Pr. Commissioner Of Income ... vs Laxmiraj Distributors Pvt. ... on 6 September, 2017

Author: Akil Kureshi

Bench: Akil Kureshi, Biren Vaishnav

O/TAXAP/472/2017 JUDGME

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

TAX APPEAL NO. 472 of 2017

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?

PR. COMMISSIONER OF INCOME TAX-VADODARA-1....Appellant(s)
Versus
LAXMIRAJ DISTRIBUTORS PVT. LTD.....Opponent(s)

Appearance:
MR KM PARIKH, ADVOCATE for the Appellant(s) No. 1
MR B S SOPARKAR, ADVOCATE for the Opponent(s) No. 1

CORAM: HONOURABLE MR.JUSTICE AKIL KURESHI

and
HONOURABLE MR.JUSTICE BIREN VAISHNAV

Date : 06/09/2017
ORAL JUDGMENT

(PER : HONOURABLE MR.JUSTICE AKIL KURESHI) HC-NIC Page 1 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT

1. This tax appeal is filed by the Revenue challenging judgement of the Income Tax Appellate Tribunal dated 13.10.2016. By the impugned judgement, the Tribunal had declared that the notice of reopening issued by the Assessing Officer against the respondent-assessee was bad in law. Noticing that return filed by the assessee was accepted under section 143(1) of the Income Tax Act, 1961 ['the Act' for short] without scrutiny, we had issued notice for final disposal for consideration of following substantial question of law:

> "[A] Whether in facts and circumstances of the case the Income Tax Appellate Tribunal was justified in declaring the process of reopening the assessment invalid?"

2. Facts are as under:

> The respondent-assessee is a company registered under the Companies Act. For the assessment year 2009-10, the assessee had filed the return of income on 13.09.2009 declaring total income of Rs. 78.46 lacs (rounded off). The return was accepted under section 143(1) of the Act. No scrutiny assessment under section 143(3) of the Act was framed. Subsequently, a survey was carried out at the premises of the assessee-company. A statement of the Director of the company Shri Parasmal Jain was recorded on 30.08.2012 during such survey several documents were seized. The assessee also had written a letter dated 04.09.2012 to the Assessing Officer in which, it was stated inter alia that the company had verified its record for HC-NIC Page 2 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT various years. Certain issues and transactions recorded in the regular books of accounts may not be possible to substantiate, as required under law, as it may take lot of time and effort. The company would like to avoid protected litigation. To avoid litigation and penalty and to buy peace, the company would voluntarily disclose an amount of Rs. 9 crores as its undisclosed income which would comprise of Rs. 7.52 crores for the assessment year 2009-10 towards share capital reserves and Rs. 1.48 crores for the assessment year 2013-14 towards estimated profit for the year. In such letter, details of the companies, to which, 7.52 lacs shares were allotted with premium of Rs. 676.80 lacs were given.

3. It appears that despite such letter, the assessee-company did not offer such income to tax. The Assessing Officer, thereupon, issued notice dated 13.02.2013 under section 148 of the Act to reopen the assessment of the respondent-assessee for the said assessment year 2009-10. The Assessing Officer had recorded following reasons for issuing the notice:

"A survey u/s. 133A was carried out in the case of Laxmiraj Distributors Private Limited, Baroda on 30.08.2012. During survey proceedings some incriminating documents were found, which are inventoried and impounded as annexure BF-1 to BF-

15. On scrutinizing the annexure BF-1, it was noticed that the assessee had introduced unaccounted capital through share capital and share premium. The assessee company raised an amount of Rs. 7,52,00,000/- by allotting its shares to 10 HC-NIC Page 3 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT different companies, located at Surat, Ahmedabad and Kolkata. The assessee company had allotted total 7,52,000 shares with face value of Rs. 10/-at a premium of Rs. 90/- in F.Y. 2008-09. Later in F.Y.2009-10, the assessee purchased back these shares from these 10 companies at a rate of Rs. 10/-each share. The assessee company paid back Rs. 75,20,000/- to purchase the allotted shares. The details of working is as under:

Sr. Name of Allottee No. of Amount/Re No. of Amount No shares alized shares sale paid allotted @ back @ Rs.

		Rs. 10/- each at a premium of Rs. 90/-		10 to Laxmiraj	
1	Shrikant Broking Pvt Ltd	30000	3000000	30000	30
2	Bhandari Glasses Pvt. Ltd.	48000	4800000	48000	48
3	Flacsel Contech Pvt Ltd	49000	4900000	49000	49
4	Chirag Call Shops Pvt. Ltd.	25000	2500000	25000	25
5	Angelica Commotrade Pvt Ltd	80000	8000000	80000	80
6	Anticlock Vyapaar Pvt Ltd.	95000	9500000	95000	95
7	Veronica Commerce Pvt Ltd	100000	10000000	100000	10
8	Muse Dealers Pvt Ltd	155000	15500000	155000	15
9	Medler Dealcom Pvt Ltd	125000	12500000	125000	12
10	Winter fresh food Pvt Ltd	45000	4500000	45000	45
	Total	752000	75200000	752000	75

During survey proceedings, the statement of Shri Parasmal Jain, director of the company was also recorded. But the statement left unconcluded, due to his health reasons. Accordingly, the assessee was summoned u/s. 131 of I.T.Act on 31.08.2012, to attend the office of ACIT, Circle 1(2), Baroda on 03.09.2012.

