THOUGHT PAPER ON PROVISIONS OF SECTION 147/148 OF THE INCOME TAX ACT 1961

Section 147 empowers the assessing officer to assess or reassess any income chargeable to tax which has escaped assessment. He can assess or reassess this income if he has reasons to believe that the income has escaped assessment for any assessment year subject to the provisions of section 148 and 153 of the Act. W.e.f. 01.04.1989 the assessing officer can assess the escaped income for which he has formed a belief AND also any other income chargeable to tax which has subsequently come to his notice in the course of the proceedings under this section or recompute the loss, or the depreciation allowance or any other allowances as the case may be.

I would first of all like to emphasis upon the basic steps which are essential for the A.O. to start the proceedings of reassessment and if any of the steps are not taken by the A.O. it can amount to invalidity of the reassessment proceedings.

1. EXAMINATION OF THE INFORMATION BY THE A.O.

The first and the foremost step is that A.O. should examine the information in his possession which he is going to rely on, for formation of his belief that income of the assessee has escaped assessment. The information should be specific clear and have nexus with the assessee. Further the information should be available at the time of re-opening of the assessment and not subsequent to the re-opening of the assessment by issuing a notice u/s 148 in this regard attention is drawn towards the judgment of Special Bench reported in 240 ITR(Nagpur) AT 12 & 311 ITR (P&H) 38

Further the information should be specific and not general in nature. The information collected by the DDI without any specific proof that it relates to the assessee in particular cannot be used against the assessee. For example in a general Hawala Case unearthed by the DDI the same cannot be used by the AO against a particular assessee unless there is a confessional statement against the assessee by the Hawala Operator. Reference can be made to the following judgments in this regard:

92 ITD(Asr)(SB) 85, 98 ITD(Asr)(SB)227, 97 TTJ(Jd)573, 329 ITR(Del)110, 248 CTR(Del)33, 325 ITR(Del)285, 132 TTJ(Nag)490.

2. FORMALTION OF THE BELIEF

After the examination of the information the A.O. has to form a belief that income has escaped assessment. Again for formation of the belief the information should be credible and should have a live link and nexus with the belief about escapment of income.The belief is to be formed on the basis of the information available with the A.O. at that time. He cannot go ahead in re-opening of the assessment issue a notice and then search for the material. It is also important to note that there should be reasons to forma belief and not reasons to suspect. Whatsoever strong the suspicion it may be. In this regard reference can be made to 90 ITD Patna(TM) 90, 104 TTJ(Asr)353.

Further there is an another aspect also to formation of the belief and that is the satisfaction should be the own satisfaction of the A.O. and not the borrowed satisfaction. If the A.O. re-opens an assessment simply on the basis of satisfaction recorded by some other authority like Sales Tax, Excise or Director Investigation and does not record his own satisfaction re-opening by the assessment has been held as bad. Reference can be made to the following judgments in this regard:

313 ITR(Raj)231, SLP dismissed(St)27, 135 ITD(Ahd)1, 220CTR Mad 335 & (Raj)361 & (Del)531 125 TTJ(Del)816, 236 CTR(Del)362.

The Hon'ble Supreme Court in the case of ACIT Vs. DHARIYA CONSTRUCTION CO. reported in 328 ITR 515 has held that having examined the record, we find that in this case, the department sought reopening of the assessment based on the opinion given by the District Valuation Officer (DVO). The opinion of the DVO per se is not an information for the purposes of reopening assessment under section 147 of the Income Tax Act, 1961. The A.O. has to apply his mind to the information, if any, collected and must from a belief thereon. In the circumstances, there is no merit in the civil appeal. The department was not entitled to reopen the assessment

3. RECORDING OF THE REASONS

After formation of the belief that income has escaped assessment the next important step is that A.O. has to record reasons in writing that income has escaped assessment. The reasons should be clear specific and not vague it should clearly point towards the escaped income and not based on any kind of suspicion, conjunctures and surmises. It is not only mandatory upon the A.O. to record the reasons but also it is mandatory upon the A.O. to supply the copy of the same to the assessee after he files his return enabling him to make his case. In this regard following judgments may kindly be referred to:

248 ITR(P&H)266, 203 CTR(Bom)232, 258 ITR(Bom)183, 96 TTJ(Hyd)832, 106 TTJ(JP)114, 112 TTJ(Del)445, 218 CTR(Guj)53, 114 ITD(Del)(TM)69, 305 ITR(P&H)161, 131 TTJ(Chd)(UO)34, 312 ITR(Del)166, 340 ITR(Bom)66, 350 ITR(Bom)120, 350 ITR(Guj)131.

