IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 16901 of 2011

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA

HONOURABLE MR.JUSTICE J.B.PARDIWALA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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RUBAMIN LIMITED - Petitioner(s)

Versus

LOVE KUMAR - Respondent(s)

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Appearance :

MR KH KAJI with MR MANISH K KAJI for Petitioner(s) : 1,
MR KM PARIKH for Respondent(s) : 1,

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CORAM : HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA

and

HONOURABLE MR.JUSTICE J.B.PARDIWALA

Date : 30/04/2012

CAV JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

By this Application under Article 226 of the Constitution of India, the writ-petitioner, an assessee under the Income Tax Act, 1961 (“the Act”, for short) has prayed for issuance of mandamus to quash and set-aside the notice dated 15th September 2009 under Section 148 of the Act (Annexure-'A' to the writ-application).

The facts leading to the filing of the above petition under Article 226 of the Constitution of India may be summed up thus :

(1) The petitioner is engaged in the business of manufacturing of various grades of zinc oxide, cobalt/nickel related products, intermediates and generating electricity through non-conventional energy devices (wind mills).

(2) On 26th October, 2005, the petitioner-company filed return of income for the Assessment Year 2005-06, declaring total income of Rs.16,92,45,000=00. The return was processed under Section 143(1)(a) of the Act on 17th February 2006. The case of the petitioner was selected for scrutiny under Section 143(3). The assessment order came to be passed on 27th December 2007, wherein the Assessing Officer disallowed export commission payment made by the petitioner to one M/s.Softgenie Limited at the rate of 5% to the tune of Rs.1,01,46,996=00.

(3) The said assessment order came to be challenged by the petitioner by way of appeal before the Commissioner of Income Tax (Appeals) III, Baroda. The Commissioner of Income Tax (Appeals), vide order dated 28th February 2008, partly allowed the appeal of the petitioner. The export commission payment to the extent of 2% was considered reasonable, and while passing

the said order, the Commissioner of Income Tax (Appeals) placed reliance on order passed for the Assessment Year 2004-05 in the case of the petitioner itself.

(4) The said order of the Commissioner of Income Tax (Appeals) was challenged both by the department and the petitioner-company before the Income Tax Appellate Tribunal being I.T.A. No.1618 of 2008 filed by the department and I.T.A. No.1327 of 2008 of the petitioner-company. The Income Tax Appellate Tribunal, vide its order dated 27th November 2009, allowed the appeal of the petitioner-company by accepting that the commission payment made to M/s.Softgenie at the rate of 5% was allowable and dismissed the appeal preferred by the department.

(5) The respondent herein issued a notice under Section 148 of the Act dated 15th September 2009 for the purpose of reassessing the income of the petitioner. The petitioner-company addressed a letter dated 14th October 2009 requesting the Assessing Officer to consider the return filed under Section 139(1) of the Act as the return filed pursuant to the notice under Section 148 of the Act.

(6) The petitioner-company, vide letter dated 14th October 2009, also requested the Assessing Officer to supply copy of the reasons recorded for reopening of the assessment.

(7) The petitioner-company was supplied with reasons vide letter dated 16th February 2010 after almost a lapse of four months, wherein it was stated that the petitioner-company had not deducted Tax Deducted as Source and, thereby, violated the provisions of Section 194H of the Act.

(8) The petitioner-company, thereafter, filed its objections vide letter dated 22nd February 2010. As the objections raised by the petitioner-company were not dealt with and disposed of by the respondent, the petitioner preferred writ-petition being Special Civil Application No.8378 of 2011 before this Court challenging the notice of reopening. The said petition came up for hearing before the Division Bench of this Court on 30th August 2011 and was disposed of by a direction to the office concerned to decide the objections raised by the petitioner-company within a period of four weeks.

(9) The Assessing Officer disposed of the objections raised by the petitioner for reopening by passing an order dated 3rd October 2011. The respondent rejected the objections raised by the petitioner stating that in the course of regular assessment finalized under Section 143(3) of the Act, the issue was based on the addition made under Section 40A(2)(b) of the Act whereas, the assessment was reopened on the violation of the provisions laid down under Section 40(a)(ia) of the Act and that the TDS was not deducted under Section 194H of the Act neither was there anything on record to establish that M/s.Softgenie had sought any certificate of short/no deduction of TDS in prescribed form.

