आयकर अपीलीय अधिकरण, 'सी' न्यायपीठ, चेन्नई

IN THE INCOME TAX APPELLATE TRIBUNAL
' C' BENCH : CHENNAI

श्री चंद्र पूजारी, लेखा सदस्य एवं
श्री धुव्वुरु आर.एल रेड्डी न्यायिक सदस्य के समक्ष

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND Shri Duvvuru RL Reddy, JUDICIAL MEMBER

आयकर अपील सं./**I.T.A.No.1698/Mds./2016**
निर्धारण वर्ष /Assessment year : 2009-10

Shri K.R.Jayaram, 4/50,Thriu Vee Ka Street, Villankuruchi Post, Coimbatore 641 035.	**Vs.**	The ACIT, NC Circle-2, Coimbatore.
[PAN AFEPJ 8078 A] **(अपीलार्थी/Appellant)**		**(प्रत्यर्थी/Respondent)**

अपीलार्थी की ओर से/ Appellant by	**:**	Mr.Arjunraj, C.A
प्रत्यर्थी की ओर से /Respondent by	**:**	Mr.K.Ravi, JCIT, DR
सुनवाई की तारीख/Date of Hearing	**:**	27-09-2017
घोषणा की तारीख /Date of Pronouncement	**:**	17-10-2017

आदेश / O R D E R

PER CHANDRA POOJARI, ACCOUNTANT MEMBER

This appeal of the assessee is directed against the order of the Commissioner of Income-tax (Appeals)-2, Coimbatore dated 30.03.2016 pertaining to assessment year 2009-10.

2. The assessee has raised the following grounds for adjudication.

1. *The order of the Commissioner of Income Tax appeals in confirming the order of the assessing officer is contrary to law and facts and in the circumstance of the case.*

2. *The Commissioner of Income Tax Appeals has erred in confirming the order of the Assessing Officer on reopening the assessment. The Sale Deed copy was available with the assessing officer and after applying his mind only he has passed the original order u/s. 143(3). There was no fresh material available with the assessing officer. Since the assessing officer has not applied the provisions of Section 50C while making the original order of assessment. Now the Assessing officer has changed his opinion and tried to apply Section 50C. Thus there is no escapement warranting reassessment on any fresh material information but only change of opinion.*

3. *The Commissioner of Income Tax Appeals erred treating the profit as short term capital gains while it was arising out of an adventure in the nature of trade.*

4. *The Commissioner of Income Tax Appeals has erred in confirming the order of the Assessing Officer who has not met the grounds and the evidences shown by the appellant but summarily rejected the points and treating the profit as short term capital gains.*

5. *For the foregoing grounds and for the grounds that may be raised at the time of hearing the appellant humbly prays the Hon'ble Income Tax Appellate Tribunal that the entire order be quashed as not maintainable or pass appropriate orders deem fit and thus render justice.*

3. The assessee has raised the following additional grounds for adjudication.

1. The above appellant has filed appeal before the honourable Income Tax Appellate Tribunal, Chennai for the assessment year 2009-10 and registered as Appeal No. ITA 1698/Chny/2016 before 'C' Bench.

2. The appellant is not aware of the provisions of the Income Tax Act. Hence engaged the services of an Income Tax Practitioner before CIT(A)/Coimbatore.

3. The following legal issues were not raised before the Commissioner of Income Tax (Appeals) because of the mistake of the Counsel.

4. Without prejudice to the grounds taken in the appeal petition, the following are the additional grounds for which prayer for grant of leave under Rule 11 is sought.

- *i. The value assessed for the purpose of stamp duty would not ipso facto substitute the7 actual sale consideration in the absence of admissible evidence.*
- *ii. The officer has not referred the matter for the valuation by District Valuation Officer and the CIT(A) is erred in upholding the same.*
- *iii. Sec. 50C applies only to Capital asset, being land or building or both, but it cannot be made applicable to any right in the above i.e. the appellant has the right only as power agent; Even if it is taken as capital asset, it is to be assessed in the hands of the owner of the asset and not on the power agents.*
- *5. The issues involved are pure question of law based on the relevant provisions of the statute and relates to the same subject matter based on materials already on record only.*

4. At the time of hearing, the ld. Counsel made an endorsement that the additional grounds are not pressed. Accordingly, we dismiss the additional ground Nos. 01 to 05, as not pressed

