IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI B BENCH, MUMBAI

[Coram: Pramod Kumar (Vice President),
and Sandeep S Karhail (Judicial Member)]

ITA No. 1300/Mum/2018
Assessment year: 2010-11

Navajbai Ratan Tata Trust **……Appellant**
Bombay House, 24, Homy Mody Street, Fort,
Mumbai 400 001 [PAN: AAATN0202B]

Vs.

Assistant Commissioner of Income Tax
(Exemptions)-2(1), Mumbai **……...……Respondent**

ITA No. 1315/Mum/2018
Assessment year: 2010-11

Assistant Commissioner of Income Tax
(Exemptions)-2(1), Mumbai **……Appellant**

Vs.

Navajbai Ratan Tata Trust **……Respondent**
Bombay House, 24, Homy Mody Street, Fort,
Mumbai 400 001 [PAN: AAATN0202B]

Appearances by:
Percy Pardiwalla *along with* **Sukhsagar Syal** *for the appellant*
Dr. Mahesh Akhade *for the respondent*

Date of concluding the hearing : 28/03/2022
Date of pronouncing the order : 27/06/2022

O R D E R

Per Bench

1. These cross appeals are directed against the order 15th December 2017, passed by the learned CIT(A), in the matter of assessment under section 143(3) r.w.s. 147 of the Income Tax Act 1961, for the assessment year 2010-11

2. When this appeal came up for hearing, learned senior counsel for the assessee urged us to first take up the assessee's grievance against reopening of the assessment, as, in the event of the assessee's succeeding on this point, all other grievances raised in these cross-appeals will be rendered academic and infructuous. The learned Departmental Representative does not oppose this prayer, though, on merits of the matter, he has his vehement submissions. With the consent of the parties, as such, we take up the reopening aspect first.

3. Grievance of the assessee, as set out in the first ground of appeal of the assessee, is as follows:-

> *1. On the facts and under the circumstances of the case and in law, the learned Commissioner of Income-Tax (Appeals) [(CIT(A)] has erred in upholding the proceedings u/s 147 of the Income-tax Act, 1961 (the 'Act'), initiated by the learned Assessing Officer.*
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> *The Appellant prays that the reassessment order be set-aside.*

4. To adjudicate on this appeal, only a few material facts need to be taken note of. The assessee before us is a public charitable trust, registered under the Bombay Public Trust Act 1950 as also under the Income Tax Act 1961. The assessee has filed it's income tax return, disclosing an income of Rs. 81,36,94,364/- on 08.10.2010. This return was processed under section 143(1) on 25.02.2012. The matter, however, did not end there. Notice under section 148 of the Act was issued and reassessment proceedings were initiated for the year under consideration. The reasons recorded by the Assessing Officer on 10.01.2014 were provided to the assessee, which reads as under:-

> *Reason for opening of assessment u/s. 148 of the I.T Act.*
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> *A) The assessee filed its return of income on 08.10.2010 declaring deficit of Rs. 81,36,94,364 after claiming accumulation u/s. 11(1)(a) of Rs. 54,56,784/- . No scrutiny assessment was completed in this case.*
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> *Section 11(1A) of the Income Tax Act, 1961 provides that when a capital asset, being property held under Trust is transferred resulting in capital gain, and if such sale proceeds are utilized for acquiring another capital asset, then the capital gain shall be deemed to be applied for the objects of the Trust. If only part of the sale proceeds are reinvested, the excess of the re-investment over the cost of the transferred asset is deemed to be applied and qualifies for exemption. The Calcutta High Court, in the case of CIT vs. East India Charitable Trust (1996) 206 IT 152 has held that the term "income" includes capital gains, and therefore it may be invested within the same year or the next year, as contemplated in the explanation to section 11(1).*

Section 13(1)(d) provides that the income of any public trust will not be exempt u/s. 11 if it holds for any period during a previous year any shares in a company [other than shares in a public sector company or shares as prescribed/s.11(5)(xii).

Further, proviso to section 164(2) provides that the portion of income not exempt u/s.11 or 12 by virtue of the fact that any funds of the trust have not been invested or deposited for any part of the year in consonance with the provisions of section 13(1)(d) read with section 11(5) shall be charged to tax at the maximum marginal rate of tax.