In compliance to summon issued, the assessee attended the office of the undersigned, where his statement u/s 131 was recorded. While recording statement, the director of the company was asked vide Q. No. 57 to 70 of the statement recorded u/s 131 of the Act on 03.09.2012 about details of investors of the company and the investments made by them. But the director Shri Parasmal Jain who is the only beneficiary to enjoy the profits of the company and who take care all the matters of the company, was unable to give any detail in respect of investors. Even he was not able to name any one of investors who made such huge investments in the company.

Later, on the same day the director of the company Shri Parasmal Jain, vide his hand written letter admitted Rs. 9 crores as his unaccounted income. He also stated in the letter that the breakup-and the nature of this unaccounted income will be submitted in short duration of time.

Accordingly, the assessee company vide its submission dated

04.09.2012 received this . 1,2012, through the director Shri Rarasmal V Jain, submitted the year wise nature of the A.Y.Particulars Amount (Rs.) 2009-10 Share Capital + 7,52,00,000 Reserves 2013-14 Estimated profit for the 1,48,00,000 year Regarding unaccounted income an account of bogus share capital the assessee vide above mentioned letter, submitted the HC-NIC Page 5 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT following names of companies through which unaccounted money was introduced:

1. Shnkant Broking Pvt Ltd

2. Bhandari Glasses Pvt Ltd

3. Flacsel Contech Pvt Ltd

4. Chirag Call Shops Pvt Ltd

5. Angelica Commotrade Pvt Ltd

6. Anticlock VyapaaertLtd

7. Veronica Commerce Pvt Ltd

8. Muse Dealers Pvt Ltd

9.Medler Dealcom Pvt Ltd

10. Water fresh food Pvt Ltd Vide this submission, the company had claimed to have allotted shares of Rs. 75.20 lacs numbering to 7,52,000 shares with a premium of Rs. 676.80 lakhs to various companies numbering 10 in numbers. The assessee had surrendered this share capital along with share premium amounting to Rs. 7.52 crores. He had also furnished a computation of income for the purpose, wherein this income has been shown as additional income. Wherefore since the income disclosed as a result of survey at Rs. 7.52 crores over and above Rs. 78,46,643/- returned in the original return filed on 13.09.2009. In view of the above facts, I have reason to believe that income of Rs. 7.52 crores have been escaped from assessment. Therefore notice u/s. 148 is being issued for A.Y. 2009-10."

4. The Assessing Officer passed the order of assessment under section 143 (3) read with section 147 of the Act on 31.03.2014.

He made the addition of Rs. 7.52 crores as bogus share capital and computed the assessee's total income at Rs. 8.32 crores (rounded off) which included the assessee's original returned income of Rs. 78.46 lacs. The assessee challenged the HC-NIC Page 6 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT order of assessment before the Appellate Commissioner. By a detailed order dated 29.10.2015, the Commissioner rejected the assessee's appeal. Thereupon, the assessee preferred appeal before the Tribunal.

5. Before the Tribunal, the assessee, for the first time, raised the ground of validity of the notice of reopening which the Tribunal permitted since it touched upon the very jurisdiction of the Assessing Officer to reassess. The asssessee also canvassed detailed arguments on the merits of the additions made by the Assessing Officer and confirmed by the CIT(Appeals). With respect to the legality of the notice for reopening, the assessee had raised following five contentions:

i. The Assessing Officer has not established a live link between the material relied upon to reopen the assessment and the escapement of income;

ii. The reopening of assessment is done without application of mind as the Assessing Officer has not looked into the material available before him;

iii. The Assessing Officer had initiated the proceedings on the basis of incorrect facts and irrelevant material;

iv. The Assessing Officer had reopened the assessment without any fresh tangible material in his possession to show that income of the assessee had escaped assessment;

v. The validity of the notice has to be adjudged on the basis

of the reasons recorded which cannot be supplemented by additional reasons.

6. The detailed arguments were made by both sides before the Tribunal on the question of validity of the reopening of the assessment as well as on the merits of the additions. The Tribunal, by the impugned judgement, held that reopening of assessment was bad in law. Consequently, the Tribunal did not enter into the question of correctness of the additions. The Tribunal was aware that the assessee's return was originally processed under section 143(1) of the Act and accepted without scrutiny. The Tribunal referred to the decision of Supreme Court in case of Income Tax Officer, I Ward, Distt. VI, Calcutta and ors vs. Lakhmani Mewal Das reported in [1976] 103 ITR 437 in the context of the Assessing Officer's reason to believe that income chargeable to tax had escaped assessment. The Tribunal also referred to the judgement in case of Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd. reported in 291 ITR 500 in which, the distinction between the reopening of an assessment which was previously framed after scrutiny and one which was accepted without scrutiny was highlighted. The Tribunal also noticed the decision of this Court in case of Inductotherm (India)(P) Ltd vs. M.Gopalan, Deputy Commissioner of Income Tax reported in 36 taxmann.com 401 [356ITR 481] and proceeded to annul HC-NIC Page 8 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT the reassessment on the ground that the formation of belief by the Assessing Officer that income chargeable to tax had escaped assessment was erroneous. In the process, the Tribunal made following observations:

"30. We keep mind the above legal principles inter aha that an Assessing Officer's reopening reasons cannot be improved upon, they have to have cause and effect relationship between reopening reasons and escapement of taxable income, an Assessing Officer cannot resort to reopening in absence of material leading to formation of reasons to believe as per reasonable prudence that any taxable income has escaped assessment and that the same is not in the nature of a fishing or roving inquiry; respectively and proceed to examine the validly of the impugned reopening before us.

31. The assessee's plea is that the impounded document annexure BF-Ol is its annual statement] report at page 01 to 620 of the paper book already tiled with the return. The Assessing Officer's first reason is that a scrutiny thereof indicates the assessee to have introduced unaccounted capital through share capital and premium. The same is nowhere even referred to in the body of assessment order containing 13 pages of Assessing Officer's findings. We afforded sufficient opportunity to Shri Patel to take us to any such material in BF-Ol forming part of the paper so as to even prima facie indicate at slightest pretext that there is even any evidence much less a conclusion indicating assessee's unaccounted income have been invested in the share capital in question. He fails to refer to any such material. We accordingly observe that the impugned reopening reasons nowhere indicate any live nexus between the income sought to be reassessed. Our View therefore is that the Assessing Officer has proceeded on a mere apprehension leading to the impugned long drawn process of roving inquiry which has held to be not permissible by the hon'ble apex court. This met reason accordingly fails the test of cause-effect relationship as discussed in preceding paras. The assessee's first HC-NIC Page 9 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT limb of argument is thus accepted.

32. We come to second reason of the impugned reopening that the assesses company bought back the share capital in question from the ten investor companies by paying them a sum of Rs. 75.20 lacs. This reason no more survives in View of Assessing Officer's remand report as well as CIT (A)'s lower appellate findings that it is the relatives of assessee's directors who have been found to be the purchasers of the share capital in question. We put up a specific query to Shri Patel to point out that the above four share capital purchasers are in any way related to assessee's directors. His case is that the assessee is a closely held company and it is not possible for the department to prove this relationship. This plea does not impress upon us. We notice from Shri Jain's survey statement that he was put up a very specific query about his family members and assesses's other directors. The same were sufficiently replied.

There is no evidence in the case file linking the said persons with those investors found in the remand report. Our view is that neither there is any material on record to point out specified relationship u/s. 4OA(2)(b) of the act nor are their assessment records placed in the case file to prove this crucial relationship. We are also of the opinion that this negative burden that these purchasers are not its relatives cannot be put to the assessee. Nor the department in instant case made any effort to find about finding of the assessment in cases of investor companies as well as the four individual assessee who have repurchased the share capital despite that the fact it itself is the assessing authority of all of them. We rely on the case law in preceding paragraphs that the basic tenet of cause-effect relation between the reopening reasons and taxable income having escaped assessment is accordingly not made out. The assessee succeeds in the instant argument as well.

33. We now come to assessee's third limb of argument that the mere fact of Shri Jain's statement not being able to furnish names of the investor companies or their HC-NIC Page 10 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT negotiators cannot form the reason to believe of its taxable income having escaped assessment. We notice that page 644 contains survey party's specific queries as to whether he remembered the above state particulars of the investors. His reply was that he did not remember. We reiterate that assessee transferred its share capital in financial year 2008-09 and this survey statement is dated 03-09-20 12 i.e. after a time gap of four years. There is further no issue that the department had already impounded BF-Ol on 31-08-2012 stating all details of assessee's companies contained in its annual statement and other documents. The same was furnished back only after issuance of reopening notice (supra). There is thus nothing in Shri Jain's statement which could be held to be treated as an admission or that it is pointing towards introduction any unaccounted income in share capital. The CBDT circular dated 10-03-2003 {as reiterated on 18/12/2014 vide clarification no. 286/98 /2013-IT(Inv-II)} has already clarified that search /survey teams have to collect evidence instead of obtaining confessions of the concerned assessee. Hon'ble jurisdictional high court in Kailashben case (supra) takes notes of the same in para 13 of the judgement to conclude that an addition in absence of corroborative evidence ought not to be made merely on the basis of assessee's admission. We accordingly reject Revenue's contentions supporting this third limb of the impugned reopening as well.

34. This leaves us with the last reason of reopening stated to be based assessee's written correspondence dated 03.09.2012 and 04.09.2012 disclosing names of ten investor companies through whom it had allegedly introduced the impugned unaccounted money. We revert back to page 648 of the paper book. Shri Jain submitted a hand written letter dated 03.09.2012 that assessee's director had consulted the matter to agree for disclosing an unaccounted income of Rs. 9 crores. This followed assessee's retraction on the very next day ie.