5. The brief facts of the case are that the assessee is an individual, engaged in the business of Real Estate. For assessment year 2009-10, the assessee originally filed a return of income on 01.07.2009. In the return of income, the assessee had shown the sale of land inadvertently under the head "short term capital gains". Subsequently, the case was taken up for scrutiny. The fact that the assessee sold a land of 4.9 acres at Telungupalayam, Coimbatore, jointly held with one Mr.Guruswamy during the year under consideration for a consideration of ₹318.50 lakhs and offered his fifty percent share of profit under the head 'capital gains' in the original return. While computing capital gains, the assessee claimed deduction of expenses incurred on improvement of the property like levelling, sand filling and road laying etc. On account of the assessee's failure to produce any evidence in respect of these expenses during the original assessment proceedings, the AO disallowed improvement cost amounting to ₹23,29,000/-and completed assessment u/s 143(3) on 05.12.2011. Thereafter, the AO found on verification of the sale document that the value of this property for Stamp purpose as fixed by the DRO was ₹735 lakhs and

half of this value amounting to ₹367.50 lakhs should have been adopted as sale consideration under deeming provisions of section 50C for computing capital gains instead of consideration mentioned in the document which was less than that value. Hence, the AO was of the opinion that capital gains have been understated and to that extent income has escaped assessment and reopened the assessment by issuing notice u/s 148. After issue of notice, the appellant filed a return on 02.06.2014 terming it as a revised return where in profit on sale of the said land was shown under the head "Business Income" while the same profit, as mentioned above, was declared as Capital Gains in the original return. So far as reply to notice u/s 148, the assessee stated that he filed revised return on 02.06.2014. The AO arrived at a conclusion that the so called revised return cannot be treated as a valid return as it was filed beyond stipulated time under the Act. Further it was filed after issue of notice under section 148 and after the reason for reopening was made, known to him. With regard to reclassifying the profit on sale of land under the head 'Business income" in the so called revised return, the AO held this action as an afterthought to avoid application of provisions of section 50. According to the AO, the assessee understood that provisions of 50C would be invoked which would increase tax liability and this apprehension led the assessee to file revised return changing the head of income. Otherwise there is no need for filing a revised return, particularly after issue of notice u/s 148. The AO found that the other joint owner of the property offered the profit on sale of this land under capital gains and the same was also assessed as capital gains. With these observations, the AO

refused to accept the invalid revised return and proceeded to assess capital gains by invoking the provisions of the section 50C. The value of the property for Stamp Duty purposes is taken as sale consideration. The assessment was completed by adding the difference of ₹2,02,35,151/-. Later, the AO passed rectification order u/s.154, enhancing the total income to ₹4,03,73,125/- by adding difference in capital gains earlier omitted. It is against the assessment of gain on transfer of land as capital gains by invoking section 50C provisions. Aggrieved by the order of ld. Assessing Officer, the assessee carried the appeal before the Ld.CIT(A). On appeal, the Ld.CIT(A) confirmed the order of the AO and dismissed the appeal of the assessee. Against the order of Ld.CIT(A), now the assessee is in appeal before us.

6. The first ground for our consideration is reopening of assessment.

7. The ld.A.R submitted that the original assessment was completed u/s.143(3) of the Act vide order dated 05.12.2011. Subsequently, the assessment was re-opened after the verification of documents, which were already on record so as to invoke the provisions of the section 50C of the Act. Accordingly notice u/s.148 dated 20.03.2014 was served on the assessee on 26.03.2014. According to ld.A.R, though the notice u/s.148 was served on the assessee within four years of end of relevant to assessment year, there was no tangible fresh material so as to reopen the concluded assessment. He submitted that at the time of original assessment , the AO

considered all the material evidences with regard to capital gains and accepted the explanation of the assessee, therefore mere change of opinion, reopening of assessment is bad in law. Further, the ld.A.R submitted that reopening of assessment u/s.147 of the Act, there should be some outside material, which could be said to have come to the knowledge of the AO after the original assessment order was passed. It was, therefore, found that it is a case of mere change of opinion. Accordingly, mere non-discussion of applicability of provisions 50C would not amount to presume that the AO has not applied his mind while accepting the income declared by the assessee. Since the AO did not have any tangible material in his possession except the sale deed, which was already produced before the AO at the stage of the original assessment proceedings, therefore reopening of assessment is only mere change of opinion, which is not permissible. In view of the judgement of Delhi High Court in the case of Kelvinator India Ltd. reported in 256 ITR 1 (Del.) and Usha International Ltd., in 210 Taxman 188. Further, ld.A.R relied on the following judgments.

