आयकर अपीलीय अधिकरण न्यायपीठ रायपुर में।

IN THE INCOME TAX APPELLATE TRIBUNAL,
RAIPUR BENCH, RAIPUR

(Through Virtual Court)

BEFORE SHRI RAVISH SOOD, JUDICIAL MEMBER
AND
SHRI JAMLAPPA D BATTULL, ACCOUNTANT MEMBER

आयकर अपील सं. / ITA No. 23/RPR/2018

निर्धारण वर्ष / Assessment Year : 2008-09

Shri Abhay Kumar Jain,
Prop. M/s. Jain Fabrics,
Mahalaxmi Market, Pandri,
Raipur (C.G.)
PAN : ACHPJ5173C

.......अपीलार्थी / Appellant

बनाम / V/s.

The Assistant Commissioner of Income Tax-3(1),
Raipur (C.G.)

......प्रत्यर्थी / Respondent

Assessee by	:	Shri Bikram Jain, AR
Revenue by	:	Shri Shravankumar Meena, DR

सुनवाई की तारीख / Date of Hearing	: 10.05.2022
घोषणा की तारीख / Date of Pronouncement	: 10.05.2022

आदेश / ORDER

PER RAVISH SOOD, JM:

The present appeal filed by the assessee is directed against the order passed by the CIT(Appeals)-1, Raipur dated 16.11.2017, which in turn arises from the order passed by the A.O under Sec. 143(3) r.w.s. 147 of the Income Tax Act, 1961 (for short 'the Act'), dated Nil for assessment year 2008-09. Before us the assessee has assailed the impugned order on the following grounds of appeal:

> *"1. On the facts and in the circumstances of the case, the learned CIT(A) has erred in sustaining the order of the A.O. where in the A.O has erred in making addition of Rs.2,75,375/- u/s.69 of the Income Tax Act, 1961 as unexplained investment. The addition made by the A.O and confirmed by the CIT(A) is unjustified, unwarranted and uncalled for.*
>
> *2.The assessee reserves the right to add, amend, or alter any grounds of appeal at any time of hearing."*

2. Succinctly stated, original assessment was framed by the A.O vide his order passed u/s.143(3) of the Act dated 13.12.2010 determining the income of the assessee at Rs.6,02,300/-. Subsequently, the case of the assesee was reopened by the A.O u/s. 147 of the Act for the following "reasons to believe":

In this regard, as per your request for providing the reason for re-opening/re- assessment of the case u/s 147 of the IT Act for the A.Y. 2008-09 is as furnished below.

1. *An amount of Rs.2,75,375/- (which is included in the total figure of Rs.9,44,993/-) in the name of Shri Mahendra Kochar was shown under the head loans, advances & deposits but the same was not found in the closing balance of said person in the conformation of account submitted by you, hence the said bogus debtor in the name of Shri Mahendra Kochr is required to be disallowed and added back to your income u/s 69 of Income 'Tax Act' 1961. Further as Shri Mahendra Kochar has made repayment of loans amounting to Rs.2,90,275/- in cash has violated the S. 269T.*

2. *In the case of Smt. Tara Bai jain it has been noted that interest, credited against the loan given by her to the assessee works out to Rs.2903/- whereas the assessee has debited Rs.14550/- in his P&L A/c. Hence the excess claim of interest Rs. 11,647/- (Rs. 14550/-- Rs.2903/-) is required to be disallowed.*

3. *Similarly the asseessee has debited Rs.11416/- as interest paid to lender Shri Madanlal Sunil Kumar whereas on perusal of conformation of account it Was found that the assessee has made payment of interest amounting to Rs.781/- only.*

4. *Further the assessed has debited Rs.4013/-, Rs.1405/- & Rs.1605/- as Interest in the name of Shri Gulab Chand Jain , Smt. Jaten Bai Jain & Smt. Basal Bai Jain but in the confirmation of account no such payment of interest has been shown. Hence the claim of Rs.7023/- is required to be disallowed & should be added back in the income of the assessee.*

5. *It was also noted that the assessee has failed to deduct TDS in respect of the payment of interest to the following persons-*

   1) Shri Abhay Kochar (HUF)- Rs. 72,346/-
   2) Shri Motila Kochar (HUF)- Rs. 47,503/-
   3) Smt. Dimple Kochar - Rs. 28,647/-
   4) Smt. Jaten Bai Kochar , Rs.19,268/-
   5) Smt. Kavita Kochar - Rs.7808/-
   6) Smt. Vandana Kochar - Rs. 14,436/-

   Hence, the above payment of interest i.e. Rs.1,90,008/- is required to be disallowed u/s 40(a)(ia) of the I.T. Act, 1961/-."

