutinize the return which is not permissible.

- Even though law does not specify the condition of new material, it can be read in accordance with the legislative intention.

- For instance, Hon'ble SC in case of GKN Drive shafts (2003) 259 ITR 19 has upheld the passing of objection order. Similarly, concept of "change of opinion" is not prescribed by Statue but these concepts have been evolved in view of interpretation and observations of Apex Courts after going through the legislative intentions and provisions of the Act.

- Otherwise power to reopen will be abused by the AO to reopen the assessment and what he cannot do directly, he will do indirectly.

- Allowing the AO to reopen the assessment on the basis of return of income completed u/s 143 (1), would amount to review of the earlier proceeding and abuse of power by AO.

Position after mandatory e-filing of ROI and electronic generation of Intimation under section 143(1), without any scrutiny by the AO??

Whether in case assessee has made appropriate disclosures in return of income etc. , AO may reopen the assessment beyond 4 years on the premise that mere production of records does not amount to full & true disclosure?

Full & True disclosure

Favourable to assessee		Against the assessee	
Judgment	**Citation**	**Judgment**	**Citation**
Calcutta Discount Co v CIT	(1960) 41 ITR 191 (SC)	Dr. Amin Pathology Laboratories v HCIT	(2001)252 ITR 673 (Bom)
CIT v Bhanji Lavji	(1971) 79 ITR 582 (SC)	Consolidated Photo & Finvest v ACIT	(2006) 151 Taxman 41
CIT v Foramer France	(2003) 129 Taxman 72 (Sc)		
CIT vs. Corporation Bank Ltd	(2002) 254 ITR 791 (SC)		
Arthus Anerson & Co. vs. ACIT	(2010) 324 ITR 240 (Bom)		
Gemini Leather Stores	(1975) 100 ITR 1 (Bom)		
M/s Rock Castle Property Pvt Ltd Vs CIT	WP 738 of 2012 (Bom.) Dated : October 22, 2012		
SAK Industries Private Limited Vs DCIT	WP 1884 of 2012 (Del.) Dated: July 16, 2012		

Full & True disclosure

Favorable to assessee	Against the assessee
Calcutta Discount Co (supra) (SC) *"…Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. 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. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?"*	**Amin Pathology (supra) (Bom HC)** *"…The assessee-firm had claimed expenses in respect of all purchases. However, an amount of Rs. 6,70,758 represented unpaid purchases. It is for this reason that the Assessing Officer has come to the conclusion for issuance of notice under section 148 that the assessee-firm had suppressed an income to the extent of Rs. 6,70,758. Under Explanation 1 to the proviso, mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance-sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso. In the present case, the facts show that the Assessing Officer overlooked the aforestated item."*

Whether reopening of the assessment is permissible in view of retrospective amendments in the Act?

Retrospective amendments

Retrospective Amendments - to cover indirect transfers, royalty on copyrighted article, definition of international transactions etc. Whether retrospective amendment of law by Parliament in itself is sufficient for reopening concluded assessment

CBDT Clarification F.No. 500/111/2009 dated May 29, 2012

The Board, after due consideration, hereby directs that in case where assessment proceedings have been completed under section 143(3) of the Act, before the first day of April, 2012, and no notice for reassessment has been issued prior to that date; then such cases shall not be reopened under Section 147 / 148 of the Act on account of the abovementioned clarificatory amendments introduced by the Finance Act, 2012. However, assessment or any other order which stand validated due to the said clarificatory amendments in the Finance Act 2012 would of course be enforced.

Judicial Precedent - DIL Ltd vs ACIT [343 ITR 296] (Bom HC)

"..it is evident that in so far as the diminution in the value of investment of Rs.1.28 crores is concerned, Explanation (1)(i) was inserted into the provisions of Section 115JB by the Finance (No.2) Act, 2009 with retrospective effect from 1 April 2001. Clause (i) of Explanation (1) was introduced to include the amount or amounts set aside as provision for diminution in the value of investment. ***In view of the retrospective amendment of law by Parliament, the Assessing Officer may have reason to believe that income has escaped assessment. But that in itself is not sufficient for reopening an assessment beyond the period of four years****. Beyond the period of four years when an assessment is sought to be reopened, there must be a failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment. In fact, the retrospective amendment of law by Parliament would negate the inference which is sought to be drawn of the failure to disclose material facts."*

Retrospective amendments

Can reassessment be initiated on the basis of retrospective amendment ?

