Lokesh Talanki , Bangalore vs The Assistant Commissioner Of Income ... on 22 April, 2022

IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH : BANGALORE

BEFORE SHRI BEENA PILLAI, JUDICIAL MEMBER AND MS. PADMAVATHY S, ACCOUNTANT MEMBER

ITA No.261/Bang/2019

Assessment year : 2013-14

Shri. Lokesh Talanki No.690, "Talankis" 7th Main J P Nagar III Phase Bangalore 560 078 PAN - AAZPL3005D	Vs.	ACIT Central Circle 2(3)(1) Bangalore
APPELLANT		RESPONDENT

Assessee by : Shri Deepesh Waghale CA
Revenue by : Shri Shehnawaz Ul Rahaman Addln CIT

Date of hearing : 13.04.2022
Date of Pronouncement : 22.04.2022

ORDER

Per Padmavathy S, Accountant Member

This appeal is against the order of the Commissioner of Income Tax Appeals - 4 dated 30/10/2018 for the assessment year 2013-14.

2. The assessee has raised legal grounds challenging the reopening u/s. 148 and also grounds on merits challenging the denial of deduction u/s. 54F. The grounds raised by the assessee are as under

> a. The learned ad Commissioner Appeals erred in acknowledging the fact that the assessing officer is not justified in opening the file of the assessee for the AY 13-14 u/s. 148 of the Income Tax Act 1961 based on mere change of opinion. The assessing officer has not found any new evidence and he has not applied his mind in reopening the assessment b. The learned Commissioner appeals erred in acknowledging the fact that the assessing officer is not justified in reopening the file u/s. 148 of the Income Tax Act 1961 just to review its own order passed the time of regular scrutiny c. The learned Commissioner appeals erred in acknowledging the fact that the assessing officer is not justified in opening the file of the assessee u/s. 148 of the Income Tax Act based on a High Court judgment d. The learned Commissioner appeals is not justified in ignoring the income tax return filed audited books of accounts produced

and supporting documents at the time of regular scrutiny assessment for the AY 13-14.

e. The learned Commissioner appeals wherein knowledge in the fact that an investment was made with unrelated and independent people and does not fall for the inclusion of number of residential house property for the deduction u/s. 54F of the Income Tax Act 1961.

f. The learned Commissioner appeals erred in calculation of the interest u/s. 234B at the time of passing the impugned assessment order g. The learned Commissioner appeals has not considered the valid explanation given by your appellant in this regard

3. The assessee is an individual and has filed the return of income on 30.09.2013. The case was selected for scrutiny and notice u/s. 143(2) dated 05.09.2014 was duly issued and served. The notice u/s. 142(1) r.w.s. 129 dated 30.06.2015 was also served calling for various details from the assessee. The assessee had sold the plot at shop enclave on 30.05.2012 resulting in capital gain of Rs.1,99,15,242. The assessee has claimed deduction u/s. 54F as the assessee has invested the entire consideration received from the sale of asset in a residential house property in JP Nagar 3rd phase. In the course of assessment the assessing officer (AO) accepted the return of income filed by the assessee and concluded the assessment by order dated 19.10.2015. During the regular scrutiny assessment for assessment year 2015-16 the AO noticed that the residential property which the assessee owned along with the 3 others was bought by the assessee on 01.09.2004. The AO reopened the assessment of the year under consideration u/s.148 by notice dated 30.10.2017 to verify the claim of section 54F as the AO was of the opinion that the assessee owned more than one residential house during the assessment year 2013-14 and hence not entitled for claim u/s. 54F. The AO passed an assessment order u/s. 143(3) r.w.s. 147 on 21.03.2018 disallowing the claim u/s. 54F and recomputed the income of the assessee at Rs. 2,50,88,284. Aggrieved the assessee filed an appeal before the CIT (A) challenging the re- opening of assessment and also the re-computation of capital gains. The CIT(A) held that the re-opening is valid and also confirmed the computation of capital gain by the AO relying on the decision of the Karnataka High Court in the case of M J Siwani 366 ITR 356.