Assessment order u/s.143(3) r.w.s.147 of the Act dated Nil was thereafter framed by the A.O and an amount of Rs.2,75,375/- reflected in the balance sheet of the assessee company under the head "loans, advances & deposit" was held by him as an unexplained investment u/s.69 of the Act.

3. Aggrieved, the assessee assailed the matter in appeal before the CIT(Appeals) but without any success.

4. The assessee being aggrieved with the order of the CIT(Appeals) has carried the matter in appeal before us.

5. We have heard the ld. Authorised Representatives for both the parties, perused the orders of the lower authorities and the material available on record, as well as considered the judicial pronouncements that have been pressed into service by them to drive home their respective contentions.

6. At the very outset of the hearing of appeal, it was submitted by the Ld. Authorized Representative (for short 'AR') for the assessee that the A.O. in the present case before us, had wrongly assumed jurisdiction u/s.147 of the Act and on the basis of a mere "change of opinion", traversed beyond the scope of his jurisdiction and dislodged the concluded assessment that

was earlier framed by his predecessor vide order passed u/s.143(3), dated 13.12.2010. In order to buttress his aforesaid contentions the Ld. AR had drawn our attention to the copy of "reasons to believe" on the basis of which the case of the assessee was reopened u/s.147 of the Act, Page 6-7 of APB. It was claimed by the Ld. AR that a perusal of the "reasons to believe" as were made available to him by the A.O vide his letter dated 30.06.2015, reveals beyond doubt that reopening of the concluded assessment of the assessee was carried out on the basis of a mere "change of opinion" for reviewing the earlier order so passed by him. It was submitted by the Ld. AR that as reopening of the concluded assessment is based on a mere "change of opinion" which is not permissible as per the mandate of law, therefore, the order passed u/s.143(3)/147, dated Nil being devoid and bereft of any force of law was liable to be quashed on the said count itself.

7. Per contra, the Ld. Departmental Representative (for short 'DR') relied on the orders of the lower authorities. It was submitted by the Ld. DR that as the A.O had validly assumed jurisdiction u/s. 147 of the Act, therefore, no infirmity did emerge from the order passed by him u/s. 143(3)/147 of the Act dated Nil determining the assessee's income at Rs.8,77,680/-.

8. As the Ld. AR has assailed the validity of the jurisdiction assumed by the A.O for reopening the case of the assessee u/s.147 of the Act, therefore, we shall first deal with the same. On perusal of the "reasons to believe" as have been culled out by us hereinabove, it can safely be gathered, beyond doubt, that the impugned reassessment proceedings had been resorted to by him on the basis of a mere "change of opinion" ,i.e., on the basis of the same set of facts as were available before his predecessor while framing the assessment u/s.143(3), dated 13.12.2010 and no new material was brought to his notice which would have otherwise justified the reopening of assessee's case. In fact, we find that a perusal of the "reasons to believe" reveals that the A.O had merely sought a review of the order that was earlier passed by his predecessor while framing the original assessment. As per the mandate of law, a review in the garb of proceedings u/s.147 of the Act is not permissible, therefore, we find substance in the claim of the Ld. AR that the impugned order passed by the A.O u/s.143(3)/147 of the Act dated Nil cannot be sustained in the eyes of law and is liable to be quashed for want of valid assumption of jurisdiction on his part. Our aforesaid view is fortified by the judgment of the Hon'ble Supreme Court in in the case of CIT Vs. Kelvinator of India (2010) 320 ITR 561 (SC) wherein the Hon'ble Apex Court had

observed, that the case of an assessee cannot be reopened on the basis of a mere "change of opinion", holding as under:-

> 'On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to ITA No.1212/Mum/2019 A.Y. 2012-13 M/s Medley Pharmaceuticals Ltd. Vs. DCIT-10(2)(2) give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO 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 AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows:
>
> "7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression „reason to believe" in s. 147.--A number of representations were received against the omission of the words „reason to believe" from s. 147 and their substitution by the „opinion" of the AO. 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 s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 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 s. 147, however, remain the same."

