

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 214 of 2012

For Approval and Signature:

HONOURABLE THE ACTING CHIEF JUSTICE
MR.BHASKAR BHATTACHARYA
 AND
 HONOURABLE MR.JUSTICE **J.B.PARDIWALA**

=====

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 ?

=====

VISHWANTH ENGINEERS
 Versus
 ASST. COMMISSIONER OF INCOME TAX

=====

Appearance :
 MR MANISH J SHAH for Petitioner.
 MRS MAUNA M BHATT for Respondent.

=====

CORAM :	HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR BHATTACHARYA
	and

	HONOURABLE MR.JUSTICE J.B.PARDIWALA
--	-------------------------------------

Date : 11/04/2012

CAV JUDGMENT

(Per : HONOURABLE THE ACTING CHIEF JUSTICE MR.BHASKAR
BHATTACHARYA)

1. This application under Article 226 of the Constitution of India is at the instance of an assessee under the Income Tax Act, 1961 ["the Act"] and in this application, the assessee has challenged a notice under Section 148 of the Act and the subsequent reassessment order passed by the Assessing Officer consequent to such notice.

2. The case made out by the writ-petitioner may be summarized thus:

2.1 The petitioner is a firm and return of the said firm was filed on July 22, 2005 declaring the total income of Rs. 20,39,324/- after claiming deduction under Section 80IB[10] of the Act at Rs. 3,64,17,127/-. The return of income was accompanied by statement of income in which deduction under Section 80IB[10] for development and building housing project at 100% was claimed at Rs. 3,64,17,127/-.

2.2 The working of this calculation was attached with the statement of income. A note No.7 pertaining to the fact that audit report in

prescribed form No. 10CCB under Section 80IB [10] was enclosed along with the evidence. Note No.9 to such statement mentioned the different enclosures viz. development agreement, partnership deed of the firm, construction development permission, building use permission, approved plans and sample copy of allotment agreement with members which were attached to the computation of income. Over and above, the balance-sheet and profit and loss account were also attached to the return of income along with Form No. 3CB and 3CD wherein in Form No. 3CD, at Point No.26, specifically the details of deduction under Chapter VI-A had been mentioned in accordance with the requirement.

2.3 Form No. 10CB which is a form of audit report for claiming deduction under Section 80IB and which is prescribed under Rule 18BBB was also enclosed with the return in which the details about the project on which deduction under Section 80IB[10] was claimed were submitted.

2.4 A notice dated December 11, 2006 under Section 142[1] of the Act was received by the writ-petitioner on December 22, 2006 from the Assessing Officer calling for the details and particularly Point No. 14, called for brief note on how the deduction under Section 80IB was allowable. The petitioner provided those and drew the attention to all details *vide* letter January 10, 2007 and for specific query on Section 80IB deduction, the petitioner once again furnished all the

agreements as well as the approvals etc and clarified that it had fulfilled all the requirements for the purpose of claiming deduction under Section 80IB[10] of the Act.

2.5 The petitioner received a notice dated March 23, 2007 on March 29, 2007 under Section 143[2] of the Act. The petitioner *vide* its letter dated April 11, 2007 replied to the said notice informing the Assessing Officer that it had already furnished all the details in response to the notice under Section 142[1] dated December 11, 2006.

2.6 Another notice under Section 143[2] dated June 14, 2007 was received by the petitioner on June 18, 2007. In response to the said notice, the petitioner furnished its reply dated July 22, 2007, wherein, at Point No. 2, the petitioner once again explained the activity carried out by it along with certain annexures showing the funds provided by it for purchase of land to the society.

2.7 The respondent scrutinizing all the details extensively passed the original assessment order dated December 12, 2007 under Section 143[3] of the Act. In the said assessment, he specifically mentioned that the petitioner firm had filed audit report in Form No. 3CB and 3CD and also had filed audit report in Form No. 10CCB for the purpose of claiming deduction under Section 80IB of the Act.

2.8 Subsequently, a notice dated March 16, 2011 under Section 148 of the Act for the Assessment Year 2005-06 was served upon the petitioner on March 18, 2011, asking it to file a return within 30 days of the receipt of the said notice.

