

आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ, बी, मुंबई ।

**IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "B", MUMBAI**

**श्री जोगिन्दर सिंह, न्यायिक सदस्य एवं
श्री एन. के. प्रधान, लेखा सदस्य, के समक्ष**

**Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member**

**ITA NO.6369/Mum/2014
Assessment Year: 2006-07**

ACIT-4(3), 6 th Floor, R. No.649, Aayakar Bhavan, M.K. Road, Mumbai-4020	<u>बनाम/</u> Vs.	M/s Mumbai Stock Brokers Pvt. Ltd. R No.10A, 1 st Floor, 7/10, Botwala Building, Horniman Circle, Fort, Mumbai-400023
(राजस्व /Revenue)		(निर्धारिती /Assessee)
P.A. No. AABCM4133A		

**Cross Objection No.39/Mum/2016
(Arising out of ITA NO.6369/Mum/2014)
Assessment Year: 2006-07**

M/s Mumbai Stock Brokers Pvt. Ltd. R No.10A, 1 st Floor, 7/10, Botwala Building, Horniman Circle, Fort, Mumbai-400023	बनाम/ Vs.	ACIT-4(3), 6 th Floor, R. No.649, Aayakar Bhavan, M.K. Road, Mumbai-4020
(निर्धारिती / Assessee)		(राजस्व / Revenue)
P.A. No. AABCM4133A		

निर्धारिती की ओर से / Assessee by	Shri Ajay R. Singh
राजस्व की ओर से / Revenue by	Shri Purushottam Kumar- DR

सुनवाई की तारीख / Date of Hearing :	15/11/2016
आदेश की तारीख /Date of Order:	15/11/2016

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The Revenue is aggrieved by the impugned order dated 12/08/2014 of the Ld. First Appellate Authority, Mumbai and assessee has preferred cross objection.

2. During hearing, the ld. counsel for the assessee, Shri Ajay R. Singh, contended that cross objection of the assessee may be taken first as legal issue is involved, wherein, the assessee has challenged reopening of assessment u/s 147/148 of the Income Tax Act, 1961 (hereinafter the Act)

being beyond the period of four years more specifically when there is no failure on the part of the assessee to disclose the material facts fully and truly which were necessary for framing the assessment. It was also contended that notice u/s 148 of the Act dated 22/03/2013 for reopening the completed assessment made u/s 143(3) dated 27/05/2008 is merely based upon change of opinion. It was contended that the original assessment was completed after due application of mind on the issue of section 115JB of the Act as well as section 88E of the Act.

2.1. On the other hand, the ld. DR, Shri Purushottm Kumar, defended the reopening of assessment by contending that there is no change of opinion by the Assessing Officer as income as escaped assessment.

2.2. We have considered the rival submissions and perused the material available on record. In the light of the foregoing arguments from both sides, now question arises whether any opinion was formed by the Assessing Officer. We find that the Ld. Assessing Officer considered the issue of section 115JB of the Act along with section 88E of the Act while framing the original assessment. It is noted that while framing the assessment the ld. Assessing Officer duly applied his mind and after considering the material facts, filed by the assessee, the assessment was framed u/s 143(3) of the Act.

2.3. Now, question arises whether there was a change of opinion by the Assessing Officer and the validity of reopening of assessment u/s 147/148 after a period of four years. Since, we have observed that an opinion was formed by the Assessing Officer that too after due deliberation, therefore, we shall analyse the validity of reopening of assessment. Considering the totality of facts, we find that reassessment proceedings will be invalid, in case, the assessment order itself records that the issue was raised and decided that too while framing the assessment u/s 143(3) of the Act. Therefore, the reassessment proceedings in this case is hit by the principle of “change of opinion” because reassessment proceedings will be invalid as notices/queries were raised by the Assessing Officer as is evident from the assessment order. The assessee duly replied to the query as is evidenced from letter dated 27/05/2008, addressed to the Assessing Officer (page 16 & 17 of the paper book). The queries raised by the Assessing Officer were duly answered by the assessee during original assessment proceedings. The expression “change of opinion” postulates formation of opinion and then a change thereof. In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. A distinction must be drawn between erroneous application/ interpretation/ understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the

passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record or not made available by the assessee, during assessment proceedings, the principle of “change of opinion” will not apply. The reason is that “opinion” is formed on facts. “Opinion” formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of “change of opinion”. Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression “material facts” means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have a remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the assessment proceedings on the

basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. If a subject-matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and, therefore, it is a case of “change of opinion”. When at the first instance, in the original assessment proceedings, no opinion is formed, the principle of “change of opinion” cannot and does not apply. There is a difference between “change of opinion” and “failure or omission” of the Assessing Officer to form an opinion on a subject-matter, entry, claim, deduction, etc. When the Assessing Officer fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion. Whether or not the Assessing Officer had applied his mind and examined the subject-matter, claim, etc., depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject-matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing-Officer did not examine a particular subject-matter, claim, etc. The stand and substance of the assessee and the Assessing Officer in such cases are relevant.

2.4. Section 114 of the Evidence Act, 1872, is permissive and not a mandatory provision. Nine situations by way of

illustrations are stated. These are by way of example or guidelines. As a permissive provision it enables to judge to support his judgment but there is no scope of presumption when facts are known. Presumption of facts under section 114 is rebuttable. The presumption raised under illustration (e) to section 114 of the Act means that when an official act is proved to have been done, it will be presumed to have been regularly done but it does not raise any presumption that an act was done for which there is no evidence or proof.

(i) Assessments cannot be validly reopened under section 147 of the Act even within four years, if an assessee had furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made under section 143(3). So long as the assessee has furnished full and true particulars at that time of original assessment and so long as the assessment order is framed under section 143(3) of the Act, it matters little that the Assessing Officer did not ask any question or query with respect to one entry or note but had raised queries and questions on other aspects.

(ii) Section 114(e) of the Act can be applied to an assessment order framed under section 143(3) of the Act, provided there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter covered by the disclosure, it would amount to change of opinion. The ratio

laid down in the following cases usefully throw lights on the issue in hand:-

- A. L. A. Firm v. CIT [1976] 102 ITR 622 (Mad) (para 9)*
A. L. A. Firm v. CIT [1991] 189 ITR 285 (SC) (paras 32, 60, 61)
Anandji Haridas and Co. P. Ltd. v. Kushare (S. P.), STO [1968] 21 STC 326 (SC) (para 35)
Bankipur Club Ltd. v. CIT [1971] 82 ITR 831 (SC) (para 34)
Barium Chemicals Ltd. v. CLB [1966] 36 Comp Cas 639 (SC) (para 56)
BLB Ltd. v. Asst. CIT [2012] 343 ITR 129 (Delhi) (para 14)
Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) (para 45)
CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) (paras 9, 34)
CIT v. Chase Bright Steel Ltd. (No. 1) [1989] 177 ITR 124 (Bom) (para 21)
CIT v. DLF Power Ltd. [2012] 345 ITR 446 (Delhi) (para 14)
CIT v. Eicher Ltd. [2007] 294 ITR 310 (Delhi) (paras 10, 28)
CIT v. Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] (paras 2, 12, 20, 48)
CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) (paras 2, 28)
CIT v. Khemchand Ramdas [1938] 6 ITR 414 (PC) (para 50)
CIT v. P. V. S. Beedies P. Ltd. [1999] 237 ITR 13 (SC) (para 18)
CIT (Asst.) v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC) (paras 4, 12)
CIT v. Sharma (H. P.) [1980] 122 ITR 675 (Delhi) (para 9)
Consolidated Photo and Finvest Ltd. v. Asst. CIT [2006] 281 ITR 394 (Delhi) (paras 9, 11)
Dalmia P. Ltd. v. CIT [2012] 348 ITR 469 (Delhi) (para 17)
G. R. Ramachari and Co. v. CIT [1961] 41 ITR 142 (Mad) (paras 38, 61)
Hari Iron Trading Co. v. CIT [2003] 263 ITR 437 (P&H) (para 10)
ITO v. Habibullah (S. K.) [1962] 44 ITR 809 (SC) (para 50)
Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC) (paras 34, 35)
Indian Hume Pipe Co. Ltd. v. Asst. CIT [2012] 348 ITR 439 (Bom) (para 17)
3i Infotech Ltd. v. Asst. CIT [2010] 329 ITR 257 (Bom) (para 26)
International Woollen Mills v. Standard Wool (U. K.) Ltd. [2001] 5 SCC 265 (para 30)
Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) (paras 9, 33, 34, 35)
KLM Royal Dutch Airlines v. Asst. Director of I. T. [2007] 292 ITR 49 (Delhi) (para 12)
Kunhayammed v. State of Kerala [2000] 245 ITR 360 (SC) (para 31)
Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC) (para 34)
Muthukrishna Reddiar v. CIT [1973] 90 ITR 503 (Ker) (para 9)