During the year, from the records it is seen that the book value quoted shares which was Rs.10,89,469/- in A.Y.2009-10 has reduced to Rs.89,469/- in A.Y.2010-11. Consequently, the quoted shares has increased from Rs.1234 Crores in A.Y.2009-10 to Rs.1501.5 Crores in A.Y.2010-11. This implies that the assessee had earned capital gains on sale of quoted shares and invested in prohibited mode of investment as per section 13(1)(d) of the Act. Therefore, the investment in prohibited mode to the extent of Rs.267.5 Crores (Rs.1501.5 Crores - Rs.1234 Crores) has escaped from being taxed.

In view of the non-compliance of the provisions of section 13(1)(d), exemption u/s.11 should have been denied on the net sale proceeds of Rs.267.5 Crores. Therefore, I have reason to believe that the income to the extent of Rs.267.5 Crores has escaped assessment for A.Y.2010-11.

B) The assessee has claimed exemption u/s.10(33) of Rs.96,16,26,397/- which was not in order. As the assessee has received dividend on the Investments from shares / units which is income derived from property/investment held under trust wholly for charitable tor religious purpose. Therefore, the same dividend income should have been offered as income and should be subjected to the norms of application of income (i.e. 85% of unaccumulated income should be taxed in the year). As the dividend income was excluded from the gross income, the same was not included as income derived from the property held under a trust. Therefore an income of Rs. 96,16,26,397/- has escaped income for the A.Y.2010-11.

C) The assessee claimed deduction U/s.11(1)(a) of Rs.54,56,784/- (15% of gross income) which was not in order. As the assessee has shown deficit of Rs. 81,36,94,364/- after claiming exemption u/s.11(1)(a) of Rs.54,56,784/- during the year, the exemption u/s.11(1)(a) was required to be restricted to Nil. Hence excess allowance of accumulation of Rs.54,56,784/-has been wrongly claimed by the assessee. Therefore an income of Rs.54,56,784/- has escaped income for the A.Y.2010-11.

In view of the above facts, I have reason to believe that the income to the extent of Rs.267.5 Crores + Rs.96,16,26,397 + Rs.54,56,784 = Rs.364.2 Crores has escaped assessment for A.Y.2010-11. As such the assessment for A. Y.2010-11 is re-opened by way of Issue of notice u/s. 148 of the I.T. Act.

5. The assessee filed detailed objections against the initiation of reassessment proceedings, which were rejected by the Assessing Officer vide order dated 02.12.2014, inter-alia, on the following basis:-

- *since the return was not selected for scrutiny therefore there was no occasion for calling the details and forming any opinion and thus the reassessment proceedings cannot be said to be based upon the change of opinion.*

- *intimation under section 143 (1) cannot be treated to be an order of assessment as decided by Hon'ble Supreme Court in the case of ACIT vs Rajesh Jhaveri Stock Brokers Private Limited (291 ITR 500)*

In the aforesaid order dated 02.12.2014, Assessing Officer agreed that the proceedings under section 147 have been initiated on perusal of the return.

6. Pursuant thereto the Assessing Officer completed the reassessment proceedings and passed the order dated 10.02.2015 under section 143(3) read with section 147 of the Act. Aggrieved, *inter alia*, by these reassessment proceedings, the assessee carried the matter in appeal but without any success. Learned CIT(A) confirmed the action of the Assessing Officer and observed as follows:-