Further, following the judgment of the full bench of the Hon'ble High Court of Delhi in the case of Kelvinator of India (supra), which thereafter had been upheld by the Hon'ble Apex Court, the Hon'ble High Court of Bombay in the case of Asteroids Trading & Investment P. Ltd. Vs. DCIT (2009) 308 ITR 190 (Bom), had held, that an A.O is precluded from assuming jurisdiction to initiate reassessment proceedings on the basis of a "change of opinion", observing as under:

> "8. Perusal of the record shows that the petitioner had made full disclosure necessary for claiming deduction under s. 80M. The AO after applying his mind to the relevant records had made a specific order allowing the deduction. A perusal of the record shows that now respondent No. 1 proposes to reopen the assessment because according to him deduction under s. 80M was wrongly allowed, and, therefore, he was of the opinion that the income has ITA No.1212/Mum/2019 A.Y. 2012-13 M/s Medley Pharmaceuticals Ltd. Vs. DCIT-10(2)(2) escaped assessment. Though, in the notice respondent No. 1 has used the phrase "reason to believe", admittedly between the date of the order of assessment sought to be reopened and the date of forming of opinion by respondent No. 1, nothing new has happened and there is no change of law, no new material has come on record, no information has been received. It is merely a fresh application of mind by the same officer to the same set of facts. Thus, it is a case of mere change of opinion, which, in our opinion, does not provide jurisdiction to respondent No. 1 to initiate proceedings under s. 148 of the Act. It can now be taken as a settled law, because of a series of judgments of various High Courts and the Supreme Court, which have been referred to in the judgment of the Full Bench of the Delhi High Court in the case of Kelvinator of India Ltd. (supra) referred to above, that under s. 147 assessment cannot be reopened on a mere change of opinion."

We further find that the Hon'ble High Court of Bombay in the case of Asian Paints Ltd. Vs. DCIT (2008) 308 ITR 195 (Bom) had observed, that as no new information /material was received by the A.O, therefore, the fresh application of mind by him

to the same set of facts and material which were available on record at the time of framing of the assessment, but had inadvertently remained omitted to be considered would tantamount to review of order which is not permissible as per law, had held as under:

> "10. 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 respondent No. 1 to issue notice under s. 148".

Further, the Hon'ble High Court of Bombay in the case of ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT (2010) 325 ITR 471 (Bom), relying on the judgment of the Hon'ble Supreme Court in the case of Kelvinator of India (supra), had held as under:

> "23. Though the power to reopen an assessment within a period of four years of the expiry of the relevant assessment year is wide, it is still structured by the existence of a reason to believe that income chargeable to tax has escaped assessment. The Supreme Court, in a recent judgment in Kelvinator of India Ltd. (supra) while drawing upon the legislative history of s. 147 held that the expression „reason to believe" needs to be given a schematic interpretation in order to ensure against an arbitrary exercise of power by the AO. The judgment of the Supreme Court emphasises that the power to reopen an assessment is not akin to a power to review the order of assessment and a mere change of opinion would not justify a recourse to the power under s. 147. Unless the AO has tangible material to reopen an assessment, the power cannot be held to be validly exercised. The Supreme Court has held thus :

> "...Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words „reason to believe" failing which we are afraid s. 147 would give arbitrary powers to the AO 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 AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of „change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of „change of opinion" as an inbuilt test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is „tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief."
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> 24. In the present case, for all the assessment years in question, and a fortiorari for asst. yr. 2004-05, what the AO has purported to do is to reopen the assessment on the basis of a mere change of opinion. That the AO had no tangible material is evident from the circumstance that the reasons which have been disclosed contain a reference to the same basis, namely the existence of a nil surplus/deficit in Form 1 which was drawn to the attention of and was present to the mind of the AO during the assessment proceedings under s. 143(3). Consequently, it is evident that there is an absence of tangible material before the AO".