New Light Trading Co. v. CIT [2002] 256 ITR 391 (Delhi) (para 18)
Praful Chunilal Patel v. Makwana (M. J.)/Asst. CIT [1999] 236 ITR 832 (Guj)
(para 21)
Snowcem India Ltd. v. Deputy CIT [2009] 313 ITR 170 (Bom) (para 31)
Sri Krishna P. Ltd. v. ITO [1996] 221 ITR 538 (SC) (paras 56, 58)
Suresh Budharmal Kalani v. State of Maharashtra [1998] 7 SCC 337 (para 29)
Union of India v. Suresh C. Baskey [1996] AIR 1996 SC 849 (para 20)
United Mercantile Co. Ltd. v. CIT [1967] 64 ITR 218 (Ker) (para 9)

"(i) What is meant by the term 'change of opinion' ?

(ii) Whether assessment proceedings can be validly reopened under section 147 of the Act, even within four years, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion ?

(iii) Whether the bar or prohibition under the principle 'change of opinion' will apply even when the Assessing Officer has not asked any question or query with respect to an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects ?

(iv) Whether and in what circumstances section 114(e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion ?"

2.5. To explain the aforementioned position of the law, we are reproducing hereunder the relevant provision of section 147 of the Act.

"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 re-compute 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 under section 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.

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 ;

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

(i) income chargeable to tax has been under assessed ; 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.

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."

2.6. For reopening an assessment made under section 143(3) of the Act, the following conditions are required to be satisfied:-

(i) the Assessing Officer must form a tentative or prima facie opinion on the basis of material that there is underassessment or escapement of income ;

(ii) he must record the prima facie opinion into writing ;

(iii) the opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.

(iv) reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.

(v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. The Explanation to the section stipulates that mere production of books of account or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to "full and true disclosure of material facts" (the proviso is not applicable where reasons to believe for issue of notice are recorded and notice is issued within four years from the end of assessment year).

2.7. The expression "change of opinion" postulates "formation of opinion" and then a "change thereof". In the context of section 147 of the Act it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under section 143(3) and thereafter, with the initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view. The word "opinion" is derived from the latin word "opinari" which means "to believe", "to think". The word "opinion" as per the Black's Law Dictionary means a statement by a judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. Ramanatha Aiyar (third edition) explains the term "opinion" to mean "something more than mere retaining of gossip or hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question . . . An opinion is a conviction based on testimony . . . they are as a result of reading, experience and reflection".

2.8. In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. The question of change of opinion arise when an Assessing Officer forms an opinion and

decides not to make an addition or holds that the assessee is correct and accepts his position or stand. In *Hari Iron Trading Co. v. CIT* [2003] 263 ITR 437 (P&H), a Division Bench of the Hon'ble Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that, generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed on record by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted/rejected the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of his lapses.