4. The assessee is in appeal before the Tribunal against the order of the CIT(A).

5. We will first consider the legal ground raised challenging the reopening of assessment u/s. 148. The learned AR argued that reopening of assessment u/s. 148 is bad in law as no new material was found to justify the reopening . The learned AR submitted that all details including the balance sheet of the assessee in which all the three immovable properties owned by the assessee are disclosed was produced before the AO at the time of regular assessment and therefore the reopening is done on the basis of a mere change of opinion by the AO. In this regard the learned AR placed reliance on CIT vs Corporation Bank Ltd (2002) 254 ITR 791 (SC). The learned AR also submitted the details submitted before the AO during the course of regular assessment.

6. The learned DR submitted that the nature and character of the asset sold during the assessment year 2015-16 was never verified by the AO and had he done it with due diligence the ownership of two assets of two residential assets at the time of sale of the capital asset in assessment 2012-13 would have surfaced whereby the assessee would not have got the exemption u/s.54F. The Learned DR in this regard placed reliance on the decision of the Supreme Court in the case of Ess Ess Kay Engineering Co. P. Ltd. vs CIT (2001) 247 ITR 818 SC.

7. We have heard the rival submissions and perused the materials on record. We notice that the AO during the course of original assessment u/s.143(3) of the Act, had called for various details including the statement of income, Balance sheet and Profit & Loss account, property details, rental agreements etc. which the assessee has been sharing on from time to time. These details that have been called for are for assessment years 2012-13 and 2011-12 also besides the year under consideration. The AO has raised queries after perusal of materials for which the assessee had provided the required clarifications. The details called for includes those relating to the properties owned by the assessee like rental agreements, Katha etc. The balance sheet of the assessee as at 31.03.2013 clearly shows that the assessee is owning a 1/4th share in property at JP Nagar Bangalore besides the new assets (under construction) and one more property Flat at Brigade Gateway. The AO in fact had called for the rental agreement of one of the properties at Brigade Gateway. This proves the fact that the AO has indeed applied his mind while reviewing the balance sheet of the assessee and called for relevant documents before concluding the assessment allowing the deduction u/s.54F. The contention of the learned AR that no new materials is found by the AO and that the reopening is done based on a mere change of opinion merits consideration.

8. It is relevant here to look at the provisions of section 147 which reads as follows

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return u/s. 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
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> Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity)

located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :--

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

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

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required u/s. 92E;

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

(i) income chargeable to tax has been underassessed ; or

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

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

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

(ca) where a return of income has not been furnished by the assessee or a return of income has been furnished by him and on the basis of information or document received from the prescribed income-tax authority, under sub-section (2) of section 133C, it is noticed by the Assessing Officer that the income of the assessee exceeds the maximum amount not chargeable to tax, or as the case may be, the assessee has

understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

Explanation 3.--For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148.

Explanation 4.--For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

9. The first proviso and the explanations to section 147 are not applicable in the case of the assessee as the AO has re-opened the assessment within 4 years from the end of relevant assessment year in which the assessment u/s.143(3) was completed. Hence what is relevant here is the AO's 'reason to believe' that any 'income has escaped assessment' where the original assessment is completed accepting the return of income filed by the assessee. The Hon'ble Delhi High Court in the case of CIT, Delhi vs M/S. Kelvinator Of India Ltd, 256 ITR 1 has considered a similar issue where the court has held that

18. From a bare perusal of the provisions contained in Section 147 of the said Act, as it stood up to 31st March 1989, it is evident that to confer jurisdiction u/s. 147 of the Act two conditions were required to be satisfied viz.; (i) the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either; (a) omission or failure on the part of the assessed to make a return of his income u/s. 139 or

(b) omission or failure on the part of the assessed to disclose fully and truly all material facts necessary for his assessment for that year. The afore-mentioned requirements of law must be held to be conditions precedent for invoking jurisdiction of the Assessing Officer to re-open the assessment u/s. 147 of the said Act. It is trite that both the conditions afore-mentioned are cumulative. It is also a well settled principle of law that, in the event, it is found that any of the said two conditions is not fulfillled the notice issued by the Assessing Officer would be wholly without jurisdiction. the expression "reason to believe" finds place both in Clause (a) and

(b) of Section 147 of the Act. Sub-section (2) of Section 148 of the Act mandates that before jurisdiction u/s. 147 of the Act is invoked by the Assessing Officer he is to record his reasons for doing so or before issuing any notice u/s. 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the assessment officer could re-open a completed assessment. Since assessment has been re-opened on 20th April 1990, Section 147 as

amended w.e.f. 1st April 1989 would apply.