Also, the Hon'ble High Court of Bombay in the case of Aventis Pharma Ltd. Vs. Asst. CIT (2010) 323 ITR 570 (Bom), reiterating its aforesaid view that reassessment proceedings cannot be permitted on the basis of a "Change of opinion", had held as under:-

> "There is merit in the submission which has been urged on behalf of the assessee that there was no tangible material before the AO on the basis of which the assessment could have been reopened and what is sought to be done is to propose a reassessment on the basis of a mere change of opinion. This, in view of the settled position of law is impermissible. No tangible material is shown on the basis of which the assessment is sought to be ITA No.1212/Mum/2019 A.Y. 2012-13 M/s Medley Pharmaceuticals Ltd. Vs. DCIT-10(2)(2) reopened. In the absence of tangible material, what the AO has done while reopening the assessment is only to change the opinion which was formed earlier on the allowability of the deduction. The

> power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. The power is not akin to a review. The existence of tangible material is necessary to ensure against an arbitrary exercise of power. There is no tangible material in the present case.

9. At this stage, we may herein observe, that as per the mandate of law, even where a concluded assessment is sought to be reopened by the A.O within a period of 4 years from the end of the relevant assessment year, it is must that the A.O has fresh material or information with him, that had led to the formation of belief on his part that the income of the assessee chargeable to tax has escaped assessment. Our aforesaid view is fortified by the judgments of the Hon'ble High Court of Bombay in the case of NYK Lime (India) Ltd. Vs. DCIT (No.2) [2012] 346 ITR 361 (Bom) and Purity Tech Textile Pvt. Ltd. Vs. ACIT & Anr. [2010] 325 ITR 459 (Bom).

10. We, thus, in the backdrop of our aforesaid observations not being able to persuade ourselves to subscribe to the order passed by the CIT(Appeals) who had upheld the jurisdiction assumed by the A.O u/s. 147 of the Act, set-aside his order and quash the assessment framed by him u/s. 143(3)/147 of the Act dated Nil for want of jurisdiction.

11. As we have quashed the assessment framed by the A.O. u/s. 143(3)/147 of the Act dated Nil for want of valid assumption of jurisdiction on his part, therefore, we refrain from adverting to the other contentions which had been advanced by the Ld. AR qua merits of the case and the same are left open.

12. In the result, appeal of the assessee is allowed in terms of our aforesaid observations.

Order pronounced in open court on 10th day of May, 2022.

Sd/-	Sd/-
JAMLAPPA D BATTULL	**RAVISH SOOD**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

रायपुर/ RAIPUR ; दिनांक / Dated : 10th May, 2022
SB

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

1. अपीलार्थी / The Appellant.
2. प्रत्यर्थी / The Respondent.
3. The CIT(Appeals)-1, Raipur (C.G)
4. The Pr. CIT-1, Raipur (C.G)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण,रायपुर बेंच, रायपुर / DR, ITAT, Raipur Bench, Raipur.
6. गार्ड फ़ाइल / Guard File.

आदेशानुसार / BY ORDER,

// True Copy //

निजी सचिव / Private Secretary
आयकर अपीलीय अधिकरण, रायपुर / ITAT, Raipur

		Date	
1	Draft dictated on	10.05.2022	Sr.PS/PS
2	Draft placed before author	10.05.2022	Sr.PS/PS
3	Draft proposed and placed before the second Member		JM/AM
4	Draft discussed/approved by second Member		AM/JM
5	Approved draft comes to the Sr. PS/PS		Sr.PS/PS
6	Kept for pronouncement on		Sr.PS/PS
7	Date of uploading of order		Sr.PS/PS
8	File sent to Bench Clerk		Sr.PS/PS
9	Date on which the file goes to the Head Clerk		
10	Date on which file goes to the A.R		
11	Date of dispatch of order		