

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 04.10.2018

Reserved on 12.09.2018
Delivered on 04.10.2018

C O R A M

THE HON'BLE Mr.JUSTICE K.RAVICHANDRABAABU

W.P.No.7416 of 2017

and

WMP No.8070 of 2017

M/s.MBI Kits International,
Rep. by its Partner,
Sri.D.Chandrasekar,
Son of Dr.M.N.Dhandapani,
Park View, 3rd Floor,
85, G.N.Chetty Road,
Chennai 600 017.

...Petitioner

vs

The Income-tax Officer,
Non-Corporate Ward-1(3),
Room No.307, III Floor,
New Block AayakarBhavan,
121, Mahatma Gandhi Road,
Chennai 600 034.

...Respondent

Prayer:Writ petition filed under Article 226 of the Constitution of India for issuance of a writ of certiorari to call for the records in NCW1(3)/AAFFM2374Q dated 13.02.2017 on the file of the respondent relating to the assessment year 2010-11 and quash the same.

For petitioner : Mr.M.P.Senthilkumar

For Respondents: Mrs.Hema Muralikrishnan
Senior Standing Counsel (I.T)

O R D E R

The petitioner is aggrieved against the proceedings of the respondent dated 13.02.2017 in rejecting the objections filed by the petitioner against the reopening of the assessment under Section 148 of the Income Tax Act, in respect of the Assessment

Year 2010-11.

2. The case of the petitioner is as follows:

The petitioner is an assessee under the respondent. The petitioner firm was formed under Partnership Deed dated 20.03.2000 with an object to carry on the business of manufacturing and testing chemicals. The Madras Export Processing Zone issued a letter of permission dated 28.03.2000. The Government of India, Ministry of Commerce by letter dated 29.03.2000, granted permission to the petitioner to carry on its business of manufacturing of test kits used for checking iodized salt. The petitioner was granted permanent Registration Certificate by the Director of Industries and Commerce dated 31.05.2000. The petitioner commenced its business of production on 25.05.2000. The petitioner filed its return of income for the Assessment Year 2010-11 on 24.09.2010, claiming deduction under Section 10B of the said Act to the tune of Rs.97,34,667/-. After scrutiny, an order of assessment under Section 143(3) was passed on 28.01.2013, accepting the claim of deduction under Section 10B, however by making minor additions. The petitioner filed an appeal as against the additions and the Appellate Authority, through his order dated 30.06.2016, deleted the additions and allowed the appeal. Thereafter, a notice under Section 148 dated 03.01.2017 was served on the petitioner for reopening of the assessment, on the reason that the income of the petitioner chargeable to tax for the assessment year 2010-11 has escaped assessment. The petitioner filed its return on 19.01.2017, declaring its taxable income at nil, as was declared in original return. The petitioner through the letter dated 19.01.2017, also sought reasons for reopening the assessment. The respondent, through the communication dated 25.01.2017, informed the reasons for reopening of the assessment. It was stated that the petitioner has extended its 10B holiday period to the eleventh year and hence, become ineligible for deduction under Section 10B. The petitioner, through the letter dated 02.02.2017, objected to the reopening on the ground that the same was beyond four years of the end of the relevant assessment year and that the petitioner firm commenced its business of manufacturing activity only after 01st April 2000 and consequently, the initial year, when the undertaking commenced manufacturing activity being the assessment year 2001-02, the claim of deduction under Section 10B was well on the tenth year itself. The petitioner also contended that the reopening was made merely based on change of opinion without there being new tangible material to deny the claim under Section 10B. However, the respondent, through the impugned communication, rejected the objection filed by the petitioner. Hence the present writ petition.

3.The respondent filed a counter affidavit, wherein it is

stated as follows:

The petitioner was an assessee under the respondent. The petitioner was formed under Partnership Deed dated 20.03.2000. The petitioner had executed a legal agreement with MEPZ dated 28.03.2000, pursuant to the letter of permission granted by the said Authority on 28.03.2000. The petitioner was granted permission to carry on business by the Ministry of Commerce, Government of India, on 29.03.2000. The petitioner was granted permanent Registration Certificate by the Directorate of Industries and Commerce dated 31.05.2000. The petitioner commenced its business of production on 28.03.2000 and not on 25.05.2000, as claimed by the petitioner. The same is evidenced by the relevant entry in column No.7 of Annexure A to Form No.56G in support of claim of deduction under Section 10B for the assessment year 2010-11. The petitioner filed its return for the assessment year 2010-11 on 24.09.2010, claiming deduction under Section 10B to the tune of Rs.97,34,667/-. The same was allowed incorrectly in the order under Section 143(3) dated 28.01.2013 due to failure on the part of the Assessing Officer to verify the relevant content of Form No.56G that relates to the date of commencement of production. Proceedings under Section 147 was initiated, since the relevant assessment year 2010-11 happens to be the eleventh year from the date of commencement of production, while the tax holiday is permissible to 10 assessment years at the maximum. Therefore, the benefit of deduction under Section 10B could not be extended. The Assessing Officer, while completing the original assessment, had failed to take cognizance about the date of commencement of manufacture incorporated in Form No.56G. The petitioner in all the Audit Reports under Section 56G had mentioned the date of commencement of production to be 28.03.2000. Therefore, the respondent had ample reason to believe that the income of the petitioner had escaped assessment. The respondent had not relied on any external material but based on the records available in the form of Annexure to Form No.56G. The correctness of the claim of the date of manufacture can only be ascertained if the process of reassessment is allowed to go further. Such process of enquiry cannot be undertaken in writ proceedings, more particularly, when the feature as expressed in Form No.56G is not in dispute. The qualified Chartered Accountant of the petitioner had incorporated the date of manufacture in the Audited Report in Form 56G to be 28.03.2000. Any deviation cannot be accepted on the face value of the document submitted. Necessary enquiries have to be undertaken with MEPZ before entertaining the claim of the petitioner. Therefore, the respondent is right in rejecting the objections and ensuring the continuance of reassessment proceedings. The respondent is well within the jurisdiction to reopen the assessment beyond four years.

4. Mr.M.P.Senthilkumar, learned counsel for the petitioner made his submission. A written submission is also filed on behalf of the petitioner. The sum and substance of the submissions made on behalf of the petitioner are as follows:

a) The petitioner was granted permission to carry on the business by the Ministry of Commerce only on 29th March 2000 and thus, the petitioner commenced the manufacturing activities on 25th May 2000. Thus, during the financial year ended on 31.03.2000, there was no manufacturing activity. The quarterly progress report and the annual progress report submitted to MEPZ, would reflect the date of commencement of production as 25.05.2000. The reopening of the assessment is beyond four years, since notice under Section 148 was issued only on 03.01.2017, when the four years from the end of the assessment year 2010-11 fell on 31.03.2015. Even for assuming jurisdiction beyond four years on the ground of escaped assessment, the Assessing Officer has to ascertain any failure on the part of the assessee to make full and true disclosure of the facts and materials. The assessee had filed complete details in the return of income and therefore, the reopening after four years, is barred by limitation. The very fact that the respondent passed an order of assessment under Section 143(3) based on the return filed by the petitioner would show that the petitioner had filed and furnished full and complete details in the original assessment proceedings. The Assessing Officer had completed the assessment only after taking into consideration of all those details. Therefore, it cannot be said that the Assessing Officer had reason to believe that the income had escaped assessment. The reopening is merely on change of opinion in the absence of any fresh materials with the Assessing Officer to exercise jurisdiction under Section 147. In the order under Section 143(3) for the assessment year 2010-11, the Assessing Officer had disallowed exemption under Section 10B only to the extent of Rs.1,01,819/- and thus, allowed exemption in respect of the balance claim. This clearly shows that the Assessing Officer had applied his mind to the allowability of exemption under Section 10B. Therefore, there cannot be a reassessment on the issue of exemption. Therefore, there is no case for reason to believe that the income had escaped assessment, that too, when there is no default or failure on the part of the assessee to disclose the material facts. In this connection, the following decisions are relied on:

1. (2010) 320 ITR 561 SC, CIT v. Kelvinator of India Ltd.
2. (2008) 11 DTR (Chen) 73, CIT vs Tube Investments of India Ltd.
3. (2018) 404 ITR 10 (SC), ITO vs Techspan India P. Ltd. = (2018) 6 SCC 685.

b) The respondent relied on column No.7, wherein the date of commencement of production was stated as 28th March 2000 to

reopen the assessment without noting column No.8, therein showing the year where the deduction claimed as "tenth year". If the petitioner commenced its manufacturing activities on 28.03.2000, then in Form 56G for the Assessment Year 2001-02 would have been filed by the petitioner stating the consecutive year for which the deduction is claimed as second year not first year. The respondent had exceeded his jurisdiction by issuing notice under Section 148, as the petitioner had claimed exemption under Section 10B, which is legally available to the petitioner and hence, no income has escaped assessment within the meaning of Section 147. The date wrongly mentioned in the first year of claim made in the assessment year 2001-02 inadvertently gets carried over for future years too. The petitioner filed all the evidences to show that commencement of business was only on 25.05.2000 and that the date mentioned in column No.7 was not correct. The date mentioned in column No.7 was only typographical error and it will not amount to any non filing of full and true material facts.