The case made out by the writ-petitioner in this writ-application may be summed up thus :

(1) The petitioner-company, by way of its objections to the notice of reopening under Section 148 of the Act very specifically brought to the notice of the officer that a certificate has been issued by the respondent, whereby the petitioner was permitted to make the payment of commission to M/s.Softgenie without deducting tax under Section 194H of the Act. Even in the earlier writ-

petition being Special Civil Application No.8378 of 2011 filed by the petitioner, the certificates issued by the Income Tax department were annexed and the respondent was aware about the valid certificate issued by the department under Section 194H of the Act. It was explained to the respondent that the party receiving the payment has not to apply for certificate under Section 194H of the Act as it is a payer who has to obtain a certificate permitting payment without TDS. The petitioner-company had obtained such a certificate. In light of the certificate issued, there is no valid ground to proceed further with reopening of assessment.

(2) During the course of regular assessment, the petitioner had furnished all the details regarding payment of commission to various parties. All the payments were made only after deduction of TDS and the details in this regard were filed. As regards the commission paid to M/s.Softgenie Limited, the petitioner had obtained a certificate under Section 197 of the Act from the Income Tax department permitting the petitioner from not deducting TDS.

(3) The issue on which the respondent seeks to reopen the assessment has already been dealt with in the regular assessment in detail inasmuch as all necessary details as called for during the regular assessment had been furnished. On being satisfied, the Assessing Officer chose to make the disallowance.

(4) According to the petitioner, therefore, it is now not open for the respondent to issue notice of reassessment when the issue has already been dealt with in detail. According to the petitioner-company, the notice of reassessment having been issued on 15th September 2009, the last date in making reassessment order was 31st December 2010 as provided in Section 153(2) of

the second proviso, the proposed reassessment would be now barred by limitation unless the respondent is able to show that the case falls within the ambit of third proviso to Section 153(2) of the Act because of reference under Section 92CA(1) made by him.

(5) The respondent sought to reopen the assessment under Section 147 of the Act by issuing a notice under Section 148 of the Act notwithstanding the fact that there is no valid reason to issue such notice.

(6) The reasons recorded for issue of notice under Section 148 of the Act indicate mere change of opinion of the Assessing Officer on the selfsame issue, which was processed in the original assessment. There was no failure on the part of the petitioner either in filing the return or full furnishing of the particulars.

(7) The entire initiation of jurisdiction under Section 147 read with Section 148 of the Act is contrary to the ratio of the recent three-judge-bench decision of the Supreme Court in the case of Kelvinator of India Limited, reported in 320 ITR 561.

The writ-application is opposed by the Revenue by filing affidavit-in-reply thereto opposing the prayer of the writ-petitioner and the defence of the Revenue may be epitomized thus :

1. The writ-petition filed by the petitioner is a premature one inasmuch as only a notice under Section 148 of the Act has been issued and in the event the petitioner is aggrieved by the reassessment order to be passed, the statutory remedy of appeal under the provisions of the Act is available.

2. In course of regular assessment proceedings finalized by the

Assessing Officer under Section 143(3) of the Act, the commission paid to M/s.Softgenie Limited was dealt with by the Assessing Officer from the view point of Section 40A(2)(b) of the Act and not from the view point of Section 194H of the Act. The assessment for the Assessment Year 2005-06 was reopened by the Revenue not just on the violation of the provisions laid down under Section 40(a)(ia) of the Act, and thus, there is no change of opinion as canvassed by the petitioner in this petition.

3. There was nothing on record to establish that M/s.Softgenie Limited had sought any certificate of short/no deduction of TDS in the prescribed form and, therefore, the Assessing Officer had valid reasons to believe that the income has escaped the assessment.

4. The issue of payment of commission made by M/s.Softgenie Limited was examined by the Assessing Officer in regular assessment proceedings under Section 143(3) of the Act from the view of Section 40A(2)(b) of the Act and not from the view point of Section 40(a)(ia) of the Act. The certificates at Exhibit J were not available on the record and proceeding before the Assessing Officer at the time of regular assessment proceedings under Section 143(3) of the Act and the same had not been furnished by the petitioner-company before the Assessing Officer during the regular assessment proceedings. Thus, certificate of TDS under Section 197(1) of the Act was not available for perusal at the time of regular assessment proceedings.

5. None of the authorities have considered the violation of the provisions of Section 194H of the Act and, therefore, reasons recorded for reopening of the assessment for the Assessment Year 2005-06 are just, legal and proper.

We shall also look into the reasons assigned by the Deputy Commissioner of Income Tax, Circle-4, Vadodara while disposing of the objections raised by the petitioner-assessee to the notice issued under Section 148 of the Act.