Ester Industries Ltd vs Union of India (2013) 39 taxman 107 (Del)	Avadh Transformers P Ltd vs Union of India (2013) 33 taxman 24(All)
Reassessment initiated within 4 years	Reassessment initiated beyond 4 years
Retrospective legislative amendment of relevant provision forms the basis for belief that income had escaped assessment, notice u/s 148 is valid.	Unless it is justified that there is failure on the part of the assessee to make full and true disclosure, reassessment not justified beyond a period of four years . There can be no deemed failure as contended by the Revenue.
Thus, retrospective amendment constitutes tangible material permitting the reopening of assessment.	Reassessment cannot be justified on the basis of retrospective amendment. Affirmed by SC in WP No 21477/2013

Reasons supplied to the Assessee beyond limitation period

- **If notice issued within time limit but copy of reasons for re-opening not supplied within time – whether re-assessment valid ?**

Favorable to asessee

- **Haryana Acrylic 308 ITR 38 (Del) [***notice u/s 148 was issued on 29-3-2004 and if the date of filing of the counter-affidavit be taken as the date of communication of reasons then it is 5-11-2007]*

"Apart from this, one must not forget the provisions of s. 149 which prescribe the time-limit for a notice under s. 148. Sec. 149(1) (b) stipulates the outer limit of six years from the end of the relevant assessment year where the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees one lakh or more for that year. This means that a notice under s. 148, in the present case, could not, in any event, have been issued after six years from the end of the asst. yr. 1998-99, i.e., after 31st March, 2005….. In a case, where the notice has been issued within the said period of six years, but the reasons have not been furnished within that period, any proceedings pursuant thereto would be hit by the bar of limitation inasmuch as the issuance of the notice and the communication and furnishing of reasons go hand-in-hand - **Followed by Balwant Rai Wadhwa ITA No. 4806/Del/2010 (Del)**

Against the assessee

- **A.G. Holdings (p.) Ltd. v ITO (2012) 21 Taxmann.com 34**

"..Therefore, the real ratio of the judgment, as we understand it, is that the reassessment was invalid because the notice under Section 148(1), had it been issued on the basis of the reasons recorded on 5.11.2007, would have been hopelessly time barred. In our opinion, this is the basis upon which the judgment of Haryana Acrylic Mfg. Co. (supra) was rendered by this Court....The only feature in the instant case is that there was a delay of 4 1/2 months in supplying the reasons recorded by the AO to the assessee. This, by itself, cannot invalidate the reassessment proceedings"

Whether in case reassessment has been initiated u/s 147, is the assessee entitled to file writ before the High Court invoking jurisdiction under Article 226 of the Constitution ?

Recent Judgments

Maintainability of Writ Petition challenging Reassessment Proceedings

Favourable to assessee		Against the assessee	
Judgment	**Citation**	**Judgment**	**Citation**
Aroni Commercials Ltd vs ACIT	WP No 1327 of 2013 dtd 16th July 2014 (Bom HC)	CIT vs Chhabil Dass Agarwal	[2013] 36 taxman 36 (SC) dtd 8th Aug 2013
Dell India (P.) Ltd vs JCIT	WP No 8901 of 2015 dtd 23rd March 2015 (Kar HC)	Jeans Knit Private Limited vs DCIT **	WP No 5789/2013 dtd 29th April 2014 (Kar HC)
		Kalanithi Maran & Others ***	WP No 347 & 348/2014 and many other batch of appeals dtd 4th July 2014 (Mad HC)

** Stayed by 3 Judge Bench of SC vide 19652/2014 on 11th Aug 2014

*** Stayed by 2 member Bench of SC vide 15470/2014 on 14th Jul 2014

Recent Judgments

Maintainability of Writ Petition challenging Reassessment Proceedings

Favorable to assessee	Against the assessee
Aroni Commercials Ltd (Supra) dtd 16-07-2014 Reopening u/s 147 on the basis of change of opinion hits the validity to enter into the jurisdiction to reopen completed assessment. Distinguishes jurisdiction facts(JF) with adjudicatory facts(AF). JF are those facts which gives jurisdiction to enter upon enquiry, while AF comes up for consideration after validly entering upon enquiry i.e. having jurisdiction . There could be occasions where JF could itself be a matter of factual enquiry. In such a case even if the challenge is w.r.t. JF, yet the Court in its discretion may not entertain the petition. Holds facts in Kalanithi were adjudicatory, while in Aroni's case the facts are jurisdictional.	**Chhabil Dass Agarwal (Supra) dtd 08-08-2013** Rule of self imposed limitation-when efficacious alternative remedy available, writ jurisdiction by HC shall not be entertained. Act provides complete machinery for providing relief in respect of improper orders. Assessee not permitted to abandon the machinery to invoke jurisdiction of HC under Article 226 of the Constitution. Neither the Assessee-writ petitioner described the available alternate remedy under the Act as ineffectual and non-efficacious while invoking the writ jurisdiction of the High Court. Nor has the High Court ascribed cogent and satisfactory reasons to have exercised its jurisdiction in the facts of instant case.

