



Amrut

IN THE HIGH COURT OF BOMBAY AT GOA**WRIT PETITION NO. 194 OF 2022**

Sete Mares Global Forex Private Limited,
Through its authorised Director Mr Miguel
Afonso, Aged 45 years, married,
r/o H.No.887, Acsona Pattern,
Benaulim, Salcete Goa.

... Petitioner

Versus

1 Union of India,
Ministry of Finance,
Income Tax Department,
Government of India,
National E-Assessment Centre, Delhi

2 Assistant Commissioner of Income Tax,
National E-Assessment Centre, Delhi

3 Income Tax Officer,
Office of Income Tax Officer Ward-1,
Blessings Pioneer CPLX,
Old Market, Opp. Distt Court,
Margao Goa.

... Respondents

Mr Parag Rao and Mr Akhil Parrikar, Advocates for the petitioner.
Ms Amira Razaq, Standing Counsel for respondent No.3.

CORAM:**M. S. KARNIK &
VALMIKI MENEZES, JJ****Reserved on : 20th AUGUST 2024****Pronounced on : 28th AUGUST 2024**

JUDGMENT (Per M. S. Karnik, J)

1. Heard learned counsel for the parties.
2. Rule. The rule is made returnable forthwith at the request and with the consent of the learned counsel for the parties.
3. The challenge in this petition under Article 226 of the Constitution of India is to the impugned notice dated 31.03.2022 issued by the Income Tax Officer, Ward-1, Margao under Section 148 of the Income Tax Act, 1961 (the Act for short).
4. The facts in a nutshell are thus:

The petitioner-assessee is a full-fledged money changer pursuant to a full-fledged money changer's license issued by the RBI under the Foreign Exchange Management Act, 1999. The assessee undertakes the sale and purchase of foreign currency and makes a profit only on the basis of the commission it earns.

5. The assessee filed income tax returns for the Assessment Year 2018-2019 disclosing the total taxable income of Rs.3,50,100/- (Rupees Three Lakhs Fifty Thousand One Hundred Only). Respondent No.2 issued notice under Section 143(2) of the Act to

the assessee for complete scrutiny on 22.09.2019. The assessee also received notice under Section 142(1) of the Act on 10.12.2020 calling upon the assessee to submit various documents and to answer various questions concerning the transactions. In the annexure to the notice under Section 142(1), it was mentioned that the complete scrutiny was initiated, major issue being high risk transactions. The assessee *inter alia* was called upon to explain the nature of source of cash deposits aggregating to an amount of Rs.52,55,50,000/- (Rupees Fifty Two Crores Fifty Five Lakhs Fifty Thousand Only).

6. The assessee submitted all the details and answered all the queries vide communication dated 10.02.2021. The assessee relied upon a cash flow statement, register of sale of foreign currency, daily summary and balance book, register of purchase of foreign currency for public, register of sale of foreign currency to authorized dealers and money changers, summary of sale and purchase of foreign currency, cash register and RBI audit letter. The assessee indicated that the RBI had done a thorough audit relating to inspection of all books and records relating to FMMC transactions for Financial Year 2017-18.

7. Respondent No.2 after complete scrutiny passed an Assessment Order dated 12.05.2021 adding an income of

Rs.91,800/- to the income of the assessee on account of transaction of Rs.45,90,000/- which was the amount advanced by the assessee to Umami Forex and Holidays Private Limited.

8. A show cause notice under Section 148A (b) of the Act was issued calling the assessee to show cause as to why in view of details contained in Annexure – A, a notice under Section 148 of the Act should not be issued. The assessee responded to the show cause notice by his reply dated 21.03.2022 *inter alia* pointing out that on the earlier occasion the scrutiny was conducted under Section 143(2) of the Act and that full information about cash deposit was submitted by the assessee and that the show cause notice was issued by respondent No.2 without verifying its own records. Respondent No.3 passed impugned order under Section 148A(d) of the Act on 31.03.2022 based on the report of the DDIT (INV) Unit -1 Panaji, which stated that the net profit declared by the assessee was 0.05% of the turnover and felt that in the line of business of forex dealers in Goa, the average gross profit would be 0.50% of the turnover. The report referred to NP/GP ratio. Simultaneously, Respondent No.3 issued notice under Section 148 of the Act on 31.03.2022 for assessment/re-assessment of the income of the assessee for the Assessment Year 2018-19.

SUBMISSIONS OF THE PETITIONER

9. Mr Parag Rao, learned counsel for the assessee in challenge to the impugned notice submitted that in the absence of information, the issuance of the impugned order and notice dated 31.03.2022 is illegal and without satisfaction of the jurisdictional requirement. Assuming without admitting that the cash deposits would classify as information under (i) to Explanation 1 to Section 148 of the Act, in the absence of fresh tangible information, the re-opening sought to be carried out is in the nature of change of opinion and/or review. Respondent No.2 could not have taken resort to GP/NP ratio and in any case the approach adopted of going by GP/NP ratio was misconceived. The detailed reply filed by the assessee to the notice was not given any consideration or dealt with. The reference to absence of KYC never formed part of show cause notice under Section 148A(b) of the Act and therefore, the same cannot form part of the impugned order. The requirement of KYC does not qualify as ‘*information*’ under Explanation 1 to Section 148 of the Act.