i) Dishman Pharmaceuticals And Chemicals Ltd. Vs. DCIT in [2012] 346 ITR 245 (Guj)

ii) CIT Vs. Ashley Services Ltd. in [2014] 369 ITR 209 (Mad)

iii) Apollo Hospitals Enterprises Ltd. Vs. ACIT in [2006] 287 ITR 25 (Mad)

iv) Debashis Moulik Vs. ACIT in [2015] 370 ITR 660 (Cal)

v) Bapalal And Co. EXPORTS Vs. JCIT(OSD) in [2007] 289 ITR 37 (Mad)

vi) INCOME TAX OFFICER Vs. Shri Haresh Chand Agarwal, HUF in ITA No.282/Agra/2013 vide order dated 20.12.2013 wherein held that:-

> *5. We have considered rival submissions and material available on record. Hon'ble full Bench of Delhi High Court in the case of Kelvinator of India Ltd., 256 ITR 1 by following circular no.549 of CBDT held that on mere change of opinion of AO cannot be a ground for re-assessment and that amendment of sec. 147 w.e.f. 1.4.89 has not altered the position. Hon'ble Gujrat High Court in the case of Garden Silk Mills P. Ltd., 237 ITR 668 held that "however wide the scope of taking action u/s 148 of IT Act, it does not confirm jurisdiction on change of the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion that there has been excessive loss or depreciation allowance or that there has been under assessment or assessment at a lower rate or for applying other provisions of explanation 2 to sec. 147, it must be on material and it should have nexus for holding such opinion contrary to what has been expressed earlier. Even after the amendment of sec. 147, mere change of opinion does not confirm jurisdiction on the ITO to initiate proceeding for reassessment merely by resorting to explanation 1 to sec. 147." Hon'ble Calcutta High Court in the case of Berger Paints India Ltd., 245 ITR 648 held when any particular issue has been considered by the ITO and CIT(A) and when there is no failure to disclose the facts, the reassessment proceedings are not valid. Hon'ble Supreme Court in the case of CIT vs. Foraner France, 264 ITR 566 held reassessment — not on basis of mere change of opinion — law same before and after amendment by direct tax laws. Hon'ble Supreme Court in the case of Indian Oil Corporation, 159 ITR 956 held that no case u/s 148 is made out when the facts were known all along with to the revenue while*

making the original assessment. Hon'ble Supreme Court in the case of Associated Stone Industry Ltd., 224 ITR 560 held that the assessee shall have to disclose only the primary facts. Considering the above legal propositions decided in the above cases, it is clear that AO is not justified in reopening the assessment on mere change of opinion. It is admitted fact that there is no material available with the AO to form his opinion that income has escaped assessment. All material evidences were available at the stage of original assessment proceedings and the AO merely following the provisions of section 50C, as was not considered in the original assessment proceedings, reopened the assessment order. The assessee has disclosed all the facts which were known all along to the Revenue. Section 50C is not final determination to prove that it is a case of escapement of income. The report of approved valuer may give estimated figure on the basis of facts of each case. Therefore, on mere applicability of section 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the cost of property as was declared by the assessee. Therefore, on mere change of opinion, the AO was not justified in reopening the assessment.

The ld.A.R prayed that re-assessment order to be quashed.

8. Regarding reopening of assessment, the ld.D.R submitted that in the assessee's case, it was reopened within four years from the end of the assessment year. As per the provisions of section 147, it is only in

a case where a scrutiny assessment was earlier made, the AO is barred from reopening assessment unless income chargeable to tax escaped (assessment by reason of failure on the cart of the assessee to disclose fully and truly all material facts necessary for assessment in the original return or during the earlier proceedings. As per Explanation (1) to section 147, merely producing a document from which material evidence could have been gathered by the AO with due diligence, will not necessarily amount to full and true disclosure. The appellant might have produced the sale deed copy during original assessment proceedings but had not put to the notice of the AO that the sale consideration amount as per the document was less than the value fixed for Stamp Duty purposes. The assessee himself should have adopted the value fixed for Stamp Duty purposes as sale consideration while computing capital gains in the original return following the provisions of section 50C. Even during the original assessment proceedings, the appellant did not explain the reasons for deviating from the provisions of section 50C. The AO also did not either deal with the issue of applicability of provisions of section 50C in the original assessment. In other words, the AO had not earlier taken any view in this matter. So, the appellant is not correct in alleging that the reopening was made on change of opinion. Further, the appellant did not fully and truly disclose the relevant facts. In this connection, it was

relied on the order of Tribunal in the case of DCIT vs. M/s. Pradeep Stainless Steel lnd Pvt Ltd. LT.A. No. 1750/Mds/2013 dated 2011.2015, wherein Hon'hle Chenna !TAT held on the issue of reopening of assessment within four years as under:-