Recent Judgments

Maintainability of Writ Petition challenging Reassessment Proceedings

Favorable to assessee	Against the assessee
Dell India (P.) Ltd (Supra) dtd 23-03-2015 Contention of Revenue that HC has no jurisdiction to entertain the writ petition on the ground of petitioner having alternate and efficacious remedy available under law is not acceptable. Extraordinary jurisdiction is available on actions of the authorities on following ground: • Without jurisdiction • Violation of principles of natural justice • Without authority of law • Validity of vires of statutory provision being under challenge Availability of alternative remedy under the Act would not be a bar to examine notice issued u/s 148, if it is challenged on jurisdictional error.	**Jeans Knit Private Limited (Supra) dtd 29-04-2014** Hierarchial remedy to be exhausted before invoking the jurisdiction under Article 226 (reliance on SC decision in Chhabil Dass Agarwal) Writ not maintainable since AO did follow due procedure and recorded sufficient reasons to justify issuance of section 148 notice. HC held that the only remedy available to the facts and circumstances of the case was to file an appeal after the reassessment order u/s 147 of the Act.

Recent Judgments

Maintainability of Writ Petition challenging Reassessment Proceedings

Favorable to assessee	Against the assessee
	Kalanithi Maran (Supra) dtd 04-07-2014 Distinguishes between 'jurisdictional fact' and 'adjudication fact'. Holds jurisdiction under article 226 can be invoked where no adjudication is required on facts. Where adjudicatory process is involved on merits , the remedy available is to go through the procedure provided in the enactment. Both assessee and Revenue to exhaust the statutory hierarchy of remedy of appeals before seeking relief by invoking writ jurisdiction. HC held that pre-adjudication proceedings not deciding the issues shall not be put into challenge while exercising the discretionary power under Article 226.

Recent Judgments

Validity of Reassessment

Rival Contentions	Held
Issue:- Whether information submitted to DRP pursuant to queries raised by him on restructuring constitutes 'new material' for the AO to initiate reassessment? Whether it constitutes change of opinion? **Assessee's Contention** • Transfer was part of restructuring exercise and was within the knowledge of the AO and DRP • Reopening is on the basis of change of opinion which is not permissible in law • No new material had surfaced therefore reassessment cannot be initiated **Revenue's Contention** • AO had not considered the said transaction in his draft order • DRP had not given any directions with regard to taxability of said transaction, the AO cannot include on his own. • AO was well within his rights to construe material placed before DRP as 'new material'	**Lahmeyer Holding GMBH vs DDIT (WP No 7417/2012 dtd 19-5-15) (Del)** • DRP Procedure part of assessment proceedings • On the restructuring issue, DRP raised queries and the assesse gave detailed reply which was noted as observations. • No addition made either by the DRP or by the AO. The fact that no addition was made would imply that an opinion was formed that transaction is not exigible to tax. • No new facts or material were there; Reassessment on the basis of same material is contrary to law. • DRP could examine the issues arising out of assessment proceedings even though such issues were not subject to variations suggested by AO.

Few key observations of Kelvinator (supra)

Key observations of Kelvinator (supra)

Facts the case:

- A return of income declaring income of Rs. 1,62,890 was filed on 29th June, 1987, by the assessee wherewith computation of income, annual report, tax audit report, etc. were also filed. Order u/s 143(3) was passed on November 12, 1989.
- Subsequently, a notice under s. 148 of the Act was issued on 20th April, 1990, for reopening of the assessment in terms of s. 147 thereof (case of reopening within 4 years).
- The assessee objected to the said reopening of the assessment. However, an order of reassessment was 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.
- CIT(A) quashed the reassessment proceedings holding that the assessee had disclosed all the facts. It was held that no new fact or material was available with the AO, 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 AO and as such the reassessment proceedings could not have been validly initiated.
- On further appeal the Tribunal upheld the afore-mentioned decision of the CIT(A). It also held that the amended provision of s. 147 of the IT Act was applicable. It reiterated that it was a case of mere change of opinion.
- An application filed by the Department to refer the question whether Tribunal was correct in holding that the proceedings initiated under s. 147 of the said Act were invalid on the ground that there was a mere change of opinion

Key observations of Kelvinator (supra)

Key Observations:

1. *If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the AO. The AO who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to reopen the proceeding.*
2. *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 AO does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in s. 154 of the Act.*
3. *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 reassessment or by way of rectification of mistake.*
4. ***In the event it is held that by reason of s. 147 if ITO exercises its jurisdiction for initiating a proceeding for reassessment only upon mere change of opinion, the same may be held to be unconstitutional. We are, therefore, of the opinion that s. 147 of the Act does not postulate conferment of power upon the AO to initiate reassessment proceeding upon his mere change of opinion.***
5. *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 AO 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.*

Key observations of Kelvinator (supra)

6. *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 AO to initiate a proceeding under s. 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-s. (1) of s. 143 or sub-s. (3) of s. 143.*
7. *When a regular order of assessment is passed in terms of the said sub-s. (3) of s. 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 cl. (e) of s. 114 of the Indian Evidence Act the judicial and official acts have been regularly performed.*
8. *If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the 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.*

SC affirmed the Full Bench judgment in the case of Kelvinator on the short question :

"*Whether the concept of "change of opinion" stands obliterated w.e.f. April1, 1989?"*

Held: ***"…one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would go ve arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen…..The AO has no power to review, he has power to re-assessee……One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after April 1, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."***

Thank You

CA Sanjiv Chaudhary