4. ISSUE OF NOTICE U/S 148

After recording of the reasons the A.O. has to issue a notice u/s 148 directing the assessee to file the return of income. Such notice is required to be served upon on the assessee also as per the provisions of section 282 of the Act.

Following issues must be kept in mind for issuing of the notice.

i. The notice must be issued by the A.O. who has the jurisdiction of the case of the assessee. Issue of notice u/s 148 by the A.O. having no jurisdiction over the assessee is invalid and all the proceedings carried on in pursuance of that notice are invalid and can be quashed. Further A.O. recording reasons and issuing notice has to be same person. Reference may be made to 93 TTJ Chennai 537, 147 TTJ(Ahd)730.

ii. Section 151 provides for the sanctions to be obtained before issuing of the notice u/s 148. If original assessment has been framed u/s 143(3) or section 147 has been made for any relevant assessment year no notice can be issued by an A.O. below the rank of ACIT or DCIT unless the JCIT has given ;a sanction on the ;reasons recorded by the A.O. that it is fit case for issue of notice. Provided that after the expiry of four years in such case from the end of relevant asst year no notice without the sanction of CIT or CCIT can be issued. In cases other than stated aforesaid no notice shall be issued by an A.O. below the rank of JCIT after the expiry of four years from the end of relevant assessment year without the sanction of JCIT. However only sanction is required from the JCIT, CIT & CCIT as required and notice need not be issued by them.

In case where notice u/s 148 is issued in violation of the provisions of section 151 discussed above proceedings undertaken against such notice are invalid.

Reference may be made to the following judgments:

249 CTR(Delhi)357 (Bombay)370

iii. Issue of Notice with in the limitation period

Provisions of time limit for issue of notice have been provided in section 149 of the Act. The time limit for issue of notice is four years from the end of the assessment if the escaped income is below one lac or six years from the end of the assessment year in case the escaped income is more than one lac. Further w.e.f. 01.07.2012 if the income escaped is in relation to any asset(including financial interest in any entity) located outside India the limitation period for issue of notice has been extended to 16 years from the end of relevant assessment year. It is very important to note that although it is mandatory to serve the notice issued to the assessee u/s 148 but for the purpose of limitation prescribed u/s 149 the phrase used is only issued and not served. Hence for counting of the limitation period it is mandatory for the A.O. to issue the notice u/s 148 within the limitation period and service of the same can be subsequent also. However before making the assessment, reassessment or recomputation u/s 147 it is mandatory upon the A.O. to serve such notice issued u/s 148.

iv. Issue of Second Notice u/s 148 during the pendency of the first notice

It is well settled law that after issue of the notice u/s 148 reassessment, assessment or recomputation proceedings are set in motion u/s 147. These proceedings need to be terminated by either passing an assessment/reassessment/recomputation order within the limitation period or the reassessment proceedings need to be dropped after satisfaction by the A.O. that no income has escaped assessment. Thus when any notice is issued u/s 148 during the pendency of that notice no second notice u/s 148 can be issued. If a second notice is issued then any order passed in pursuance of that notice shall be invalid. In this regard the following judgments may be considered rendered by Supreme Court various High Courts and Benches of ITAT.

83 ITR(SC)104, 48 ITD(Jaipur)124, 227 ITR(Raj)302, 51 ITR(SC)557, 90 ITR(Bom)435, 181 ITR(Ker)234, 189 ITR(Pat)476, 247 ITR(SC)271, 242 ITR(SC)381, 74 TTJ(Chd)901, 198 CTR(Guj)360, 207 CTR(Raj)463, 112TTJ(Del)220.

It may however be clarified here that assessment can be re-opened any number of times within the period of limitation but the second notice u/s 148 can only be issued after terminating the proceedings initiated by the first notice.

5. FILING OF RETURN

After receiving the notice u/s 148 it is for the assessee to file his return of income which if he feels has any escaped income would include such escaped income or in the case where assessee feels that there is no escaped income he can file the same return or give in writing that original return filed by the assessee may be treated as return filed in pursuance to notice u./s 148.