2.9 In response to such notice under Section 148 of the Act, the petitioner submitted its reply dated April 12, 2011. In the said reply, the petitioner asked the respondent to treat the original return filed by it as the return filed in response to the notice under Section 148 of the Act. Various other objections were also taken by the petitioner against the said notice given by the respondent under Section 148 of the Act. In the said submission, the petitioner requested that a copy of the reasoned order be given to the petitioner which had not been provided.

2.10 Thereafter, a notice dated July 25, 2011 under Section 143[2] of the Act was served on the petitioner on July 27, 2011, asking the petitioner to attend the office of the respondent. The petitioner replied to the said notice *vide* letter dated August 2, 2011, wherein, the petitioner once again drew attention of the respondent to the letter objecting to reassessment notice and requested the respondent to furnish a copy of the reasons recorded.

2.11 The respondent *vide* letter dated August 4, 2011 furnished the copy of the reasons recorded by him for taking steps for initiating

process of reassessment. The reasoned order is quoted below:

“The assessee who is engaged in the business of real estate has filed its return of income at Rs 20,39,924/- on 22/07/2005. Income is assessed u/s. 143[3] of the Act at Rs. 20,95,530/- on 20.12.2007 after allowing exemption u/s. 80IB of Rs. 3,64,17,127/-.The assessee entered in a development agreement with Mahima [Satellite] Co. Op. Housing Society Ltd. On 07.07.2003. The terms of agreement is 1] the assessee was given possession of the land for construction of housing units as per the plan. 2] The assessee was allowed to enroll prospective buyers as the members on behalf of the society. 3] The assessee was allowed to collect the consideration for land as well as super-structure from the buyers on behalf of the society. 4] The assessee was allowed to retain the consideration received for construction and charge the land cost to the society. In other words, the society was formed for group housing of the members and was supposed to construct and transfer the houses to the members. 5] According to the Development Agreement, since the society had no experience of construction, the assessee was allowed to construct the houses on behalf of the society as per the terms narrated in the agreement according to the approval plan of the society. Further, the land owner is M/s. MAHIMA [Satellite] Co.Op. Housing Society Ltd. The assessee is came into project only after “Development agreement” which is a work contract, entered by it with the land owner. Therefore, it is very much clear that the assessee is not satisfying the conditions laid down in the Section 80IB[10] of the Act.

In view of the above facts, it is very much clear that the land is not on the name of the assessee. The permission of local authority to construct the building is also not on the name of

the assessee. The assessee came into project only with work contract entered with the land owner. Thus, the assessee does not satisfy the conditions laid down u/s. 80IB[10] of the Act and an amount of Rs. 3,64,17,127/- has escaped income of the assessee. In view of the above, I have to reason to believe that the assessee have escaped income, which is subject to tax in the year under consideration.

Permission from the CIT, Ahmedabad-IV, Ahmedabad was obtained vide letter No. CIT-IV/HQ/Approval/U/s.147/2000-11 dtd. 17.06.2010. Issue Notice U/s. 148 of the Income Tax Act."

2.12 The petitioner vide its letter dated August 10, 2011 requested the respondent to dispose of the objections given by it vide letter dated April 12, 2011 before a period of three months. The petitioner also drew attention of the respondent to the decision of the Hon'ble Supreme Court in the case of **GKN Driveshafts [India] Ltd. V. Income Tax Officer and others reported in 259 ITR 19** laying down the law on the point.

2.13 The petitioner received another notice dated November 15, 2011 given by the respondent asking it to furnish the details so that the reassessment proceedings could be decided on merits. The petitioner vide letter dated November 18, 2011 once again drew the attention of the respondent to its previous objections taken vide letter dated April 12, 2011. The petitioner also mentioned the decision of the Supreme Court in the case of GKN Driveshafts [India] Ltd. [supra] and requested that at least 30 days may kindly be granted to

the petitioner in case the objections were not accepted favourably so that the legal remedy could be availed of by the petitioner.

2.14 However, the petitioner received the impugned reassessment order dated December 12, 2011 under Section 143[3] read with Section 147 of the Act, instead of an order disposing of the objections taken by it. Hence this petition.