SUBMISSIONS OF THE RESPONDENTS

10. Ms Razaq while arguing in support of the impugned order vehemently opposed the petition submitting thus: -

(i) The assessee company carries on the business of Forex Dealer and this business activity pertains to buying and selling of foreign currencies. The assessment proceedings under Section 143(3) read with Section 144B of the Act in respect of the petitioner/assessee were completed vide order dated 12.05.2021. The scope of scrutiny which is found at Para 3.1 of the order dated 12.05.2021 reveals suspicious transactions. The report highlighted the transaction carried out by the assessee with M/s Umami Forex and Holidays Pvt. Ltd. The assessee company agreed to the addition of Rs.91,800/- to its return of income as per the show cause notice issued to it. There was no other matter either scrutinized or assessed in the said scrutiny assessment.

(ii) Thereafter, vide notice dated 12.03.2022 issued under Section 148A(b) of the Act, the assessee was intimated that the department has information which suggests that income chargeable to tax has escaped assessment. The Annexure reads "*cash deposits made in various bank accounts by the assessee company during the Financial Year 2017-18 (Assessment year 2018-19) of Rs.65,41,72,500/-.*" The order under Section 148A(d) dated 31.03.2022 was passed after considering the response of the assessee and the records on the file. The Assessing Officer *inter alia* recorded that the information of cash transactions highlighted by the report of the Deputy Director Income Tax

(DDIT) in the case of the assessee is categorized as “*High Risk Transaction*”. It is recorded that the NP/GP ratio is much less than the NP/GP ratio in the line of business and further records that “*Further the large cash deposits being made in the accounts of the assessee appear to be on account of unauthorized transaction of forex which are made without requisite KYC of the forex purchasing party*”. The reply of the assessee though was considered, however, was found not tenable as no substantial supporting documents/details have been filed by the assessee with respect to the total cash deposited during the Financial Year 2017-2018 of Rs.65,41,72,500/- . The Assessing Officer finally directed issuance of notice under Section 148 of the Act for reopening of the assessment for the Assessment Year 2018-19 with prior approval of the Principal CIT.

11. The issue on which notice under Section 148A(b) issued was the large cash deposits for which the assessee was directed to produce its response with supporting documents. The issue under consideration in 148A proceedings was totally different from the one verified/discussed in the scrutiny proceedings and the order passed under Section 143(3) of the Act. Although the assessee was directed to submit records pertaining to the cash transactions, the assessee merely relied upon its own cash registers containing quantity based records of the transactions made with unknown

persons. Our attention is drawn to paragraphs 223 to 337 of the compilation submitted. No further or supporting documents as asked for by the department in the notice under Section 148A(b) were produced by the assessee. Reliance is placed on the RBI Master Circular No.10/2014-15 dated 1st July 2014, that AMCs may accept payment in cash up to Rs.50,000/- against sale of foreign exchange for travel abroad (for private visit or for any other purpose). Wherever the sale of foreign exchange exceeds the amount equivalent to Rs.50,000/- the payment must be received only by a crossed cheque drawn on the applicant's bank account or crossed cheque drawn on the bank account of the firm/company. Reliance is also placed on Guideline 6, which are conditions for sales against reconversion of Indian currency. The guidelines mandate the need for carrying out transactions in excess of Rs.50,000/- via banking channels. The assessee has carried out huge cash transactions in money exchange and has deposited such cash in its accounts. The assessee did not produce the details of customers from whom cash was received for the purpose of money exchange either at the time of the scrutiny assessment nor when it was asked to produce the supporting documents pertaining to the said cash deposits in terms of the notice under Section 148A(b). Undisputedly, the documents pertaining to KYC of customers and genuineness of the deposits with reference to their individual

respective records such as passports was never produced by the assessee at any point of time i.e. either in the scrutiny proceedings or in response to the notice under Section 148A(b). These are primary documents relevant to the large cash deposits made by the assessee which were being inquired into vide notice under Section 148(b) and the burden of producing these records in support of its case was on the assessee.

12. The issue in question was never examined nor was an opinion formed by the department regarding the same prior hereto. Even at the stage of notice under Section 148(b), the assessee was called upon to provide supporting records pertaining to the said cash deposits but has failed to do so. Quantified verification of the GP/NP ratio was also not the subject matter of the earlier assessment which was carried out.

13. The issues highlighted in the impugned order were never inquired into nor any opinion formed thereon. As such, the same would not come within the ambit of change of opinion or review as is the contentions of the assessee. The relevant provisions of the Act and the judicial pronouncements support the contentions of the respondent that this is not a case of change of opinion or review. At the preliminary stage of Section 148A, the information is merely suggestive of escapement of income. No conclusive

finding need be arrived at by the Assessing Officer of such escapement. The assessee has failed to produce any cogent evidence or material of KYC or other documents of the parties to whom foreign exchange was sold despite opportunity to show that all cash deposits were made with due satisfaction of the RBI Guidelines, despite a clear request to produce supporting documents vide notice under Section 148A(d).

14. It is not for the Assessing Officer to demand for each and every document in connection with the cash deposited by the assessee. The legal obligation to produce this primary evidence is upon the assessee. The assessee having failed to do so, the Assessing Officer cannot be faulted with for the order directing reopening of the assessment for the Assessment Year in question. The impugned order is well within the framework of law and jurisdiction. The issue of change of opinion would also not arise as demonstrably from the record, the question of genuineness or identity of parties and/or the cash deposits made and consequently NP/GP ratio was never the subject matter of the scrutiny assessment nor was it examined at any earlier stage.

15. The assessee would have full, fair and detailed opportunity to produce all and every evidence/s in support of its contentions that the NP/GP ratio is correct and/or that the cash deposits are

made by genuine customers with all documents which were not produced by it during the assessment proceedings. The assessee would also have an alternate statutory remedy and after due process of reassessment, if the assessee is aggrieved by the reassessment order. In view of the facts and circumstances of the present case, and as per settled judicial pronouncements, the present case is not one which the reopening be interdicted by judicial intervention under Article 226 of the Constitution of India.