6. OBTAINING COPY OF THE REASONS RECORDED

As per my discussions above it is observed that it is mandatory upon the A.O. to record the reasons for re-opening of the assessment. Now after filing of the return it is the right of the assessee to obtain the copy of the reasons recorded by the A.O. Once this request is made the A.O. is bound to provide the copy of the reasons recorded within a reasonable time but before starting the reassessment proceedings. In this regard the attention is invited to the judgment of Punjab & Haryana High Court reported in 305 ITR 124 besides the judgments already considered for mandatory recording of the reasons and supply the same to the assessee.

7. FILING OBJECTIONS BY THE ASSESSEE TO THE REASONS RECORDED & DISPOSAL OF OBJECTIONS BY THE A.O.

After receiving the copy of the reasons recorded the assessee shall within a reasonable time file his objections to the reasons recorded with the A.O. It is important to note here that objections must be filed within a reasonable time before the initiation of the reassessment proceedings. In case the assessee files his objections the objections must be disposed off by the AO by way of a speaking order. This procedure was will settled by the Hon'ble Apex Court in the famous case of GKN Drive Shaft reported in 259 ITR(SC)19. In addition to this judgment one can also visit the following judgments:
185 CTR(P&H)587, 169 CTR(Raj)549, 270 ITR(Ker)280, 305 ITR(P&H)124, 220 CTR(Del)631, 257 CTR(Guj)123, 346 ITR(Bom)81

8. REMEDY OF THE ASSESSEE AFTER DISPOSAL OF THE OBJECTIONS BY THE A.O.

After the disposal of objections by the AO or non disposal of the same by a speaking order before starting the reassessment proceedings, the assessee if aggrieved can file a writ petition before the High Court. However it must be kept in mind that High court will

not go into the merits of the case but would interfere into the case if prima facie it is established that the reasons recorded by the AO are incorrect or if any jurisdictional defect in the notice or procedure, also if it is the case of prima facie change in opinion etc. It is also worth mentioning here that AO after disposal of the objections and before initiation of reassessment proceedings must give reasonable time to the assessee to decide about his action. Wherein the reasons recorded the AO could not lead to the conclusion that escapement of income is over 1 lac. Notice issued was quashed 183 CTR(P&H)237.

9. REASSESSMENT PROCEEDINGS

The last step to be taken by the AO is to start reassessment proceedings. He has to issue notice u/s 143(2)/142(1) for commencement of proceedings. He can only make enquiries about the issues recorded in the reasons of re-opening of the assessment. It is not permissible for the AO to make fishing and Roving enquiries for finalizing the reassessment of the assessee. The following judgments in this regard may be considered: 255 ITR(P&H)220, 110 TTJ(Jd)118, 289 ITR(P&H)378, 90 ITD(Del)TM1, 275 ITR(P&H)294

It is often seen that the AO normally serves a detailed questionnaire for framing the reassessment where all the information is called for. It is very important to note that the assessment and reassessment proceedings are different and the assessee must object to the questions asked by the AO which have nothing to do with the reasons recorded of escaped income. At the same time in respect of other items finality of assessment cannot be disturbed as discussed by the detailed judgment of Punjab & Haryana High Court in the case of Vipin Khanna reported in 255 ITR 220. It is also made clear that there is no bar on the AO to assess any other escaped income other than the recorded in the reasons provided if he has any information in his possession that such income has escaped assessment.

The limitation for completing the reassessment proceedings is prescribed u/s 153 of the Act and under sub section 2 of section 153 it is provided that no order of assessment/reassessment/recomputation shall be made u/s 147 after the expiry of one year from the end of financial year in which notice u/s 148 was served.

Now would like to discuss certain very common situations where the reassessment proceedings have been held to be bad by various courts:

i. JURISDICTION OF A.O.