The first objection which was raised by the petitioner vide letter dated 14th October 2009 was that the notice issued under Section 148 of the Act dated 15th September 2009 was without any authority granted under Section 147 of the Act and was beyond the powers vested under Section 147 for reopening the assessment where the assessment was completed under Section 143(3) of the Act. This objection came to be dealt with and was disposed of by replying that the objection has no force of law. It was replied relying on a decision rendered by this High Court in Special Civil Application No.15304 of 2010 in the case of Dishman Pharmaceuticals and Chemicals Limited v/s. DCIT (OSD) Range-1 that the reasons recorded and communicated to the assessee should sufficiently and clearly lay down the foundation for reopening of the assessment on the ground of assessee not having truly and fully disclosed the facts.

The petitioner was also informed that the provisions of Section 151(1) are self-explanatory. If an assessment has been made under Section 143(3) of the Act or under Section 147 of the Act for the relevant Assessment Year, no notice under Section 148 of the Act by an Assessing Officer who is below the rank of Assistant Commissioner or Deputy Commissioner can issue such a notice unless the Joint Commissioner or Additional Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for issuance of notice. While rejecting the objections, it observed that the Assessing Officer of the rank of ACIT or DCIT is empowered to issue notice under Section 148 of the Act if four years from the end of the relevant Assessment Year have not elapsed. This is how the Deputy

Commissioner tried to justify issuance of notice under Section 148 of the Act.

The second objection raised by the petitioner was that the assessment was finalized under Section 143(3) of the Act and the details of commission paid to M/s.Softgenie were furnished to the then Assessing Officer and the entire expenses was disallowed under Section 40A(2)(b) of the Act. According to the assessee, the condition precedent for issuance of notice under Section 148 of the Act was not satisfied with reference to the fact that there was no escapement of income tax by either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for assessment.

This objection was overruled by the officer concerned, stating that in the course of regular assessment finalized under Section 143(3) of the Act, the issue was based on the addition made under Section 40A(2)(b) of the Act, whereas the assessment was reopened on the violation of the provisions laid down under Section 40(a)(ia) of the Act on the premise that TDS was not deducted under Section 194H of the Act, nor there was anything on record to establish that M/s.Softgenie Limited had sought any certificate of short/no deduction of TDS in prescribed form.

On this reasoning, the officer overruled the objections holding that the Assessing Officer had valid reason to believe that the income had escaped the assessment.

Mr.Manish K.Kaji, the learned advocate appearing on behalf of the petitioner has strongly relied upon the decision of the Supreme Court in the case of Kelvinator of India Limited, reported in [2010] 2 SCC 723 and contended that in the case before us, no 'tangible materials' have been disclosed in coming to a conclusion that there was escapement of income from assessment. Mr.Kaji, in this

connection, had drawn our attention to the reasons for initiation of proceedings and has contended that the reasons itself indicate that this is a case of mere 'change of opinion'.

Mr.K.M.Parikh, the learned advocate appearing on behalf of the Revenue has, on the other hand, opposed the aforesaid contention of Mr.Kazi and has also relied upon the selfsame decision of Kelvinator of India Limited (*supra*) in support of his contention that after the amendment of the Act in the year 1989, the scope of Section 148 of the Act is much wider. He, therefore, prayed for dismissal of the appeal.

In order to appreciate the question involved in this petition, we first propose to deal with the reasons for initiating proceedings under Section 147 of the Act as disclosed by the Assessing Officer. The reasons assigned by the Assessing Officer are quoted below :

> *"The assessee had paid commission to Soft Genie Ltd., Baroda for Rs.1,01,46,996 on export sales and Rs.10,48,758 on domestic sales to other party aggregating to Rs.1,11,95,754. However, tax was not deducted at source while making payment or crediting to payee's account. For confirming the non-deduction of TDS, case records of commission recipient party, namely, Softgenie, was verified and found that though the commission income was shown in profit and loss account but no credit for TDS was claimed by Softgenie. Scrutiny of ledger of commission on export sales and domestic sale revealed that no entry exit to confirm the deduction of TDS. This confirmed that the non-deduction of TDS by the assessee. This violated the provisions of section 194H and, therefore, entire expenditure was required to be disallowed."*

In order to appreciate the aforesaid question, it will be profitable

to refer to the provisions contained in Section 147 of the Act, which are quoted below :

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 sub-section [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 sub-section [1] of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:*

Provided further *that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped*

assessment.

