आयकर अपीलीय अधिकरण 'ए' न्यायपीठ चेन्नई में।
IN THE INCOME TAX APPELLATE TRIBUNAL
'A' BENCH, CHENNAI

माननीय श्री वी. दुर्गा राव, न्यायिक सदस्य एवं
माननीय श्री मनोज कुमार अग्रवाल ,लेखा सदस्य के समक्ष।
BEFORE HON'BLE SHRI V. DURGA RAO, JUDICIAL MEMBER
AND
HON'BLE SHRI MANOJ KUMAR AGGARWAL, AM

आयकर अपील सं./ **ITA No.708/Chny/2020**
(निर्धारण वर्ष / Assessment Year: 2009-10)

M/s. Global Arkitekts P. Ltd. No.33, Shafee Mohammed Road, Chennai – 600 006.	बनाम/ Vs.	**ITO** Corporate Ward-2(2), Chennai.
स्थायी लेखा सं./जीआइ आर सं./**PAN/GIR No. AABCR-9405-L**		
(□पीलार्थी**/Appellant**)	:	(प्रत्यर्थी / **Respondent**)

अपीलार्थी की ओरसे/ **Appellant by**	:	Shri S. Sridhar (Advocate) & Shri Arjunraj (CA) - Ld. ARs
प्रत्यर्थी की ओरसे/**Respondent by**	:	Shri S. Chandrasekaran (JCIT) – Ld. Sr. DR

सुनवाई की तारीख**/Date of Hearing**	:	19-09-2022
घोषणा की तारीख **/Date of Pronouncement**	:	30-11-2022

आदेश / O R D E R

Manoj Kumar Aggarwal (Accountant Member)

1. Aforesaid appeal by assessee for Assessment Year (AY) 2009-10 arises out of the order of learned Commissioner of Income Tax (Appeals)-6, Chennai [CIT(A)] dated 18-03-2020 in the matter of an assessment framed by Ld. Assessing Officer [AO] u/s.143(3) r.w.s. 147 of the Act on 31-12-2016. The grounds taken by the assessee read as under:

1. The order of the Commissioner of Income Tax (Appeals) - 6, Chennai dated 18.03.2020 in I.T.A.No.457/CIT(A)-6/2016-17 for the above-mentioned Assessment Year is contrary to law, facts, and in the circumstances of the case.
2. The CIT (Appeals) erred in confirming the re-assessment completed u/s 143(3) read with section 147 of the Act without assigning proper reasons and justification and ought to have appreciated that the order of reassessment under consideration was passed out of time, invalid, passed without jurisdiction and not sustainable both on facts and in law.
3. The CIT (Appeals) failed to appreciate that the presumption of escapement of income was wholly unjustified and further ought to have appreciated that having not followed the procedure prescribed for conducting the re-assessment, the consequential re-assessment completed by the Assessing Officer should be reckoned as bad in law.
4. The CIT (Appeals) failed to appreciate that the re-opening initiated beyond four years in the absence of fresh/tangible materials would negate the assumption of jurisdiction u/s 147 of the Act thereby vitiating the consequential completion of re-assessment on various facets.
5. The CIT (Appeals) failed to appreciate that there was no failure on the part of the appellant to disclose fully and truly material facts and ought to have appreciate that re-appraisal of existing details provided by the Appellant right from the assessment year 2007-08 defying the law declared by the Supreme Court reported in 320 ITR 561 would vitiate the entire re-assessment proceedings under consideration.
6. The CIT (Appeals) erred in sustaining the treatment of the surplus from sale of exempted category of agricultural lands to the tune of Rs.17,86,27,910/- as income under the business while computing taxable total income without assigning reasons and justification.
7. The CIT (Appeals) failed to appreciate that the intention of the Appellant to hold the asset as a fixed asset would not change solely based on the short period of holding which is determined/influenced by various external factors thereby vitiating the conclusions drawn in the impugned order.
8. The CIT (Appeals) failed to appreciate that the decision of the Appellant at the time of purchase and the decision taken by the Appellant immediately after the date of purchase for selling the impugned asset was wrongly questioned and doubted and further ought to have appreciated that the Revenue should not sit in the arm chair of the Appellant to come to the conclusion for taxing the surplus as business profits while further ought to have appreciated that the conduct of the Appellant including the maintaining of the character of the asset as exempted category of agricultural land from the date of purchase till the date of sale in the previous relating to the assessment year under consideration by virtue of the sale deed executed was wrongly misunderstood thereby vitiating all the related findings.
9. The CIT (Appeals) failed to appreciate that having not shown/proved the conduct of the real estate business by the Appellant in any of the assessment years, the incorporated objects should not be considered as decisive to ascertain the intention of the Appellant with regard to the purchase and sale of the agricultural land while further ought to have appreciated that the holding of exempted category of agricultural lands including the impugned lands as fixed assets being not disputed, the sustenance of the treatment of the surplus of the sale of exempted category of agricultural lands as business profit was wrong, erroneous, incorrect and wholly unjustified.
10. The CIT (Appeals) failed to appreciate that having impliedly accepted the transfer of exempted category of agricultural lands in the assessment year 2007-08, the sustenance of the decision of the Assessing Officer should be only viewed to overcome

the said admitted position by changing the head of income thereby vitiating all the related findings in the impugned order.

11. The CIT (Appeals) failed to appreciate that in any event having not disputed the grant of possession as on 24.01.2007 coupled with the extinguishment of rights by the Appellant, the business income derived from sale of the impugned asset shall not be chargeable to tax during the assessment year under consideration.

12. The CIT (Appeals) failed to appreciate that the entire computation of taxable total income on various facets was wrong, erroneous and unsustainable both on facts and law.

13. The CIT (Appeals) failed to appreciate that there was no proper opportunity given before passing of the impugned order and any order passed in violation of the principles natural justice would be nullity in law.

As is evident, the assessee challenges the validity of reassessment proceedings on legal grounds. The assessee also challenges the quantum additions on merits. The subject matter of appeal is computation of capital gains on certain parcel of land sold by the assessee.

2. The Ld. AR advanced arguments assailing the validity of reassessment proceedings on the ground that no fresh tangible was available before Ld. AO to reopen the case of the assessee. To support the same, Ld. AR drew attention to various documents on records. The Ld. AR also assailed quantum additions on merits.

The Ld. Sr. DR, on the other hand, submitted that there was sufficient formation of belief by Ld. AO that there was escapement of income. Both sides filed written submissions which have duly been considered while adjudicating the issues.

The assessee, in its written submissions has submitted that the land under consideration was sold under sale agreement to M/s Shoreline Developers Ltd. (SDL). The payment was received spanning over AYs 2007-08 to 2009-10 and the physical possession of the land was handed over to M/s SDL on 24.01.2007. The land was shown as an

investment in the Books of Accounts. It has further been submitted that the land, as per revenue records, was an agricultural land and the same was situated beyond 8 Kms from nearest municipal limits. The assessee recorded the sale of land in the books in AY 2009-10 when entire payment was received from the vendor. Assailing the reasons recorded to reopen the case, it has been submitted that the land was neither purchased nor sold in this year. The reasons do not indicate any escapement of income. There was no tangible material with Ld. AO suggesting any escapement of income during the year under consideration. The notice issued u/s 148 is without any basis and without any reasonable belief. The reopening has been resorted to based on information already available in the return of income and therefore, reopening beyond 4 years is not permissible in terms of various judicial pronouncements.

The ld. SR. DR, in his written submissions, has submitted that AO had tangible and specific information from records / other wings of the department resulting into formation of reasons about income escaping assessment. On merits, Ld. Sr. DR submitted that the assessee did not carry out any agricultural operations and no income was admitted on this account. The buyer made full payment and took possession of the land in this year and the assessee also declared the profits in this year by crediting the surplus to 'Reserves and Surplus Account'. The sale deed executed on 15.05.2009 would not be of much relevance. The assessee as well as the buyer was not engaged in agricultural activity. The intention to carry out this transaction was not for agricultural even though as per revenue records it was mentioned as agricultural land. Reliance has been placed on the decision of Hyderabad Tribunal in

D.S. Karunakar Reddy (ITA No.752-757/hyd/2011 dated 30.11.2011 wherein it was held that entry in revenue records is not conclusive proof that the land is agricultural land in the absence of evidence that the land is put to use for agricultural purposes. Reliance has also been placed on the decision of Chennai Tribunal in **Shri A. V. Anoop vs. ACIT (ITA No.461/Mds/2013)** as well as the decision in **ITO V/s Aboobukcer (67 Taxmann.com 114).** The Ld. Sr. DR also controverted the fact that the possession was handed over on 24.01.2007 since the document was not registered one and the same was not endorsed by any witnesses.

Having heard rival submissions and considering the case laws cited before us, our adjudication would be as under. The assessee being resident corporate assessee is stated to be engaged in real estate business.

Assessment Proceedings

3.1 The original return of income as field by the assessee was processed u/s 143(1). However, subsequently while going through the return of income, Ld. AO noted that the assessee company credited an amount of Rs.1786.27 Lacs to 'Reserves and Surplus account'. On scrutiny of records, it came to light that the assessee had purchased land measuring 8.55 Acres for an amount of Rs.7 Crores on 19.10.2006. The assessee entered into a sale agreement with M/s Shoreline Development Ltd. (SDL) for sale of the land for Rs.26.68 Crores. Accordingly, forming a belief that the income escaped assessment, Ld. AO proceeded to reopen the case for this year and issued notice u/s 148 which was served on 31.03.2016. Thus, the

reopening was done beyond 4 years from the end of relevant assessment year.

3.2 The assessee offered original return and demanded reasons for reopening. The same were supplied to the assessee. The statutory notices were issued in due course of time requiring the assessee to filed requisite documents.

3.3 A notice u/s 133(6) was issued to Sub Registrar, Thirupporur calling for copy of purchase deed and encumbrance certification and reply was received which was taken on record.

3.4 The assessee submitted that agricultural land was purchased purely for agricultural purposes and was shown as 'Fixed Asset' in the Balance Sheet. The Company entered into sale agreement dated 08.11.2006 with M/s SDL. This transaction was stated to be completed by the year 2009. The assessee submitted that the intention was to keep the land as investment and the land was always held as 'fixed asset' and not as stock-in-trade which was amply evident from the financial statements. It was further submitted that the sale transaction constituted only sale of agricultural land and the same could not be considered as Business Transaction. In support, various arguments were put forth.

3.5 The assessee further submitted that the land is not a capital asset as defined u/s 2(14) since is situated in Muttukadu Village, Chengalpet Taluk, Kancheepuram District which is rural area and do not fall within the prescribed 8 Kms. Jurisdiction of a nearest Municipality or Cantonment Board or a Municipal Corporation or a notified area committee or town committee. The land is also not situated within the jurisdiction of Municipality or a Cantonment Board which has a

population not less than ten thousand according to the latest preceding census. The land is about 12-15 Kms away from Uthandi Village and hence do not fall with the jurisdiction of nearest municipality of corporation limits.

3.6 The assessee further submitted that the possession of the land was given as early as on 24.01.2007 and the same was never treated as stock-in-trade. The assessee did not carry out any commercial activity with respect to the land such as getting approval for converting stated land into sites, plotting of the same into sites etc.

3.7 However, Ld. AO held that the assessee was engaged in the business of real estate and any asset so purchased would be for the purpose of business only. The income arising therefrom would constitute Business Income only. The amount received by the assessee, against sale of land, could be tabulated as under: -

S. No.	Assessment Year	Amount Received
1	2007-08	808.60
2	2008-09	1580.00
3	2009-10	211.40
	Total	2600.00

3.8 M/s SDL, in response to notice u/s 133(6), furnished copy of approval for laying of plots which was dated 22.02.2007. Upon perusal of the same, it was noted by Ld. AO that the approval was in the name of the assessee only.

3.9 Finally, the surplus arising form the sale of land was treated as Business Income and the same was brought to tax.

Appellate Proceedings

4.1 During appellate proceedings, the assessee assailed the validity of reassessment proceedings and also agitated the quantum additions on merits.

4.2 On legal issue, the assessee submitted that reopening of the assessment beyond 4 years would amount to re-appraisal of information already available on record. There was no tangible material before Ld. AO and therefore, the reopening was bad-in-law as per the decision of Hon'ble Delhi High Court in **CIT vs. Orient Crafts Ltd. (354 ITR 536)** wherein Hon'ble Court quashed the reassessment proceedings under similar circumstances by relying upon the decision of Hon'ble Supreme Court in **CIT vs. Kelvinator of India Ltd. (320 ITR 561)**. Similar was stated to be the ratio of decision of Hon'ble Gujarat High Court in **282 CTR 75** as well as the decision of Hon'ble High Court of Madras in **M/s Tanmac India vs. DCIT (78 Taxmann.com 155).**

4.3 On merits, the assessee submitted that the possession of the land was transferred in AY 2007-08. The land was agricultural land and therefore, outside the ambit of capital asset as defined in Sec.2(14) and the proceeds from such transfer is not chargeable to tax in view of the provisions of Sec. 2(47)(v). Under these circumstances, this transaction could not be brought to tax in this year,

4.4 The assessee also submitted that in revenue records, the land was shown as agricultural land which was evident from Patta, Chitta, Adangal and Land Tax Receipts. The assessee furnished copy of MAP as well as census showing the location and population of Muttukadu

Village to submit that the land was beyond 8 Kms from nearest municipal limits.

4.5 The assessee reiterated that in financial statements, the land was held only as 'fixed assets' and not as stock-in-trade and accordingly, the additions were not justified by treating the same as business income.

4.6 Regarding approval, the assessee submitted that the possession was handed over on 24.01.2007 and the purchaser requested the Panchayat for approval for laying of plot and the same was carried out by the purchaser only. Since the sale deed was not executed at that point of time, the approval was given in the name of the assessee company. The intention of the buyer in using the land for non-agricultural purposes would not alter the nature of the land and laying of plots by the purchaser could not be a ground to treat the land as non-agricultural land whereas revenue record clearly show that the land was agricultural land. Reliance was placed on the decision of Hon'ble Apex Court in **Smt. Sarifabibi Mohmed Ibrahim vs CIT (204 ITR 631)** where Hon'ble Court laid down certain 13 factors / indicators to ascertain the nature of income. Reliance was also placed on the decision of jurisdictional High Court in **M/s Sakunthala Vedachalam Vs ACIT (53 Taxmann.com 62)** as well as in **M.S. Srinivasa Naicker vs. ITO (292 ITR 481).**

4.7 The Ld. CIT (A) noted that the assessee entered into sale agreement within 20 days of purchases. The transactions concluded in financial year 2008-09 since the payment was fully received in this year and the original sale deed was handed over by the assessee to the M/s

SDL and therefore, the same would be chargeable to tax in this year only.

4.8 The Ld. CIT(A) upheld the reassessment proceedings on the ground that except for processing of return u/s 143(1), the case was never taken up for scrutiny. Before initiating action u/s 147, Ld. AO had evidence in the possession and reasons to believe that certain income had escaped assessment.

4.9 On merits, Ld. CIT(A) held an opinion that the land was classified as 'fixed asset' to avoid payment of taxes. If the reasons for buying the subject land were to carry out agricultural activities, the assessee should have carried out agricultural activities. However, the land was bought only for the purpose of real estate trade. The assessee claimed that it was not possible to conduct agricultural operations on the subject land due to scarcity of water, labour, economic viability etc. However, this submission stood controverted by the fact that as per assessee's submissions, there were around 400 trees on the land. The land was stated to have three wells, a farm house, and a compound wall. The assessee would have inspected the property before buying it and therefore, the submissions would not carry much value. The sale took place within a short span. The negotiations would be going on before actual agreement. Just by change of hands within a fortnight, the assessee was able to fetch profit of nearly Rs.20 Crores but it had no intention to pay the taxes. This transaction would be an adventure in the nature of trade as held by Chennai Tribunal in **Shri A.V. Anoop vs ACIT (ITA No.461/Mds/2013).** The bench held that no evidence was brought on record to show that the assessee was carrying out any agricultural activities on the land. Only because the land is shown as

agricultural in the revenue records, it would not mean that the land was being used for agricultural purposes. Mere entry in the revenue records was not sufficient to claim the land as agricultural in nature. Considering all these facts, Ld. CIT(A) upheld the action of Ld. AO against which the assessee is in further appeal before us.

Our findings and Adjudication

5. Since the legal ground raised by the assessee goes to the root of the matter and challenges the very validity of reassessment proceedings, we proceed to deal with the same first.

6. From the fact, it emerges that the assessee filed its return of income on 29.09.2009 which was processed u/s 143(1). In the financial statements, the land held by the assessee form part of Schedule of 'Fixed Assets' and the land constitute 'fixed asset' for the assessee and not stock-in-trade. Since the land has been sold during the year, the value of the land in this schedule has been reduced to nil. The corresponding surplus arising on sale of land has been credited to 'Reserve and Surplus Account'. In other words, the assessee has recognized the sale of land in the books of accounts for this year as sale of 'fixed assets' and the resultant surplus has also been recognized in 'Reserves and Surplus Account' of this year. Therefore, this transaction would rightly be assessed in this year only.

7. Subsequently, upon perusal of return of income as well as case records, Ld. AO held an opinion that there was escapement of income and accordingly, notice u/s 148 was issued on 31.03.2016 which is beyond 4 years from the end of relevant assessment year. The reasons recorded were as under: -

> The assessee company having its office at No.33, Shafee Mohammed Road, Rutland Towers, 4th floor, off: Greams Road, Chennai – 600 006 is in the business of real estate, property development and other related services.
>
> The assessee company purchased a land measuring 8.55 acres at No.36, Mutthukkadu Village, Chenglepet Taluk, Kancheepuram District for a consideration of Rs.7 crores on 19.10.2006. An agreement for sale was made between the assessee company and M/s Shoreline Development Limited on 08.11.2006 barely 20 days after purchase, for Rs.26.68 Crores. The company has received an amount of Rs.26.68 crores on various dates from December 2006 to January 2009. Assessee admitted the difference of Rs.17.68 Crores of as surplus from sale of agricultural land for the Assessment Year 2009-10.
>
> The copy of sale deed dated 15-05-2009 mentions that the project is developed and titled "Ocean side" and sale of lands have taken place only after the layouts were drawn. From the deed executed it is clear that the profit out of sale is non-agricultural and assessee has failed to offer any capital gains.
>
> Hence, I have reason to believe that the income chargeable to tax has escaped assessment in the hands of the company.

8. From the perusal of reason, it could be gathered that there is no tangible material which has come to the possession of Ld. AO which would lead to formation of belief that the income has escaped assessment. The information, as already available on record, has been used to arrive at this belief. However, this is not permissible as per the decision of Hon'ble Delhi High Court in **CIT vs. Orient Crafts Ltd. (354 ITR 536)** wherein Hon'ble Court quashed the reassessment proceedings under similar circumstances by relying upon catena of decisions including the decision of Hon'ble Supreme Court in **CIT vs. Kelvinator of India Ltd. (320 ITR 561)**. The adjudication of Hon'ble Court was as under: -

> 8. The Tribunal has extracted the reasons recorded by the Assessing Officer for reopening the assessment. They are as follows:-
>
> > "On going through the return of income filed by the assessee, it is revealed that while deducting 90% of other income from the profit of business, premium on sale of quota of Rs. 17,54,174/- included in the sales was not considered. Therefore omission to deduction 90% of Rs. 17,54,174/- from the profit of business resulted in excess allowance of deduction u/s 80HHC

> of the Income Tax Act, 1961. In view of these facts there is reason of believe that the income chargeable to tax has escaped assessment."

We think that the point taken on behalf of the assessee that even an assessment made under Section 143(1) of the Act can be reopened under Section 147 only subject to fulfillment of the conditions precedent, which include the condition that the Assessing Officer must have "reason to believe" that income chargeable to tax has escaped assessment, is sound. It is true that no assessment order is passed when the return is merely processed under Section 143(1) and an intimation to that effect is sent to the assessee. However, it has been recognised by the Supreme Court itself in Asstt. CIT v. Rajesh Jhaveri Stock Brokers (P). Ltd. [2007] 291 ITR 500/161 Taxman 316, a decision that was relied upon by the revenue, that even where proceedings under Section 147 are sought to be taken with reference to an intimation framed earlier under Section 143(1), the ingredients of Section 147 have to be fulfilled; the ingredient is that there should exist "reason to believe" that income chargeable to tax has escaped assessment. This judgment, contrary to what the Revenue would have us believe, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under Section 143(1) at his whims and caprice; he must have reason to believe within the meaning of the Section. It would be appropriate to reproduce the following portions from the judgment:-

> "The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such 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. So long as the ingredients of section 147 are fulfilled, the Assessing Officer is free to initiate proceeding under section 147 and failure to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under section 143(1) had been issued. The inevitable conclusion is that the High Court has wrongly applied Adani's case [1999] 240 ITR 224 (Guj) which has no application to the case on the facts in view of the conceptual difference between section 143(1) and section 143(3) of the Act."

We have searched the judgment in vain for the liberty said to have been given to the Assessing Officer by the above judgment that the finality of an intimation under Section 143(1) can be disturbed even by dispensing with the requirement of "reason to believe". On the contrary the observations extracted above reiterate that the intimation can be disturbed by initiating reassessment proceedings only "so long as the ingredients of Section 147 are fulfilled" and with reference to Section 143(1) vis-a-vis Section 147, the only ingredient is that there should be reason to believe that 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". The fact that the intimation issued under Section 143(1) cannot be equated to an "assessment", a position which has been elaborated by the Supreme Court in the judgment cited above, cannot in our opinion lead to the conclusion that the requirements of Section 147 can be dispensed with when the finality of an intimation under Section 143(1) is sought to be disturbed. We are at pains to point out this position, which seems fairly obvious to us, because of the argument frequently advanced before us on behalf of the Revenue in other cases as well, under the misconception, if we may say so with respect, that an intimation under Section 143(1) can be disturbed on any ground which appeals to the Assessing Officer. The consequence of countenancing such an argument could be grave. The expression "reason to believe" has come to attain a certain signification and content, nourished over a long period of years by judicial refinement painstakingly embarked upon by great judges in the past. The expression has been judicially interpreted in a particular manner. When Section 147 was recast with effect from 1st April, 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 Kelvinator of India Ltd. (supra) in the following words:-

> "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 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. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR

> (St.) 1, 29), which reads as follows : "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."

9. 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.

10. A constitution bench of the Supreme Court in A.N. Lakshman Shenoy v. ITO [1958] 34 ITR 275, 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 opined as under:-

> "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. Income-tax Officer, Companies District 1, Calcutta)."

In Sheo Nath Singh v. Appellate Asstt. CIT [1971] 82 ITR 147 the Supreme Court (Hegde J) observed as under:-

> "There can be no manner of doubt that the words "reason to believe" suggest that the belief must be that of an honest and reasonable 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 conditions 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."

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

11. 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. The following principles were laid down:-

(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 subjective 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.

12. In Kelvinator of India Ltd. (supra) the Supreme Court observed as under:-

> "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 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."

It was also observed that after 1.4.1989 the Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is escapement of income. 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.

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

The Hon'ble Court, inter-alia, held that Assessing Officer has power to reopen provided there is "tangible material" to come to the conclusion that there is escapement of income. 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. In this case, the Ld. AO reached the belief of escapement of income on going through the return of income filed by the assessee after the return was accepted u/s 143(1). The Hon'ble Court held that it was nothing but a review of the earlier proceedings and an abuse of power by AO. The less strict interpretation of the words "reason to believe" vis-à-vis an intimation issued u/s 143(1) cannot be permitted. There is no whisper

in the reasons recorded, of any tangible material which came to the possession of the AO subsequent to the issue of the intimation which reflects an arbitrary exercise of the power conferred under section 147.

9. This decision has been followed by Hon'ble High Court of Madras in **M/s Tanmac India vs. DCIT (78 Taxmann.com 155)** which has also been rendered in the context of an intimation issued u/s 143(1). The Hon'ble Court held that If Ld. AO, after issuing intimation u/s 143(1), does not issue a notice u/s. 143(2) of the Act to initiate proceedings for scrutiny of the return of income then the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed is in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of re-assessment, but of review. Having missed the bus earlier, the Department cannot be permitted to avail the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has already elapsed prior to issue of notice u/s. 148. The notice u/s 148 would be an arbitrary exercise of power and a review of proceedings which is impermissible in law. Having chosen not to scrutinize the return earlier, ld. AO cannot resort to the provisions of Sec.147 in the absence of any new or fresh material indicating escapement of income. Accordingly, reassessment proceedings were quashed. Similar is the ratio of subsequent decision of Hon'ble Court in **Indian Syntans Investment P. Ltd vs. ACIT (126 Taxmann.com 26)** as well as the decision in **Bapalal & Company Exports vs JCIT (170**

Taxman 131). Similar is the ratio of various other decisions as cited by Ld. AR in the written submissions which, for the sake of brevity, have not been referred here since the direct decision of jurisdictional High Court in **M/s Tanmac India vs. DCIT (supra)** is available before us.

10. The Ld. Sr. DR has relied on the decision of Hon'ble Bombay High court in **Nickunj Eximp. Enterprises P. Ltd (48 Taxmann.com 20).** In this case, the return was scrutinized u/s 143(3). Subsequently, survey was carried out u/s 133A wherein it transpired that the assessee entered into bogus purchase transactions. Accordingly, the case was reopened which was under challenge in writ jurisdiction. The Hon'ble Court declined to quash the proceedings on the ground that there was an efficacious alternative remedy to the assessee. Therefore, this case law has no applicability to the facts before us.

11. The decision of Hon'ble Gujarat High Court in **Peass Industrial Engineers Pvt. Ltd (76 Taxmann.com 106)** is also on similar factual matrix. The return was scrutinized u/s 143(3). Subsequently, survey actions on other entities revealed that the assessee stood beneficiary of accommodation entries. Accordingly, Hon'ble Court held that a specific information was received by Ld. AO and there was concrete tangible material to reopen the case of the assessee. The same is not the case here since in the present case, no new material has come into the possession of Ld. AO.

12. The decision of Hon'ble Punjab & Haryana High Court in the case of **Greater Mohali Area Development Authority (93 taxmann.com 441)** is a case where the impugned issue was not considered by Ld. AO at the time of assessment and there was no proper disclosure of

material facts. Under these circumstances, the writ petition filed by the assessee was dismissed.

13. In the case before us, the formation of belief by Ld. AO was on the basis of existing material only. Evidently, there is no tangible material which has come to the possession of Ld. AO. Therefore, considering the facts and circumstances of the case and respectfully following the cited decision of jurisdictional High Court, the reassessment proceedings could not be sustained in the eyes of law and the same are liable to be quashed. We order so. Accordingly, the consequential assessment of income would not survive.

14. Since the reassessment proceedings have been held to be bad-in-law, delving into the merits of quantum addition has been rendered mere academic in nature and accordingly, no adjudication has been rendered against the same.

15. The appeal stand allowed in terms of our above order.

Order pronounced on 30th November, 2022.

Sd/-	**Sd/-**
(V. DURGA RAO)	**(MANOJ KUMAR AGGARWAL)**
न्य□यिक सदस्य /JUDICIAL MEMBER	**लेख□सदस्य / ACCOUNTANT MEMBER**

चेन्नई / Chennai; दिनांक / Dated : 30-11-2022
EDN/-

<u>आदेश की प्रतिलिपि □ ग्रेषित/Copy of the Order forwarded to</u> :

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