> *6.4 In the first ground of appeal, the appellant has contended that the reassessment is bad in law since -initiated without giving reasons for reopening the assessment. In respect of this, it is stated that in this case notice u/s. 148 of the Act was issued on 10th January, 2014 to the assessee which was duly served. The Assessee Trust filed its response dated 14th February, 2014. In the said letter, the only mention was that they were enclosing photocopy of the revised income-tax return filed on October 8, 2010. After submitting so, the appellant requested for providing the reasons for reopening of the assessment u/s.148 of the Act. It is only subsequently vide their letter dated 18th June, 2014 that the appellant stated that their return submitted on 8th October, 2008 be considered to have been filed in response to the notice u/s.148 of the Act. In the said letter dated 18.06.2014, the assessee again requested for providing reasons for reopening of the assessment. Subsequently, the reasons were supplied to the assessee during the course of hearing, consequent to the notice issued by the AO u/s.143(2) and 142(1) dated 26.09.2014. Accordingly, it is not a case or the contention of the assessee that the copy of the reasons recorded were not provided to the appellant. The appellant, relying on the decision of Hon'ble Supreme Court in the case of GKN Driveshafts (India) Ltd. vs DCIT (supra) have contended that the procedure prescribed as per law for reopening of the assessment has not been followed. In this regard, it is stated that the law laid down by the Hon'ble Supreme Court stipulates that the assessee can ask for reasons recorded after having complied with the notice u/s. 148 and it is only after that, the AO is bound to furnish within reasonable time such reasons recorded. In the decision, the Hon'ble Supreme Court have not observed anywhere that the reasons are necessarily to be issued or supplied to the assessee prior to any issue of notice u/s.143(2)/142(1) of the Act. It is further not the case that the reasons in this case have not been supplied to the assessee within the reasonable time after asking for the same and after complying with the notice issued u/s.148 of the Act. The assessee-has further relied upon the decisions in the case of CIT (LTU) vs. IDBI Limited (supra). In the said case, the Hon'ble High Court have held the grievance of the Revenue to be unsustainable for the reason that the reasons recorded for reopening of the assessment were*

never communicated to the assessee. In the instant case, the reasons were supplied to the assessee within reasonable time which has not been disputed. The appellant has further relied on the decision in the case of CIT vs. Trend Electronics (supra) which only re-emphasizes that the reasons should be provided to the assessee. There is no such facts in the case on hand that reasons recorded were not provided to the assessee within the reasonable time. Further, in none of the cases that has been relied upon by the assessee, it has been observed or provided that the reasons recorded for reopening of the assessment had to be necessarily supplied prior to issue of any notice u/s.143(2) and 142(1). Accordingly, Ground No.1 of appeal is dismissed.

7. The assessee is not satisfied with the stand so taken by the learned CIT(A) and is in further appeal before us.

8. During the course of hearing, Shri Percy Pardiwala, learned Senior Counsel appearing for the assessee submitted that the reassessment proceedings initiated in the present case are bad in law as no tangible material was available with the Assessing Officer for initiating the reassessment proceedings. Learned Senior Counsel further submitted that proceedings under section 147 of the Act can be initiated only when the Assessing Officer has 'reason to believe' and this precondition is equally applicable to both the cases i.e. where return has been processed under section 143(1) as well as where scrutiny assessment is completed under section 143(3) of the Act.

9. On the other hand, Dr. Mahesh Akhade, learned Departmental Representative submitted that the arguments raised by the assessee are not arising from the grounds raised before the Tribunal. Learned DR further submitted that even before the learned CIT(A) proceedings under section 147 were not challenged on these basis.

10. In a short rebuttal, learned Senior Counsel submitted that ground no. 1 raised in present appeal is wide enough to cover all the aspects of assessee's challenge to reassessment proceedings under section 147 of the Act. Learned Senior Counsel by referring to assessee's submission dated 20.11.2014 submitted that the assessment proceedings were also challenged on this aspect.

11. We have considered the rival submissions and perused the material available on record. In the present case, return filed by the assessee was processed vide intimation issued under section 143(1) of the Act and same was not selected for scrutiny and thus, no order under section 143(3) of the Act was passed. The Assessing Officer, pursuant to notice issued under section 148 of the Act, initiated reassessment proceedings. Copy of reasons recorded for reopening the assessment was subsequently provided to the assessee. From the perusal of the reasons recorded for reopening the assessment, as reproduced above, it is evident that the impugned reassessment

proceedings has been initiated after perusal of the return and other annexures filed by the assessee along with the return. This fact has also been admitted by the Assessing Officer vide its order dated 02.12.2014 rejecting assessee's objections against impugned reassessment proceedings for the year under consideration. From the perusal of the reasons recorded for reopening the assessment, it is also evident that no new or tangible material was available with the Assessing Officer for initiating the impugned reassessment proceedings. With this factual background, it is relevant to note that under the provisions of section 147 of the Act, the Assessing Officer can initiate reassessment proceedings only if he has reason to believe that any income chargeable to tax has escaped assessment. The courts have interpreted that the term 'reason to believe' doesn't mean subjective belief of the Assessing Officer and the same should be based on some material which has come to the knowledge of the Assessing Officer before initiating proceedings under section 147 of the Act. While rejecting the objections raised by the assessee against initiation of reassessment proceedings, the Assessing Officer vide order dated 02.12.2014 held that since the return was not selected for scrutiny, therefore, no details were called and thus no opinion was formed on any of the aspect on which the reassessment has been initiated in the present case. Though, it is true that, in the present case, as the return of income filed by the assessee was processed under section 143(1) of the Act and thus no scrutiny assessment was carried out, therefore, the impugned reassessment proceedings cannot be questioned on the ground of 'change of opinion' by the Assessing Officer. However, non-selection of the case for scrutiny does not in any manner belittle / reduce the significance and meaning of the term 'reason to believe', which is of paramount importance for initiating proceedings under section 147 of the Act and, as been held in various decisions, reason to believe that income has escaped assessment should be based on some new or tangible material. Such a requirement also rules out the possibility of initiation of reassessment proceedings only on the basis of suspicion without any material being available with the Assessing Officer.

