Delhi High Court Dy. Cit vs Kelvinator Of India Ltd. on 21 May, 1999 Equivalent citations: (2002) 75 TTJ Del 966 ORDER By the Bench These appeals of the revenue are directed against the orders of the Commissioner for the assessment years 1986-87 and 1988-89. 2. The assessee in this case is a limited company deriving income from manufacture and sale of refrigerators. For the assessment year 1986-87, it filed its return of income on 27-6-1986, declaring income of Rs. 58,18,520. Assessment was completed under section 143(3) on 8-3-1989, on a total income of Rs. 1,10,08,344. 2. The assessee in this case is a limited company deriving income from manufacture and sale of refrigerators. For the assessment year 1986-87, it filed its return of income on 27-6-1986, declaring income of Rs. 58,18,520. Assessment was completed under section 143(3) on 8-3-1989, on a total income of Rs. 1,10,08,344. 3. Similarly, for assessment year 1988-89, the assessee filed the original return on 30-6-1988, declaring income of Rs. 49,55,592 (at Rs. 88,82,463 under section 115J) This return was revised on 5-10-1989, whereby depreciation claimed amounting to Rs. 3,49,82,152 in the original return was withdrawn. There was no change, however, in the total income as assessable under section 115J of the Income Tax Act, 1961. Assessment was completed vide order dated 29-12-1989, on a total income of Rs. 88,82,462 under section 115J of the Act. 3. Similarly, for assessment year 1988-89, the assessee filed the original return on 30-6-1988, declaring income of Rs. 49,55,592 (at Rs. 88,82,463 under section 115J) This return was revised on 5-10-1989, whereby depreciation claimed amounting to Rs. 3,49,82,152 in the original return was withdrawn. There was no change, however, in the total income as assessable under section 115J of the Income Tax Act, 1961. Assessment was completed vide order dated 29-12-1989, on a total income of Rs. 88,82,462 under section 115J of the Act. 4. On 20-4-1990, the assessing officer issued notice under section 148 for both the years. In compliance to which the assessee filed return for both the years on 23-5-1990. Reassessment was completed by the assessing officer on 31-10-1990. Against this reassessment order, the assessee took up the matter in appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) summarised the contentions of the assessee in the appellate order for assessment year 1986-87 as follows : 4. On 20-4-1990, the assessing officer issued notice under section 148 for both the years. In compliance to which the assessee filed return for both the years on 23-5-1990. Reassessment was completed by the assessing officer on 31-10-1990. Against this reassessment order, the assessee took up the matter in appeal before the Commissioner (Appeals). The learned Commissioner (Appeals) summarised the contentions of the assessee in the appellate order for assessment year 1986-87 as follows : "(1). In the return of income filed originally the appellant had claimed deduction under section 80-I amounting to Rs. 196.39 lakhs in respect of following new industrial undertakings : Rs. (in lakhs) Rs. (in lakhs) Refrigerators 13.63 Compressors 106.47 Lamination 37.49 Control 38.80 Total 196.39 In the course of the assessment proceedings which were completed on 8-3-1989, queries were raised in respect of claim under section 80-I and were replied vide letters dated 7-3-1989 and 8-3-1989. Assessment was completed on 8-3-1989, accepting the claim under section 80-I. (2). Notice under section 148 was is-

sued on 20-4-1990. The assessing officer during the course of the reassessment proceedings pointed out that assessment was reopened to very the deduction under section 80-I wrongly allowed in the original assessment. However, neither in the notice nor at the time of assessment was it specified whether the proceedings had been initiated under section 147(a) or 147(b) despite requests made in this behalf, under letters dated 26-4-1990, and 18-9-1990. 3. In the reassessment proceedings the assessing officer has varied the deduction under section 80-I originally allowed at Rs. 196.39 lakhs to Rs. 170.01 lakhs. The main reason for variation is that"other income" amounting to Rs. 40,75,414 has been reduced from the profits of the new industrial undertakings eligible for deduction. 4. The assessing officer did not validly assume jurisdiction under section 148 and consequently the reassessment order passed is bereft of jurisdiction. No mention by the assessing officer, in spite of request made in writing, as to whether jurisdiction had been assumed under section 147(a) or 147(b) shows that the assessing officer did not record his satisfaction for any reason to believe that the income alleged to have escaped assessment was due to any omission on the part of the appellant to disclose fully and truly material facts or in consequence of any information coming to his possession subsequent to completion of assessment. 5. Computation of claim under section 80-I was given by the appellant to the assessing officer at the time of original assessment and was duly considered by him. Queries raised by him were also answered. Therefore, the assessing officer being satisfied that deduction under section 80-I was available, allowed the same. This is clear from page 6 of the assessment order, dated 8-3-1989. This clearly shows that the assessing officer had duly applied his mind in the original assessment. 6. There was no omission or failure on the part of the appellant to disclose fully and truly material particulars, which were duly apprised by the assessing officer. The successor assessing officer has varied the deduction admissible under section 80-I merely on a change of opinion. 7. Even assuming, though not conceding, that a wrong conclusion was drawn in the original assessment on the basis of primary facts disclosed, the successor assessing officer cannot reopen the assessment merely on reappraisal of the same facts as he has no powers to review. Reliance is placed in this connection on Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191 (SC) and other judgments in ITO & Ors. v. Lakhmani Mewaldas (1976) 103 ITR 437 (SC), Narsinghdas Bagree v. ITO & Anr. (1961) 61 ITR 172 (Cal), CIT v. Bhagwan Das K. Bros. (1973) 91 ITR 256 (Bom), CIT v. Vijay Laxmi Sugar Mills Ltd. (1975) 101 ITR 670 (All). 8. When the primary facts necessary for assessment are fully and truly disclosed at the stage of original proceedings, the assessing officer is not entitled to commence proceedings under section 147(a) merely on a change of opinion. Reliance was placed in this connection on decision in the case of CIT v. Bhanji Lavji (1971) 79 ITR 582 (SC) and Sirpur Paper Mills Ltd. v. ITO (1978) 114 ITR 404 (AP). There has been no lapse on the part of the appellant to disclose primary facts at the time of original assessment. 9. In the cases of Arvind Boards & Paper Products Ltd. v. ITO (1980) 124 ITR 626 (Guj), K.C.P. Ltd. v. ITO 13 Taxman 104 (AP) and Chemical & Fibres of India Ltd. v. M.K.N. Pillai (1983) 32 CTR (Bom) 97, which all dealt with