> *"For reopening assessment within four years, it may not be necessary that there is negligence on the part of the assessee. What is necessary is to see whether any income of the assessee chargeable to tax escaped income. In this case, the AO came to a conclusion that there was reason to believe that the income otherwise chargeable to tax has escaped income since there was difference in the allotment of shares to the partners. Therefore, this Tribunal is of the considered opinion that the AO has rightly reopened the assessment. Since no opinion was expressed in the original assessment, it is not the question of change of opinion".*

9. We have heard both the parties and perused the material on record. The main contention of the ld.A.R is that the assessment herein was originally completed u/s.143(3) of the Act, so that the assessment can be re-opened u/s.147 of the Act subject to fulfillment of conditions precedent, which include the condition that the AO must have "reason to believe" that income chargeable to tax is escaped assessment. It is true that the original assessment order was passed u/s.143(3) of the Act. The AO cannot disturb the finality of the original assessment passed u/s.143(3) of the Act at his whims and caprice; he must have reason to believe within the meaning of sec.147 of the Act.

The scope and effect of sec.147 of the Act substituted with effect from 01.04.1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly, the Assessing Officer must have reason to believe that income, profits or gains chargeable to Income-tax have escaped assessment, and, secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso.

9.1 As seen from the above, the finality of the assessment passed u/s.143(3) of the Act can be disturbed by initiating the re-assessment proceedings only "so long as the ingredients of sec.147 are fulfilled" and there should be reason to believe that the income chargeable to tax has escaped assessment and it does not matter that there has been no failure or omission on the part of the assessee to disclose full and true particulars at the time of the original assessment. There is nothing in the language of section 147 to unshackle the Assessing Officer from the need to show "reason to believe". When section 147 was recast with effect from April 1, 1989, the Legislature sought to replace the expression "reason to believe" with the expression "for reasons to be recorded by him in writing". But there were representations against the proposal and bowing to them the original expression was restored. This aspect of the matter has been brought out by the Supreme Court in the case of CIT v. Kelvinator in 320 ITR 561 as follows:-

> *"However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, 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. 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 preconditions and if the concept of 'change of opinion' is removed, as contended on behalf of the Depart ment, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer . . . 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', Parlia ment reintroduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549, dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows :
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> '7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression "reason to believe" in section 147. A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing, is of the opinion".

> Other provisions of the new section 147, however, remain the same'."

10. It would be appropriate at this juncture to take a brief survey of a few decisions of the Supreme Court which have infused meaning and content to the expression "reason to believe" appearing in section 147.

11. A Constitution Bench of the Supreme Court in A. N. Lakshman Shenoy v. ITO [1958] 34 ITR 275 (SC), speaking through S. K. Das J held that an assessment cannot be reopened on the basis of a mere guess, gossip or rumour. This was in the context of the pre-1948 law relating to reassessment under which the Assessing Officer was empowered to reopen the assessment on the basis of "definite information". Though this judgment is based on the phraseology of section 34 of the 1922 Act as it existed before 1948 which did not contain the expression "reason to believe", that principle was adopted by the Supreme Court while dealing with section 34 of the Act after the amendment made in 1948. In that year, the words "definite information" were replaced by the words "reason to believe". While expatiating on the new words, a three-judge Bench of the Supreme Court, speaking through V. Ramaswami J., in S.Narayanappa v. CIT [1967] 63 ITR 219 (SC), opined as under (page 222) :

"Again, the expression 'reason to believe' in section 34 of the Income-tax Act does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The belief must be held in good faith: it cannot be merely a pretence. To put it different, it is open to the court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings under section 34 of the Act is open to challenge in a court of law (see Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC))."