12. In this regard, following observations of Hon'ble Delhi High Court in **CIT vs Orient Craft Ltd., [(2013) 354 ITR 536 (Del)]**, becomes relevant, as the Hon'ble High Court has also analysed the decision of Hon'ble Supreme Court in Rajesh Jhaveri Stock Brokers (supra), which has been relied by the Assessing Officer while disposing assessee's objections: –

> *13. 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(1) 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; it makes no distinction between an order passed under section 143(3) and the intimation issued under section 143(1). Therefore it is not permissible to adopt different standards while interpreting the words "reason to believe" vis-à-vis Section 143(1) and Section 143(3). We are*

unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143(3) cannot apply where only an intimation was issued earlier under Section 143(1). It would in effect place an assessee in whose case the return was processed under Section 143(1) in a more vulnerable position than an assessee in whose case there was a full-fledged scrutiny assessment made under Section 143(3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of proving valid reasons to believe could be circumvented by first accepting the return under Section 143(1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression "reason to believe" in cases where assessments were framed earlier under Section 143(3) and cases where mere intimations were issued earlier under Section 143(1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed.

14. Certain observations made in the decision of Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra) are sought to be relied upon by the revenue to point out the difference between an "assessment" and an "intimation". The context in which those observations were made has to be kept in mind. They were made to point out that where an "intimation" is issued under section 143(1) there is no opportunity to the assessing authority to form an opinion and therefore when its finality is sought to be disturbed by issuing a notice under section 148, the proceedings cannot be challenged on the ground of "change of opinion". It was not opined by the Supreme Court that the strict requirements of section 147 can be compromised. On the contrary, from the observations (quoted by us earlier) it would appear clear that the court reiterated that "so long as the ingredients of section 147 are fulfilled" an intimation issued under section 143(1) can be subjected to proceedings for reopening. The court also emphasised that the only requirement for disturbing the finality of an intimation is that the assessing officer should have "reason to believe" that income chargeable to tax has escaped assessment. In our opinion, the said expression should apply to an intimation in the same manner and subject to the same interpretation as it would have applied to an assessment made under section 143(3). The argument of the revenue that an intimation cannot be equated to an assessment, relying upon certain observations of the Supreme Court in Rajesh Jhaveri Stock Brokers (P.) Ltd. (supra) would also appear to be self-defeating, because if an "intimation" is not an "assessment" then it can never be subjected to section 147 proceedings, for, that section covers only an "assessment" and we wonder if the revenue would be prepared to concede that position. It is nobody's case that an "intimation" cannot be subjected to section 147 proceedings; all that is contended by the assessee, and quite rightly, is that if the revenue wants to invoke section 147 it should play by the rules of that section and cannot bog down. In other words, the expression "reason to believe" cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under section 143(3) and another applicable where an intimation was earlier issued under section 143(1). It follows that it is open to the assessee to contend that notwithstanding that the argument of "change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the assessee to challenge the reasons recorded under section 148(2) on the ground that they do not meet the standards set in the various judicial pronouncements.

15. In the present case the reasons disclose that the Assessing Officer reached the belief that there was escapement of income "on going through the return of income" filed by the assessee after he accepted the return under Section 143(1) without scrutiny, and nothing more. This is nothing but a review of the earlier proceedings and an abuse of power by the Assessing Officer, both strongly deprecated by the Supreme Court in Kelvinator of India Ltd. (supra). The reasons recorded by the Assessing Officer 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 an intimation issued under section 143(1) can cause to the tax regime. There is no whisper in the reasons recorded, of any tangible material which came to the possession of the assessing officer subsequent to the issue of the intimation. It reflects an arbitrary exercise of the power conferred under section 147.

16. For the above reasons, we answer the substantial question of law framed by us in the affirmative, in favour of the assessee and against the Revenue. The appeal of the Revenue is accordingly dismissed. There shall be no order as to costs.

13. Further, Hon'ble jurisdictional High Court in **Balakrishna Hiralal Wani vs ITO, [2010] 321 ITR 519 (Bombay)**, emphasised the importance of fulfilment of jurisdictional condition, i.e. existence of 'reason to believe' on the basis of tangible material, before initiating reassessment proceedings under section 147 of the Act, by observing as under: –

9. Section 147 empowers the Assessing Officer to assess or reassess income, which he has reason to believe has escaped assessment for the assessment year. The existence of a reason to believe is the condition precedent to the exercise of power and the reasons must be recorded in writing. The proviso to section 147 imposes an additional condition in a situation where action is sought to be taken after the expiry of four years from the end of the relevant assessment year and that condition is that the income chargeable to tax must have escaped assessment for such assessment year by reason of the failure on the part of the assessee inter alia to disclose fully and truly all material facts necessary for the assessment for that assessment year. In the present case, admittedly, the notice under Section 148 has been issued within a period of four years of the expiry of relevant assessment year. Therefore, the condition which is imposed by the proviso to section 147 has no application. The only question in such a case is as to whether the Assessing Officer had reason to believe that income chargeable to tax had escaped assessment. Another facet of the matter which must be taken into consideration is that in the present case, an assessment order has not been passed under section 143(3), a circumstance which has been emphasised by counsel for the Revenue. The case is, therefore, at the stage of an intimation under section 143(1). After 1st April, 1989 the power to reopen an assessment has been widened as compared to the position as it stood prior to that date. But it is settled law that Section 147 has to be given a schematic interpretation to ensure against an arbitrary exercise of power. The manner in which the provisions of section 147 should be construed is clarified in the judgment of the Supreme Court in Kelvinator of India Ltd. [2010] 320 ITR 561. The Supreme Court held as follows:-

> *" ...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, 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. But reassessment has to be based on fulfilment of certain pre-conditions 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 Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.... "*
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> ……
>
> *12. Thus, there was, in our opinion, no tangible material before the Assessing Officer, as explained in the judgment of the Supreme Court in Kelvinator (supra) to form a conclusion that income has escaped assessment. Hence though no assessment order was passed under section 143(3), we are of the view that the jurisdictional condition precedent prior to the exercise of the power to reopening the assessment under Section 147 of the Act has not been fulfilled. The petition will, therefore, have to be allowed.*

14. In view of the above, we are of the considered view that reassessment proceedings initiated by the Assessing Officer under section 147 of the Act are bad in law, as there was no new or tangible material which came to the possession of the Assessing Officer subsequent to the issue of the intimation under section 143 (1) of the Act and therefore, the jurisdictional condition i.e. existence of reason to believe is not satisfied in the present case. As regards learned DR's submission that arguments now raised in present appeal were not taken by the assessee before the learned CIT(A) and the same are also not covered in any of the grounds raised by the assessee, we are of the view that when the proceedings under 147 of the Act are challenged all the aspects pertaining to same gets covered and more particularly the aspect of existence of 'reason to believe', which is a precondition for initiation of any proceeding under section 147 of the Act. Accordingly, ground no. 1 raised in assessee's appeal is allowed.

15. As we have decided the jurisdictional issue in favour of the assessee, all the other grounds raised in present cross appeals, on merits, are rendered academic and infructuous. Accordingly, same are dismissed.

16. In the result, appeal by the assessee is partly allowed, while appeal by the Revenue is dismissed. Pronounced in the open court today on the 27th day of June 2022.

Sd/-	Sd/-
Pramod Kumar	**Sandeep S Karhail**
(Vice President)	(Judicial Member)

Mumbai, dated the 27th day of June, 2022

Copies to: *(1)* *The appellant* *(2)* *The respondent*
(3) *CIT* *(4)* *CIT(A)*
(5) *DR* *(6)* *Guard File*

By order etc

Assistant Registrar/ Sr PS
Income Tax Appellate Tribunal
Mumbai benches, Mumbai