19. What would constitute 'reason to believe' is no longer res integra.

20. In Calcutta Discount Co. Ltd. (supra) the Apex Court clearly held that once the primary facts are before the Assessing Authority he requires no further assistance by way of disclosure. It was observed by the Apex Court that:

> "It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessed- to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessed must disclose what inferences - whether of facts or law - he would draw from the primary facts."

21. As regards Scheme of the Act, the Apex Court held:

> "The Scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under-assessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for reassessment within a period of 8 years; and where he has reason to believe that an under-assessment has resulted from other causes he shall have jurisdiction to start proceedings for reassessment within 4 years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under -assessment has resulted from non- disclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under-assessment has resulted from nondisclosure of material facts, cannot therefore be accepted."

22. In Indian & Eastern Newspaper Society v. C.I.T. (S.C.) reported in (1979) 119 ITR 996 three Judges Bench of the Apex Court held that although disclosure of a new fact therein may be an information within the meaning of the afore-mentioned provisions this opinion of law would not be as regard a contention on the part of the Revenue that the expression information in Section 147(b) refers to realization by the ITO that he has committed an error while making original assessment. The Apex Court said:

> "that he has committed an error when making the original assessment. it is said that, when upon receipt of the audit note the ITO discovers or realizes that a mistake has been committed in the original assessment, the discovery of the mistake would be "information" within the meaning of Section 147(b). The submission appears to us inconsistent with the terms of Section 147(b). Plainly, the statutory provision envisages that the ITO must first have information in his possession, and then in

> consequence of such information he must have reason to believe that income has escaped assessment. The realization that income has escaped assessment is covered by the words "reason to believe", and it follows from the "information" received by the ITO. The information is not the realization, the information gives birth to the realization."

23. This has been the settled position in law althrough. However, the question which requires consideration is whether any change in law has been brought about on account of amendment of Section 147 with effect from 1st April 1989.

24. In Jindal Photo Films Ltd. (supra) R.C. Lahoti, J. (as his Lordship then was) observed:

> "The power to reopen as assessment was conferred by the Legislature not with the intention to enable the Income-tax Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods." It was further held by the Bench that:
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> "Reverting back to the case at hand, it is clear from the reasons placed by the Assessing Officer on record as also from the statement made in the counter affidavit that all that the Income-tax Officer has said is that he was not right in allowing deduction u/s. 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record.
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> No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons u/s. 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings u/s. 147 of the Act.
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> It is also equally well settled that if a notice u/s. 148 has been issued without the jurisdictional foundation u/s. 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or

> adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings u/s. 147/148 of the Act."

25. Thus, the Court held that even under the newly substituted Section 147, with effect from 1st April 1989, an assessment could not be re-opened on a mere change of opinion. Yet again in Foramer's cases (supra) a Division Bench of the Allahabad High Court has held that if a notice u/s. 147/148 was issued after the coming into force of the amended Act, the latter shall be attracted. However it is observed that:

> "Although we are of the opinion that the law existing on the date of the impugned notice u/s. 147/148 has to be seen, yet even in the alternative even if we assume that the law prior to the insertion of the new Section 147 will apply even then it will make no difference since even under the original Section 147 notice for reassessment could not be given on the mere change of opinion as held in numerous cases of the Supreme Court, some of which have been mentioned above. Since the Tribunal in the appeal relating to the assessed-company had considered the Tribunal's earlier decision in Boudier Christian's case, it will obviously amount to mere change of opinion, and hence the notice u/s. 147/148 would be illegal"

26. We may also notice that a Division Bench of the Gujrat High Court in Garden Silk Mills Pvt. Ltd. (supra), while expressing similar views observed:

> "The reasons recorded by the Assessing Officer which led to the belief about the escapement of assessment disclose that the present case is nothing but mere change of opinion on the facts which were already before the Assessing Officer while making the first assessment to which conscious application of mind is reflected from the proceedings, and allowed in the computation and which has not been disputed by the Revenue."

27. Although the referring Bench had prima facie agreed with the decision of this Court in Jindal Photo Films (supra), but a doubt was sought to be raised by the revenue in view of a decision of the Gujrat High Court in Praful Chunilal Patel's case (supra). Therefore let us now consider the decision of the Division Bench of Gujrat High Court in the said case, wherein it was held:

> "It will thus be seen that in the proceedings taken u/s. 147, the Assessing Officer may make an assessment or reassessment, or recomputation, as the case may be. The word "assess" refers to a situation where the assessment was not made in the normal manner while the word "reassess" refers to a situation where an assessment is already made, but it is sought to be reassessed on the basis of this provision. In cases where the Assessing Officer has not made an assessment of any item of income chargeable to tax while passing the assessment order in the relevant assessment year, it cannot be said that such income was subjected to an assessment. In the assessment

> proceedings, the Assessing Officer would ascertain on consideration of all relevant circumstances the amount of tax chargeable to a given taxpayer. The word "assessment" would mean the ascertainment of the amount of taxable income and of the tax payable thereon. In other words, where there is no ascertaining of the amount of taxable income and the tax payable thereon, it can never be said that such income was assessed. Merely because during the assessment proceedings the relevant material was on record or could have been with due diligence discerned by the Assessing Officer for the purpose of assessing a particular item of income chargeable to tax, it cannot be inferred that the Assessing Officer must necessarily have deliberated over it and taken it out while ascertaining the taxable income or that he had formed any opinion in respect thereof. If looking back it appears to the Assessing Officer (albeit within four years of the end of the relevant assessment year) that a particular item even though reflected on the record was not subjected to assessment and was left out while working out the taxable income and the tax payable thereon, i.e., while making the final assessment order, that would enable him to initiate the proceedings irrespective of the question of non- disclosure of material facts by the assessed."

28. We are, with respect, unable to subscribe to the afore- mentioned view. If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the Assessing Officer. The Assessing Officer who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to re-open the proceeding. Assessment proceedings may be furthermore re-opened more than once. It is now trite that where two interpretations are possible, that which fulfills the purpose and object of the Act should be preferred.

29. It is well settled principle of interpretation of statute that entire statute should be read as a whole and the same has to be considered thereafter Chapter by Chapter and then Section by Section and ultimately Word by Word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in Section 154 of the Act. The power of rectification of mistake conferred upon the ITO is circumscribed by the provisions of Section 154 of the Act. The said power can be exercised when mistake is apparent. Even mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income-tax Appellate Tribunal has limited jurisdiction u/s. 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

30. It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the ITO does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of re-assessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.

31. In Bawa Abhai Singh's case (supra) a Division Bench of this Court of which one of us (D.K. Jain, J.) is a Member, clearly held:

> "The crucial expression is "reason to believe". The expression predicates that the Assessing Officer must hold a belief ... by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran and Sons P. Ltd. v. ITO (1981) 130 ITR 1 (SC), the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. in S.Narayanappa v. CIT (1967) 63 ITR 219, it was noted by the apex court that the expression "reason to believe" in Section 147 does not mean purely a subjective satisfaction on the part of the Assessing Officer, the belief must be held in good faith; it cannot be merely a pretence. It is open to the court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, the action of the Assessing Officer in initiating proceedings u/s. 147 can be challenged in a court of law."

It was further observed:

> "Up to March 31, 1989 two conditions were required to be fulfillled to confer jurisdiction on the Assessing Officer to act u/s. 147. They are (1) he must have information which comes into his possession subsequent to the making of the original assessment order, and (2) that information must lead to his belief that income chargeable to tax has escaped assessment, or that it has been under assessed or assessed at too low a rate or has been made the subject of excessive relief. After April v, 1989, the position is somewhat different. Section 147 with effect from April 1, 1989, provides that where the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of Section 148 to 153. he may assess or reassess the income which has escaped assessment. It is to be noted that Section 147 as it stands with effect from April, 1989, not only merges Clauses (a) and (b) of the pre-amended Section 147 but also brings about a significant change in the preliminary requirement of certain conditions mandatory in character before reassessment proceedings should be initiated in the pre-amended section. the conditions precedent for initiation of action u/s. 147(a) or 147(b) of the pre-amended situation, is high-lighted above. The amended provisions are contextually different and the cumulative conditions spelt out in Clause (a) or (b) of Section 147 prior to its amendment, are not present in the amended provision. The only condition for action is that the Assessing Officer should have reason to believe that income has escaped assessment, which belief can be reached in any manner and is not qualified by a pre-condition of faith and true