As discussed above it is mandatory upon the A.O. to record the reasons of initiating the reassessment proceedings before issue of notice u/s 148 of the Income Tax Act. Hence the A.O. gets its power to issue the notice and start the reassessment proceedings from the reasons recorded by him. The jurisdictional Pb. & Haryana High Court had very clearly settled the law in the case of Atlas Cycle Industries reported in 180 ITR 319 wherein it was made clear that if no addition is made in the assessment order by the Assessing Officer in respect of the escaped income recorded in the reasons of re-opening and the other additions are made in respect of other escaped income which has no nexus with the reasons recorded than the A.O. losses his jurisdiction for making reassessment and the assessment order passed by him was treated to be invalid. This judgment was followed and discussed by various Benches of ITAT and the High Court in the following judgments:

108 TTJ(Asr)1, 108 ITD(Agra)115, 239 CTR(Bom)183, 242 CTR(Del)117, 339 ITR(Pat)272, 253 CTR(Guj)321, 258 CTR(Guj)168, 128 TTJ(Mum)514, 217 CTR(Raj)345, 237 CTR(Del)473, 220 CTR(Raj)629, 246 CTR(Chatti)255.

However the Pb. & Haryana High Court in the case of Manjinder Singh Kang Vs. CIT reported in 344 ITR 358 took a contrary stand and held that under explanation 3 to sec. 147 which was inserted by Finance Act (No. 2) 2009 retrospectively w.e.f. 1.4.89 the AO had the power to make additions even if he has not made any additions in respect of escaped income mentioned in the reasons recorded. Thus the High Court distinguished the judgment of Atlas Cycle Industries which as per them was prior to the amendment With due respect to the Hon'ble High Court this judgment is not correct in law because if we read the provisions of section 147 it clearly provides that if the AO has any reasons to believe that any income has escaped assessment he shall record the reasons to reassess such escaped income AND any other escaped income which comes to its knowledge during the reassessment proceedings. Thus the word used is AND which clearly states that first the escaped income noticed by him prior to issue of notice u/s 148 is to be assessed and only other escaped income not mentioned in the reasons can be assessed. The High Court had wrongly interpreted

explanation 3 which is only clarificatory in nature. In fact the recent judgment of Gujrat High Court in the case of ITO Vs. Mohmed Juned Dadani 258 CTR 168 the Hon'ble Gujrat High Court has concurred with Atlas Cycle Inds. And dissented from judgment of Pb. High Court in the case of Manjinder Singh Kang. To sum up inspite of the Pb. &

Haryana High Court judgment in Manjinder Singh Kang case I feel that the A.O. completely losses his jurisdiction on the case of reassessment in case he does not make any addition in respect of reasons recorded by him. Unfortunately we are bound by the unbalanced judgment of Pb. & Haryana High Court which is binding in the territory of Punjab.

ii. <u>REOPENING OF ASSESSMENT PASSED U/S 143(3)AFTER 4 YEARS WHERE ALL PARTICULARS DISCLOSED</u>

The proviso to section 147 provides that where an assessment is framed u/s 143(3) or u/s 147 no action shall be taken under this section after the expiry of 4 years from the end of relevant assessment year unless any income chargeable to tax has escaped assessment by reason of the failure on part of the assessee to make a return u/s 139 or in response to a notice u/s 142(1) or 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year. Thus it is a very well settled law that no reassessment can be made after 4 years in a case where original assessment has been framed u/s 143(3) unless there is a failure on the part of the assessee to disclose the any material which has come to the notice of the A.O. Now it is often seen that A.O. issues the notice u/s 148 on the basis of the same facts which are available at the time of original assessment also and in such cases the reassessment framed by him is bad. The following judgments can be visited on this account:

229 CTR(Bom)160, (Del) 167, 230 CTR(Allah)167, 129 TTJ(Ahm)495, 238 CTR(Bom)28 & 283, 137 TTJ(Ahm)(TM)129, 335 ITR(Guj)234, 340 ITR(Bom)299, 343 ITR(Del)129, 141,155 & 185, 250 CTR(Bom)116,119, 344 ITR(Del)1, 346 ITR(Guj)193,199,204,326,355, 347 ITR(Guj)546, 151 TTJ(Jod)28, 348 ITR(SC)299, (Bom)335,(Del)452, 352 ITR(Guw)305.