Explanation 1.-- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.-- For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

[a] where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

[b] where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

[c] where an assessment has been made, but--

[i] income chargeable to tax has been under assessed; or

[ii] such income has been assessed at too low a rate; or

[iii] such income has been made the subject of the excessive relief under this Act; or

[iv] excessive loss or depreciation allowance or any

other allowance under this Act has been computed.

Explanation 3.-- For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section [2] of section 148."

In the case before us, the assessee having challenged the notice of reassessment in a proceeding under Article 226 of the Constitution, before proceeding further, we propose to deal with the scope of interference in such a matter.

The Supreme Court in the case of the Commissioner of Income Tax, Gujarat v/s. M/s.A.Raman and Company, reported in AIR 1968 SC 49, had the occasion to deal with such a question. We may appropriately refer to the following observations made by a three-judge-bench in the above matter by relying upon the majority view taken in an earlier decision of that court taken by a bench of five judges:

“4. It was held by this Court in Calcutta Discount Co. Ltd. v. Income-tax Officer, (1961) 41 ITR 191 = (AIR 1961 SC 372) that the High Court in appropriate cases has power to issue an order prohibiting the Income-tax Officer from proceeding to reassess the income when the conditions precedent do not exist. At p. 207, K.C. Das Gupta, J., delivering the majority judgment of the Court observed:

"*It is well settled however that though the writ of prohibition or*

certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, it is well settled will issue appropriate orders or directions to prevent such consequences.

The High Court may, therefore, issue a high prerogative writ prohibiting the Income-tax Officer from proceeding with reassessment when it appears that the Income-tax Officer had no jurisdiction to commence proceeding.

5. The condition which invests the Income-tax Officer with jurisdiction has two branches: (i) that the Income-tax Officer has reason to believe that income chargeable to tax has escaped assessment; and (ii) that it is in consequence of information which he has in his possession and that he has reason so to believe. Since the learned Judges of the High Court have concentrated their attention upon the second branch of the condition and have reached their conclusion in favour of the assessees on that branch, it would be appropriate to deal with the correctness of that approach. The expression "information" in the context in which it occurs must, in our judgment, mean instruction or knowledge derived from an external source concerning facts or particulars, or as to law relating to a matter bearing on the assessment. If as a result of information in his possession the Income-tax Officer has reason to believe that income chargeable to tax had escaped assessment, the Income-tax Officer has jurisdiction to assess or reassess income under Section 147 (1) (b) of the Income-tax Act, 1961, Information in his possession that income chargeable to tax has

escaped assessment furnishes a starting point for assessing or re-assessing income. If he has that information, the Income-tax Officer may commence proceedings for assessment or reassessment. To commence the proceeding for reassessment it is not necessary that on the materials which came to the notice of the Income-tax Officer, the previous order of assessment was vitiated by some error of fact or law.

6. ***The High Court exercising jurisdiction under Article 226 of the Constitution has power to set aside a notice issued under Section 147 of the Income-tax Act, 1961, if the condition precedent to the exercise of the jurisdiction does not exist. The Court may, in exercise of its powers, ascertain whether the Income-tax Officer had in his possession any information: the Court may also determine whether from that information the Income-tax Officer may have reason to believe that income chargeable to tax had escaped assessment. But the jurisdiction of the Court extends no further. Whether on the information in his possession he should commence a proceeding for assessment or reassessment, must be decided by the Income-tax Officer and not by the High Court. The Income-tax Officer alone is entrusted with the power to administer the Act; if he has information from which it may be said prima facie, that he had reason to believe that income chargeable to tax had escaped assessment, it is not open to the High Court, exercising powers under Article 226 of the Constitution, to set aside or vacate the notice for reassessment on a re-appraisal of the evidence.***

7. ***The High Court in this case was apparently of the view that the information in consequence of which***

proceedings for reassessment were intended to be started, could have been gathered by the Income-tax Officer in charge of the assessment in the previous years from the disclosures made by the two Hindu undivided families. But that, in our judgment, is wholly irrelevant. *Jurisdiction of the Income-tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment.* ***That information must, it is true, have come into possession of the Income-tax Officer after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income-tax Officer is not affected."***

(Emphasis supplied)

At this stage, we propose to refer to two more decisions of the Supreme Court, one, in the case of Gemini Leather Stores v/s. The Income Tax Officer, 'B' Ward Area and others, reported in AIR 1975 SC 1268 and the other, in the case of Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad v/s. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad, reported in AIR 1975 SC 703, which would be relevant for the purpose of this case.