2.9. The Hon'ble Delhi High Court in *Consolidated Photo and Finvest Ltd.* [2006] 281 ITR 394 (Delhi) held as under:

"In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments 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. It 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, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for

taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

2.10. From the foregoing discussion, the clear position emerges as under:

(1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

2.11. Thus, where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort may be made through section 263 of the Act. But initiation of reassessment proceedings will be invalid on the ground of change of opinion. Here a distinction has to be drawn between

erroneous application/interpretation/ understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression "material facts" means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer's proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance

and will have to be examined to determine whether the stand of the Revenue is correct. A decision from Hon'ble Delhi High Court dated September 26, 2011 in *Dalmia P. Ltd. v. CIT* [2012] 348 ITR 469 (Delhi) and another decision from Hon'ble jurisdictional High Court dated November 8, 2011, in *Indian Hume Pipe Co. Ltd. v. Asst. CIT* [2012] 348 ITR 439 (Bom.) are two such cases, which throw light on the issue. In the original assessment/order dated 27/05/2008, the Assessing Officer found that the assessee declared income of Rs.2,47,77,760/- and the return was processed u/s 143(1) of the Act. The case of the assessee was selected for scrutiny, therefore, notices u/s 143(2) and 142(1) were issued and served upon the assessee. As is evidenced from para 2 of the original assessment order, the assessee attended from time to time and filed the details called for. The details were also explained by the assessee. The ld. Assessing Officer duly examined the profit & loss account, tax audit report, computation of income, balance sheet with their schedules. The ld. Assessing Officer duly considered the depreciation on earlier years on computer, disallowance u/s 14A, the issue of rebate u/s 88E (para-9) of the assessment order and concluded that the assessee has correctly claimed the STT rebate in computation of income then the income was computed as mentioned in para 10 onwards of the assessment order, thus, it is clear that the original assessment was framed after due application of mind. Thus, the reassessment framed by the Assessing Officer in the second category is a case of

"change of opinion" and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view.

2.12. A division Bench of Hon'ble Delhi High Court in *New Light Trading Co. v. CIT* [2002] 256 ITR 391 (Delhi), referred to the decision of the Hon'ble Apex Court in *CIT v. P. V. S. Beedies P. Ltd.* [1999] 237 ITR 13 (SC) and made following observations. (page 392) :

"In the case of CIT v. P. V. S. Beedies P. Ltd. [1999] 237 ITR 13 (SC), the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee."

"As recorded above, the reasons recorded or the documents available must show nexus that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income. At the same time, it is not the requirement that the Assessing Officer should have finally ascertained escapement of income by recording conclusive findings. The final ascertainment takes place when the final or reassessment order is passed. It is enough if the Assessing Officer can show tentatively or prima facie on the basis of the reasons recorded and with reference to the documents available on record that income has escaped assessment."

This brings us to the observations of the Delhi High Court in Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] which read as under (page 18):

"The Board in exercise of its jurisdiction under the aforementioned provisions had issued the circular on October 31, 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."

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. It is, therefore, evident that even according to the CBDT a "mere change of opinion" cannot form the basis for reopening a completed assessment.

2.13. Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra virus article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favoured. In the event it is held that by reason of section 147 if the Income-tax Officer 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 reassessment proceeding upon mere change of opinion.

2.14. The Hon'ble Apex Court thereafter referred to the subsequent decision in *Indian and Eastern Newspaper Society v. CIT* [1979] 119 ITR 996 (SC) wherein it was observed that some of the observations made in *Kalyanji Mavji* (supra) were far too wide and the statute did not permit reappraisal of material considered by the Assessing Officer during the original assessment. The observations in *Kalyanji Mavji* (supra) that reopening would cover a case "where income has escaped assessment due to the oversight, inadvertence or mistake" was too broadly expressed and did not lay down the correct law. It was clarified and observed at page 1004 in *Indian and Eastern Newspaper Society* [1979] 119 ITR 996 (SC) as under :

*"Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on *Kalyanji Mavji and Co. v. CIT* [1976] 102 ITR 287 (SC), where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the 'oversight, inadvertence or mistake' of the Income-tax Officer must fall within section 34(1)(b) of the Indian Income-tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income-tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion,*

an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this court in Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC), CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) and Bankipur Club Ltd. v. CIT [1971] 82 ITR 831 (SC), and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law."