deduction under section 80-I and can be said to be similar cases, reopening was held not to be justified. 10. Assessment year 1986-87 is not the first year for the purposes of deduction under section 80-I. This deduction has been claimed and allowed in the earlier assessment years on the same basis as claimed and allowed in the original assessment for the assessment year 1986-87. 11. Even if it is assumed for the sake of argument that due care and caution was not exercised by the predecessor assessing officer while allowing deduction under section 80-I, failure to make the enquiry at the time of original assessment does not justify proceedings for reassessment. Reliance was placed in this connection on judgments in Dunlop Rubber Co. Ltd. (London) v. ITO & Ors. (1971) 79 ITR 349 (Cal), E.M. Muthappa Chettiar v. CIT (1964) 53 ITR 642 (Mad) and Bhanji Lavji v. CIT (1967) 63 ITR 1 (Guj). 12. On the facts and circumstances of the case, the provisions of section 147(b) also cannot be invoked. Where the assessing officer gets on subsequent information but merely proceeds to reopen the original assessment without any fresh facts or material but only on reappraisal of the same material (as is the position in the present case) initiation under section 147(b) cannot be upheld. Reliance is placed on CIT v. Hickson & Dedajee Ltd. (1980) 121 ITR 368 (Bom). 13. The interpretation of the word "information" appearing in section 147(b) has been subject-matter of judicial review and has been held to mean instruction or knowledge derived from an external source concerning facts or particulars or as to the law relating to the matter bearing on the assessment. Reliance is placed in this connection on the cases of CIT v. A. Raman & Co. (1968) 67 ITR 111 (SC) and STO v. Harbans Motor Stores 37 STC 67 (Del). 14. If the predecessor Income Tax Officer did not apply his mind to a question and his successor did, that does not mean that the successor Income Tax Officer came into possession of information justifying reopening. Reliance is placed in this connection on the case of Ram Kishan Oil Mills v. CIT (1965) 56 ITR 156 (MP), CWT v. Manilal C. Desai (1973) 91 ITR 135 (MP). 15. The Supreme Court in the case of Indian & Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC) has observed that an error discovered on the reconsideration of the same material does not give the Income Tax Officer the power to reopen the assessment under section 147(b). 16. In the present case the assessing officer subsequent to the completion of reassessment did not come into possession of any information which could have led him to believe that income chargeable to tax has escaped assessment. Had there been any such information the assessing officer would have brought that on record. In these circumstances, action under section 147(b) is also not justified." 5. The learned Commissioner (Appeals) considered the various contentions raised and eventually came to the conclusion that the assessing officer was not entitled to commence proceedings under section 147(a) or 147(b) as there was no fresh facts or material with the assessing officer but it was only on reappraisal of the same material that he discovered an error which he has sought to correct by virtue of the present proceedings. He accordingly quashed the reassessment proceedings for assessment year 1986-87. 5. The learned Commissioner (Appeals) considered the various contentions raised and eventually came to the conclusion that the assessing officer was not entitled to commence proceedings under section 147(a)

or 147(b) as there was no fresh facts or material with the assessing officer but it was only on reappraisal of the same material that he discovered an error which he has sought to correct by virtue of the present proceedings. He accordingly quashed the reassessment proceedings for assessment year 1986-87. 6. For similar reasons, the learned Commissioner (Appeals) quashed the proceedings for assessment year 1988-89. 6. For similar reasons, the learned Commissioner (Appeals) quashed the proceedings for assessment year 1988-89. 7. The revenue has come up in appeal before the Tribunal. For the assessment year 1986-87, the following specific ground is raised : 7. The revenue has come up in appeal before the Tribunal. For the assessment year 1986-87, the following specific ground is raised : "On the facts and in the circumstances of the case, the learned Commissioner (Appeals) has erred in quashing the reassessment proceedings initiated under section 147(a)/I47(b) by holding that the same were not validly initiated because there was no fresh facts or material with the assessing officer". 8. Similarly, for assessment year 1988-89, the Commissioner raised the following ground : 8. Similarly, for assessment year 1988-89, the Commissioner raised the following ground : "On the facts and in the circumstances of the case, the Commissioner (Appeals) has erred in quashing the proceedings initiated by virtue of notice under section 148 of the Income Tax Act on the ground that there was no omission or failure on the part of the assessee to disclose fully and truly all material particulars necessary for the assessment and that no fresh information had come to the possession of the assessing officer which would entitle him to commence proceedings either under section 147(a) or 147(b) of the Income Tax Act, 1961. The learned Commissioner (Appeals) has failed to appreciate that the assessee had not disclosed full and true facts with regard to claim of depreciation and deduction under section 80-I of the Income Tax Act." It is prayed that the order of the learned Commissioner (Appeals) may be set aside and that of the assessing officer restored." 