5. Mrs.Hema Muralikrishnan, learned counsel appearing for the respondent made her submission. She has also filed a written submission. The sum and substances of the submissions are as follows:

The proceedings impugned in this writ petition is an 'intermediate' order rejecting the petitioner's objections to the reasons for reopening. The action of the respondent in reopening the assessment under Section 148 vide notice dated 03.01.2017, has not been challenged by the petitioner. Therefore, they cannot dispute that the respondent has no power to reopen the assessment. In any event, the respondent has not passed any orders on merits of the issue as to whether the petitioner is entitled to exemption under Section 10B of the said Act or not. Where the reassessment proceedings are still in the nascent stage, what has to be seen is whether there is any prima facie material to support the reopening and whether the reassessment is within the period of limitation. It is not in dispute that Annexure to Form 56G submitted for the assessment year 2010-11 contained contradictory statement in column No.7 and 8. While Column 7 referred the date of commencement of manufacture as 28.03.2000, Column 8 referred the year of claim for deduction as tenth year. If the petitioner had commenced the production on 28.03.2000, then 2010-11 cannot be tenth year of production and in fact, it is the eleventh year. Therefore, it is clear that there has not been a full and true disclosure. Consequently, the respondent is entitled to proceed with the reassessment after the period of four years as well and within the period of six years from the relevant assessment year. The contention of the petitioner that a mistake has been crept in, while filling Column 7, cannot be treated simply as a mistake, especially when such mistake

continued repeatedly for ten years. In any event, the contention of the petitioner with regard to the date of manufacture based on all documents, has not been decided till this date by the respondent. There has been escapement of income inasmuch as if the deduction under Section 10B of the Act is disallowed, then the amount will be added to the taxable income. The respondent had only called upon the petitioner to file further reply and the merits of the issue will be decided thereafter.

6. Heard both sides and perused the materials placed before this Court.

7. The petitioner is aggrieved against the reopening of the assessment in respect of the Assessment Year 2010-11. I have already narrated in detail, the facts warranting the petitioner to file the present writ petition and the rival contention of the parties for and against the reopening of the assessment. Therefore, I am not reiterating the same once again hereunder, while rendering my findings.

8. The petitioner is engaged in manufacturing of test chemicals. They got approval from the Development Commissioner, Madras Export Processing Zone on 29.03.2000. It is claimed by the petitioner that they commenced the manufacturing activities only on 25.05.2000 and not on 28.03.2000, as has been wrongly stated in Form 56G, an Auditor's Report filed for claiming deduction under Section 10B of the Income Tax Act. Section 10B entitles newly established 100% export oriented undertakings, a deduction of such profits and gains as are derived from the export of articles or things or computer software for a period of ten consecutive assessment years beginning with the assessment year relevant to the previous year which the undertaking begins to manufacture or produce articles or things or computer software. Accordingly, the petitioner claimed the deduction under Section 10B of the said Act by enclosing Form 56G, the report of the Auditor, mentioning therein the date of commencement of manufacture or production as 28.03.2000 and the number of consecutive years for which the deduction claimed as tenth year. The amount of deduction claimed by the assessee was Rs.97,34,667/-. The Assessing Officer, after considering such claim made under Section 10B, partly disallowed such claim only to the tune of Rs.1,01,819/- on the reason that the exemption claimed under the Foreign Exchange to the tune of Rs.1,64,936/- obtained beyond one year without the approval of the competent Authority cannot be allowed. The Assessing Officer passed the order of assessment on 28.01.2013 and derived a taxable income as Rs.1,01,819/- and consequently, a demand of Rs.42,170/- towards tax was raised. In other words, the Assessing Officer has evidently accepted the claim of the assessee for Section 10B

deduction and allowed the same for the balance claim. The Assessee went on appeal before the Commissioner of Income Tax (Appeals) as against such partial disallowance and the Appellate Authority allowed the appeal thereby deleting the additions made by the Assessing Officer of the unrealised amounts of foreign exchange remittances. Therefore, the net result was that both the Assessing Officer as well as the Appellate Authority have considered the claim of the assessee for deduction under Section 10B, based on the materials placed before them, which includes Form 56G and have allowed such claim. In other words, it is evident that based on those documents filed by the Assessee including Form 56G, the Assessing Officer got satisfied with the material details stated therein and thus formed an opinion in favour of the petitioner on their entitlement for deduction under Section 10B. At this juncture, it is relevant to note that though Column 7 in the Form 56G submitted by the petitioner referred the date of commencement of manufacture or production only as 28.03.2000, the number of consecutive years for which the deduction claimed was referred as tenth year in Column 8. Based on those details, the Assessing Officer has chosen to form the opinion and granted the deduction.

9. While that being so, a notice under Section 148 of the said Act was issued on 03.01.2017 for reopening by stating that the Assessing Officer has reasons to believe that the income chargeable to tax for the Assessment Year 2010-11 had escaped assessment. On receipt of such notice, the petitioner filed their Nil return. They also sought for reasons for reopening the assessment. Accordingly, the respondent issued the impugned communication dated 25.01.2017, wherein it is stated as follows:

"The order of assessment u/s143(3) was passed with minor addition on 28.01.2013, accepting the claim of deduction u/s 10B. The addition was subsequently deleted in appeal.

The claim of deduction u/s 10B for the year of Rs.97,34,667/- is allowed, based on Form No.56G. The Form states in Column No.8 that it is the 10th year of claim. But, Column 7 specifies that the date of commencement of manufacturing is 28.03.2000. Therefore the year under consideration happens to be the eleventh year. Even in the record provided to substantiate the claim on the eligibility by way of copy of Form 56G for Ay 2001-02 the same is found. Column No.7 maintains that the date of commencement of manufacture is 28.03.2000 but Column No.8 states that AY 2001-02 is its first year of claim.

Therefore it is clear that the assessee has exclusively extended its 10B holiday period to the eleventh year and hence become ineligible for deduction of 10B.

It is clear from the above details that the income of the assessee has escaped assessment within the meaning of section 147. Since the AO has not even taken a faint notice of this essential aspect that determines the allowability of deduction, Explanation (1) to section 147 comes into operation and first proviso to section 147 becomes redundant and hence there is a reason to believe that the income of Rs.97,34,567/- has escaped assessment."

10. Perusal of the impugned communication would undoubtedly show that the reason for reopening the assessment was solely based on the statement or entry made in Column No.7 and 8 of Form 56G, which according to the respondent, is not a true and full disclosure. Thus, the initiation of proceedings under Section 147, after the expiry of four years from the date of the relevant assessment year, is sought to be justified. At this juncture, it is relevant to quote Sections 147, 148 and 149 of the Income Tax Act, 1961, which deal with reopening of assessment as follows:

"Income Escaping Assessment:

147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

Provided that where an assessment under subsection (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Issue of notice where income has escaped assessment.

148. (1) Before making the assessment,

reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :

Time limit for notice.

149. (1) No notice under section 148 shall be issued for the relevant assessment year,—

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year."

11. Going by the above provisions, let me consider whether the reopening is legally sustainable. Admittedly, the order of assessment under Section 143(3) for the Assessment Year 2010-11 was passed on 28.01.2013. Therefore, the end of four years from the Assessment Year 2010-11 fell on 31.03.2015. However, the notice under Section 148 was issued on the petitioner only on 03.01.2017. Therefore, it is evident that the proceeding under Section 147 was initiated after a period of four years, as required under Section 147. However, first proviso to Section 147 entitles the respondent to initiate such proceedings for reopening the assessment beyond the period of four years also and within a period of six years, provided anyone of the following conditions are satisfied:

i) Any income chargeable to tax has escaped assessment for such Assessment Year by reason of failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Section 142(1) or Section 148.

ii) the assessee failed to disclose fully and truly all material facts necessary for the assessment year.

12. To put it to more precisely, the first proviso to Section 147, for extending the period of limitation of four years, can be taken shelter, only when the assessee either failed to make a return in response to the notice under Sub

Section 142(1)/Section 148 or failed to disclose fully and truly all material facts necessary for his assessment.

13. In this case, it is not in dispute that the petitioner has filed their original return and nil return in response to the notice issued under Section 148. Therefore, the first condition is not attracted to invoke the proviso to Section 147.

14. Whether the other condition is satisfied, is the next question. Admittedly, the petitioner has furnished the details in coloumn 7 and 8 of Form 56G.

15. According to the Revenue, if the date of commencement of manufacture or production referred to in the Column No.7 in Form No.56G as 28.03.2000 is taken as true, the deduction claimed was at the eleventh year and not at the tenth year. The petitioner seeks to explain that the entry made in Column No.7 of Form 56G was by mistake and on the other hand, the actual date of commencement of manufacture was only on 25.05.2000. At the same time, Column No.8, which deals with number of consecutive year for which the deduction claimed, was rightly stated as tenth year. Therefore, the question that arises for consideration, under the above stated circumstances, is as to whether these contradictory statement made by the petitioner can be brought under the purview of non disclosure of fully and truly all material facts necessary for his assessment, to attract the extended period of limitation.

16. No doubt, Column No.7 and 8 contradicts each other with regard to the commencement of manufacture. However, when one of such column has specifically referred the number of consecutive year as the tenth year to claim 10B deduction and when the Assessing Officer has also considered and allowed such deduction, it has to be construed that such deduction was granted by the Assessing Officer by forming his opinion based on the conjoined consideration of materials already placed. In other words, it cannot be stated that the petitioner has availed the benefit under Section 10B by giving false details. If the date of manufacture as referred to in Form 56G is taken as the right date, the Assessing Officer ought not to have allowed the deduction. Likewise, if the number of consecutive year referred to in Form 56G as tenth year is taken as the true statement, the Assessing Officer was right in allowing the deduction. Therefore, it is evident that by furnishing the wrong date of manufacture as 28.03.2000, the petitioner has not either deceived or suppressed any material fact before the Assessing Officer to claim deduction under Section 10B. If the exact date of manufacturing could be ascertained or gathered from the conjoined consideration of other material documents, such as relevant certificates of registration by the competent authority, mere wrong mentioning of the date in Column 7 cannot

be construed as non disclosure of true and material facts, especially when column 8 of statement supports the claim. One can understand and appreciate the stand of the Revenue for reopening the assessment, if the assessee, by giving a false information regarding the date of commencement of manufacture as 28.03.2000 alone, had obtained deduction under Section 10B. Thus, it is seen that the Assessing Officer, who has originally chosen to allow the deduction based on the materials filed already, has now changed his opinion and has chosen to reopen the assessment, which in my considered view, cannot be done after a period of four years.

17. If, by furnishing incorrect particulars or facts, the assessee got benefited, then one can understand that there was no true and full disclosure by the assessee. On the other hand, if the benefit, in this case the deduction, was granted or allowed inspite of such furnishing of incorrect particulars or facts, then it could, at the best, be called only as the escapement of income from the consideration of the Assessing Officer for being assessed and not the escapement of income by any of the act or omission by the assessee. At this juncture, the admission made by the respondent in the counter affidavit, more particularly, at paragraph No.10 is relevant to be quoted. He had admitted that while completing the original assessment, the Assessing Officer failed to take cognizance about the date of commencement of manufacture incorporated in Form No.56G. Thus, it is evident that it is by the mistake or fault of the Assessing Officer in not taking cognizance about the date of commencement of manufacture, according to the Revenue, the income escaped assessment. If that be the case, the Assessing Officer is entitled to reopen the assessment before the expiry of four years only and correct the mistake and make the addition. In other words, the term "any income chargeable to tax has escaped assessment" referred to under Section 147 has to be understood to mean that such alleged escapement of assessment is based on the belief of the Assessing Officer with some reasons and that such reasons may include his own omission or default. On the other hand, the very same term "any income chargeable to tax has escaped assessment" referred to in the first proviso to Section 147, certainly not to be construed to mean that such belief of the Assessing Officer with reason will also fit into such proviso to invoke the extended period of limitation. On the other hand, as stated supra, such escapement of assessment can be brought into tax by way of reopen only when either of the two ingredients referred to in the proviso, as discussed supra, is satisfied. In other words, the Assessing Officer's omission or mistake does not have a role to play for invoking proviso to Section 147 and on the other hand, such invoking should stand or fall solely depending upon the satisfaction of those conditions stipulated therein.

18. Every non disclosure of material facts will not or cannot be a justifiable reason for reopening sustainable under judicial scrutiny. On the other hand, such non disclosure of a material fact must be of such nature that, but for such non disclosure, the income, relatable to such material fact, would not have escaped assessment. In other words, it should lead to an irrebuttable conclusion that by the conduct of the assessee, either by providing wrong or incorrect particulars or by not providing the full and correct particulars, he should have made the Assessing Officer not to bring a particular income to tax, which is otherwise liable to be taxed. If this test is applied to the present case, I am of the view that the Revenue has to fail.

19. It is settled law that mere change of opinion on the existing material cannot be a ground for reopening the assessment in the absence of any new material that had come to the possession of the Assessing Officer. In this case, there is no tangible material available before the Assessing Officer to reopen the assessment and on the other hand, it was purely out of his change of opinion on the material already existed. In this connection, the following decisions can be relied on:

20. In 2010) 320 ITR 561, the Apex Court has held at paragraph No.4 as follows:

"4. 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 fulfillment 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 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 fulfillment 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."

21. In (2008) 11 DTR (Chen) 73, CIT vs Tube Investments of India Ltd., the Division Bench of this Court has held at paragraphs 6 and 7 as follows:

"6. Having recorded the above findings, the Tribunal had also referred to the judgment of this Court in the case of Apollo Hospitals Enterprises Limited Vs. ACIT (287 ITR 25) to sustain their view point. The findings so recorded are also fortified by the revisional order wherein in para.4 of the assessment order, the Assessing Officer has stated as follows:-

"Assessee has claimed this interest as revenue for income tax purpose. For the assessment year 1996-1997, the interest amount was disallowed as it is in capital nature. The decision for assessment year 1996-1997 has not become final. Applying the same ratio, the interest income of Rs.378.06 lakhs is disallowed and added to total income."

7. From the above, it is manifestly clear that particulars about the claim of interest amount are very much available before the Assessing Officer while he framing the original assessment, and after taking into consideration the claim on interest in respect of the above said amount, the original assessment was framed. The subsequent re-opening of the assessment is nothing but in our considered view also a mere change of opinion to follow the earlier year assessment order, which is not the reason for reopening of the assessment under Section 147 of the Income-tax Act. Further, the re-opening of the assessment cannot also be brought within the exemption stated therein for reopening after the period of four years.

22. In (2018) 404 ITR 10 (SC), ITO vs Techspan India P. Ltd. Equivalent citation: (2018) 6 SCC 685, the Apex has held at paragraphs 14 to 18 as follows:

"14. The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe'

in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

15. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17. It is well settled and held by this court in a catena of judgments and it would be sufficient to refer to Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd. (2010) 320 ITR 561(SC) wherein this Court has held as under:-

"5...where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".... Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of

opinion", which cannot be per se reason to re-open.

6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment 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 re-opening the assessment, review would take place.

7. 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 1-4-1989, 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 live link with the formation of the belief."

18. Before interfering with the proposed re-opening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier made has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the assessing officer any opinion on the questions that are raised in the proposed re-assessment proceedings. Every attempt to bring to tax, income that has escaped assessment, cannot be absorbed by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the re-assessment proceedings."

23. No doubt, the learned counsel for the respondent contended that the present writ petition is not maintainable, since the impugned proceedings is only giving reasons for reopening and therefore, it is an intermediate order. I do not think that such objection can be raised by the Revenue when the reopening itself is questioned on the ground of limitation.

Only when the respondent crosses the hurdle of limitation issue, then the question as to whether the petitioner has to face the assessment proceedings or not would arise. In this case, as discussed supra, the petitioner has questioned the reopening on the ground of limitation and this Court, based on the reasonings and findings rendered supra, is fully convinced that the reopening is beyond the period of limitation, since it was based on mere change of opinion and not due to the failure on the part of the assessee in not disclosing fully and truly all material facts.

24. Accordingly, the writ petition is allowed and the impugned proceedings of the respondent in reopening the assessment for the assessment year 2010-11 is set aside. No costs. The connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-IX)

//True Copy//

Sub Assistant Registrar

vri

To

The Income-tax Officer,
Non-Corporate Ward-1(3),
Room No.307, III Floor,
New Block Aayakar Bhavan,
121, Mahatma Gandhi Road,
Chennai 600 034.

+1cc to Mr.G.Baskar, Advocate, S.R.No. 68415

+1cc to Mr.Hema Muralikrishnan, Advocate, S.R.No.68471

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GN(24/10/2018)