In the case of Gemini Leather Stores *(supra)*, while making a best judgment assessment, the Income-tax Officer had discovered certain transactions evidenced by the drafts, which the assessee had not disclosed. In spite of this discovery and the knowledge of all the material facts, the Income-tax Officer did not make necessary enquiries and draw proper inferences as to whether the amounts

invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. In such a situation, it was held that it was plainly a case of oversight and the Income-tax Officer could not take recourse to Section 147 (a) to remedy the error resulting from his own oversight and that therefore the notice under Section 148 should be quashed.

In the case of Nawab Mir Barkat Ali Khan Bahadur, Hyderabad *(supra*), the Supreme Court even went to the extent that non-production of the documents at the time of the original assessments cannot be regarded as non-disclosure of any material facts necessary for the assessment of the respondent for the relevant assessment years, where such documents conform to the documents already filed by the assessee in material particulars.

The following observations are in this connection relevant and are quoted below:

> *"Non-production of the documents executed in 1957 at the time of the original assessments cannot therefore be regarded as non-disclosure of any material fact necessary for the assessment of the respondent for the relevant assessment years. The High Court was right in holding that the Income-tax Officer had no valid reason to believe that the respondent had omitted or failed to disclose fully and truly all material facts and consequently had no jurisdiction to reopen the assessments for the four years in question.* ***Having second thoughts on the same material does not warrant the initiation of a proceeding under Section 147 of the Income-tax Act 1961."***
>
> *(Emphasis supplied)*

At this stage, we may rather aptly refer to a latest three-judge-

bench decision of the Supreme Court in the case of Commissioner of Income Tax v/s. Kelvinator of India Limited, reported in (2010)2 SCC 723, where the said court after taking into consideration the effect of Direct Tax Laws (Amendment) Act, 1987 on section 147 made the following observations while dismissing the appeals preferred by the Revenue:

> *"**5.** On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, 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.*
>
> *6**.** 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 fulfillment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.***

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, 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 live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in 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.

8. We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, 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 the 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."

(Emphasis supplied)

9. For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

(Emphasis given by us)

Bearing in mind the aforesaid principles, we now propose to consider the case before us.

After hearing the learned counsel for the parties and after going through the aforesaid materials on record, we find that the main reason for reopening the assessment is that the petitioner-company had paid commission to M/s.Softgenie Limited, Baroda for Rs.1,01,46,996=00 on export sales and Rs.10,48,758=00 on domestic sales to other party aggregating to Rs.1,11,95,754=00. According to the Revenue, tax was not deducted at source while making payment for crediting or payee's account. For confirming the non-deduction of TDS, case records of commission recipient party, namely, M/s.Softgenie Limited was verified and it was found that though the commission income was shown in profit and loss account but no credit for TDS was claimed by M/s.Softgenie Limited. Thus, confirming the non-deduction of TDS by the assessee. According to the Revenue, there has been violation of the provisions of Section 194H of the Act and, therefore, entire expenditure was required to be disallowed.

Record reveals that the assessment was carried out under Section 143(3) of the Act, in which the details of commission of Rs.1,01,46,966=00 paid to M/s.Softgenie Limited were furnished to the predecessor-in-office and the entire expenditure of Rs.1,01,46,966=00 was disallowed under Section 40A(2)(b) of the Income Tax Act, 1961 in the order of assessment under Section 143(3) of the Act. Thus, the first and the foremost condition for issuance of notice under Section 148 of the Act is not satisfied. In other words, it cannot be said that there was any escape of income by act of omission or failure on the part of the assessee to disclose fully or truly necessary material facts for assessment.

We are of the view that only because of the fact that the disallowance of Rs.1,01,46,966=00 has been deleted by the Income Tax Appellate Tribunal, Ahmedabad, the commission paid to M/s.Softgenie Limited cannot be again disallowed under Section 40(ia) of the Act.

We are conscious of the fact that the principle of *res judicata* would have no application to the proceedings under the Act. However, there is exception to this rule that a finding reached in the assessment proceedings after due inquiry would not be reopened merely on change of opinion.

In our opinion, the decision of the Assessing Officer to reopen the assessment on the violation of the provisions laid down under Section 40(a)(ia) of the Act on the premise that TDS was not deducted under Section 194H of the Act is not tenable in law.

To appreciate this issue, it is necessary for us to take note of the provision viz. 40(a)(ia), which reads as under :

"40. Amounts not deductible.- Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession",-

(a) in the case of any assessee-

(i) xxx xxx xxx

(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work including supply of labour for carrying out any work, on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139."