04.09.2012 claiming that its share transfer were very much genuine under the company law agreed at the same time for declaring taxable income of Rs. 9 crores. The Assessing Officer did not collect any material even upto 148 notice on 13.02.2013 HC-NIC Page 11 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT despite the fact that he was having at his disposal all the impounded material coupled with details of the ten investor companies. The Revenue at this stage seeks to involve estople principle. Its case is that the above correspondence binds the assessee since filed during survey or under section 131 of the act; as the case may be. We do not agree with this plea either way. We quote Board's circular hereinabove to hold that the same hardly carries any significance in absence of corroborative evidence. The Revenue's latter limb of argument is also devoid of merits because if this admission is not even admissible in special provisions of search or survey, it can be safely held that the very analogy covers section 131 proceedings for general provisions as Well. We have already indicated many a times that there is no corroborative evidence casting doubts on assessee's share capital transfer upto the date of reopening

notice. We further quote a co-ordinate bench decision of this tribunal in ITO vs. Ghanshyambhai R. Thakkar (1996) 56 TTJ Ahd 460 rejecting a similar argument that a statement made during survey cannot be accepted in piecemeal. We adopt the very reasoning to observe that the Revenue's approach in seeking to assess assessee's amount declared of Rs. 9 crores and at the same time questioning genuineness thereof by adopting pick and choose method is accordingly rejected. The assessee thereofre succeeds in its fourth argument as well.

35. We have already discussed in preceding paragraphs that Shri Patel has also filed a catena of case law supporting the impugned reopening. First one of Olwin Tiles (supra) upholding Assessing Officer's action issuing section 148 notice since the assessee therein had received huge premiums having regard to its net worth. We reiterate that there is no such reason in the impugned reopening before us. The same can also not be allowed to be substituted at this stage. We find Revenue's judgments on this legal aspect are not germane to the issue since the re-openings therein fulfilled all relevant parameters as per facts involved therein.

The same are accordingly distinguished.

36.We rely upon our detailed discussion hereinabove to finally conclude that all four reasons of the impugned reopening recorded by the Assessing Officer have to be held as not sustainable as per the settled law. We accordingly quash the impugned re-opening. The assessee's additional ground is accepted. All other arguments advanced at both parties' behest qua merits of the case are rendered academic."

7. We may recall that the return filed by the assessee was originally accepted without scrutiny. The notice for reopening was issued after the survey was carried out at the premises of the company during which, various documents were found and impounded. Statement of the Director of the company was recorded. In fact, after such survey was over, the company had written a letter to the Assessing Officer showing its willingness to offer income of Rs. 7.52 crores for the assessment year 2009- 10 under the head of share capital reserves. The letter of course suggested that this was being done to by peace and to avoid protected litigation as also since it was not possible to reconcile the company's accounts after long gap of time. We may also recall that neither before the Assessing Officer nor before the CIT (Appeals) the assessee had raised any ground of invalidity of the notice of reopening of assessment. This is not to suggest that before the Tribunal, the same could not have been raised for the first time. Being a jurisdictional issue, it is always open for the assessee to take up a legal contention with respect to the validity of the reopening as long as supporting factual material HC-NIC Page 13 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017

JUDGMENT was already on record. Therefore, the Tribunal did not commit any error in allowing the assessee to raise such a contention. The question is, did the Tribunal adopt the correct approach in declaring a notice for reopening invalid on the grounds it has so done?

8. In case of Rajesh Jhaveri Stock Brokers P. Ltd (supra), the Supreme Court highlighted a clear distinction between the assessment under section 143(1) of the Act and one in which, the assessment is made by the Assessing Officer after scrutiny under section 143(3) of the Act. This distinction was noticed in the background of the notice of reassessment where the return of the assessee was accepted under section 143(1) of the Act. In this context, it was held and observed that in the scheme of things the intimation under section 143(1) cannot be treated to be an order of assessment and that being the position the question of change of opinion does not arise. It was further observed as under:

> "16. Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word reason in the phrase reason to believe would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion. The function of the Assessing Officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of HC-NIC Page 14 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT fairness to taxpayers. As observed by the Delhi High Court in Central Provinces Manganese Ore Co. Ltd. v. ITO [1991 (191) ITR 662], for initiation of action under section 147(a) (as the provision stood at the relevant time) fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is reason to believe, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the Assessing Officer is within the realm of subjective satisfaction (see ITO v. Selected Dalurband Coal Co. Pvt. Ltd. [1996 (217) ITR 597 (SC)] ; Raymond Woollen Mills Ltd. v. ITO [1999 (236) ITR 34 (SC)]."