> disclosure of material fact by an assessed as contemplated in the pre-amended Section 147(a) of the Act and the Assessing Officer can under the amended provisions legitimately reopen the assessment in respect of an income which has escaped assessment. Viewed in that angle the power to reopen assessment is much wider under the amended provision and can be exercised even after the assessed has disclosed fully and truly all the material facts. To similar view were the conclusions of this court in Rakesh Aggarwal v. Asst. CIT (1997) 225 ITR 496. It is to be noted at this juncture that the twin conditions must be fulfillled if the case is one which is covered by the proviso to Section 147 operative with effect from April v, 1989." (emphasis supplied by us).

32. It is evident from the afore-extracted position of the decision that it is not an authority for the proposition that a mere change in the opinion would also confer jurisdiction upon the Assessing Officer to initiate a proceeding u/s. 147 of the Act as was contended by Mr. Jolly.

33. A decision as is well known, is an authority for the proposition that it decides and not what can logically be deduced there from. A point not raised nor argued at the bar cannot be said to be the ration of the decision.

34. Another aspect of the matter cannot be also lost sight of. The Board has power to issue Circulars under. Section 119 of the said Act. It is trite that the Circulars which are issued by the CBDT are legally binding on the Revenue (see UCO Bank v. C.I.T. (1999) 237 ITR 889). Recently in C.I.T. Mumbai v. Anjum M.H. Ghaswala and Ors. Reported in , the Apex Court following the said decision observed:

> It is true that by this press release the board had interpreted the provisions of the Act in a particular manner. Be that as it may, we would like to make it clear that every clarificatory note or press release issued by the board does not have the statutory force like the circulars issued by the board u/s. 119 of the Act. It is only those circulars issued by the board under the provisions of Section 119 of the Act, will have the statutory force and will be binding on every income-tax authorities. Therefore, the press release relied upon by Shri Ramamurti not being a circular issued u/s. 119 of the Act will not be of any assistance to the respondents in support of their contentions." It further observed that:
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> Learned Solicitor General has pointed out that by virtue of the power vested in the board u/s. 119(2)(a) of the Act, the board has issued circulars by notification No. F. No. 400/234/95-IT(B) dated 23.5.1996. As per this circular, it has empowered that the chief commissioner of income tax and director general of income-tax may waive or reduce interest charged u/s.s 234A, 234B and 234C of the Act in the class of cases or class of incomes specified in paragraph 2 of the said order for the period and on conditions which are enumerated therein. He submitted that in view of the said circular, the same authority can be exercised by the commission since the said circular would amount to relaxation of the rigor of Sections 234A, 234B and 234C of

> the Act. We are in unison with this submission of the learned Solicitor General. This Court in a catena of cases has held that the circulars of the central board of direct taxes are legally binding on the revenue. (See UCO Bank v.

Commissioner of Income-tax (1999) 237 ITR 889). Since these circulars are beneficial to the assesses, such benefit can be conferred also on the assesses who have approached the settlement commission u/s. 245C of the Act on such terms and conditions as contained in the circular. In our opinion, it is for this purpose that Section 245F of the Act has empowered the settlement commission to exercise the power of an income-tax authority under the Act. We must clarify here that while exercising the power derived under the circulars of the board, the commission does not act as a subordinate to the board but will be enforcing the relaxed provisions of the circulars for the benefit of the assessed in the process of settlement."

35. The Board in exercise of its jurisdiction under the afore- mentioned provisions had issued the Circular on 31st October 1989. The said Circular admittedly is binding on the Revenue. The Authority, therefore, could not have taken a view, which would run counter to the mandate of the said Circular. Clause 7.2 as referred to hereinbefore is important.

36. From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out i.e. only with a view to allay the fears that the omission of the expression "reason to believe" from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion.

37. It is, therefore, evident that even according to the CBDT a mere change of opinion cannot form the basis for re-opening a completed assessment.

38. The submission of Mr. Jolly to the effect that the said Circular cannot be construed in such a manner whereby the jurisdiction of the statutory authority would be taken away is not apposite for the purpose of this case. In Union of India and Others (supra), whereupon Mr. Jolly had placed strong reliance, the Apex Court was dealing with an administrative instructions whereby no right was conferred upon the respondents to have the house rent amount included in their emoluments for the purpose of computing overtime allowance. The Apex Court held that otherwise also the Governement's instruction have to be read in conformity with the provisions of the Act. Therein the Apex Court was not concerned with the statutory powers of a statutory authority to issue binding circulars.

39. Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra vires Article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favored.

40. In the event it is held that by reason of Section 147 if ITO exercises its jurisdiction for initiating a proceeding for re- assessment only upon mere change of opinion, the same may be held to be unconstitutional. We are therefore of the opinion that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate re-assessment proceeding upon his mere

change of opinion.

41. We, however, may hasten to add that if "reason to believe" of the assessing Officer if founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power u/s. 147 read with Section 148 of the Act.

42. We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessed. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessed himself.

43. We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding u/s. 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of Sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said Sub-section (3) of Section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of Clause (e) of Section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.

45. For the reasons afore-mentioned we are of the opinion that answer to the question raised before this Bench must be rendered in the affirmative, i.e. in favor of the assessed and against the Revenue. No order as to costs.

On appeal by the department to the Supreme Court, HELD dismissing the appeal [2010] 320 ITR 561 (SC)

10. In assessee's case the AO in the impugned order passed u/s. 143(3) r.w.s 147, has mentioned that the AO who completed the regular assessment u/s. 143(3) has done it without due diligence and that the fact of assessee owning more than one house property other than new property would have surfaced thereby denying the deduction u/s. 54F. In the decision of Kelvinator of India Ltd (Supra) the ratio laid down is that "When a regular order of assessment is passed in terms of section 143(3) of the Act, a presumption can be raised that such an order has been passed on application of mind. If it is to be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi-judicial function to take benefit of its own wrong".

11. The AO who completed the regular assessment u/s. 143(3) during the course of assessment has in fact called for details relating to properties and has verified the details before passing the order and hence ought to have applied his mind while passing the order. The AO had called for details pertaining to various sources of income declared by the assessee i.e. details pertaining to professional income, income from house property etc. and has concluded the assessment after thorough verification of these details. Hence it would not be prudent to say that there has not been an application of mind on the part of the AO while completing the original assessment u/s.143(3) even if one wants to take cannot take shelter under clause (c) to explanation 2 to section 147 for the purpose of reopening the assessment. There is no new material has been brought on record where the AO has a 'reason to believe' that the income has escaped assessment when all the relevant materials have already been made available at the time of original assessment. The decision relied on by the revenue of Ess Ess Kay Engineering Co. P. Ltd (supra) is distinguishable as the Hon'ble Supreme Court in that case held that the AO may reopen the assessment of an earlier year on the basis of his findings of fact made on the basis of fresh materials in the course of assessment of the next assessment year. In the case under consideration no fresh materials are found and the reopening is done basis of the materials which were already with AO during the course of regular assessment u/s.143(3).

12. Hence in our considered view, the reopening of assessment is merely a change of opinion and hence is bad in law. We allow the appeal in favour of the assessee. Since the appeal is allowed in favour of the assessee on legal grounds, the grounds raised on merits become academic in nature and does not warrant separate adjudication.

13. In the result, appeals of the assessee are allowed.

Order pronounced in court on 22nd day of April, 2022 Sd/- Sd/-

(BEENA PILLAI)
Judicial Member

(PADMAVATHY S)
Accountant Member

Bangalore,
Dated, April, 2022
/ vms /
Copy to:
1. The Applicant
2. The Respondent
3. The CIT
4. The CIT(A)
5. The DR, ITAT, Bangalore.
6. Guard file

By order

Asst. Registrar, ITAT, Bangalore.

1. Date of Dictation

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2. Date on which the typed draft is placed before the dictating Member .....

3. Date on which the approved draft comes to Sr.P.S .....

4. Date on which the fair order is placed before the dictating Member .....

5. Date on which the fair order comes back to the Sr. P.S. .....

6. Date of uploading the order on website.....

7. If not uploaded, furnish the reason for doing so .....

8. Date on which the file goes to the Bench Clerk .....

9. Date on which order goes for Xerox & endorsement.....

10. Date on which the file goes to the Head Clerk .....

11. The date on which the file goes to the Assistant Registrar for signature on the order .....

12. The date on which the file goes to dispatch section for dispatch of the Tribunal Order .....

13. Date of Despatch of Order.

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