12. In Sheo Nath Singh v. AAC of I. T. [1971] 82 ITR 147 (SC) the Supreme Court (Hegde J.) observed as under (page 153) :

"There can be no manner of doubt that the words 'reason to believe' suggest that the belief must be that of an honest and rea sonable person based upon reasonable grounds and that the Income- tax Officer may act on direct or circumstances evidence but not on mere suspicion, gossip or rumour. The Income-tax Officer would be acting without jurisdiction if the reason for his belief that the condi tions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the court."

12.1 It was further observed that the reasons themselves cannot be stated to be beliefs, which would be an obvious self-contradiction.

13. The entire law as to what would constitute "reason to believe" was summed up by H. R. Khanna J., speaking for the Supreme Court in ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC). The following principles were laiddown :

"(a) The powers of the Assessing Officer to reopen an assessment, though wide, are not plenary.

(b) The words of the statute are 'reason to believe' and not 'reason to suspect'.

(c) The reopening of an assessment after the lapse of many years is a serious matter. Since the finality of a judicial or quasi-judicial proceedings are sought to be disturbed, it is essential that before taking action to reopen the assessment, the requirements of the law should be satisfied.

(d) The reasons to believe must have a material bearing on the question on escapement of income. It does not mean a purely subjec tive satisfaction of the assessing authority ; the reason be held in good faith and cannot merely be a pretence.

(e) The reasons to believe must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Assessing Officer and the formation is belief regarding escapement of income.

(f) The fact that the words 'definite information' which were there in section 34 of the Act of 1922 before 1948, are not there in section 147 of the 1961 Act would not lead to the conclusion that action can now be taken for reopening an assessment even if the information is wholly vague, indefinite, far-fetched or remote."

14. In CIT v. Kelvinator India Ltd.(320 ITR 561) the Supreme Court observed as under (page 564) :

> *"However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, we are afraid, 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. 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 preconditions and if the concept of 'change of opinion' is removed, as contended on behalf of the Depart ment, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer."*

It was also observed that after April 1, 1989, the Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is escapement of income. This judgment has laid emphasis on two more aspects: that there can be no review of an assessment in the guise of reopening and that a bare review without any tangible material would amount to abuse of the power.

15. Having regard to the judicial interpretation placed upon the expression "reason to believe", and the continued use of that expression right from 1948 till date, we have to understand the

meaning of the expression in exactly the same manner in which it has been understood by the courts. The assumption of the Revenue that somehow the words "reason to believe" have to be understood in a liberal manner where the finality of an intimation under section 143(3) is sought to be disturbed is erroneous and misconceived. As pointed out earlier, there is no warrant for such an assumption because of the language employed in section 147.

16. In the present case, the reasons disclosed that the AO reached the belief that there was an escapement of income on verification of the documents, which were already on record, and it was seen that Sec.50C value was fixed at Rs.735 lakhs by DRO. The market value should be adopted at 367.5 lakhs (50% of Rs.735 lakhs). Thus, the sale consideration for capital gains computation should have been worked out on this amount. Hence, the AO have a reason to believe that income chargeable to tax has escaped assessment within the ambit of section 147 of the Act and the case was re-opened. A notice u/s.148 was served on the assessee on 26.03.2014. There was no whisper that the AO came to know this from any tangible fresh material, which came to his possession after conclusion of original assessment so that there was an escapement of income. This is nothing but a review of the earlier proceedings and an abuse of power

by the ld. Assessing Officer, both strongly deprecated by the Supreme Court in the case of CIT Vs. Kelvivator (supra).

17. The reasons recorded by the AO in the present case do confirm our apprehension about the harm that a less strict interpretation of the words "reason to believe" vis-à-vis and order u/s.143(3) and cast to the tax regime. Since there was no whisper in the reasons recorded of any tangible material, which came to possession of the AO, subsequent to the order passed u/s.143(3) of the Act. It reflects an arbitrary exercise of the power conferred u/s.147 of the Act. At this stage, it is pertinent to mention that there was a cleavage of opinion even to consider the SRO value as the price of the property as sales consideration received by the assessee for the purpose of S.48. For this purpose, we place reliance in the case of CIT Vs. SMt.Shweta Buchar in (2010) 0192 Taxman 0067 (P&H). Further, in the case of CIT Vs. Chandni Buchar in (2010) 323 ITR 0510(P&H) held that in the absence of any admissible evidence, valuation done by stamp duty authorities could not be taken as actual sale consideration and the value shown in the sale deed had to be accepted.