2.15. In A. L. A. Firm (supra), the Hon'ble Apex Court explained that there was no difference between the observations of the Supreme Court in Kalyanji Mavji [1976] 102 ITR 287 (SC) and Indian and Eastern Newspaper Society case [1979] 119 ITR 996 (SC), as far as proposition (4) is concerned. It was held that (page 297 of 189 ITR) :

"We have pointed out earlier that Kalyanji Mavji's case [1976] 102 ITR 287 (SC) outlines four situations in which action under section 34(1)(b) can be validly initiated. The Indian Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has only indicated that proposition (2) outlined in this case and extracted earlier may have been somewhat widely stated ; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji's case. The facts of the present case squarely fall within the scope of propositions 2 and 4 enunciated in Kalyanji Mavji's case [1976] 102 ITR 287 (SC). Proposition (2) may be briefly summarized as permitting action even on a 'mere change of opinion'. This is what has been doubted in the Indian and Eastern Newspaper Society case [1979] 119 ITR 996 (SC) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Mavji's case [1976] 102 ITR 287 (SC). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on 'information' in the shape of some light thrown on aspects of facts or law which the Income-tax Officer had not earlier been conscious of. To give a couple of illustrations ; suppose an Income-tax Officer, in the original assessment, which is a voluminous one involving several contentions, accepts a plea of

the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently, he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the Income-tax Officer derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose the Income-tax Officer accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under section 147(b) by virtue of proposition (4) of Kalyanji Mavji. The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.

What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Mavji's case [1976] 102 ITR 287 (SC). The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the Income-tax Officer initiates reassessment proceedings in the light of 'information' obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier, for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the Income-tax Officer, having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC), it also ropes in cases of a 'bare or mere change of opinion' where the Income-tax Officer (very often a successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor Income-tax Officer) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and the

Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji [1976] 102 ITR 287 (SC). The second paragraph from the judgment in the Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) earlier extracted has also reference only to this situation and insists upon the necessity of some information which make the Income-tax Officer realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas 21 STC 326. Even making allowances for this limitation placed on the observations in Kalyanji Mavji, the position as summarised by the High Court in the following words represents, in our view, the correct position in law (at page 629 of 102 ITR) :

The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently came by the material from the record itself, then such a case would fall within the scope of section 147(b) of the Act.'" (emphasis supplied)

The aforesaid observations are a complete answer to the issue that if a particular subject-matter, item, deduction or claim is not examined by the Assessing Officer, it will nevertheless be a case of "change of opinion" and the reassessment proceedings will be barred.

2.16. We are conscious of the fact that the aforesaid observations have been made in the context of section 147(b) with reference to the term "information" and conceptually there is difference in scope and ambit of reopening provisions

incorporated with effect from April 1, 1989. However, it was observed by the Hon'ble Apex Court in *Kelvinator of India Ltd.* [2010] 320 ITR 561 (SC) that the amended provisions are wider. What is important and relevant is that the principle of "change of opinion" was equally applicable under the un-amended provisions. The Supreme Court was, therefore, conscious of the said principle, when the observations mentioned above in *A. L. A. Firm* [1991] 189 ITR 285 were made.

2.17. Under the new provisions of section 147, an assessment can be reopened if the Assessing Officer has "reason to believe" that income chargeable to tax has escaped assessment; but if he wants to do so after a period of four years from the end of the assessment year, he can do so only if the assessee has fallen short of his duty to disclose fully and truly all material facts necessary for his assessment. It does not follow that he cannot reopen the assessment even within the period of four years as aforesaid if he has reason to believe that the assessee has failed to make the requisite disclosure. All that the section says is that in a case where the assessment is sought to be reopened after the period of four years, the only reason available to the Assessing Officer is the non-disclosure on the part of the assessee. The Act places a general duty on every assessee to furnish full and true particulars along with the return of income or in the course of the assessment proceedings so that the Assessing Officer is