9. Subsequently by letter, dated 4-2-1977, the Deputy Commissioner, Spl. Range-IV, New Delhi, filed revised grounds of appeal for both the above assessment years by filing Form No. 36 in which the grounds are raised as under : 9. Subsequently by letter, dated 4-2-1977, the Deputy Commissioner, Spl. Range-IV, New Delhi, filed revised grounds of appeal for both the above assessment years by filing Form No. 36 in which the grounds are raised as under : "Learned Commissioner (Appeals) erred in quashing the reassessment proceedings initiated under section 147 by holding that the assessing officer was not entitled to commence proceedings under section 147(a) or 147(b) even though in the amended provisions applicable with effect from 1-4-1989, there was no sub-section like 147(a) or 147(b), as on the date of issue of notice, i.e., on 20-4-1990. 2. The learned Commissioner (Appeals) failed to appreciate that the assessing officer had sufficient reasons to initiate reassessment proceedings under section 147." 10. Since the original ground raised in the appeals and the revised ground of appeal sought to be raised are fundamentally different touching upon the roots of jurisdiction and validity of the proceedings, the learned senior Departmental Representative Shri D.D. Goyal was directed to decide which of the grounds he would argue. This is also necessary in view of the fact that the assessing officer did not indicate the exact provisions applied

by him, i.e., whether the original section 147 or the amended section 147 with effect from 1-4-1989. The learned senior Departmental Representative chose to argue on the revised ground filed by the revenue for both the years. 10. Since the original ground raised in the appeals and the revised ground of appeal sought to be raised are fundamentally different touching upon the roots of jurisdiction and validity of the proceedings, the learned senior Departmental Representative Shri D.D. Goyal was directed to decide which of the grounds he would argue. This is also necessary in view of the fact that the assessing officer did not indicate the exact provisions applied by him, i.e., whether the original section 147 or the amended section 147 with effect from 1-4-1989. The learned senior Departmental Representative chose to argue on the revised ground filed by the revenue for both the years. 11. The learned authorised representative of the assessee Shri Ajay Vohra raised preliminary objection on the ground that the revenue raised altogether a new issue which was not a subject-matter of consideration before the assessing officer and the Commissioner (Appeals). The revenue is seeking the Tribunal to decide the controversy whether the opening could be sustained under the amended provisions of section 147 of the Act applicable with effect from 1-4-1989, which had not been considered either by the assessing officer or the Commissioner (Appeals). The subject-matter of the original appeal has altogether been changed and, therefore, the revised appeals filed in February, 1997, after more than 5 years of filing of the original appeals is clearly belated and, therefore, the same should be dismissed in limine on the grounds of lashes/inordinate delay. It is also submitted that there is no provision in the Act or the Rules to revise the grounds of appeal to completely alter the controversy at issue. The Tribunal, at best, can grant leave for additional grounds of appeal in accordance with the procedure laid down under rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963. Since no application under rule 11 of the Rules has been filed, nor any reasons adduced to explain the inordinate delay in filing the revised appeals/grounds, the same is liable to be dismissed. 11. The learned authorised representative of the assessee Shri Ajay Vohra raised preliminary objection on the ground that the revenue raised altogether a new issue which was not a subject-matter of consideration before the assessing officer and the Commissioner (Appeals). The revenue is seeking the Tribunal to decide the controversy whether the opening could be sustained under the amended provisions of section 147 of the Act applicable with effect from 1-4-1989, which had not been considered either by the assessing officer or the Commissioner (Appeals). The subject-matter of the original appeal has altogether been changed and, therefore, the revised appeals filed in February, 1997, after more than 5 years of filing of the original appeals is clearly belated and, therefore, the same should be dismissed in limine on the grounds of lashes/inordinate delay. It is also submitted that there is no provision in the Act or the Rules to revise the grounds of appeal to completely alter the controversy at issue. The Tribunal, at best, can grant leave for additional grounds of appeal in accordance with the procedure laid down under rule 11 of the Income Tax (Appellate Tribunal) Rules, 1963. Since no application under rule 11 of the Rules has been filed, nor any reasons adduced to explain the inordinate delay

in filing the revised appeals/grounds, the same is liable to be dismissed. 12. Since the appellant cannot seek to completely alter the subject-matter of the appeal to the prejudice or detriment of the respondent by raising altogether new grounds which were not considered by the lower authorities, it is submitted that these revised grounds cannot be entertained at this stage. It is also submitted by the learned authorised representative of the assessee that the Hon'ble Patna High Court in a recent judgment in the case of Ranchi Handloom Emporium v. CIT (1999) 235 ITR 604 (Pat) held that unamended provisions of section 147 of the Act would govern the assessment relating to assessment years prior to assessment year 1989-90. The Hon'ble Patna High Court further considered the decision of the Hon'ble Delhi High Court in the case of Rakesh Aggarwal v. CIT (1997) 225 ITR 496 (Del) and distinguished the same as that decision related to the assessment year 1989-90 and was rendered on the basis of the amended provision. Since this decision of the Hon'ble Patna High Court is the only direct decision, it is submitted that the same is binding on the Tribunal as held by the jurisdictional High Court in the case of All India Lakshmi Commercial Bank Officers Union v. Union of India (1984) 150 ITR 1 (Del). 12. Since the appellant cannot seek to completely alter the subject-matter of the appeal to the prejudice or detriment of the respondent by raising altogether new grounds which were not considered by the lower authorities, it is submitted that these revised grounds cannot be entertained at this stage. It is also submitted by the learned authorised representative of the assessee that the Hon'ble Patna High Court in a recent judgment in the case of Ranchi Handloom Emporium v. CIT (1999) 235 ITR 604 (Pat) held that unamended provisions of section 147 of the Act would govern the assessment relating to assessment years prior to assessment year 1989-90. The Hon'ble Patna High Court further considered the decision of the Hon'ble Delhi High Court in the case of Rakesh Aggarwal v. CIT (1997) 225 ITR 496 (Del) and distinguished the same as that decision related to the assessment year 1989-90 and was rendered on the basis of the amended provision. Since this decision of the Hon'ble Patna High Court is the only direct decision, it is submitted that the same is binding on the Tribunal as held by the jurisdictional High Court in the case of All India Lakshmi Commercial Bank Officers Union v. Union of India (1984) 150 ITR 1 (Del). 13. The learned authorised representative of the assessee further submitted that even under the amended provisions of section 147 of the Act, the powers of the assessing officer to reopen a completed assessment are circumscribed and the assessing officer cannot on a change of opinion reopen the completed assessment. For this proposition, reliance was placed on the following decisions : 13. The learned authorised representative of the assessee further submitted that even under the amended provisions of section 147 of the Act, the powers of the assessing officer to reopen a completed assessment are circumscribed and the assessing officer cannot on a change of opinion reopen the completed assessment. For this proposition, reliance was placed on the following decisions : (1) VXL India Ltd. v. Asstt. CIT (1995) 215 ITR 295 (Guj); (2) Kaira Distt. Co-op. Milk Producers Union Ltd. v. Asstt. CIT (1996) 220 ITR 194 (Guj); (3) Garden Silk Mills Ltd. v. Dy. CIT (1996) 222 ITR 68 (Guj); (4) Nagin Bhai G. Patel v. ITO (1997) 224 ITR 459

(Guj); (5) Jindal Photo Films Ltd. v. Dy. CIT (1998) 234 ITR 170 (Del); (6) Sarabhai M. Lakhani v. ITO (1998) 231 ITR 779 (Guj); and (7) ITAT decision in assessee's own case for assessment year 1987-88. 14. Looking to all aspects, it is submitted that the reopening of the assessment by the assessing officer, for these two years cannot be sustained and the order of the learned Commissioner (Appeals) is liable to be upheld. 14. Looking to all aspects, it is submitted that the reopening of the assessment by the assessing officer, for these two years cannot be sustained and the order of the learned Commissioner (Appeals) is liable to be upheld. 15. On the other hand, the learned Departmental Representative Shri D.D. Goyal, vehemently supported the revised ground raised by the revenue. According to him the revised grounds of appeals were filed to bring out more clarity regarding issues involved and put them in sharper focus. Broadly speaking the subject-matter of the appeal is whether the reopening of assessment under section 147 of the Act is valid or not. The assessing officer in his reasons recorded for the reopening has referred to only section 147 and there is no reference to clauses (a) or (b) because with effect from 1-4-1989, the provisions of section 147 have been amended and clauses (a) and (b) have been deleted. Since the learned Commissioner (Appeals) ignored the amended provisions of section 147 and decided the appeal on the basis of the old provisions of section 147(a)/147(b), the grievance of the revenue before the Tribunal was that the learned Commissioner (Appeals) should have decided the appeal on the basis of the amended provisions of section 147. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT v. Edward Keventer (Successor) (P) Ltd. (1980) 123 ITR 200 (Del) where the Hon'ble Court has held that the subject-matter of appeal should be understood not in a narrow and unrealistic manner but should be so comprehended as to encompass the entire controversy between the party which is sought to be adjudicated upon by the Tribunal. 15. On the other hand, the learned Departmental Representative Shri D.D. Goyal, vehemently supported the revised ground raised by the revenue. According to him the revised grounds of appeals were filed to bring out more clarity regarding issues involved and put them in sharper focus. Broadly speaking the subject-matter of the appeal is whether the reopening of assessment under section 147 of the Act is valid or not. The assessing officer in his reasons recorded for the reopening has referred to only section 147 and there is no reference to clauses (a) or (b) because with effect from 1-4-1989, the provisions of section 147 have been amended and clauses (a) and (b) have been deleted. Since the learned Commissioner (Appeals) ignored the amended provisions of section 147 and decided the appeal on the basis of the old provisions of section 147(a)/147(b), the grievance of the revenue before the Tribunal was that the learned Commissioner (Appeals) should have decided the appeal on the basis of the amended provisions of section 147. Reliance was placed on the decision of the Hon'ble Delhi High Court in the case of CIT v. Edward Keventer (Successor) (P) Ltd. (1980) 123 ITR 200 (Del) where the Hon'ble Court has held that the subject-matter of appeal should be understood not in a narrow and unrealistic manner but should be so comprehended as to encompass the entire controversy between the party which is sought to be adjudicated upon by

the Tribunal. 16. Since in both the appeals, the main issue is whether amended provisions of section 147 will apply in the said years and since that issue has already been decided by the Tribunal in assessee's own case for assessment year 1987-88 [reported as CIT v. Kelvinator of India (1998) 67 ITD 213 (Del)], it is submitted that the Tribunal was bound to follow the earlier decision and uphold the reassessment proceedings initiated by the assessing officer. In case, the Bench decided not to agree with the said finding, only a larger Bench can be constituted as held by the Hon'ble Supreme Court in the case of Asstt. CED v. Devki Ammal (1995) 212 ITR 395 (SC). 16. Since in both the appeals, the main issue is whether amended provisions of section 147 will apply in the said years and since that issue has already been decided by the Tribunal in assessee's own case for assessment year 1987-88 [reported as CIT v. Kelvinator of India (1998) 67 ITD 213 (Del)], it is submitted that the Tribunal was bound to follow the earlier decision and uphold the reassessment proceedings initiated by the assessing officer. In case, the Bench decided not to agree with the said finding, only a larger Bench can be constituted as held by the Hon'ble Supreme Court in the case of Asstt. CED v. Devki Ammal (1995) 212 ITR 395 (SC). 17. With regard to the contentions of the learned authorised representative of the assessee that the reassessment under section 147 cannot be sustained on a mere change of opinion, it is submitted that the Hon'ble Delhi High Court in the case of Rakesh Aggarwal v. Asstt. CIT (supra) considered this issue and explained the impact and scope of the amended provisions of section 147 and held that the power of the assessing officer to reopen assessment is much wider and can be exercised even if an assessee had disclosed fully and truly all material facts. Since in this case, there was a clear finding of grant of excess loss or depreciation and also deduction under section 80-I, on other income, the assessing officer initiated the reassessment proceedings validly and, therefore, the same is liable to be upheld. 17. With regard to the contentions of the learned authorised representative of the assessee that the reassessment under section 147 cannot be sustained on a mere change of opinion, it is submitted that the Hon'ble Delhi High Court in the case of Rakesh Aggarwal v. Asstt. CIT (supra) considered this issue and explained the impact and scope of the amended provisions of section 147 and held that the power of the assessing officer to reopen assessment is much wider and can be exercised even if an assessee had disclosed fully and truly all material facts. Since in this case, there was a clear finding of grant of excess loss or depreciation and also deduction under section 80-I, on other income, the assessing officer initiated the reassessment proceedings validly and, therefore, the same is liable to be upheld. 18. We have carefully considered the rival submissions in the light of the material on record. From the order of the assessing officer and the Commissioner (Appeals), it is a matter of record that the assessee wanted clarification regarding the exact provisions of the section under which the reassessment proceedings were initiated by the assessing officer. This issue is vital in view of the fact that the provisions of section 147 were amended with effect from 1-4-1989, by the Direct Tax Laws (Amendment) Act, 1987. The assessment years involved in the reassessment proceedings are the assessment years 1986-87, 1987-88 and 1988-89. Since these assessment years are prior to the date

of 1-4-1989, it was necessary for the assessee to know the basis of the charge so that it can meet the charges levelled against it. The assessing officer was silent on this point and did not clarify the section under which the proceedings were initiated. 18. We have carefully considered the rival submissions in the light of the material on record. From the order of the assessing officer and the Commissioner (Appeals), it is a matter of record that the assessee wanted clarification regarding the exact provisions of the section under which the reassessment proceedings were initiated by the assessing officer. This issue is vital in view of the fact that the provisions of section 147 were amended with effect from 1-4-1989, by the Direct Tax Laws (Amendment) Act, 1987. The assessment years involved in the reassessment proceedings are the assessment years 1986-87, 1987-88 and 1988-89. Since these assessment years are prior to the date of 1-4-1989, it was necessary for the assessee to know the basis of the charge so that it can meet the charges levelled against it. The assessing officer was silent on this point and did not clarify the section under which the proceedings were initiated. 19. When the matter came up before the Commissioner (Appeals), the learned Commissioner (Appeals) cancelled the proceedings in terms of section 147(a)/147(b) of the Act on the finding that there was no fresh material or facts with the assessing officer but it was only on reappraisal of the same material that he discovered an error which he sought to correct by virtue of the present proceedings. 19. When the matter came up before the Commissioner (Appeals), the learned Commissioner (Appeals) cancelled the proceedings in terms of section 147(a)/147(b) of the Act on the finding that there was no fresh material or facts with the assessing officer but it was only on reappraisal of the same material that he discovered an error which he sought to correct by virtue of the present proceedings. 20. In terms of section 253 of the Act, the Commissioner objects to the order passed by the Commissioner (Appeals) and direct the assessing officer to file appeal to the Tribunal against the order on the original grounds extracted above. However, for the assessment year 1987-88, the Commissioner raised the following ground : 20. In terms of section 253 of the Act, the Commissioner objects to the order passed by the Commissioner (Appeals) and direct the assessing officer to file appeal to the Tribunal against the order on the original grounds extracted above. However, for the assessment year 1987-88, the Commissioner raised the following ground : "On the facts and in the circumstances of the case, the learned Commissioner (Appeals) erred in holding that the proceedings initiated under section 147 of the Income Tax Act by issue of notice under 148 on 20-4-1990, were not valid without taking into consideration the amended provisions of section 147 introduced by the Direct Tax Laws (Amendment) Act, 1987, with effect from 1-4-1989." 21. Since the same Commissioner directed the assessing officer to file appeal against the order of the Commissioner (Appeals) for the above three years and authorised specific grounds as indicated above, it cannot be said that the identical ground raised for assessment year 1986-87 and 1988-89 is a mistake or omission on the part of the Commissioner. The ground raised is clear and specific contending that the learned Commissioner (Appeals) has erred in quashing the reassessment proceedings initiated under section 147(a)/147(b) by holding that the same were not validly initiated be-

cause there were no fresh facts or material with the assessing officer. Similar was the ground for assessment year 1988-89 where the Commissioner challenged the finding of the Commissioner (Appeals) that there was no omission or failure on the part of the assessee to disclose fully and truly all material particulars necessary for the assessment and that no fresh information had come to the possession of the assessing officer which would entitle him to commence the proceedings under section 147(a) or 147(b) of the Income Tax Act, 1961. From the above facts, it is clear that the proceedings for assessment years 1986-87 and 1988-89 were initiated under the pre-amended section 147 and the Commissioner tried to defend the proceedings initiated by the assessing officer in the grounds raised before the Tribunal. This is very clear from the specific ground of appeal raised for assessment year 1987-88 where the Commissioner made it clear that the proceedings were initiated under the amended provisions of section 147 and the learned Commissioner (Appeals) erred in holding that the proceedings initiated under section 147 of the Act by issue of notice under section 148 on 20-4-1990, were not valid. 21. Since the same Commissioner directed the assessing officer to file appeal against the order of the Commissioner (Appeals) for the above three years and authorised specific grounds as indicated above, it cannot be said that the identical ground raised for assessment year 1986-87 and 1988-89 is a mistake or omission on the part of the Commissioner. The ground raised is clear and specific contending that the learned Commissioner (Appeals) has erred in quashing the reassessment proceedings initiated under section 147(a)/147(b) by holding that the same were not validly initiated because there were no fresh facts or material with the assessing officer. Similar was the ground for assessment year 1988-89 where the Commissioner challenged the finding of the Commissioner (Appeals) that there was no omission or failure on the part of the assessee to disclose fully and truly all material particulars necessary for the assessment and that no fresh information had come to the possession of the assessing officer which would entitle him to commence the proceedings under section 147(a) or 147(b) of the Income Tax Act, 1961. From the above facts, it is clear that the proceedings for assessment years 1986-87 and 1988-89 were initiated under the pre-amended section 147 and the Commissioner tried to defend the proceedings initiated by the assessing officer in the grounds raised before the Tribunal. This is very clear from the specific ground of appeal raised for assessment year 1987-88 where the Commissioner made it clear that the proceedings were initiated under the amended provisions of section 147 and the learned Commissioner (Appeals) erred in holding that the proceedings initiated under section 147 of the Act by issue of notice under section 148 on 20-4-1990, were not valid. 22. The learned Departmental Representative Shri D.D. Goyal, tried to emphasise on the facts that the basic issue in this case is validity of the proceedings for reopening the assessment for the above assessment years. In such a case, it was his contention that the decision of the Hon'ble Delhi High Court in the case of CIT v. Edward Keventer, (Successor) (P). Ltd. (supra) covers the case as the subject-matter of appeal remains the same under section 147, of the Act. This contention, in our view cannot be accepted in view of the fact that the jurisdiction of the assessing officer depends on the validity of the initiation of such proceedings

under the Act. The provisions of sub-clause (a) and sub-clause (b) of section 147 are totally different. Similarly, under the amended provisions, the assessing officer has a much wider power than under the pre-amended section 147 of the Act. Therefore, unless the nature of the proceedings are clearly indicated, the assessee cannot have a reasonable opportunity to meet the charges and consequently the proceedings cannot be sustained. The principle of natural justice requires that the assessee shall be heard to ensure that the basic requirement of fair play and action is fulfillled. The rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principle of natural justice on the ground of absence of opportunity, it has to be established that prejudice has been caused to the parties concerned by the procedure followed. In the instant case, the assessee has not been provided with the specific section under which the proceedings were initiated. Determination of the proper clause under which reassessment notice is issued is indispensable because the clauses (a) and (b) of section 147 contemplate two separate and mutually exclusive jurisdiction. 22. The learned Departmental Representative Shri D.D. Goyal, tried to emphasise on the facts that the basic issue in this case is validity of the proceedings for reopening the assessment for the above assessment years. In such a case, it was his contention that the decision of the Hon'ble Delhi High Court in the case of CIT v. Edward Keventer, (Successor) (P). Ltd. (supra) covers the case as the subject-matter of appeal remains the same under section 147, of the Act. This contention, in our view cannot be accepted in view of the fact that the jurisdiction of the assessing officer depends on the validity of the initiation of such proceedings under the Act. The provisions of sub-clause (a) and sub-clause (b) of section 147 are totally different. Similarly, under the amended provisions, the assessing officer has a much wider power than under the pre-amended section 147 of the Act. Therefore, unless the nature of the proceedings are clearly indicated, the assessee cannot have a reasonable opportunity to meet the charges and consequently the proceedings cannot be sustained. The principle of natural justice requires that the assessee shall be heard to ensure that the basic requirement of fair play and action is fulfillled. The rules of natural justice are flexible and cannot be put on any rigid formula. In order to sustain a complaint of violation of principle of natural justice on the ground of absence of opportunity, it has to be established that prejudice has been caused to the parties concerned by the procedure followed. In the instant case, the assessee has not been provided with the specific section under which the proceedings were initiated. Determination of the proper clause under which reassessment notice is issued is indispensable because the clauses (a) and (b) of section 147 contemplate two separate and mutually exclusive jurisdiction. 23. On the other hand, if the proceedings are initiated under the amended provision which comes into effect from 1-4-1989, the assessee has to be given an opportunity to argue its case that the amended provisions are not applicable in this case as the assessments involved are 1986-87 to 1988-89. This opportunity was denied and eventually the learned Commissioner (Appeals) decided the issue on the basis of the unamended provisions and held that the initiation of proceedings cannot be sustained even under sub-clause (a) or (b)

of section 147. The Commissioner who authorised the appeals to the Tribunal also challenged the finding of the Commissioner (Appeals) under sub-clauses (a) and (b) of section 147 of the Act. It is only in the assessment year 1987-88 that the Commissioner challenged the finding of the Commissioner (Appeals) on the ground of non-consideration of the amended provisions of section 147. Therefore, to revise the grounds of appeal after a lapse of more than five years, in our view, is not fair and is prejudicial to the respondent who had not been provided opportunity before the assessing officer and the first appellate authority. There is, therefore, no reason for the department to slumber for more than five years and wake up with the revised ground of appeal without giving any valid reasons. We, therefore, see no reason to admit the revised ground of appeal which was not a subject-matter of issue before the assessing officer and the Commissioner (Appeals). 23. On the other hand, if the proceedings are initiated under the amended provision which comes into effect from 1-4-1989, the assessee has to be given an opportunity to argue its case that the amended provisions are not applicable in this case as the assessments involved are 1986-87 to 1988-89. This opportunity was denied and eventually the learned Commissioner (Appeals) decided the issue on the basis of the unamended provisions and held that the initiation of proceedings cannot be sustained even under sub-clause (a) or (b) of section 147. The Commissioner who authorised the appeals to the Tribunal also challenged the finding of the Commissioner (Appeals) under sub-clauses (a) and (b) of section 147 of the Act. It is only in the assessment year 1987-88 that the Commissioner challenged the finding of the Commissioner (Appeals) on the ground of non-consideration of the amended provisions of section 147. Therefore, to revise the grounds of appeal after a lapse of more than five years, in our view, is not fair and is prejudicial to the respondent who had not been provided opportunity before the assessing officer and the first appellate authority. There is, therefore, no reason for the department to slumber for more than five years and wake up with the revised ground of appeal without giving any valid reasons. We, therefore, see no reason to admit the revised ground of appeal which was not a subject-matter of issue before the assessing officer and the Commissioner (Appeals). 24. Consequently in view of the change in the ground of appeal sought for by the revenue, it is to be presumed that the findings of the Commissioner under sub-clauses (a) and (b) of section 147 are conceded and, therefore, no interference is called for in the order of the Commissioner (Appeals) for assessment years 1986-87 and 1988-89. 24. Consequently in view of the change in the ground of appeal sought for by the revenue, it is to be presumed that the findings of the Commissioner under sub-clauses (a) and (b) of section 147 are conceded and, therefore, no interference is called for in the order of the Commissioner (Appeals) for assessment years 1986-87 and 1988-89. 25. This brings us to the scope of the amended provisions of section 147 of the Act. In this regard, it is the claim of the learned senior Departmental Representative that the order of the assessing officer should be upheld in the light of the decision of the Hon'ble Delhi High Court in the case of Rakesh Aggarwal (supra) wherein it was explained that the power of the assessing officer to reopen assessment is much wider and can be exercised even if an assessee had disclosed

fully and truly all material facts. It was further claimed that there was a ground of excessive loss or depreciation and also that the deduction under section 80-I was allowed on other income which are not derived from industrial undertaking. Even assuming that the proceedings are initiated under the amended provisions, the findings of the Commissioner (Appeals) are that the assessee made a claim of deduction under section 80-I for a sum of Rs. 186.75 lakhs based on certain calculations. This claim was revised during the course of those proceedings to Rs. 196.39 lakhs. While. making the initial claim, the assessee had included in its computation a deduction permissible under section 80-I, certain figures of depreciation which were later on changed in the revised calculation on account of change in basis of claim. Likewise in the initial calculations investment allowance was not deducted and certain other incomes had also not been deducted which were depicted in the revised claim for which calculations were furnished before the assessing officer during