CONSIDERATIONS

16. Heard learned counsel. Perused the memo of the petition and various documents relied upon in support. We have gone through the affidavit in reply filed on behalf of the respondent and the rejoinder filed in response by the petitioner.

17. Before examining the rival contentions, it is necessary for us to seek guidance from the judicial pronouncements as to what would constitute a change of opinion/review so to entertain the assessee's jurisdictional challenge to the reopening of the assessment by the respondent. The Supreme Court in *Mangalam Publications Vs Commissioner of Income Tax*¹ exhaustively

¹ (2024) 158 taxmann. com 564 (SC)

dealt with the expression ‘*change of opinion*’. The observations at Paras 24 to 36 are relevant which read thus:

24. At the outset, we may advert to certain provisions of the Act as existed at the relevant point of time having a bearing on the present lis. Chapter XIV of the Act comprising Sections 139 to 158 deals with procedure for assessment. Section 139 mandates filing of income tax return. At the relevant point of time, this provision provided that every person, if his total income or the total income of any other person in respect of whom he was assessable under the Act during the previous year had exceeded the maximum amount which is not chargeable to income tax, he shall on or before the due date furnish a return of his income or the income of such other person during the previous year in the prescribed form and verified in the prescribed manner, setting forth such other particulars as may be prescribed.

24.1. Since reference was made to sub-section (9)(f) of Section 139, both in the pleadings and in the oral hearing, we may mention that under sub-section (9) of Section 139, where the assessing officer considers that the return of income furnished by the assessee is defective, he may intimate the defect to the assessee and give him an opportunity to rectify the defect within a period of fifteen days from the date of such intimation or within such further period, the assessing officer may in his discretion allow. If the defect is not rectified within the specified period or within the further period as may be allowed, the return shall be treated as an invalid return. In such an eventuality, it would be construed that the assessee had failed to furnish the return. There is an Explanation below sub-section (9) which clarifies that a return of income shall be regarded as defective unless all the conditions mentioned thereunder are fulfilled.

Clause (f) says that where regular books of account are not maintained by the assessee but the return is accompanied by a statement indicating the amounts of turnover or gross receipts, gross profit, expenses and net profit of the business or profession and the basis on which such amounts have been computed and also disclosing the amounts of total sundry debtors, sundry creditors, stock in trade and cash balance as at the end of the previous year, such a return shall not be treated as defective.

24.2. Thus, Section 139 places an obligation upon every person to furnish voluntarily a return of his total income if such income during the relevant previous year had exceeded the maximum amount which is not chargeable to income tax. Under sub-section (9), if there are defects in the return which are not rectified within the stipulated period after being intimated by the assessing officer, the return of income would be treated as an invalid return. Of course, it would not be treated as defective and consequently invalid if in a case, such as, under clause (f) where regular books of account are not maintained but the return of income is accompanied by a statement indicating the amounts of turnover etc.

25. Section 142 deals with enquiry before assessment. As per sub-section (1), the assessing officer may issue notice upon an assessee who has made a return seeking details of such accounts, information or documents etc. which may be necessary for the purpose of making an assessment. Sub-section (2) empowers the assessing officer to make such enquiry as he considers necessary for obtaining full information and sub-section (3) requires the assessing officer to provide an opportunity of hearing to the assessee in respect of any material gathered on the basis of the enquiry.

26. This takes us to Section 143 which is the provision for assessment. As per sub-section (1), where a return is made under Section 139 or in response to a notice under Section 142(1), the assessing officer may carry out adjustments in accordance with law and thereafter, issue intimation to the assessee specifying the sums payable. Such intimation shall be deemed to be a notice of demand under Section 156 of the Act.

26.1. Sub-section (2) provides that where a return has been furnished under Section 139 or in response to a notice under sub- section (1) of Section 142, to ensure that the assessee has not under- stated the income or has not computed excessive loss or has not under- paid the tax in any manner, the assessing officer shall serve on the assessee a notice to produce evidence in support of the claim made by the assessee.

26.2. As per sub-section (3) of Section 143, after hearing such evidence as the assessee may produce and such other evidence as the assessing officer may require on specified points and after taking into account all relevant material which he has gathered, the assessing officer shall make an assessment of the total income or loss of the assessee by an order in writing. In the said exercise, he shall determine the sum payable by the assessee or refund of any amount due to him on the basis of such assessment.

27. Section 144 provides for best judgment assessment. It says that if any person fails to submit a return under sub- section (1) of Section 139 or fails to comply with the terms of a notice under sub- section (1) of Section 142 or having made a return fails to comply with all the terms of a notice issued under sub-section (2) of Section 143, the assessing officer after taking into account all relevant materials and

after giving the assessee an opportunity of being heard make the assessment to the best of his judgment and determine the sum payable by the assessee on the basis of such assessment.

28. This brings us to the pivotal section i.e. Section 147. Prior to the Direct Tax Laws (Amendment) Act, 1987, Section 147 read as under:

147. Income escaping assessment.—If

- (a) the Income Tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year to the Income Tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or
- (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that 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 or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in Sections 148 to 153 referred to as the relevant assessment year)."

28.1. This provision was amended by the Direct Tax Laws (Amendment) Act, 1987 with effect from 01.04.1989. Post such amendment, Section 147 read as under:

"147. Income escaping assessment.—If the assessing officer, for reasons to be recorded by him in writing, is of the opinion 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).”

28.2. As can be seen from the above, prior to 01.04.1989, the income tax officer was required to have reason to believe that by reason of the omission or failure on the part of an assessee to make a return under Section 139 for any assessment year or to disclose fully and truly all material facts necessary for such assessment, income chargeable to tax had escaped assessment for that assessment year or the income tax officer had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year, the income tax officer could reopen an assessment. But with effect from 01.04.1989, the requirement of law underwent a change. It was sufficient if the assessing officer for reasons to be recorded by him in writing was of the opinion that any income chargeable to tax had escaped assessment for any assessment year, he could assess or reassess such income chargeable to tax which had escaped assessment and which came to his notice subsequently. Therefore, post 01.04.1989, the power to reopen an assessment became much wider.

28.3. It appears that a number of representations were received against the omission of the words “reason to believe” from Section 147 and their substitution by the word “opinion” of the assessing officer. It was pointed out by the representationists that the meaning of the expression “reason

to believe” was explained in a number of judgments and was well settled. Omission of such an expression from Section 147 would give arbitrary powers to the assessing officer to reopen past assessments. To allay such apprehensions, Parliament enacted the Direct Tax Laws (Amendment) Act, 1989 again amending Section 147 by re-introducing the expression “reason to believe”. Section 147 after the amendment carried out by the Direct Tax Laws (Amendment) Act, 1989 reads as under:

“147. Income escaping assessment.—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).”

28.4. Thus, Section 147 as it stood at the relevant point of time provides that if the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may assess or re-assess such income and such other income which has escaped assessment and which comes to his notice subsequently in the course of proceedings under Section 147.

29. Section 148 says that before making an assessment, re-assessment etc. under Section 147, the assessing officer is required to issue and serve a notice on the assessee calling upon the assessee to file a return of his income in the

prescribed form etc., setting forth such particulars as may be called upon.

30. Such a notice is subject to the time limit prescribed under Section 149. Under sub-Section (1)(b), no notice under Section 148 shall be issued in a case where an assessment under sub-section (3) of Section 143 or Section 147 has been made for such assessment year if seven years but not more than 10 years have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to Rs. 50,000 or more for that year.

31. At this stage, we deem it necessary to expound on the meaning of disclosure. As per the P. Ramanatha Aiyar, Advanced Law Lexicon, Volume 2, Edition 6, 'to disclose' is to expose to view or knowledge, anything which before was secret, hidden or concealed. The word 'disclosure' means to disclose, reveal, unravel or bring to notice, vide CIT Vs. Bimal Kumar Damani, (2003) 261 ITR 87 (Cal). The word 'true' qualifies a fact or averment as correct, exact, actual, genuine or honest. The word 'full' means complete. True disclosure of concealed income must relate to the assessee concerned. Full disclosure, in the context of financial documents, means that all material or significant information should be disclosed. Therefore, the meaning of 'full and true disclosure' is the voluntary filing of a return of income that the assessee earnestly believes to be true. Production of books of accounts or other material evidence that could ordinarily be discovered by the assessing officer does not amount to a true and full disclosure.

32. Let us now discuss some of the judgments cited at the bar. First and foremost is the decision of a constitution bench of this Court in Calcutta Discount Company Limited

(*supra*). That was a case under Section 34 of the Indian Income Tax Act, 1922 which is in pari-materia to Section 147 of the Act. The constitution bench explained the purport of Section 34 of the Indian Income Tax Act, 1922 and highlighted two conditions which would have to be satisfied before issuing a notice to reopen an assessment beyond four years but within eight years (as was the then limitation). The first condition was that the income tax officer must have reason to believe that income, profits or gains chargeable to income tax had been under-assessed. The second condition was that he must have also reason to believe that such under-assessment had occurred by reason of either (i) omission or failure on the part of the assessee to make a return of his income under Section 22, or (ii) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. It was emphasized that both these were conditions precedent to be satisfied before the income tax officer could have jurisdiction to issue a notice for the assessment or re-assessment beyond the period of four years but within the period of eight years from the end of the year in question. The words used in the expression “omission or failure to disclose fully and truly all material facts necessary for his assessment for that year” would postulate a duty on every assessee to disclose fully and truly all material facts necessary for his assessment though what facts are material and necessary for assessment would differ from case to case. On the above basis, this Court came to the conclusion that while the duty of the assessee is to disclose fully and truly all primary facts, it does not extend beyond this. This position has been reiterated in subsequent decisions by this Court including in Income Tax Officer Vs. Lakhmani Mewal Das, 1976 (3) SCC 757; 1976 (103) ITR 437. The expression “reason to believe” has also been explained to mean reasons deducible from the materials on record and which have a live

link to the formation of the belief that income chargeable to tax has escaped assessment. Such reasons must be based on material and specific information obtained subsequently and not on the basis of surmises, conjectures or gossip. The reasons formed must be bona fide.

33. In Phool Chand Bajrang Lal (supra), this Court examined the purport of Section 147 of the Act and observed that the object of Section 147 is to ensure that a party cannot get away by willfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say “you accepted my lie, now your hands are tied and you can do nothing”. This Court opined that it would be a travesty of justice to allow an assessee such latitude. After advertizing to various previous decisions, this Court held that an income tax officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Act only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that due to omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. In the above context, Supreme Court has held as under:

25.He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were

earlier available but acting on fresh information. Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment.....”

34. This Court in the case of Srikrishna Private Limited (supra) emphasized that what is required of an assessee in the course of assessment proceedings is a full and true disclosure of all material facts necessary for making assessment for that year. It was emphasized that it is the obligation of the assessee to disclose the material facts or what are called primary facts. It is not a mere disclosure but a disclosure which is full and true. Referring to the decision in Phool Chand Bajrang Lal (supra), it has been highlighted that a false disclosure is not a true disclosure and would not satisfy the requirement of making a full and true disclosure. The obligation of the

assessee to disclose the primary facts necessary for his assessment fully and truly can neither be ignored nor watered down. All the requirements stipulated by Section 147 must be given due and equal weight.

35. Kelvinator of India Limited (supra) is a case where this Court examined the question as to whether the concept of “change of opinion” stands obliterated with effect from 01.04.1989 i.e. after substitution of Section 147 of the Act by the Direct Tax Laws (Amendment) Act, 1987. This Court considered the changes made in Section 147 and found that prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under two conditions i.e., (a) the Income Tax Officer had reason to believe that by reason of omission or failure on the part of the assessee to make a return under Section 139 for any assessment year or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax had escaped assessment for that year, or (b) notwithstanding that there was no such omission or failure on the part of the assessee, the Income Tax Officer had in consequence of information in his possession reason to believe that income chargeable to tax had escaped assessment for any assessment year. Fulfilment of the above two conditions alone conferred jurisdiction on the assessing officer to make a re-assessment. But with effect from 01.04.1989, the above two conditions have been given a go- by in Section 147 and only one condition has remained, viz, that where the assessing officer has reason to believe that income has escaped assessment, that would be enough to confer jurisdiction on the assessing officer to reopen the assessment. Therefore, post 01.04.1989, power to reopen assessment is much wider. However, this Court cautioned that one needs to give a schematic interpretation to the words “reason to believe”, otherwise Section 147 would give arbitrary powers to the

assessing officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen.

35.1. This Court also referred to Circular No.549 dated 31.10.1989 of the Central Board of Direct Taxes (CBDT) to allay the apprehension that omission of the expression “reason to believe” from Section 147 and its substitution by the word “opinion” would give arbitrary powers to the assessing officer to reopen past assessments on mere change of opinion and pointed out that in 1989 Section 147 was once again amended to reintroduce the expression “has reason to believe” in place of the expression “for reasons to be recorded by him in writing, is of the opinion”. This Court thereafter explained as under:

“6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. One must treat the concept of “change of opinion” as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is “tangible material” to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words “reason to believe” but also inserted the word “opinion” in Section 147 of the Act. However, on receipt

of representations from the companies against omission of the words “reason to believe”, Parliament reintroduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the assessing officer.

36. Elaborating further on the expression “change of opinion”, this Court in Techspan India Private Limited (*supra*) observed that to check whether it is a case of change of opinion or not one would have to see its meaning in literal as well as legal terms. The expression “change of opinion” would imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by the assessing officer resulting from what he thinks on a particular question. Therefore, before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change of opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed reassessment proceedings.”

(emphasis supplied)

18. The principle is well settled by the Supreme Court that a mere change of opinion cannot be a basis for reopening completed assessments and would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. The principle will have no

application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment.

19. It is material to refer to *Anshul Jain Vs Principal Commissioner of Income Tax*², relied upon heavily by Ms Razaq. The Supreme Court rejected the assessee's appeal against the judgment of the Punjab & Haryana High Court *inter alia* holding as follows:-

"1. What is challenged before the High Court was the re-opening notice under Section 148A(d) of the Income Tax Act, 1961. The notices have been issued, after considering the objections raised by the petitioner. If the petitioner has any grievance on merits thereafter, the same has to be agitated before the Assessing Officer in the re-assessment proceedings.

2. Under the circumstances, the High Court has rightly dismissed the writ petition."

20. Ms Razaq wants us to go through the relevant extracts from the decision of Punjab & Haryana High Court in *Anshul Jain Vs ITO* (2022) 143 T.com 37 quoted herein below:

"Supreme Court in the case of 'Raymond Woollen Mills Limited vs. Income Tax Officer, Centre XI, Range Bombay and others' (Civil Appeals No.1972 of 1992 with No.1973 of 1992. D/d 17.12.1997), held that -

² (2022) 143 Taxmann.com 38 (SC)

"3. In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was *prima facie* some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding. We are not expressing any opinion on the merits of the case. The questions of fact and law are left open to be investigated and decided by the assessing authority. The appellant will be entitled to take all the points before the assessing authority."

Thus, the consistent view is that where the proceedings have not even been concluded by the statutory authority, the writ Court should not interfere at such a pre-mature stage. Moreover it is not a case where from bare reading of notice it can be axiomatically held that the authority has clutched upon the jurisdiction not vested in it. The correctness of order under Section 148A(d) is being challenged on the factual premise contending that jurisdiction though vested has been wrongly exercised. By now it is well settled that there is vexed distinction between jurisdictional error and error of law/fact within jurisdiction. For rectification of errors statutory remedy has been provided.

In the light of aforesaid settled proposition of law, we find that there is no reason to warrant interference by

this Court in exercise of the jurisdiction under Article 226/227 of the Constitution of India at this intermediate stage when the proceedings initiated are yet to be concluded by a statutory authority. Hence the writ petition stands dismissed."

21. In *Export Credit Guarantee Corporation of India Vs Additional Commissioner of Income Tax*³, this Court held that tangible information need not be new or from an external source. The following are the relevant observations which read thus:-

" To hold that the Assessing Officer must be deemed to have accepted what he has plainly overlooked or ignored in the assessment order would be to stretch the interpretation of Section 147 to a point where the provision would cease to have meaning and content. Such an exercise of excision by judicial interpretation is impermissible. When an assessment is sought to be reopened within a period of four years of the end of the relevant assessment year, the test to be applied is whether there is tangible material to do so. What is tangible is something which is not illusory, hypothetical or a matter of conjecture. Something which is tangible need not be something which is new. An Assessing Officer who has plainly ignored relevant material in arriving at an assessment acts contrary to law. If there is an escapement of income in consequence, the jurisdictional requirement of Section 147 would be fulfilled on the formation of a reason to believe that income has escaped assessment. The reopening of the assessment within a period of four years is in these circumstances within jurisdiction.

³ (2013) 30 taxmann.com 211 (Bombay)

We have considered it appropriate to emphasise this aspect because much of the submission on behalf of the Petitioner in these proceedings has focused on the merits of the assessment. At this stage, the test to be applied is whether there was reason to believe that income had escaped assessment and whether the Assessing Officer has tangible material before him for the formation of that belief. A reason to believe is what is relevant not an established fact of the escapement of income.

The salient aspect of the case that merits emphasis is that the order of assessment that was passed by the Assessing Officer under Section 143(3) is completely silent in respect of each one of the five points on the basis of which the assessment is sought to be reopened. There is merit in the contention which has been urged on behalf of the Revenue that no query had been raised during the course of the assessment and the assessment order would ex-facie disclose that the Assessing Officer has not applied his mind at all to any of the points on the basis of which the assessment is now sought to be reopened. That there exists tangible material for the Assessing Officer to reopen the assessment in the present case is evident from the record. For instance, as we have noted earlier, in respect of one of the grounds, ground (ii), the reasons which have been disclosed to the assessee would indicate that reliance has been placed on paragraph 6.1 of the Notes forming part of the accounts in Schedule 17. Paragraph 6.1 posits that an amount of Rs.27.96 crores is the estimated amount of recovery expected out of the claims paid or payable by the assessee which had been recognized on an individual assessment/estimate basis on the basis of the accounting practice followed by the assessee. During the year in question, there was a change in accounting policy as a result of which the provision for estimated recovery in respect of

claims paid and outstanding for recovery for a period of three years or more as on the balance-sheet date has been estimated at Rs.100/- for each claim in substitution of the individual assessment/estimate made earlier. The assessee has stated that the change in policy has the effect of the existing provision for estimated recovery being written off by about Rs.20 crores to the revenue account and reducing the profit of the accounting year consequently. Evidently the Assessing Officer had not considered paragraph 6.1 of the Notes forming part of the accounts. At this stage, it would be necessary for the Court to record that we have not been called upon to decide as to whether any addition to the income would have to be made on that ground since that is a matter which has to be decided after the assessment is reopened. All that is relevant at this stage is whether there is reason to believe on the part of the Assessing Officer that income had escaped assessment. The answer is in the affirmative. It would not be appropriate for this Court to preempt an enquiry whatsoever by the Assessing Officer, once a tangible basis has been disclosed for reopening the assessment. Similarly, in respect of the revision of pay scales, the Assessing Officer has sought to reopen the assessment on the ground that the liability had not crystallized before the balance-sheet date. Here again, it is apparent that there has been no application of mind to the relevant facts by the Assessing Officer during the course of the assessment proceedings. As regards the first ground, on the basis of which the assessment is sought to be reopened, it has been sought to be urged that under Section 44 read with Rule 5(a), it would not be open to the Assessing Officer to make an income addition. Moreover, it has been urged that in the past, the same practice had been accepted by the Revenue. These are matters which on the merits will be considered by the Assessing Officer and it would be inappropriate for this Court to express any opinion on the merits of issue.

Moreover, once the Court has come to the conclusion that even a single ground on the basis of which the assessment is sought to be reopened is valid and within jurisdiction, the notice for reopening of the assessment would have to be upheld. Consequently, we clarify that though submissions have been urged on the merits of each of the grounds, we keep all rights and contentions of the parties open to be urged before the Assessing Officer, once the assessment is reopened in exercise of the power conferred by Section 147. The Assessing Officer has acted within jurisdiction in reopening the assessment.

For these reasons, no case for interference under Article 226 of the Constitution is made out. We accordingly dismiss the petition. There shall be no order as to costs.”

22. This Court in *Aroni Commercials Limited Vs The Deputy Commissioner of Income Tax*⁴ considered the broad parameters to be considered while dealing with the reopening of assessment completed under Section 143(3) of the Act. In Paras 12 to 14, it is observed as follows:

12. *In this case we are dealing with the reopening of assessment completed by order dated 12 October 2010 under Section 143(3) of the Act. The law with regard to reopening of assessment is fairly settled by decisions of Courts. The power of the Assessing Officers under Sections 147 and 148 of the Act to reopen an assessment is classified into two :-*

⁴ 2014 SCC OnLine Bom 221

- (a) Reopening of assessment within a period of 4 years from the end of the relevant assessment year and
- (b) Reopening of assessment beyond a period of 4 years from the end of the relevant assessment year.

13. The common jurisdictional requirement for reopening of assessment both within and beyond a period of 4 years has to be on the basis of reason to believe that income chargeable to tax has escaped assessment and the reason for issuing a notice to reopen are recorded before issuing a notice. However, there is one additional jurisdictional requirement to be satisfied while seeking to reopen the assessment beyond the period of 4 years from the end of the relevant assessment year viz. that there must have been a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment during the original assessment proceedings. Thus the primary requirement to reopen any assessment is a reason to believe that income chargeable to tax has escaped assessment. However, as observed by the Supreme Court in the case of CIT vs. Kelvinator India Limited 320 ITR 561 in the context of Sections 147/148 of the Act that reason to believe found therein does not give arbitrary powers to reopen an assessment. The concept of change of opinion is excluded/omitted from the words reason to believe. Thus a change of opinion would not be reason to believe that income chargeable to tax has escaped assessment. Besides the power to reassess is not a power to review. Further reopening must be on the basis of tangible material.

14. Therefore the power to reassess cannot be exercised on the basis of mere change of opinion i.e. if all facts are available on record and a particular opinion is formed, then merely because there is change of opinion on the part of the Assessing Officer notice under Section 147/148 of the Act

*is not permissible. The powers under Section-147/148 of the Act cannot be exercised to correct errors/mistakes on the part of the Assessing Officer while passing the original order of assessment. There is a sanctity bestowed on an order of assessment and the same can be disturbed by exercise of powers under Sections 147/148 of the Act only on satisfaction of the jurisdictional requirements. Further, the reasons for reopening an assessment has to be tested/examined only on the basis of the reasons recorded at the time of issuing a notice under Section 148 of the Act seeking to reopen an assessment. These reasons cannot be improved upon and/or supplemented much less substituted by affidavit and /or oral submissions. Moreover, the reasons for reopening an assessment should be that of the Assessing Officer alone who is issuing the notice and he cannot act merely on the dictates of any another person in issuing the notice. Moreover, the tangible material upon the basis of which the Assessing Officer comes to the reason to believe that income chargeable to tax has escaped assessment can come to him from any source, however, reasons for the reopening has to be only of the Assessing Officer issuing the notice. At the stage of issuing notice under Section 148 of the Act to reopen a concluded assessment the satisfaction of the Assessing Officer issuing the notice is of primary importance. This satisfaction must be *prima facie* satisfaction of having a reason to believe that income chargeable to tax has escaped assessment. At the stage of the issuing of the notice under Section 148 of the Act it is not necessary for the Assessing officer to establish beyond doubt that income indeed has escaped assessment.”*

23. In the present case, the assessee filed income tax returns for the Assessment Year 2018-2019 disclosing the total taxable income of Rs.3,50,100/- on 24.09.2018. Notice was issued under Section

143(2) of the Act for completing scrutiny on 22.09.2019. A notice was also received by the assessee under Section 142(1) of the Act on 10.12.2020 calling upon the assessee to submit various documents and to answer various questions concerning the transactions. In the Annexure to the notice under Section 142(1) of the Act, it was specifically mentioned that complete scrutiny was initiated, major issue being high risk transactions. The assessee was called upon to explain the nature of source of cash deposits aggregating to an amount of Rs.52,55,50,000/- (Rupees Fifty Two Crores Fifty Five Lakhs Fifty Thousand Only). The assessee submitted all details and answered all queries by communication dated 10.02.2021. From the response, it is seen that the assessee enclosed cash flow statement, register of sale of foreign currency, daily summary and balance book, register of purchase of foreign currency for public, register of sale of foreign currency to authorised dealers and money changers, summary of sale and purchase of foreign currency, cash register and RBI audit letter. The RBI had done thorough audit in respect of inspection of all books and records relating to FMMC transactions for Financial Year 2017-18.

24. Respondent No.2 after complete scrutiny passed an Assessment Order dated 12.05.2021 adding an income of Rs.91,800/- to the income of the assessee on account of transaction

of Rs.45,90,000/- (Rupees Forty Five Lakhs Ninety Thousand Only) which was the amount advanced by the assessee to Umami Forex and Holidays Private Limited. A show cause notice under Section 148A(b) of the Act was received by the assessee to show cause as to why in view of details contained in Annexure –A, a notice under Section 148 of the Act should not be issued. The said Annexure –A refers to “*cash deposits made in various bank accounts by the assessee company during the Financial Year 2017-2018 (Assessment Year 2018-2019)* of Rs.65,41,72,500/-.”

25. It is significant to note that in the notice under clause (b) of Section 148A of the Act dated 12.03.2022 as regards information which suggests that income chargeable to tax for the Assessment Year 2018-2019 has escaped assessment, the details of the information and enquiry which are enclosed with the notice in Annexure –A states “*cash deposits made in various bank accounts by the assesee company during the Financial Year 2017-18 (Assessment Year 2018-19)* of Rs.65,41,72,500/-.” The jurisdictional requirement for issuance of show cause notice under Section 148A (b) of the Act is the Assessing Officer must be in possession of “*information which suggests that income chargeable to tax has escaped assessment for the relevant assessment year*”. In the order under clause (d) of Section 148A of the Act, Para 4 reads thus :-

“4. It is seen that the NP/GP of the assessee company is much less than the NP/GP in this line of business. In this line of business as per the details of the GP/NP ratio of other forex dealers in Goa, it is seen that the average gross profit in this business will be around 0.50% of the turnover and The Sete Mares Global Forex Pvt. Ltd., declared its net profit as 0.05% of the turnover. Hence, GP/NP ratio for the assessee company should be 10/01. Further, the large cash deposits being made in the accounts of the assessee appear to be on account of unauthorized transaction of forex which are made without requisite KYC of the forex purchasing party.”

26. The order thus proceeds on the footing that the assessee declared its net profit as 0.05% of the turnover whereas in this line of business as per the details of the GP/NP ratio of other forex dealers in Goa, the average gross profit in this business is seen to be around 0.50% of the turnover. It is pertinent to note that in terms of Section 143(2) of the Act, a complete scrutiny was done by the Assessing Officer. In terms of Section 143(2) of the Act, the Assessing Officer has to ensure that the assessee has not stated the income or not computed excessive loss or not underpaid the tax in any manner. The Assessing Officer in terms of Section 143(1) of the Act has right to reject incorrect claim, disallow loss claim, disallow expenditure, disallow deduction, and do addition of income. In fact, vide Assessment Order dated 12.05.2021, the Assessing Officer added the income of Rs.91,800/-. In terms of Section 142(1) of the Act, the Assessing Officer can call for any

and every information that is necessary for inquiry before assessment including production of accounts or documents as he may require. The NP/GP or GP/NP ratio does not form part of the show cause notice issued under Section 148A(b) of the Act. It forms one of the basis of the order passed under clause (d) of Section 148 of the Act. The assessee in the concluded assessment proceedings had disclosed the material fact of its net profit as 0.05% of the turnover. That in respect of other forex dealers in Goa the gross profit in the business was around 0.5% cannot be said to be a fresh fact which has come to light as at the time of conclusion of the assessment this information was very much available. According to us, it was for the Assessing Officer to have called for explanation on this aspect before conclusion of the assessment proceedings. Thus, the reason that in respect of other dealers in this line of business the average gross profit will be around 0.5% of the turnover cannot be said to be a fresh fact which has come to light which was not previously disclosed or that it is such information with regard to the fact previously disclosed coming into possession of the Assessing Officer which tends to expose the untruthfulness of those facts. Had it been a case where some fresh facts which come to light were not previously disclosed or some information with regard to the facts previously disclosed coming into possession of the Assessing Officer which tends to

expose the untruthfulness of those facts, in such situation, it would not be a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Undoubtedly, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. We are not persuaded by the arguments of the learned counsel for the Revenue that the assessee had not made full and true disclosure of the material facts at the time of the original assessment and therefore the income chargeable to tax has escaped assessment.

27. The second reason for reopening assessment is the large cash deposits made in the accounts of the assessee which appear to be on account of unauthorized transactions of forex which are made without requisite KYC of the forex purchasing party. The Annexure to the notice states that "*cash deposits made in various bank accounts by the assessee company during the Financial Year 2017-18 (Assessment Year 2018-19) of Rs.65,41,72,500/-*." We find that this information of cash deposits made in various bank accounts to the tune of Rs.65,41,72,500/- was already available with the Assessing Officer when the assessment was concluded.

Not only that but by the Assessment order dated 12.05.2021, the Assessing Officer added the income of Rs.91,800/- . All the relevant registers indicating the cash deposits were placed before the Assessing Officer. In the order under clause (d) of Section 148A, it is mentioned that these cash deposits are made without requisite KYC of the forex purchasing party. The learned counsel for the Revenue was at pains to submit that the assessee was obliged to make a true and complete disclosure including the details of the KYC which the assessee failed to do. In our view, before concluding the assessment, the Assessing Officer could have called for the KYC document if there was any doubt in his mind that large cash deposits were made in the accounts of the assessee on account of unauthorized transactions of forex.

28. The Assessing Officer was conscious that this is a case of high risk transactions. The relevant documents in the nature of cash flow statement, register of sale of foreign currency, daily summary and balance book, register of purchase of foreign currency for public, register of sale of foreign currency to authorized dealers and money changers, summary of sale and purchase of foreign currency, cash register and RBI audit letter were produced by the assessee. It was also indicated that the RBI had done a thorough audit relating to the inspection of all books and records relating to FMMC transactions for the Financial Year 2017-18. After

complete scrutiny, the Assessment Order dated 12.05.2021 was passed adding an income of Rs.91,800/- to the income of the assessee on account of a transaction of Rs.45,90,000/- which was the amount advanced by the assessee to Umami Forex and Holidays Private Limited. Before concluding the assessment proceedings, the Assessing Officer could have always called upon the assessee to produce the KYC details of the forex purchasing party. According to us, the fact that unauthorized transactions of forex are made without requisite KYC of the forex purchasing party cannot be said to be a fresh fact which has come to light which was not previously disclosed or that it is an information with regard to the fact previously disclosed which tends to expose the untruthfulness of the fact.

29. As indicated earlier, the sufficiency of reason for forming the belief of the Income Tax Officer is not for the Court to judge but it is open to an assessee to establish that there existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. Though the learned counsel for the Revenue was at pains to urge that the assessee had not made full and true disclosure of the material facts at the time of the original assessment and therefore, the income chargeable to tax has escaped assessment, we are not persuaded to accept this argument in the facts of the present case.

30. The Supreme Court has explained that the purpose and intent of Sections 147(a) and 148 of the Act is to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say “*you accepted my lie, now your hands are tied and you can do nothing*”. No doubt, it would be travesty of justice to allow the assessee that latitude.

31. Let us deal with Ms Razaq’s submission that there should be no difficulty for the assessee to produce KYC documents as in any case he will be given full opportunity to establish his case that the assessment proceedings were rightly concluded. We agree with Ms Razaq about the consistent view that where the statutory authority has not even concluded the proceedings, the writ Court should not interfere at such a pre-mature stage. It is also well settled that at this stage, the test to be applied is as to whether there was reason to believe that the income has escaped assessment and whether the Assessing Officer has sufficient reason for forming that belief. However, we have to be mindful of the observations in *Kelvinator of India Limited* (supra) which explained the conceptual difference between the power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain precondition and if the concept of “*change of opinion*” is removed,

then, in the garb of reopening the assessment, review would take place.

32. In this view of the matter, we are satisfied that in the facts and circumstances of the present case, in the garb of reopening the assessment, the review would take place. The petition therefore succeeds and is accordingly allowed in terms of prayer clauses (A) and (B). No costs.

VALMIKI MENEZES, J

M. S. KARNIK, J