enabled to compute the correct amount of income on which the assessee shall pay tax. The position has been further clarified by the proviso itself in a case where assessment under sub-section (3) of section 144 of the Act or this section has been made for the relevant assessment year, no action shall be taken 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 year by the reason of 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 truly and fully all material facts necessary for his assessment for that assessment year. It is also noted that the scope of newly substituted (w.e.f. 01/04/1989) section 147 has been elaborated in department circular number 549 dated 31st October, 1989, meaning thereby, on or after 01/04/1989, initiation of reassessment proceedings has to be governed by the provisions of section 147 to 151 as substituted (amended) w.e.f. 01/04/1989. Still, power u/s 147 of the Act, though very wide but no plenary. We are aware that Hon'ble Gujarat High Court in Praful Chunilal Patel: Vasant Chunilal Patel vs ACIT (1999) 236 ITR 82, 840 (Guj.) even went to the extent that action under main section 147 is possible in spite of complete disclosure of material facts. The primary condition of reasonable belief having nexus with the material on record is still operative. However, we are of the view, that mere fresh application of mind to the same set of facts or "mere change of opinion" does

not confer jurisdiction to the Assessing Officer even under the post 1989 section 147 of the Act. Our view find support from the decision from Hon'ble Delhi High court in Jindal Photo Films Ltd. vs DCIT (1998) 234 ITR 170 (Del.), Garden Silk Mills Pvt. Ltd. vs DCIT (1999) 151 CTR (Guj.) 533, Govind Chhapabhai Patel vs DCIT 240 ITR 628, 630 (Guj.), Foramer vs CIT (2001) 247 ITR 436 (All.), affirmed in CIT vs Foramer Finance (2003) 264 ITR 566, 567 (SC), Ipica Laboratories vs DCIT (2001) 251 ITR 416 (Bom.), Ritu Investment Pvt. Ltd.(2012) 345 ITR 214 (Del.), Ketan B. Mehta vs ACIT (2012) 346 ITR 254 (Guj.), Ms. Praveen P. Bharucha vs DCIT (2012) 348 ITR 325 (Bom.), CIT vs Usha International Ltd. 348 ITR 485 (Del.), Agricultural Produce Market Committee vs ITO (2013) 355 ITR 348 (Guj.), B.B.C. World News Ltd. vs Asst. DIT (2014) 362 ITR 577 (Del.). Identical ratio was laid down in CIT vs Malayala Manorma Company Ltd. (2002) 253 ITR 378 (Ker.) We think this thread runs through the various provisions of the Act. But Explanation 1 to the section confines the duty to the disclosure of all primary and material facts necessary for the assessment, fully and truly. As to what are material or primary facts would depend upon the facts and circumstances of each case and no universal formula may be attempted. The legal or factual inferences from those primary or material facts are for the Assessing Officer to draw in order to complete the assessment and it is not for the assessee to advise him, for obvious reasons. The Explanation, however, cautions the assessee that he cannot remain smug with the belief that since

he has produced the books of account before the Assessing Officer from which material or evidence could have been with due diligence gathered by him, he has discharged his duty. It is for him to point out the relevant entries which are material, without leaving that exercise to the Assessing Officer. The caveat, however, is that such production of books of account may, in the light of the facts and circumstances, amount to full and true disclosure; this is clear from the use of the expression "not necessarily" in the Explanation. Thus, the question of full and true disclosure of primary or material facts is a pure question of fact, to be determined on the facts and circumstances of each case. No general principle can be laid down. It was observed by the Hon'ble Apex Court, in various cases that there should be some "tangible material" coming into the possession of the Assessing Officer in such cases to enable him to resort to section 147 of the Act. Despite being a case of full and true disclosure, tangible material coming to the possession of the Assessing Officer after he made the original assessment under section 143(3), would influence the opinion, formed or presumed to have been formed earlier, by the assessing authority; he can with justification change it, but that would not be a case of a "mere change of opinion" unguided by new facts or change in the legal position. It will be a case of the assessing authority having "reason to believe", notwithstanding that full and true particulars were furnished by the assessee which were examined, or presumed to be examined, by him. There was a divergence of opinion amongst