18. In our opinion, when there was a cleavage of opinion to consider the valuation done by Stamp duty Authorities as an actual consideration and to determine the capital gains u/s.48 while framing the original assessment itself, how the AO could use the same documents, which were already on record to re-open the assessment, which was concluded u/s.143(3) of the Act.

19. The co-ordinate bench of Agra Tribunal in the case of INCOME TAX OFFICER Vs. Shri Haresh Chand Agarwal,HUF in ITA No.282/Agra/2013 for assessment year 2004-05 vide order dated 20.12.2013 has observed in similar circumstances as follows:-

> *"Hon'ble Gujarat High Court in the case of Garden Silk Mills P. Ltd. reported in 237 ITR 688 held that:-*
>
> *"However wide the scope of taking action under section 148 of the Income-tax Act, 1961, it does not confer jurisdiction on change of opinion on the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion that there has been excessive loss or depreciation allowance or that there has been underassessment or assessment at a lower rate or for applying other provisions of Explanation 2 to section 147 , it must be on material and it should have nexus for holding such opinion contrary to what has been expressed earlier. Even after the amendment of section 147 mere change of opinion does not confer jurisdiction on the Income-tax Officer to initiate proceedings for reassessment merely by resorting to Explanation 1 to section 147."*

Hon'ble Calcutta High Court in the case of Berger Paints India Ltd., 245 ITR 648 held when any particular issue has been considered by the ITO and CIT(A) and when there is no failure to disclose the facts, the reassessment proceedings are not valid. Hon'ble Supreme Court in the case of CIT vs. Foraner France, 264 ITR 566 held reassessment — not on basis of mere change of opinion —law same before and after amendment by direct tax laws. Hon'ble Supreme Court in the case of Indian Oil Corporation, 159 ITR 956 held that no case u/s 148 is made out when the facts were known all along with to the revenue while making the original assessment. Hon'ble Supreme Court in the case of Associated Stone Industry Ltd., 224 ITR 560 held that the assessee shall have to disclose only the primary facts. Considering the above legal propositions decided in the above cases, it is clear that AO is not justified in reopening the assessment on mere change of opinion. It is admitted fact that there is no material available with the AO to form his opinion that income has escaped assessment. All material evidences were available at the stage of original assessment proceedings and the AO merely following the provisions of section 50C, as was not considered in the original assessment proceedings, reopened the assessment order. The assessee has disclosed all the facts which were known all along to the Revenue. Section 50C is not final determination to prove that it is a case of escapement of income. The report of approved valuer may give estimated figure on the basis of facts of each case. Therefore, on mere applicability of section 50C would not disclose any escapement of income in the facts and circumstances of the case. The AO at the original assessment stage considered all the documents and material produced before him and has accepted the value of property as was declared by the assessee. Therefore, on mere change of opinion, the AO was not justified in reopening the assessment."

20. Thus, in our view, on the basis of above said facts, it can be concluded that the present provisions of the section 147 of the Act does not enable the AO to exercise his jurisdiction for reopening the

concluded assessment . There is no dispute to the fact that Sec.50C(1) is a deeming provision, which, mandates that if the Fair Market Value adopted by the SRO for stamp duty purpose is more than the sale consideration disclosed by the assessee, the Fair Market Value adopted by the SRO for stamp duty purpose should be deemed to sale consideration. Though, the assessee in terms of Sec.50C(2) can object to adopt such value, it cannot be denied that value u/s.50C(1), automatically it cannot be considered as understatement in sale value. In that view of the matter, it is not appropriate on the part of the AO to jump to a conclusion only on the basis of value u/s.50C(1) to reopen the assessment , when the same documents which were already brought on record at the time of original assessment, he failed to take a cognizance of that documents and framed the original assessment . We are well aware that it is neither necessary nor mandatory that at the time of recording of reasons itself, the AO should come to a conclusion that there will be option of escaped assessment as per reason recorded. The only requirement in law is, the AO prima facie must have a reason to believe on the basis of material in his possession, that income is escaped assessment . In facts of the present case, the AO completed the original assessment on the basis of records available with him and there was no allegation by the AO that neither disclosed correct consideration by the assessee in

the return filed for the assessment year nor was available before the AO when the assessment was framed u/s.143(3) of the Act. Undoubtedly, the information on the basis of which assessment was reopened, which was already in the possession of the AO and it was not subsequently came to his possession after the completion of the original assessment so as to reveal understatement of the sale value. In such circumstances, the AO is not empowered under the Act to reopen the assessment.