9. The ratio of decision in case of Rajesh Jhaveri Stock Brokers P. Ltd (supra) laid down by the Supreme Court was reiterated in later judgement in case of Deputy Commissioner of Income Tax and anr vs. Zuari Estate Development and Investment Company Ltd. reported in 373 ITR 661. In case of Inductotherm (India)(P) Ltd vs. M.Gopalan, Deputy Commissioner of Income Tax, Division Bench of Gujarat High Court had an occasion to consider the challenge to a notice of reopening of assessment by the Assessing Officer in a case where the return of the assessee was accepted under section 143(1) of the Act. One of the contentions raised on behalf of the assessee was that the time limit for issuing notice under sub section (2) of section 143 of the Act to scrutinize the return of the

assessee having expired, it was not open for the Assessing HC-NIC Page 15 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT Officer to resort to reopening of the assessment. Such a contention was rejected by the Court. However, it was observed that even in case of reopening of an assessment where the return was accepted without scrutiny, the requirement that the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment would apply. Referring to the decision of Supreme Court in case of Rajesh Jhaveri Stock Brokers P. Ltd (supra), it was observed as under:

> "13. One thing further to be noticed is that intimation under section 143(1)(a) is given without prejudice to the provisions of section 143(2). Though technically the intimation issued was deemed to be a demand notice issued under section 156, that did not per se preclude the right of the Assessing Officer to proceed under section 143(2). That right is preserved and is not taken away. Between the period from April 1, 1989 to March 31, 1998, the second proviso to section 143(1)(a), required that where adjustments were made under the first proviso to section 143(1)(a), an intimation had to be sent to the assessee notwithstanding that no tax or refund was due from him after making such adjustments. With effect from April 1, 1998, the second proviso to section 143(1)(a) was substituted by the Finance Act, 1997, which was operative till June 1, 1999. The requirement was that an intimation was to be sent to the assessee whether or not any adjustment had been made under the first proviso to section 143(1) and notwithstanding that no tax or interest was found due from the assessee concerned. Between April 1, 1998 and May 31, 1999, sending of an intimation under section 143(1)(a) was mandatory. Thus, the legislative intent is very clear from the use of the word intimation as substituted for assessment that two different concepts emerged. While making an assessment, the Assessing Officer is free to make any addition after grant of opportunity to the assessee. By making adjustments under the first proviso to section 143(1)(a), no addition which is impermissible by the HC-NIC Page 16 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT information given in the return could be made by the Assessing Officer. The reason is that under section 143(1)(a) no opportunity is granted to the assessee and the Assessing Officer proceeds on his opinion on the basis of the return filed by the assessee. The very fact that no opportunity of being heard is given under section 143(1)(a) indicates that the Assessing Officer has to proceed accepting the return and making the permissible adjustments only. As a result of insertion of the Explanation to section 143 by the Finance (No. 2) Act of 1991 with effect from October 1, 1991, and subsequently with effect from June 1, 1994, by the Finance Act, 1994, and ultimately omitted with effect from June 1, 1999, by the Explanation as introduced by the Finance (No. 2) Act of 1991 an intimation sent to the assessee under section 143(1)(a) was deemed to be an order for the purposes of section 246 between June 1, 1994, to May 31, 1999, and under section 264 between October 1, 1991, and May 31, 1999. It is to be noted that the expressions intimation and assessment order have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes the computation of income,

sometimes the determination of the amount of tax payable and sometimes the whole procedure laid down in the Act for imposing liability upon the tax payer. In the scheme of things, as noted above, the intimation under section 143(1)(a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under section 143(l)(a) as it stood prior to April 1, 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with and instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D. K. Jain J) in Apogee International Limited v. Union of India [(1996) 220 ITR 248]. It may be noted above that under the first proviso to the newly substituted section 143(1), with effect from HC-NIC Page 17 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT June 1, 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under section 143(1) where (a) either no sum is payable by the assessee, or (b) no refund is due to him. It is significant that the acknowledgment is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any assessment is done by them? The reply is an emphatic no. The intimation under section 143(1)(a) was deemed to be a notice of demand under section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable. By such application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under section 143(1)(a), the question of change of opinion, as contended, does not arise.

14. Additionally, section 148 as presently stands is differently couched in language from what was earlier the position. Prior to the substitution by the Direct Tax Laws (Amendment) Act, 1987, the provision read as follows:

"148. Issue of notice where income has escaped assessment.-(1) Before making the assessment, reassessment or re-computation under section 147, the Assessing Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under subsection (2) of section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that subsection.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

17. The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution.

Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment HC-NIC Page 18 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied firstly the Assessing Officer must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a) But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."

10. In case of Lakhmani Mewal Das (supra), the Supreme Court observed that the reasons for the formation of the belief contemplated by section 147 of the Act for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation of his belief that there had been escapement of the income of the assessee from assessment. It was further observed that not any and every material howsoever vague and indefinite or distant, remote and far-fetched it would warrant the formation of the belief relating to escapement of income of the HC-NIC Page 19 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT assessee from assessment.