3. This petition is opposed by the respondent by filing affidavit-in-reply and the defence taken by the respondent may be summed up thus:

3.1 In view of the alternative remedy prescribed in the Act itself, this petition should be rejected.

3.2 After passing of the order of assessment, subsequently it was noticed that the assessee entered into a development agreement with Mahima [Satellite] Co-operative Housing Ltd. on July 7, 2003. According to the terms of the agreement:

- [i] The assessee was given possession of the land for construction of housing units as per the plan.
- [ii] The assessee was allowed to enroll prospective buyers as the members on behalf of the society.
- [iii] The assessee was allowed to collect the consideration for land

as well as super-structure from the buyers on behalf of the society.

- [iv] The assessee was allowed to retain the consideration received for construction and charge the land cost to the society. In other words, the society was formed for group housing of the members and was supposed to construct and transfer the houses to the members.
- [v] According to the development agreement, since the society had no experience of construction, the assessee was allowed to construct the houses on behalf of the society as per the terms narrated in the agreement according to the approved plan of the society. Further, the landowner is M/s. Mahima [Satellite] Co-operative Housing Society Ltd. The assessee had come into the project only after the development agreement, which was a work contract, was entered with the landowner. Therefore, it is very much clear that the assessee had not satisfied the conditions laid down in Section 80IB[10] of the Act. The permission of the local authority to construct the building was also not in the name of the assessee. The assessee came into the project only with work contract entered with the landowner.

3.3 The assessee had not disclosed the correct fact that it was only a work contractor and not a developer and as such, the benefit of the deduction under Section 80IB [10] of the Act was erroneously granted to the petitioner which has resulted in escapement of income

chargeable to tax.

3.4 Further, the Finance Act, 2009 has amended Section 80IB[10] by way of inserting the explanation with retrospective effect from April 1, 2001. By the said Explanation it is clarified that the benefit of the deduction under Section 80IB [10] is not available to any undertaking which executes the housing project as a work contractor awarded by any person [including the Central or State Government]. Accordingly, as per the details on record, it was evident that the assessee did not fulfill the conditions to be eligible for deduction under Section 80IB[10] of the Act. Therefore, the case was reopened under Section 147 of the Act after recording the reasons and obtaining the approval from the Commissioner of Income Tax, Ahmedabad-IV, Ahmedabad. The case was reopened in due time as per Section 149 of the Act.

3.5 The assessee *vide* letter dated April 12, 2011 raised objections to the reopening of assessment. The objections so raised were not acceptable and accordingly, the reassessment had been finalized under Section 143[3] read with Section 147 of the Act.

3.6 The assessee had not disclosed fully and truly all the material facts necessary for its assessment. Therefore, the proviso to Section 147 was applicable. The assessee ought to have disclosed the full and true material facts and as such, it is a fit case of rejection.

4. The assessee has given a rejoinder to the affidavit-in-reply filed by the respondent. In the said rejoinder, the assessee has reiterated the statements made in the petition and in addition to that, it was also pointed out that:

- [a] It had furnished all the documents along with the return including development agreement with Mahima [Satellite] Co-operative Housing Society Ltd. The audit report as prescribed under Section 80IB[10] under the prescribed Form No. 10CCB was also filed with the return.
- [b] A specific query *vide* notice under Section 142[1] at Point No. 14 in the notice asking for details of deduction claimed under Section 80IB[10] from the petitioner was replied *vide* reply dated January 10, 2007 and the development agreement with Mahima [Satellite] Co.Op. Housing Society Ltd. along with all details were once again pointed out to the respondent.
- [c] The respondent incorrectly stated that the petitioner came into the project only after the development agreement, because, in fact, the petitioner had given the first installment for purchase of the land in question even before the existence of the society which is mentioned in the opening para of the development agreement.