20.1 In the present case, the Assessing Officer observed that on verification of documents, it was seen that the value u/s.50C was fixed by DRO, of property at ₹735 lakhs. Hence, it means that the said details were called for by Assessing Officer at the time of original assessment. But inadvertently the same were not taken into account while framing the assessment and, therefore, it cannot be said that there is any fresh material to come to different conclusions. The relevant materials are available on record, but the Assessing Officer failed to apply his mind to that material in making the assessment order. In our considered opinion, Assessing Officer cannot recourse to the provisions of section 147 for his own failure to apply his mind to the material which, according to him, is relevant which is available on record. The ld.D.R made a plea before us that production before

Assessing Officer of books of accounts 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 first proviso to sec.147 of the Act. We find that this situation has been considered by the full Bench of the Delhi High Court in its judgment in the case of CIT Vs. Kelvinator India Ltd.(256 ITR 1) and the full Bench observed thus,

> *"The said submission is fallacious. An order of assessment can be passed either in terms of sub-s. (1) of s. 143 or sub-s. (3) of s. 143. When a regular order of assessment is passed in terms of the said sub-s. (3) of s. 143, a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of cl. (e) of s. 114 of the Indian Evidence Act, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."*

20.2 It is clear from the observations made above that the Full Bench of the Delhi High Court has taken a view that in a situation where according to the AO he failed to apply his mind to the relevant

material in making the assessment order, he cannot take advantage of his own wrong and reopen the assessment by taking recourse to the provisions of s. 147. We find ourself in respectful agreement with the view taken by the Full Bench of the Delhi High Court.

20.3 It is further to be seen that the legislature has not conferred power on the AO to review its own order. Therefore, the power under s. 147 cannot be used to review the order. In the present case, though the AO has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of formation of opinion by the AO, nothing new has happened, therefore, no new material has come on record, no new information has been received; it is merely a fresh application of mind by the same AO to the same set of facts and the reason that has been given is that the some material which was available on record while assessment order was made was inadvertently excluded from consideration. This will, in our opinion, amount to opening of the assessment merely because there is change of opinion. The Full Bench of the Delhi High Court in its judgment in the case of Kelvinator (supra) referred to above, has taken a clear view that reopening of assessment under s. 147 merely because there is a change of opinion cannot be allowed. In

our opinion, therefore, in the present case also, it was not permissible for Assessing Officer to issue notice under s. 148.

21. Further, in the case of CIT Vs. Ashley Services Ltd. in [2014] 369 ITR 209 (Mad) wherein held that reading of the reasons given for reopening of assessment shows that it was nothing but a review of the orders passed u/s.143(3) of the Act relating to the assessment years 1996-97 & 1997-98. Consequently, even though the assessment was re-opened, then a limitation period of 4 years there being no fresh material to disturb the reasoning arrived at reopening of assessment was unsustainable.

21.1 In the case of Dishman Pharmaceuticals And Chemicals Ltd. Vs. DCIT in [2012] 346 ITR 245 (Guj) held that the reasons for reopening of assessment did not make out any case of escapement of income from assessment on account of the assessee not disclosing fully and truly all material facts necessary for the same. Quiet apart from the fact that no such suggestion is recorded in the reasons, independently also there is no finding that the AO's stand in the reasons recorded , can in any manner be construed as suggesting that the income escapement on account of the assessee not disclosing the material facts.

21.2 In the case of Debashis Moulik Vs. ACIT in [2015] 370 ITR 660 (Cal) held that escapement of income could not be used to reopen an assessment on facts, information, documents which were before the AO or could have been easily found by him while making the assessment.

22. If we go through the above judgements, all the documents relating to the assessee on computation of capital gains for the subject assessment year were before the AO. There is no allegation by the AO that these documents which shows the SRO value was not at all before the AO, therefore, it cannot be said that there was "escapement of income" or that the reasons for believing that there was "escapement of income" were valid. The AO cannot say that yesterday he was ignorant, and he is wise today as all the materials are available before him, when he was framing original assessment u/s.143(3) of the Act. If he failed to take a view on the subject, the same documents should not be used to reopen the assessment as it was before him and he could have been easily found by him while framing the assessment. He cannot himself use the same documents to reopen the concluded assessment, which is nothing but abuse of law.