11. From the decisions noted above, what broadly emerges is that there is a vital distinction between reopening of an assessment where the return of an assessee has been accepted under section 143(1) of the Act without scrutiny and where the scrutiny assessment has been previously framed. In the former case, the Assessing Officer cannot be stated to have formed any opinion and therefore, unlike in the latter case, the concept of change of opinion would have no applicability. Despite this clear distinction, the common thread that would run through both sets of exercises of reopening of assessment is that the Assessing Officer must have reason to believe that income chargeable to tax had escaped assessment. Such reason to believe, as held by Supreme Court in case of Commissioner of Income Tax vs. Kelvinator of India Ltd. reported in [2010] 320 ITR 561, would mean a tangible material to enable the Assessing Officer to come to a conclusion that there is escapement of income from assessment. The reason must have live link with the formation of the belief. At the same time, the Supreme Court in case of Rajesh Jhaveri Stock Brokers P. Ltd. (supra) had reiterated that at stage of issuance of notice (for reopening of assessment) the question is whether there was relevant material on which a reasonable person could have formed the requisite belief and the final outcome of the proceedings is not relevant.

12. We may test the decision of the Tribunal on the basis of HC-NIC Page 20 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT these legal principles. We may recall,

the Assessing Officer had recorded detailed reasons. These reasons referred to survey action carried out in case of the respondent-assessee company on 30.08.2012 during which, incriminating documents were found and impounded. It was noticed that the assessee-company had raised a sum of Rs. 7.52 crores by allotting shares to ten different companies. The company had alloted 7.52 lacs shares with the face value of Rs. 10/- at a premium of Rs. 90/- in the financial year 2008-09. Later, in the financial year 2009-10, the assessee had purchased these shares from these ten companies at a rate of Rs. 10/- per share and the company had paid back a sum of Rs. 75.20 lacs to purchase these shares. During the course of survey, statement of Shri Parasmal Jain, Director of the company was recorded on 31.08.2012. His further statement was recorded under section 131 of the Act on 31.09.2012. He was asked to give details of investors of the company and the investments made by them. He was unable to give any such details. He had also admitted in his letter of the same day, Rs. 9 crores as unaccounted income. Company had subsequently under letter dated 04.09.2012 reiterated such admission out of which Rs. 7.52 crores was towards share capital reserves concerning assessment year 2009-10. It was on the basis of such material that the Assessing Officer formed a belief that income chargeable to tax to the tune of Rs. 7.52 cores had escaped assessment.

13. The Tribunal, by the impugned judgement, came to the conclusion that such formation of belief was not permissible on HC-NIC Page 21 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT the basis of materials on record. We have reproduced the portion of the judgement of the Tribunal which is relevant to this aspect. The Tribunal went into minutest details of the reasons recorded by the Assessing Officer and relied on the material which had come on record during the assessment and the appellate proceedings to hold that such reasons were not valid. In other words, without so saying, the Tribunal held that the formation of the belief by the Assessing Officer that income chargeable to tax had escaped assessment was not correct. As noted, as the judicial trend suggests that in a case where the return of an assessee is accepted under section 143(1) of the Act without scrutiny, the Assessing Officer of course, subject to the limitation provision contained in the Act, would have a right to reassess the income provided that he forms a belief that income chargeable to tax had escaped assessment. Such formation of belief, of course, must be based on a tangible material which would have a live link with the formation of the belief and cannot be based on unconnected, remote or vague material. It is equally well established that the notice for reassessment cannot be issued for a mere roving or a fishing inquiry. Nevertheless, the formation of belief is a subjective satisfaction of the Assessing Officer to be arrived at on the basis of objective consideration of materials on record. The validity of such formation of belief is of course open to challenge. Nevertheless, in our opinion, it is not permissible to criticize the formation of belief and to declare it as invalid from the inception by carrying out threadbare examination of documents, materials and the HC-NIC Page 22 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT evidences which have come on record during the assessment proceedings. It is one thing to hold that a certain addition or disallowance made by the Assessing Officer was impermissible on the basis of materials on record. It is entirely another thing to say that on the assessment of evidence on record the formation of belief by the Assessing Officer that income chargeable to tax had escaped assessment was wrong. The conclusion, that a certain addition or disallowance was not permissible in face of the evidence on record, rests in the realm of testing the Assessing Officer's findings on the issue and must necessarily take within its sweep the evidence and materials brought on record during the assessment proceedings and sometimes, even additional

material which may have been allowed to be brought on record at the appellate stage. Such exercise would necessarily rests on evaluation of evidence and preponderance of probability. The conclusion, that the notice for reopening of an assessment is invalid, has an entirely different connotation and effect. To declare the notice as invalid, on the basis that the formation of belief by the Assessing Officer that income chargeable to tax had escaped assessment by evaluating the evidence on record and by coming to the conclusion that the belief was wrong, would simply not be permissible. This is so because a certain distinction in approach is required while examining a finding by the Assessing Officer as to the addition or disallowance in an order of assessment and his formation of belief that income chargeable to tax had escaped assessment. The former would be in the realm of appreciation of evidence HC-NIC Page 23 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT which would be on the basis of preponderance of probabilities and application of mind on the facts so deduced. The later would be in the realm of reasonableness of the belief of the Assessing Officer that income chargeable to tax had escaped assessment. If therefore there was tangible material on record suggesting live link with the formation of the belief by the Assessing Officer that income had escaped assessment, the notice of reopening cannot be struck down on the ground that the formation of belief was invalid. This is not to suggest that under no circumstances the material brought on record after issuing notice of reopening, the same cannot be looked into for testing the correctness of the belief of the Assessing Officer that income chargeable to tax has escaped assessment. If such material ex facie demonstrates either in fact or in law that the Assessing Officer could not have formed a belief that income chargeable to tax had escaped assessment, the notice could as well be quashed.