- [d] Over and above, the entire chart along with the balance consideration being given by the petitioner to the society and in turn, being paid by the society to the landowner was demonstrated to the respondent at the time of assessment proceedings. Those materials were annexed at pages 100 to 105 of the petition. After considering all the details furnished in reply to the notices on the specific queries during scrutiny assessment, an order of assessment was passed clearly mentioning the audit report in Form No. 3CB and 3CD as well as audit report in Form No. 10CCB. Those reports are required to be filed for the purpose of claiming deduction under Section 80IB [10] in the body of the assessment order.
- [e] The so-called enumeration of the terms of the agreement was made to misguide this Court, inasmuch as, the respondent incorrectly stated that the consideration for the super-structure as well as consideration of the land was collected by the petitioner itself. The consideration for the land was also collected by the petitioner as the society was a debtor to the petitioner as is demonstrated above.
- [f] It was denied that the society was formed for group housing of the members and the petitioner was supposed to construct and transfer the houses to the members, because, in fact, the

petitioner was to enroll the members on their making purchase from the petitioner and the members were only to be enrolled at the instance of the petitioner.

[g] It was also denied that the petitioner was constructing the houses on behalf of the society, because, the petitioner had entered into housing construction and development agreement in accordance with which the petitioner had all the rights of construction and the petitioner was not constructing on behalf of the society. The petitioner is, therefore, a developer and not work contractor as the risk and reward under the development agreement is entirely on the petitioner.

5. Mr. M.J. Shah, learned advocate appearing on behalf of the petitioner, laboriously contended before us that the respondent acted without jurisdiction in initiating the reassessment proceedings as well as passing the reassessment order, as the conditions precedent for invoking the jurisdiction for reassessment were absent. According to Mr. Shah, even when the petitioner raised objections against the proposed reassessment and asked for disposing of such objections, the respondent failed to dispose of such objection in spite of repeated reminders and ultimately, passed the reassessment order. Thus, according to Mr. Shah, this Court should set aside the order of reassessment and the notice of reassessment itself for want of jurisdiction on the part of the respondent authority.

6. Mrs. Mauna M. Bhatt, the learned counsel appearing on behalf of the Revenue, has, on the other hand, opposed the aforesaid contentions advanced on behalf of the petitioner and has submitted that this writ-petition should be dismissed as the petitioner has the alternative remedy of appeal against the order of reassessment. She points out that the petitioner has already availed of such remedy by filing such an appeal. Mrs. Bhatt further contends that in the case before us, the petitioner did not disclose the true and correct facts and thus, the Assessing Officer, in view of the existence of tangible materials on record decided to reopen the assessment. In support of her contention, Mrs. Bhatt has relied upon the following decisions:

- [1] ISPAT INDUSTRIES LTD. VS. DEPUTY COMMISSIONER OF INCOME TAX reported in 253 ITR 274
- [2] TOLIN RUBBERS (P) LTD, VS. ASSISTANT COMMISSIONER OF INCOME TAX reported in 264 ITR 439
- [3] Dishman Pharmaceuticals and Chemicals Limited. V. Deputy Commissioner of Income Tax [OSD], reported in 2011 [2] GLH 699.

Mrs. Bhatt, thus, prays for dismissal of the writ-application.

7. First of all, we propose to dispose of the preliminary objection raised by Mrs. Bhatt as to maintainability of the present application

under Article 226 of the Constitution of India in view of the existence of alternative remedy, which, according to her, the petitioner has already availed of.

8. In this case, the present application was filed on January 10, 2012 in which order of reassessment dated December 11, 2011 was very much challenged. After filing of the present writ-application, the writ-petitioner also preferred an appeal against the order of reassessment on January 21, 2012.

9. Therefore, when the writ-application was filed and entertained by a Division Bench of this Court on January 11, 2012, no appeal against the order of assessment had been filed. Subsequently, during the pendency of the present writ-application, it appears that the assessee had preferred regular appeal against the order of reassessment.

10. Therefore, the question before us is whether in view of such subsequent event of filing of appeal by the petitioner, this writ-application should be dismissed.