Explanation is also relevant, which reads as under :

"(i) 'commission or brokerage' shall have the same meaning as in clause (I) of the Explanation to section 194H."

On plain reading of Section 40(a)(ia), it appears that commission or brokerage paid by the assessee shall not be deducted in computing the income chargeable under the head "Profits and gains of business or profession" on which tax is deductible at source under Chapter XVIIB and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of Section 139. The Explanation further clarifies that "commission or brokerage" shall have the same meaning as in clause (i) of the Explanation to Section 194H.

We shall also look into the provision of Section 194H of the Act :

"194H. Commission or brokerage.- Any person not being an individual or a Hindu undivided family, who is responsible for paying, on or after the 1st day of June, 2001, to a resident, any income by way of commission not being insurance commission referred to in section 194D or brokerage, shall, at the time of credit of such income to the account of the payee or at the time of payment of such income in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate of ten per cent.

Provided that no deduction shall be made under this section in a case where the amount of such income or, as the case may be, the aggregate of the amounts of such income credited or paid or likely to be credited or paid during the financial year to the account of, or to, the payee, does not exceed five thousand rupees.

Explanation to Section 194H again explains "commission or brokerage", which reads as under :

"Explanation.-For the purposes of this section,-

(i) "commission or brokerage" includes any payment received or receivable, directly or indirectly, by a person acting on behalf of another person for services rendered not being professional services or for any services in the course of buying or selling of goods or in relation to any transaction relating to any asset, valuable article or thing, not being securities."

However, what has been lost sight of is Section 197(1) of the Act, which reads as under :

> *"197. Certificate for deduction at lower rate.- (1) Subject to rules made under sub-section (2A), where, in the case of any income of any person or sum payable to any person, income-tax is required to be deducted at the time of credit or, as the case may be, at the time of payment at the rates in force under the provisions of sections 192, 193, 194, 194A, 194C, 194D, 194G, 194H, 194I, 194J, 194K, 194LA and 195, the Assessing Officer is satisfied, that the total income of the recipient justifies the deduction of income-tax at any lower rates or no deduction of income-tax, as the case may be, the Assessing Officer shall, on an application made by the assessee in this behalf, give to him such certificate as may be appropriate.*
>
> *(2) Where any such certificate is given, the person responsible for paying the income shall, until such certificate is cancelled by the Assessing Officer, deduct income-tax at the rates specified in such certificate or deduct no tax, as the case may be."*

We have also noticed that the department has issued certificate under Section 197(1) of the Income Tax Act for the Financial Year 2003-04 dated 10th December 2003 and for the Financial Year 2004-05 dated 11th August 2004 indicating that the petitioner-company is permitted to make the payment of commission to M/s.Softgenie Limited for both the Assessment Years without deducting tax under Section 194H of the Act. Thus, in our view, there is no violation of provisions of Section 194H of the Act as alleged by the Revenue. This is precisely the reason why M/s.Softgenie Limited did not claim credit of TDS.

In the case of CIT v/s. Eicher Ltd., reported in (2007) 294 ITR 310 (Delhi), which was also the subject-matter of appeal before the Supreme Court in the case of Kelvinator of India Limited (*supra*), the Delhi High Court dealt with the similar point as would appear from the following observations quoted below:

> *"Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.*
>
> *In so far as the present appeal is concerned, we find that the assessee had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the assessee in its letter dated November 8, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view was taken by him or his*

successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee."

We have already pointed out that the Supreme Court in the case of Kelvinator of India Limited (*supra*), dismissed the appeal preferred by the Revenue not only against the decision of the Full Bench of the Delhi High Court in the case of CIT v/s. Kelvinator of India Limited, reported in (2002) 256 ITR 1 (Delhi) but also against the above case of CIT v/s. Eicher Limited (*supra*) as both were heard analogously.

Thus, none of the reasons assigned by Assessing Officer for reopening the assessment was tenable in eye of law.

On consideration of the entire materials on record, we thus find that the condition precedent for exercising power of reopening the assessment as provided in Section 147 of the Act is absent and the Assessing Officer acted illegally in issuing notice of reassessment by forming a second opinion on the selfsame materials without having any "tangible material" to exercise jurisdiction.

We, consequently, set-aside the notice of re-assessment dated 15th September 2009 (Annexure-'A' to the Application). The Special Civil Application is, thus, allowed. No costs.

(Bhaskar Bhattacharya, Acting C.J.)

(J.B.Pardiwala, J.)

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