14. In the present case, the Tribunal has evaluated the evidence on record in minutest detail as if each limb of the Assessing Officer's reasons recorded for issuing notice of reopening was in the nature of an addition made in the order of assessment which had either to be upheld or reversed, which was simply impermissible.

15. We may refer to some of the decisions cited on behalf of the assessee. In case of Krupesh Ghanshyambhai Thakkar vs. Deputy Commissioner of Income Tax reported in 77 HC-NIC Page 24 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT taxamann.com 293, this Court observed that the Assessing Officer cannot resort to reopen the assessment for a fishing or roving inquiry or to seek to verify any claim. This is a well settled proposition with which, there could be no dispute.

16. Decision in case of TANMAC India vs. Deputy Commissioner of Income Tax, Circle-I, Pondicherry reported in 78 taxmann.com 155 of the Madras High Court seems to be suggesting that if after issuing intimation under section 143(1) of the Act, the Assessing Officer does not issue notice of scrutiny assessment under section 143(2) of the Act, it would not be open for the Assessing Officer thereafter to resort to reopening of the assessment. The High Court placed heavy reliance on the decision of Delhi High Court in case of Commissioner of Income Tax vs. Orient Craft Ltd. reported in 354 ITR 536 in which the distinction between scrutiny assessment and a situation where return has been accepted under section 143(1) is narrowed down. The Court has brought in the concept of true and full disclosure even in case of reopening assessment where return was accepted aunder section 143(1) of the Act.

17. The proposition, that if no notice for scrutiny is issued after accepting return under section 143(1) of the Act, notice for reopening cannot be issued, was not accepted by this Court in case of Inductotherm (India)(P) Ltd (supra). Relevant portion of which we have already reproduced earlier. The decision of HC-NIC Page 25 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT Delhi High Court in case of Orient Craft Ltd.(supra) came up for consideration before this Court in case of Olwin Tiles India Pvt. Ltd vs. Deputy Commissioner of Income Tax reported in 382 ITR 291. The Court observed as under:

> "9. In case of Orient Craft Ltd. (supra), heavily relied upon by Shri Shah, the Division Bench of Delhi High Court, in the context of reopening of an assessment, which was originally accepted under Section 143(1) of the Act, reiterated that the requirement of 'reason to believe' would apply even in such case and that such requirement cannot be different in case of 143(1) and 143(3) assessment. On this aspect, we have no disagreement at all. In fact, this was substantially what was held in judgment of this Court in Inductotherm (India) P. Ltd. (supra). However, in later portion of the judgment in para-18, which is reproduced hereinabove, the Court went further and observed that there was no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. The Court was, therefore, of the opinion that it reflects an arbitrary exercise of the power conferred under section 147 of the Act.

Heavy reliance was placed on the decision of the Supreme Court in case of CIT Vs. Kelvinator of India Ltd., reported in 320 ITR, page No.561. We are unable to persuade ourselves to take such a strong line. The decision of the Supreme Court in case of Kelvinator of India Ltd. (supra) was rendered in the background of a case of reopening of an assessment which was previously framed after scrutiny. The observations of the Supreme Court of requirement of reason to believe even after amendment in Section 147 of the Act therefore, must be seen in background of such facts. We are afraid, the Supreme Court never meant to convey that to reopen an assessment, which was accepted under Section 143(1) of the Act, there must be some tangible material, which is alien to the record".

18. The Court thereafter referred to the Division Bench judgement in case of Gujarat Power Corporation Ltd vs. HC-NIC Page 26 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT Assistant Commissioner of Income Tax reported in 350 ITR 266 and it was held that in case of reopening of assessment within 4 years from the end of relevant assessment year, the concept of true and full disclosure would not apply and the expression "tangible material" does not mean material alien to the original record.

19. The decision in case of Orient Craft Ltd. (supra) was also considered by Delhi High Court in case of Indu Lata Rangwala vs. Deputy Commissioner of Income Tax reported in 384 ITR 337. The Court referring to the decisions of Supreme Court in case of Rajesh Jhaveri Stock Brokers P. Ltd. (supra) and Zuari Estate Development and Investment Company Ltd. culled out legal proposition. Relevant portion of which reads as under:

"35.1 The upshot of the above discussion is that where the return initially filed is processed under Section 143 (1) of the Act, and an intimation is sent to an Assessee, it is not an 'assessment' in the strict sense of the term for the purposes of Section 147 of the Act. In other words, in such event, there is no occasion for the AO to form an opinion after examining the documents enclosed with the return whether in the form of balance sheet, audited accounts, tax audit report etc. 35.2 The first proviso to Section 147 of the Act applies only (i) where the initial assessment is under Section 143 (3) of the Act and (ii) where such reopening is sought to be done after the expiry of four years from the end of the relevant assessment year. In other words, the requirement in the first proviso to Section 147 of there having to be a failure on the part of the HC-NIC Page 27 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT Assessee "to disclose fully and truly all material facts" does not at all apply where the initial return has been processed under Section 143 (1) of the Act.