various High Courts as to what constitute "Information" for the purposes of section 34(1)(b) of the 1922 Act (which corresponds to section 147(b) of the 1961 Act) the Hon'ble Apex Court in *CWT vs Imperial Tobacco Company Ltd.* (1966) 61 ITR 461 has noted such divergence of opinion on the point. Hon'ble jurisdictional High Court in *CIT vs Sir Mohammad Yusuf Ismail* (1944) 12 ITR 8 (Bom.) held that mere change of opinion on the same facts are on question of law or mere discovery of mistake of law is not sufficient information and that in order to sustain action u/s 34 by further holding that reassessment is not permissible. The Hon'ble Apex Court in *Simon Carves Ltd.* (1976) 105 ITR 212 held that errorless legally correct order cannot be reopened, therefore, it is settled law that without any new information and on the basis of mere change of opinion, reopening of assessment is not permissible. As was held in *CIT vs TTK Prestige ltd.* (2010) 322 ITR 390 (Karn.) SLP dismissed in 2010 322 ITR (St.) 14 (SC). Reference also made to *Asian Paints ltd. vs DCIT* (2009) 308 ITR 195 (Bom.), *Andhra Bank Ltd. vs CIT* (1997) 225 ITR 447 (SC). The observations of the Supreme Court are a protection against the abuse of power; they also protect the Revenue which can, in the light of subsequent coming into light of facts or law, reopen the assessment. In the light of the aforesaid discussion, since, there was no new tangible material available with the Assessing Officer while resorting to section 147/148 of the Act, more specifically, while framing original assessment u/s 143(3) of the Act, there was full disclosure of material

facts by the assessee and on the basis of those facts, assessment was completed u/s 143(3) of the Act.

2.18. The Hon'ble jurisdictional High Court in a later decision dated 18/01/2016 in *Nirmal Bang Securities Pvt. Ltd. vs ACIT (2016) 382 ITR 83 (Bom.)* on the issue of reopening u/s 147/148 of the Act, considering various judicial pronouncements like *Hindustan Lever Ltd. vs ACIT (2004) 268 ITR 332 (Bom.)*, *CIT vs K Mohan & Company (2012) 349 ITR 653 (Bom.)*, *Prashant S. Joshi vs Income Tax Officer (2010) 324 ITR 154 (Bom.)* held that the notice issued u/s 148 of the Act cannot be sustained as the same is without jurisdiction, therefore, in our opinion, the reopening was not justified, therefore, the cross objection of the assessee is allowed.

3. So far as, merits of the appeal is concerned, though we are not expected to go into the merits of the case still during hearing, the ld. counsel for the assessee contended that the issue on merit is covered by the decision of the Tribunal for Assessment Year 2007-08 (*ITA No.5821/Mum/2013*) order dated 19/10/2016, therefore, we are reproducing hereunder the relevant portion from the order of the Tribunal dated 19/10/2016 for ready reference and analysis:-

“This appeal filed by the Revenue on 27.9.2013 is against the order of the CIT (A)-8, Mumbai dated 5.7.2013 for the assessment year 2007-2008. In this appeal, Revenue raised the following grounds which read as under:-

“1. On the facts and in the circumstances of the case and in law, the Ld CIT (A) has erred in directing the AO to allow to the assessee the rebate u/s 88E when tax liability was determined u/s 115JB of the Income Tax Act.

2. On the facts and in the circumstances of the case and in law, the impugned order of the CIT (A) is contrary to law and consequently merits to be set aside and that of the AO be restored.”