iii. <u>CHANGE OF OPINION</u>

Another important aspect of 148 is that once the A.O. forms an opinion at the time of original assessment he cannot subsequently go back from his opinion and orders passed u/s 143(3) by the recourse of 147/148 of the Act. It is immaterial that whether 4 years have elapsed from the end of relevant Asst. Year or it is prior to that. The change of opinion is not permissible in both the cases whether the assessment is being re-opened after 4years or within the 4 years. The only difference between reopening the assessment

within 4 years and after 4 years is that in a case where the assessment order passed u/s 143(3) is proposed to be reopened after the 4 years from the end of relevant assessment year then the condition that the assessee had failed to disclose the necessary material alongwith the return or during the assessment is also to be satisfied. This condition is not applicable to the cases of re-opening an assessment within the period of 4 years from the end of relevant assessment year. The change of opinion is not permissible under both the circumstances. In the case of Kelvinators of India Ltd. Reported in 174 CTR 617 Full Bench of Delhi High Court has held the re-opening of assessment bad on account of change of opinion within 4 years of the end of relevant assessment year. This judgment has been approved by Supreme Court in 228 CTR 488. The following judgments may also be visited where the re-opening of the assessment has been held to be bad within a period of 4 years where no new material other than the facts disclosed by the assessee before the A.O. has been brought on record and reassessment has been framed on the basis of change of opinion similar facts.

230 CTR(Bom)157, 323 ITR(Bom)570, 231 CTR(Del)526, 125 ITD(Hyd)259, 233 CTR(Guj)573, 132 TTJ(Del)204, 339 ITR(Guj)535, 252 CTR(HP)316, 133 ITD(Mum)543, 348 ITR(Mum)325, 341 ITR(Guj)312, 253 CTR(Del)113, 344 ITR(Del)37, 254 CTR(Guj)362, 346 ITR(Bom)361, 255 CTR(Bom)113

Recently the full Bench of Delhi High Court again discussed the re-opening of the assessment within 4 years in the case of CIT Vs. Usha International Ltd. Reported in 253 CTR 113. The Hon'ble High Court has held that PER SANJIV KAHANNA, L.(FOR HIMSELF AND ON BEHALF OF A.K. SIKRI, ACTG.C.J.);

The expression "change of opinion" postulates formation of opinion and then a change thereof. In the context of s. 147, it implies that the AO should have formed an opinion at the first instance, i.e., in the proceedings under section 143(3) and now by initiation of the reassessment proceeding, the AO proposes or wants to take a different view. In the context of assessment proceedings, it means formation of belief by an AO resulting from what he thinks on a particulars question. It is a result of understand, experience and reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. Question of change of opinion arises when an AO forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand. Experience shows that the AOs do examine several aspects and raise queries but when the written opinion is expresses in form of the assessment order, there is no discussion or elucidation on certain aspects and issues decided or held in favour of the assessee. Assessee is not the author of

the assessment order and has no control over what the AO wants to state of mention. It is therefore clear that (i) reassessment proceedings can be validly initiated in case return of income is processed under s. 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion; (ii)reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion"; (iii) reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the AO does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the AO did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the AO had formed an opinion in the original assessment, though he had not recorded his reasons. Thus where an AO incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to s. 263 is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.—CIT Vs. Kalvinator of India Ltd.(2002) 174, CTR (Del)(FB)617, 256 ITR 1(Del)(FB) and CIT Vs. Kelvinator of India Ltd. 228 CTR(SC)488, 34 DTR(SC) 49, 2 SCC 723 followed; CIT Vs. Eicher Ltd., 213 CTR(Del)57, 294 ITR 310(Del) approved; CIT Vs. H.P. Sharma 122 ITR 675(Del) and consolidated Photo & Finvest Ltd. Vs. Asstt. CIT(2006) 200 CTR(Del)433, 281 ITR 394(Del)overruled.

If new facts, material or information comes to the knowledge of the AO, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the AO at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression 'material facts' means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the AO proceeding on the bass of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. ---Dalmia (P) Ltd. Vs. CIT & Anr. 64 DTR(Del)417 approved. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the AO could have with due diligence inferred facts does not amount to full and true disclosure. In cases of reopening after four years as per the proviso to s. 147, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when reassessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the reassessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, reassessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution, it is clarified that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this : when proviso applies the condition stated therein must be satisfied and in other cases it is not a pre-requisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

If a subject-matter, entry or claim/deduction is not examined by an AO, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, principle of "change of opinion" cannot and does not apply. There is a difference between change of opinion and failure or omission of the AO to form an opinion on a subject-matter, entry, claim, deduction. When the AO fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion.----A.L.A. Firm Vs. CIT 93 CTR(SC)133, 189 ITR 285(SC) relied on.

Sec.114 of the Indian Evidence Act is a general provision dealing with presumption of facts, inferences drawn from facts, patterns drawn from experience and observations based upon habits of the society, human action, usages and ordinary course of human affairs and conduct. The presumption is no evidence or proof. It only shows on whom the burden of proof lies. Sec. 114 is permissive and not a mandatory provision. Presumption of facts under s. 114 is rebuttable. The presumption raised under illustration(e) to s. 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. The Supreme Court in their decision in Kelvinator of India Ltd. Had examined the question whether "change of opinion" can justify reopening of assessment. The Supreme Court has not stated or made any observation with reference to s. 114 of the Evidence Act.

There may be cases where the AO does not and may not raise any written query but still the AO in the first round/original proceedings, may have examined the subject-matter, claim etc. because the aspect or question maybe too apparent and obvious. To hold that the AO in the first round did not examine the question of subject-matter and form an opinion, would he contrary and opposed to normal human conduct. Such cases have tobe examined individually. Some matters may require examination of the assessment order or queries raised by the AO and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the AO. The aspects and questions examined during the course of assessment proceedings itself may indicate that the AO must have applied his mind on the entry, claim or deduction etc. It maybe apparent and obvious to hold that the AO would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case.

PER R.V. EASWAR, J.:

In a case where failure to furnish full and true particulars is not shown in the reasons recorded for reopening the assessment, albeit within four years, the assessment made under s. 143(3) cannot be reopened on the ground that no opinion was formed by the

assessing authority in the original assessment in respect of matters that are the subject-matter of the notice under s.148. Abuse of power to reopen an assessment made under s.143(3) arises when the assessing authority despite being possessed of full and true particulars furnished by the assessee, makes no reference to them in the assessment order framed under s.143(3) but merely reopens he assessment on the ground that he did not form any opinion when he made the assessment.

There is no difference between a case where a query is raised by the AO which is replied to by the assessee with supporting evidence or material, but the opinion of the AO on the assessee's reply is not recorded in the assessment order, and a case where even without a query from the AO, the assessee voluntarily discloses full and true particulars necessary for his assessment, which are not referred to in the assessment order and the opinion of the AO has not been expressly recorded therein. The distinction which was sought to be made on behalf of the Revenue between the two types of cases was that in the former the AO has manifested his intention to examine the matter by raising a query, whereas in the latter type of cases he has not even done that. The distinction is too simplistic for acceptance. The question is not whether any query was raised or not The question is whether the assessee fulfilled his duty of disclosing fully and truly all material particulars and primary facts necessary for the assessment of his income. Even in a case where a query is raised and a reply is furnished with all supporting material, if the AO chooses to keep silent in the assessment order, what difference does it make that he did not even raise a query and also chose to be silent in the assessment order? In both the cases the basis requirement that the assessee should have adduced all material particulars and primary facts fully and truly, stands satisfied. The raising of a query may only indicate that the AO had inquired into the matter, but if nothing is recorded in the assessment order, that would still not show that opinion he took of the matter, and one has to only presume that he did accept the assessee's version. There is thus qualitatively no difference between the two types of cases. The presumption under s.114(e) of the Evidence Act is applicable to both types of cases.

The judgment of the Full Bench of this Court in Kalvinator is applicable to all cases where the assessment was completed under s.143(3) of the Act, subject only to the condition that the assessee has furnished fully and truly all material particulars and primary facts necessary for the assessment It is not a question of deemed formation of opinion along; it goes beyond that, and the substratum of the ruling is that the AO cannot

take advantage of the perfunctory manner in which he completed the assessment. This does not necessarily mean that wherever the AO has completed the assessment under s.143(3) it must be taken as if he has discharged his duties in a perfunctory manner. The ratio of the judgment is rooted to the salutary principle that the assessees shall not be subjected to harassment if they have furnished full and true particulars at the time of the original assessment. It certainly does not imply that every assessment order passed under s. 143(3) without an elaborate discussion of various contentions and claims put forth by the assessee is necessarily a wrong order to be corrected later by resorting to s. 147. Making an assessment to income tax represents the quantification of the charge to tax; it is a serious task. Legal consequences follow. A return of income is not a mere scrap of paper. It is to be treated with the respect if deserves. The real principle laid down by the Full Bench in Kalvinator is that if the assessee has discharged his duty of furnishing full and true particulars at the time of the assessment, it maybe fairly taken that the AO has equally discharged his functions in the manner required of him. If he passes an assessment order under s. 143(3), it hardly matters that he has not recorded his agreement with the assessee on every issue or point; that could be reasonably inferred.---CIT Vs. Kalvinator of India Ltd. 174 CTR(Del)(FB) 617, 256 ITR 1(Delh)(FB) and CIT Vs. Kelvinator of India Ltd. 228 CTR (SC) 488, 34 DTR(SC)49, 2 SCC 723 followed; A.L.A. Firm Vs. CIT 93 CTR(SC)133, 189 ITR 285(SC) relied on.

The first proviso to s. 147 can be resorted to only if the assessee has not discharged the duty. Where the assessee has discharged his duty and the assessment completed under s. 143(3) is reopened within the period of 4 years from the end of the assessment year, the AO has to either show that the disclosure is not full and true or he has come into possession of some "tangible material" to come to the conclusion that there is escapement of income. The material must have a live-link with the formation of the belief regarding escapement of income. When there is no failure on the part of the assessee to furnish full and true particulars and there is no tangible material on the basis of which the AO can allege escapement of income, the only consequence would be that the AO was exercising the power of review on the very same materials which he is presumed to have examined. This would amount to abuse of the power to reassess and has to be checked. To argue or hold that when the AO fails to examine a subject-matter, entry, claim or deduction, he forms no opinion, notwithstanding that the assessee had made a full and true disclosure and notwithstanding that the assessment was completed under s.143(3) and to further

hold that it would be a case of "no opinion", would be to fly in the teeth of the two rulings. It is not even open to the Revenue to urge such a proposition.

The assessment proceedings cannot be validly reopened under s.147 even within four years, if an assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made under s. 143(3). So long as the assessee has furnished full and true particulars at the time of original assessment wit reference to the income alleged to have escaped assessment, if the original assessment was made under s. 143(3). So long as the assessee has furnished full and true particulars at the time of original assessment and so long as the assessment order is framed under s. 143(3), it matters little that the AO did not ask any question or query with respect to one entry or note but had raised queries and questions on other aspects. Sec. 114(e) of the Evidence Act can be applied to an assessment order framed under s. 143(3) provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter covered by the disclosure, it would amount to change of opinion.

In a recent judgment of Hon'ble Supreme Court in the case of ACIT Vs. ICICI Securities Primary Dealership Limited reported in 253 CTR 305. The Hon'ble Supreme Court upheld the order of Bombay High Court in Writ Petition no.1919 of 2006 and held that the assessee had disclosed full details in the return of income in the matter of its dealing in stocks and shares. According to the assessee, the loss incurred was a business loss, whereas according to the revenue, the loss incurred was a speculative loss. Rejection of the objections of the assessee to the reopening of the assessment by the AO vide his order dated 23rd June, 2006 is clearly a change of opinion. In the circumstances, we are of the view that the order reopening the assessment was not maintainable.

From the above it is very clear that on account of change of opinion the Bombay High Court (upheld by SC) allowed the Writ Petition of the assessee on account of change of opinion at the stage of disposal of objections submitted by the assessee to the reasons recorded.

iv. <u>CAN ASSESSMENT BE RE-OPENED AFTER 4 YEARS WITH SUBSEQUENT REVERSAL OF LAW BY SUPREME COURT</u>

It is often seen that the AO tries to reopen the settled assessment orders on the basis of subsequent amendment of law or subsequent judgments of SC or jurisdictional High Court by resorting to the provision of section 147/148 of the Income Tax Act. The AO has no right to revisit his orders passed u/s 143(3) which were passed according to the law applicable at that time. In this context the following judgments of Bombay High Court and Supreme Court may be visited:

a. CIT Vs. K. MOHAN & CO.(EXPORTS) 349 ITR 653(BOM)

   The facts in this case were that amendments were carried out to section 80HHC with retrospective effect and the assessee had fully disclosed all the material facts relevant for the purpose of assessment and the reassessment was framed by the AO to give effect to the retrospective amendment to section 80HHC w.e.f. 1.4.1998. The Hon'ble High Court held while dismissing the appeal of department that if legislature amends the provisions of the Act with retrospective effect, it could not be said that there was failure on the part of the assessee to disclose fully and truly all material facts relevant for the purpose of assessment.

b. VOLTAS LTD. VS. ASSISTANT COMMISSION OF INCOME TAX AND ANOTHER(349 ITR 656(BOM)

   In this particular case the Assessing Officer passed the reassessment order after 4 years on the basis of subsequent decisions of a Special Bench of ITAT and legislative amendments. There was no allegation by the AO that there was a failure on the part of the assessee to disclose material facts necessary for assessment the High Court held that while a subsequent decision of Court or legislative amendments enforced after the order of assessment may legitimately give rise to an influence of escapement of income yet the same cannot be done where there was a full and true disclosure on the part of the assessee

c. DEPUTY COMMISSIONER OF INCOME TAX & ORS. VS. SIMPLEX CONCRETE PILES(INDIA) LTD. 254 CTR(SC) 221

   The Hon'ble Supreme Court had held that once limitation period of four years provided under s. 147/149(1)(a) expires then the question of reopening by the department does not arise, subsequently reversal of the Legal Position by the judgment of the Supreme Court does not authorize the department to reopen the

assessment which stood closed on the basis of the law as it stood of the relevant time.

d. COMMISSIONER OF INCOME TAX VS. BAER SHOES (INDIA) (P)LTD. 331 ITR 435(MAD)

The Hon'ble High Court held that reassessment – Return filed by the Assessee with in time disclosing particulars for claiming deduction u/s 80HHC – Reassessment with in four years scaling Down Deduction – second Reassessment Notice Beyond Four Year Period on basis of Supreme Court Ruling for Disallowing sec. 80HHC deduction in TOTO – Not Permissible – Income Tax Act 1961, ss. 147,148.

Similar view have been expressed by Hon'ble Gujrat High Court in the case of SADBHAV ENGINEERING LTD. VS. DY. COMMISSIONER OF INCOME TAX reported in 333 ITR 483 (Guj) and in CADILA HEALTHCARE LTD. VS. DY. COMMISSIONER OF INCOME TAX AND ANOTHER reported in 334 ITR 420(Guj)

Hence it is clear from the above judgments that any subsequent amendment of law with retrospective effect or the subsequent judgment of SC does not empower the AO to reopen the assessment after the expiry of four years and the High Court have quashed the notice of reassessment at the notice stage only.

e. ISSUE AND SERVICE OF NOTICE

In the earlier paragraph I had mentioned that in the provisions of section 148 although it is mandatory upon the AO to serve the notice u/s 148 on the assessee before starting the reassessment proceedings but for the purpose of limitation issue of the notice u/s 148 before the expiry of limitation is enough compliance. What is the meaning of the term word and phrases "issue", it came up for consideration before the Hon'ble Gujrat High Court in the following judgments

KANUBHAI M. PATEL (HUF) VS HIREN BHATT OR HIS SUCCESSORS TO OFFICE AND OTHERS reported in 334 ITR 25(Guj)

The Hon'ble Gujrat High court gave the following findings:

On a plain reading of section 149 of the Income Tax Act, 1961, it is apparent that under the provision, the maximum time limit for issuance of notice under section 148 is six years from the end of the relevant assessment year. The expression "to

issue" in the context of issuance of notices, writs and process, has been attributed the meaning, to send out; to place in the hands of the proper officer for service. The expression "shall be issued" as used in section 149 would therefore have to be read in the aforesaid context.

Held, allowing the petition, that in the instant case the notices under section148 were in respect of the assessment year 2003-04. The notices were dated March 31, 2010. The record produced before the court showed that the notices had been sent for booking to the speed post centre only on April 7, 2010, in the absence of any evidence to the contrary being pointed out by the respondents, as well in the light of the fact that the said position as confirmed by the postal department had not been controverted by the Revenue. In the circumstances, the notices under section148 in relation to the assessment year 2003-04, having been issued on April 7, 2010 which was clearly beyond the period of six years from the end of the relevant assessment year, were clearly barred by limitation and could not be sustained.

This judgment was also followed by Gujrat High Court in the case of VINAYAK BUILDERS VS. B.D. GARSAR (DR) SUCCESSOR reported in 346 ITR 39 (Guj)

(CA. Y.K. SUD)