11. It is now settled law that if a litigant has concurrent remedies against the selfsame order, it can avail of the both without prejudice to his rights and contentions made therein unless there is a specific bar created by statute in the matter of availing both the remedies. For

instance, under the Code of Civil Procedure, against a judgment and decree, a party can file an application for review before the selfsame court on limited grounds and also file regular appeal before the higher forum the scope of which is much wider. However, the law provides that once the appeal is filed, thereafter, the application for review cannot be filed, whereas during the pendency of the application for review, if the appeal is subsequently filed, for that reason, the review application filed before filing of the appeal does not become infructuous. However, if the appeal is disposed of on merit before disposal of the application for review, the application for review will become infructuous.

12. Similarly, against an *exparte* decree, an aggrieved defendant can prefer both regular appeal under Section 96 and an application for setting aside *exparte* decree by taking recourse to Order 9 Rule 13 of the Code of Civil Procedure apart from his remedy of review. However, if the appeal is disposed of on merit where even the grounds accessible under Section 114 or Order 9 Rule 13 are also available by taking aid of Section 105, the pending applications for review or for setting aside *exparte* decree would become infructuous. (See *Bhanu Kumar Jain v. Archana Kumar and another* reported in AIR 2005 SC 626 for detail discussion).

13. Therefore, in the case before us, the petitioner filed the present application under Article 226 of the Constitution on the allegation

that he is entitled to the benefit of law laid down by the Supreme Court in case **of CALCUTTA DISCOUNT COMPANY LTD. V. I.T.O., reported in 41 ITR 191**. The petitioner has also challenged the consequent order of reassessment on the ground of violation of law laid down by the Supreme Court in the case of GKN Driveshafts [India] Ltd. [supra].

14. If the petitioner can convince this Court that the case comes within the purview of the above two decisions, the petitioner would be entitled to the remedy under the law of the land laid down by the Supreme Court. On the other hand, if the petitioner fails to convince this Court on the above ground, for that reason, the petitioner should not be deprived of the right of challenging the order of reassessment on merit before the regular appellate forum. However, the points decided in this court will not be available to the Assessee in the Regular Appeal. Similarly, by mere subsequent filing of the appeal, the constitutional right of the petitioner to challenge the notice of reassessment on the ground of non-existence of conditions precedent for exercise of such power, which he has already invoked, cannot be taken away. The scope of regular appeal is much wider than the one with which we are concerned as our limited inquiry is only to the extent of investigation pointed out by the Supreme Court in those decisions.

15. Therefore, mere filing of subsequent appeal under the Act

against the reassessment on merit cannot stand in the way of the petitioner in getting the benefit of moving a writ-application on the limited questions as pointed out by the Supreme Court in those decisions. Moreover, the question of existence of alternative remedy is a factor, which is important at the time of entertaining the application. But such question loses its importance once the High Court has entertained the writ-application and invited the respondent to file affidavit and the respondent has already filed such affidavit. We, therefore, overrule the preliminary objection raised by Mrs. Bhatt regarding the maintainability of this application.

16. On merit, we find that in the original assessment proceedings, when specific queries were made by issuing notice under Section 142 of the Act on the question of getting the benefit under Section 80 IB(10) of the Act, the petitioner specifically answered all the queries. Earlier, at the time of filing of original return, it complied with all the requirements of law for getting the benefit of Section 80IB[10] of the Act. In spite of existence of all those materials, the Assessing Officer decided to grant the above relief.

17. Therefore, if from the selfsame materials, the Assessing Officer forms a second opinion and reopens the assessment merely on the ground that on second thought, a different view is possible, such fact does not authorize him to reopen the assessment within the purview of Section 147/148 of the Act. In this connection, we may profitably

refer to the following observations made by the Supreme Court in the case of **CIT V. KELVINATOR INDIA, reported in [2010] 2 SCC 723**, where the Court made the following observation on the scope of Section 147 of the Act:

“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 fulfilment 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 from 1-4-1989), 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 fulfilment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.***

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).

18. After applying the aforesaid principle to the facts of the present case, we are convinced that this is a case where the Assessing Officer has reopened the proceeding merely on the ground that from the material available, the view earlier adopted by him was erroneous one. Thus, such fact cannot be a ground for reassessment.