the original assessment proceedings. The assessee by its letter dated 7-3-1989, drew the attention of the assessing officer to the detailed revised working for claim under section 80-I and by letter dated 8-3-1989, the basis for revising the working for claim in deduction was provided. It Was further recorded by him that in the revised computation of deduction, permissible under section 80-I filed along with letter dated 22-2-1989, before the assessing officer depreciation had been deducted and income from other sources in respect of refrigeration division at Rs. 2.44 lakhs has also been deducted as per the understanding of the assessee. There was, therefore, no omission or failure on the part of the assessee to disclose fully and truly all material particulars necessary for the assessment. It was also brought to the notice of the Bench that the income from other sources objected to by the assessing officer included items like unclaimed balances written back amounting to Rs. 22,31,167, profit on sale of assets and various interests from ICICI debentures, from customers fixed deposit including receipt from insurance companies and receipt from repairs of compressors. It is the case of the assessee that this income cannot be said to be not arising out of the business activities of the assessee. Having regard to the above facts and also keeping in view the later decision of the Hon'ble Delhi High Court in the case of Jindal Photo Films Ltd. (supra), the assessing officer cannot be said to be justified in reopening the assessment even under the amended provisions of section 147 also. Though the assessing officer is clothed with much wider powers to reopen a completed assessment, such power is not unfettered and cannot be exercised by the assessing officer on mere ipse dixit on reappraisal of the same set of facts/materials. Since the powers of the assessing officer to reopen a completed assessment are circumscribed, the assessing officer cannot on a change of opinion reopen the completed assessment. This view is supported by the decision of the Hon'ble Gujarat High Court relied upon by the learned counsel of the assessee in the cases earlier cited above. Having regard to the above facts, we are of the view that there appears to be no merit in the appeals of the revenue. We accordingly dismiss the same. 25. This brings us to the scope of the amended provisions of section 147 of the Act. In this regard, it is the claim of the learned senior Departmental Representative that the order of the assessing officer should be upheld in the light of the decision of the Hon'ble

Delhi High Court in the case of Rakesh Aggarwal (supra) wherein it was explained that the power of the assessing officer to reopen assessment is much wider and can be exercised even if an assessee had disclosed fully and truly all material facts. It was further claimed that there was a ground of excessive loss or depreciation and also that the deduction under section 80-I was allowed on other income which are not derived from industrial undertaking. Even assuming that the proceedings are initiated under the amended provisions, the findings of the Commissioner (Appeals) are that the assessee made a claim of deduction under section 80-I for a sum of Rs. 186.75 lakhs based on certain calculations. This claim was revised during the course of those proceedings to Rs. 196.39 lakhs. While. making the initial claim, the assessee had included in its computation a deduction permissible under section 80-I, certain figures of depreciation which were later on changed in the revised calculation on account of change in basis of claim. Likewise in the initial calculations investment allowance was not deducted and certain other incomes had also not been deducted which were depicted in the revised claim for which calculations were furnished before the assessing officer during the original assessment proceedings. The assessee by its letter dated 7-3-1989, drew the attention of the assessing officer to the detailed revised working for claim under section 80-I and by letter dated 8-3-1989, the basis for revising the working for claim in deduction was provided. It Was further recorded by him that in the revised computation of deduction, permissible under section 80-I filed along with letter dated 22-2-1989, before the assessing officer depreciation had been deducted and income from other sources in respect of refrigeration division at Rs. 2.44 lakhs has also been deducted as per the understanding of the assessee. There was, therefore, no omission or failure on the part of the assessee to disclose fully and truly all material particulars necessary for the assessment. It was also brought to the notice of the Bench that the income from other sources objected to by the assessing officer included items like unclaimed balances written back amounting to Rs. 22,31,167, profit on sale of assets and various interests from ICICI debentures, from customers fixed deposit including receipt from insurance companies and receipt from repairs of compressors. It is the case of the assessee that this income cannot be said to be not arising out of the business activities of the assessee. Having regard to the above facts and also keeping in view the later decision of the Hon'ble Delhi High Court in the case of Jindal Photo Films Ltd. (supra), the assessing officer cannot be said to be justified in reopening the assessment even under the amended provisions of section 147 also. Though the assessing officer is clothed with much wider powers to reopen a completed assessment, such power is not unfettered and cannot be exercised by the assessing officer on mere ipse dixit on reappraisal of the same set of facts/materials. Since the powers of the assessing officer to reopen a completed assessment are circumscribed, the assessing officer cannot on a change of opinion reopen the completed assessment. This view is supported by the decision of the Hon'ble Gujarat High Court relied upon by the learned counsel of the assessee in the cases earlier cited above. Having regard to the above facts, we are of the view that there appears to be no merit in the appeals of the revenue. We accordingly dismiss the same. 26. In the result, the

appeals are dismissed. 26. In the result, the appeals are dismissed.