23. At this stage, it is appropriate to address the contention of the ld.D.R that the AO has been careless in bringing to tax capital

gains by applying sec.50C of the Act, the AO should not be precluded from issuing notice u/s.148 of the Act. This submission of the ld.D.R overlooks the facts that power to reopen is not a power to review an assessment order. At the time of passing the assessment order, it is expected from the AO that he will apply mind and pass an order in accordance with law. An assessment order is not a mere scrap of paper. To accept the submissions of the ld.D.R, would mean to negate the well settled position in law as stated by the Supreme Court in the case of CIT Vs. Kelvinator of India Ltd.(256 ITR 1).

23.1 Further, the Supreme Court in the case of Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC) wherein held that:-

> *"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 sec tion 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 observa tions in Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) sug gesting the contrary do not, we say with respect, lay down the correct law."

23.2. The aforesaid view on the above proposition has been reiterated by the apex court in A. L. A. Firm v. CIT [1991] 189 ITR 285 (SC) wherein the court held that change of opinion where opinion was formed earlier does not give the Assessing Officer jurisdiction to reopen an assessment. The apex court, inter alia, on the above issue held as under (page 298) :

"Even making allowances for this limitation placed on the observations in Kalyanji Mavji [1976] 102 ITR 287 (SC) 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 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)

23.3 The decision of the jurisdictional High Court in the case of CIT vs.Chakiat Agencies Pvt. Ltd., in [2009] 314 ITR 200 (Mad) wherein held that:-

"Dismissing the appeals, (i) that the Revenue had not stated that new materials were received by the Assessing Officer and the Assessing Officer on the basis of the new materials based his opinion that there was escapement of income. There was no material placed on record to show that the assessee had suppressed any material fact or had failed to disclose fully and truly all material facts necessary for the assessment. The Assessing Officer had recourse to reopening of the assessment only due to change of his opinion about the admissibility of deduction under section 80-O which was originally allowed by the Assessing Officer after considering the materials placed before him. The Tribunal was right in holding that the reassessment proceedings to deny the benefit of section 80-O were only on a change of opinion of the Assessing Officer.

(ii) That the assessee was a shipping agent and its activities were based on the information received from the parties intending to send cargo and the assessee also used to contact the ship owners

and other parties on various issues before the conclusion of the agreements between them. The assessee received commission for such services. It was not disputed that the assessee had rendered commercial service to the foreign shipping owners and for the use of such information outside India by the foreign ship owners received commission in convertible foreign exchange. Hence, the rendering of the commercial service and receiving of commission in foreign exchange by the assessee would entitle the assessee to the benefit of section 80-O."

24. In the present case, the reasons as recorded by the Assessing Officer and reproduced hereinabove clearly indicate that there was no tangible fresh material adverting to the reasons recorded for issuing reopening notice. Similarly, the decision of Bombay High court in the case Dr. Amin's Pathology Laboratory (252 ITR 673), it has been observed that if any item has escaped from assessment which otherwise is includible within the assessment and the Assessing Officer notices it subsequently by raising of some information received by him, one cannot say that it constitutes change of opinion. In the present case, the AO reopened the assessment originally completed by him on the basis of the same records as were available before him while completing the original assessment and there was no new tangible material that had come to his possession on the basis of which the assessment was reopened. The relevant records including the books of account of the assessee were duly examined by the AO during the

course of assessment proceedings completed u/s.143(3) of the Act and only after being satisfied with the details, the assessment of the assessee was completed. Therefore, the reopening of the assessment by the AO was bad in law as it was based merely on a change of opinion and the assessment in pursuance thereof was invalid and liable to be quashed. In view of the above, we find no substance in the submissions raised by ld.D.R. Accordingly, we quash the reassessment order.

25. At this stage, we refrain from going into the other grounds raised by the assessee.

26. In the result, the appeal of the assessee is partly allowed.

Order pronounced on 17th October, 2017, at Chennai.

Sd/-	Sd/-
(धुव्वुरु आर.एल रेड्डी)	**(चंद्र पूजारी)**
(**DUVVURU RL REDDY**))	**(CHANDRA POOJARI)**
न्यायिक सदस्य/JUDICIAL MEMBER	**लेखा सदस्य /ACCOUNTANT MEMBER**

चेन्नई/Chennai
दिनांक/Dated: 17th October, 2017.
K S Sundaram

आदेश की प्रतिलिपि अग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त (अपील)/CIT(A)
4. आयकर आयुक्त/CIT
5. विभागीय प्रतिनिधि/DR
6. गार्ड फाईल/GF