19. Apart from the aforesaid fact, we find that Mr. Shah was justified in contending that in case of GKN Driveshafts [India] Ltd. [supra], the Supreme Court has clearly laid down the law that the Assessing Officer is bound to disclose the reason of reassessment within reasonable time and on receipt of the reasons, the assessee is entitled to raise objection and if any such objection is filed, the same must be disposed of by a speaking order before proceeding to reassess in terms of the notice earlier given.

20. In the case before us, in spite of repeated reminders by the

assessee even pointing out the above law laid down by the Supreme Court, the Assessing Officer failed to dispose of the said objections and instead of that, straightaway passed the order of reassessment.

21. Thus, we find that the Assessing Officer acted without jurisdiction in initiating the proceedings for reassessment in spite of non-existence of the required conditions specified under the Act and even did not care to follow the norms laid down by the Supreme Court in the above decision by not disposing of the objections before passing the order of reassessment.

22. We now propose to deal with the decisions cited by Mrs. Bhatt.

23. In the case of Ispat Industries Ltd. (supra), a learned Single Judge of the Calcutta High Court was dealing with the writ-application under Article 226 of the Constitution of India, where, the writ-petitioner challenged the notices issued under Sections 163 and 148 of the Act, as illegal. The first point taken by the Revenue in the said case was that Calcutta High Court had no territorial jurisdiction as the notice was issued by the respondent no.1 who is a Revenue Officer of Mumbai. In such a case, a learned Single Judge of the Calcutta High Court held that the notice having been served on the writ-petitioner at Mumbai under Section 163 of the Act whereby the petitioner had been held as an agent of a foreign firm, and furthermore, the respondent authorities having come to a conclusion and passed an

order at Mumbai, the appeal from the said order was required to be filed at Mumbai before the appellate authority. Therefore, according to the learned Single Judge, no integral part of cause of action had arisen within the jurisdiction of Calcutta High Court in respect of the order passed by the authority under Section 163 of the Act.

24. As the assessee had challenged the notice under Section 148 of the Act, according to the said learned Single Judge, the notice had been served on the petitioner to file return by respondent no.1 who had his office at Mumbai and against the order, if any, passed by the said authority, the appeal against such order would also be required to be filed at Mumbai by the petitioner as agent under Section 148 of the Act. Accordingly, the learned Single Judge was of the view that no integral part of cause of action to challenge the notice had arisen within the jurisdiction of the Calcutta High Court.

25. After deciding the aforesaid question of territorial jurisdiction on merit, His Lordship proceeded to decide whether alternative remedy available should prevent the Court from entertaining the application.

26. After arriving at the finding that the court had no territorial jurisdiction over the subject-matter, His Lordship in the last paragraph of the judgment further held that in view of the alternative remedy of appeal, His Lordship was not inclined to probe into the matter as the department had issued the notice under Section 148 of the Act after

recording reasons there.

27. In our opinion, His Lordship having specifically found that the court had no territorial jurisdiction, the other finding was regarding alternative remedy was finding of a court having no jurisdiction and thus, cannot be treated as precedent. Moreover, the said decision cannot be put forward as a precedent to the facts of the present case where we have specifically found that conditions precedent for exercising jurisdiction under Section 148 of the Act are not in existence. Therefore, the said decision does not help Mrs. Bhatt in any manner.

28. In the case of ***Tolin Rubbers [P.] Ltd. v/ Assistant Commissioner of Income-tax, reported in [2993] 264 ITR 0439,*** a learned Single Judge of Kerala High Court was considering a writ-application under Article 226 of the Constitution of India, challenging the order passed by the Assessing Authority under Section 147 read with Section 143 of the Act. The main grievance of the writ-petitioner in that case was that the impugned order had been passed in violation of the principles of natural justice and notices were issued under Section 148 of the Act based on the belief that certain income had escaped assessment. According to the petitioner, notwithstanding repeated requests, reasons so recorded were not communicated to the petitioner. It was further contended that the assessment orders were passed relying on certain material unearthed by the Central

Excise authority, but those materials were not furnished to the petitioner by the Assessing Officer.

29. While dealing with such a case, the learned Single Judge, by relying upon the decision of the Supreme Court in the case of **Mafatlal Industries Ltd. v. Union of India, reported in [1997] 5 SCC 536**, where the Supreme Court relying upon the observation of the House of Lords in the case of *Anisminic Ltd. v. Foreign Compensation Commission*, reported in [1969] All England Reports, 208, held that the petitioner had efficacious alternative remedy.

30. In the case of *Mafatlal Industries Ltd. v. Union of India* (supra), the majority laid down the following proposition of law about alternative remedy in the facts of that case:

“Where a refund of tax/duty is claimed on the ground that it has been collected from the petitioner/plaintiff — whether before the commencement of the Central Excises and Customs Laws (Amendment) Act, 1991 or thereafter — by misinterpreting or misapplying the provisions of the Central Excises and Salt Act, 1944 read with Central Excise Tariff Act, 1985 or Customs Act, 1962 read with Customs Tariff Act or by misinterpreting or misapplying any of the rules, regulations or notifications issued under the said enactments, such a claim has necessarily to be preferred under and in accordance with the provisions of the respective enactments before the authorities specified thereunder and within the period of limitation prescribed therein. No suit is maintainable in that behalf. While the juris-

diction of the High Courts under Article 226 — and of this Court under Article 32 — cannot be circumscribed by the provisions of the said enactments, they will certainly have due regard to the legislative intent evidenced by the provisions of the said Acts and would exercise their jurisdiction consistent with the provisions of the Act. The writ petition will be considered and disposed of in the light of and in accordance with the provisions of Section 11-B. This is for the reason that the power under Article 226 has to be exercised to effectuate the rule of law and not for abrogating it.”

31. From the above observation it is clear that the Supreme Court in the case of *Mafatlal Industries Ltd. v. Union of India* (supra), has specifically recognized the power of this court to entertain a writ-application by pointing out that such power cannot be circumscribed by the provisions of any enactment but while exercising such power, the writ-court will certainly have due regard to the legislative intent evidenced by the provisions of the concerned statute and would exercise their jurisdiction consistent with the provisions of the Act. Thus, in a given case, if the statutory authority exercises its power even in the absence of the conditions recognized by the Statutory provisions, a writ-court can definitely interfere to avoid prolonged alternative remedy.

32. Lastly, in the case of ***Dishman Pharmaceuticals and Chemicals Limited. V. Deputy Commissioner of Income Tax [OSD], reported in 2011 [2] G.L.H. 699***, the writ-petitioner challenged the notice dated March 24, 2010 issued by the Deputy

Commissioner of Income Tax for reassessment of income and to file return of income.

33. In the facts of the said case, the Division Bench on consideration of the entire materials came to the conclusion that reasons recorded were communicated to the assessee and the authority concerned sufficiently and clearly laid down the foundation of reopening of assessment on the ground that the assessee had not truly and fully disclosed all relevant material. Accordingly, the Division Bench dismissed the application not on the ground of alternative remedy but on merit.

34. While dealing with the said case, the Division Bench pointed out that from the return filed and the documents annexed to the return, it could not be ascertained what was the holding of the assessee company in terms of voting power in a company named SDBL. According to the Division Bench, if upon further inquiry by Assessing Officer, such details could be gathered and the nature of payment received by the petitioner from SDBL could be ascertained to find out whether the same should be treated as “deemed dividend” under Section 2[22][e] of the Act or not, the same, would not satisfy the requirement of “fully and truly disclosing all material facts necessary for assessment”.

35. In the case before us, the facts are totally different where we

have already pointed out that the Assessing Officer does not want to rely upon any new material, but from the selfsame materials produced earlier by the assessee, which were fully disclosed in accordance with law, he wants to come to a different conclusion. Therefore, none of the decisions cited by Mrs. Bhatt helps the Revenue in any way.

36. Since we have decided to quash the notice under Section 148 of the Act itself on the ground of non-existence of valid ground as disclosed in the reasons, we quash initiation of proceedings itself and consequently, the subsequent order of reassessment is also quashed.

37. Let there be an order in terms of the prayer 8[B] of the writ-application. No costs.

[BHASKAR BHATTACHARYA, ACTING CJ]

[J.B. PARDIWALA, J.]

Pirzada/-