35.5 As explained by the Supreme Court in Rajesh Jhaveri Stock Brokers P. Ltd. (supra) and reiterated by it in Zuari Estate Development and Investment Co. Ltd. (supra) an intimation under Section 143 (1) (a) cannot be treated to be an order of assessment. There being no assessment under Section 143 (1) (a), the question of change of opinion does not arise.

35.7 In other words, where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.

35.8 In the assessment proceedings pursuant to such reopening, it will be open to the Assessee to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment."

20. In case of EL Forge Ltd. vs. Deputy Commissioner of Income Tax, Special Range-I, Chennai reported in 45 taxmann.com 402, the Division Bench of Madras High Court considered the validity of notice of reopening in case of an assessee whose return was accepted under section 143(1) of the Act. The Division Bench relied on the decision of Supreme Court in case of Kelvinator of India Ltd.(supra) held that the HC-NIC Page 28 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT notice was invalid on the ground that there was no failure on part of the assessee to disclose truly and fully all material facts. The observations of the Court may be noted:

"7. The facts of the case show that there was no denial of the fact that the assessee had disclosed the details as regards the carry forward of the losses as well as the

income computed and all these details were very much there before the Assessing Officer; that there is no denial of the fact that there was no failure on the part of the assessee in disclosing the facts necessary for assessment and that there is no such allegation that the escapement of income was on account of the failure of the assessee in not disclosing fully and truly all material facts. In the circumstances, applying the Supreme Court decision referred to above, we have no hesitation in accepting the plea of the assessee that the assumption of the jurisdiction beyond four years is hit by limitation as provided under Section 147 proviso. Even though, on the merits of the assessment, the assessee's case has to fail, yet, on the limited question as regards the jurisdictional time limit as provided for under Section 147 of the Income Tax Act, the assessee is entitled to succeed. Since limitation is the fundamental aspect of the assessment, we have no hesitation in setting aside the order of the Tribunal, thereby allowing the appeal.

In the light of the above, the appeal is decided in favour of the assessee and the Tax Case Appeal stands allowed. No costs. "

21. We are unable to concur with this view. In plain terms, the proviso to section 147 of the Act would apply only in a case where previously assessment has been framed after scrutiny. In a case where the return is accepted under section 143(1) of the HC-NIC Page 29 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT Act, the additional requirement that income chargeable to tax had escaped assessment on account of the failure on part of the assessee to disclose truly and fully all material facts, simply would not apply. The decision of Supreme Court in case of Kelvinator of India Ltd.(supra) was not concerned with any such proposition. It was a case, in which, original assessment was framed after scrutiny. Notice of reopening of assessment was issued within a period of four years from the end of the relevant assessment year. The question before the Supreme Court was whether in view of the amended section 147 after 01.04.1989 the concept of change of opinion would still apply? The reference and reliance by the High Court on the decision of Supreme Court of case of Kelvinator of India Ltd.(supra) in the context of requirement of true and full disclosures where a notice has been issued for reopening of the assessment which was originally not framed after scrutiny was simply not useful.

22. The decisions of Delhi High Court in cases of Commissioner of Income Tax-Central I vs. Indo Aarab Air Service reported in 64 taxmann.257 and Pr. Commissioner of Income Tax vs. Tupperware India (P) Ltd reported in 65 taxmann.17, the Court found that the Assessing Officer had recorded contradictory reasons which was one of the many grounds for quashing the notice of reopening. In case of Ratna Trayi Reality Services (P) Ltd vs. Income Tax Officer reported in 34 taxmann.com 122, the Court struck down the notice of reopening on two grounds. One was that the assessee HC-NIC Page 30 of 32 Created On Sat Sep 16 04:13:01 IST 2017 O/TAXAP/472/2017 JUDGMENT was granted barely 12 hours to respond to the notice for production of material and that in the objections that the assessee raised to the notice of reopening, he had produced documents to establish that the investment was in fact reflected in the books contrary to what the Assessing Officer had recorded in his reasons. The Court was of the opinion that if the Assessing Officer had perused such documents, he would have been satisfied that the reason was improper. This was thus a very clear case where ex

facie the reasons recorded by the Assessing Officer were found to be invalid.

23. In the result, the Tax appeal is allowed. The question is answered in favour of the Revenue. The judgement of the Tribunal dated 13.10.2016 is set aside. Resultantly, the conclusion, that the notice of reopening of assessment was invalid, is quashed since the Tribunal had not examined the additions made by the Assessing Officer and confirmed by the CIT (Appeals) on merits. On this preliminary ground, the tax appeal before the Tribunal would be revived and would be disposed of dealing with the rest of the contentions of the assessee unmindful of the observations which we have made in this judgement.

Tax appeal is disposed of accordingly.

(AKIL KURESHI, J.)

(BIREN VAISHNAV, J.)

Jyoti