2. Briefly stated relevant facts of the case are that the assessee is a sub-broker in shares and securities and trader in shares and securities. Assessee filed the return of income declaring the total income of Rs. 2,66,56,652/-. Assessment was completed u/s 143 (3) r.w.s 147 of the Act and the assessed income was determined at Rs.2,71,12,400/-. In the assessment, AO did not allow the rebate u/s 88E of the Act. It is the opinion of the AO that the assessee company paid tax at a lower rate by complying to the normal provisions of the Act rather than payment tax @ 10% on book profits calculated as per section 115JB of the Act. Aggrieved, assessee carried the matter in appeal before the first appellate authority. 3. During the proceedings before the first appellate authority, after considering the submissions of the assessee, CIT (A) granted relief and directed the AO to allow deduction u/s 88E of the Act to the assessee while computing the taxability u/s 115JB of the Act. Aggrieved with the said decision of the CIT (A), Revenue is in appeal before the Tribunal by raising the above mentioned grounds. 4. During the proceedings before us, Ld Counsel for the assessee briefly narrated the above facts of the case and submitted that the only issue involved in this appeal relates to the allowable of rebate u/s 88E of the Act at the time of computing tax liability u/s 115JB of the Act. In this regard, Ld Counsel for the assessee mentioned that this issue is now settled by various decisions mentioned in para 2.6 of the impugned order and the judgment of the Hon'ble Karnataka High Court in the case of Horizon Capital Ltd is one of such decisions. Ld Counsel for the assessee heavily relied on the order of the CIT (A). 5. On the other hand, Ld DR for the Revenue relied on the order

of the AO. 6. We have heard both the parties and perused the orders of the Revenue Authorities as well as the relevant material placed before us. On perusal of the order of the CIT (A) in general and para 2.6 in particular, we find the same is relevant in this regard. Considering the significance of the said para 2.6 of the CIT (A)'s order for the sake of completeness this order the same is extracted as under:-

“2.6. During the appellate proceedings, the appellant has filed exhaustive submission. In its exhaustive submission / argument, amongst other explanations, the appellant submitted that total income has the same meaning if the income is computed under the normal provisions of the Act or under the provisions of section 115JB of the Act. The appellant argued that the deduction u/s 88E of the Act is allowable both when the income tax is computed under the normal provisions of the Act and also when the tax liability is computed under the provisions of section 115JB of the Act. In its exhaustive submission, the appellant also relied upon the decision of Karnataka High Court in the case of Horizon Capital Ltd. On this issue, the appellant has also relied on the decision of Kolkata ITAT in the case of Ganeshyam Securities (P) Lts vs. CIT (ITA No.342 / Kol / 2012); Nakamichi Securities Ltd Kolkata vs. ITO (ITA No.1108/Kol/2011); Ahmedabad ITAT in the case of S.K. Stock Broking Pvt Ltd vs. CIT (ITA No.1074/Ahd/2011) and Mumbai ITAT in the case of Touchstone Capital Market vs. Department of Income Tax (ITA No.6031/M/2011) wherein the Mumbai ITAT followed its own decision in the case of Shreepati Holdings & Finance Pvt Ltd in ITA No.6046/M/2011”.

7. Considering the above, we are of the opinion, CIT (A) discussed the issue at length and relied on various precedents before granting relief to the assessee. Therefore, we are of the opinion, the order of the CIT (A) is fair and reasonable and it does not call for any interference. Accordingly, grounds raised by the Revenue are dismissed. 8. In the result, appeal of the Revenue is dismissed”

3.1. We find that on the issue of rebate u/s 88E, when tax liability was determined u/s 115JB of the Act, the Tribunal considered the factual matrix and by following the decision from Hon'ble Karnataka High Court in the case of Horizon Capital Ltd. dismissed the appeal of the Revenue, thus, we

find no merit in the appeal of the Revenue also, consequently, dismissed.

Finally, the appeal of the Revenue is dismissed and the Cross objection of the assessee is allowed.

This Order was pronounced in the open court in the presence of ld. representatives from both sides at the conclusion of the hearing on 15/11/2016.

Sd/-

(N.K. Pradhan)

लेखा सदस्य / ACCOUNTANT MEMBER

Sd/-

(Joginder Singh)

न्यायिक सदस्य / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 15/11/2016

Shekhar, P.S/निजी सचिव

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)

आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai,