IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 17.03.2020

DELIVERED ON : 07 .05.2020

CORAM:

THE HON'BLE MR. JUSTICE M.SATHYANARAYANAN
AND
THE HON'BLE MR.JUSTICE ABDUL QUDDHOSE

TCA.Nos.66&67/2018

Principal Commissioner of Income Tax-6,
No.121, Nungambakkam High Road
Chennai-34. .. Appellant in both the Appeals

Vs.

M/s.SKI Retail Capital Ltd
No.4, Mookambika Complex
Lady Desika Road,
Mylapore, Chennai 600 004. .. Respondent in both the Appeals

Common Prayer: Tax Case Appeals preferred under Section 260A of the Income Tax Act, 1961, against the order of the Income Tax Appellate Tribunal, Madras "C" Bench, dated 10.08.2017 in ITA Nos.2276/Mds/2016 and in C.O.No.129/Mds/2016 in ITA.No.2276/Mds/2016.

For Appellant in both the Appeals : Mr.J.Narayanaswamy, Senior Standing Counsel

For Respondent in both the Appeals : Mr.R.Sivaraman

COMMON JUDGMENT

M.SATHYANARAYANAN, J.

The Tax Case Appeals are preferred against the common order dated 10.08.2017 made in ITA.No.2276/Mds/2016 and C.O.No.129/Mds/2016 pertains to the Assessment Year 2007-2008, by the Revenue.

2. Facts in brief relevant and necessary for the disposal of these appeals are as follows:

2.1. Income Tax Officer, Company Ward VI(1), Chennai / Assessing Officer, vide Assessment Order dated 25.11.2011 pertains to the Assessment Year 2007-08, dealt with the Return of Income filed by the respondent Company on 31.10.2007 in and by which total income of Rs.23,92,140/- was admitted. The return of income was processed under Section 143(1) of the Income Tax Act, 1961 [in short "IT Act"] on 06.03.2009.

2.2. The case was reopened under Section 148 of the IT Act on 26.08.2010 by issuance of notice and in response to the same, the respondent/assessee has sent a letter dated 14.09.2010 stating that the Return of Income already filed by him be treated as Return filed by him in

compliance of Notice issued under Section 147 of the IT Act dated 26.08.2010.

2.3. Personal hearing was afforded and details were also called for from time to time. The Assessing Officer finalized the assessment under Section 143(3) r/w. Section 147 of IT Act as follows:

Total Income Computation:		Rs.
Total Income admitted		23,92,137
Add:1.Disallowance u/s 14A	14,602	
2.Depreciation	10,979	
3.Donation	100	25,681
Total Income determined		24,17,818
Tax, S.C. & E.C.		8,13,837
Less : TDS		16,16,214
Refund		8,02,377
Add: 244-A Interest		96,285
Total Refund		8,98,662
Less: Refund already issued		9,08,420
Balance Payable		9,758

2.4. The Assessing Officer subsequently had noticed certain income chargeable to tax has escaped assessment for the Assessment Year 2007-2008 and accordingly, the said assessment was reopened with the approval

of the Commissioner of Income Tax [CIT]- VI and notice under Section 148 of IT Act was issued on 31.03.2014. The respondent/assessee, in response to the said notice, filed Return of Income on 18.04.2014 and it was followed by a notice under Section 143(2) of the IT Act and that apart, the details concerning the assessment were also called for.

2.5. Authorized Representative / one of the officials of the respondent company appeared and furnished the information called for and the Books of Accounts and Bank Account Statements were produced and verified. The Assessing Officer, after taking note of the materials as well as the explanation offered by the Assessee, had found that Road Safety Club Private Limited (RSC) is a sister concern of the assessee company and they were doing services to the respondent company / SKI Retail Capital Ltd., in terms of Insurance Marketing etc., and advances were paid by RSC to SKI towards cost of services.

2.6. The Assessing Officer also noted by looking into the share holding pattern of both the companies and found that one Mr.V.Rajagopalan is holding substantial interest in both the companies by holding 28% and 29.996% of shares and as such, found that the provisions of Section 2(22)(e)

of the IT Act is squarely applicable in respect of transactions involving both the companies.

2.7. The assessee / respondent's authorized representative was asked to show cause as to why the loan amount of Rs.10,70,01,891/- received by the assessee from RSC should not be treated as deemed dividend to the extent of accumulated profits in the books of RSC or else treat the loans as income of the assessee / respondent company? The Authorized Representative of the respondent company has submitted a written representation dated 27.03.2015. The Assessing Officer, after considering and scrutinizing the materials, had treated the credit balance as on 31.03.2007 amounting to Rs.5,30,99,960/- as deemed dividend in the hands of the respondent/company and completed the scrutiny assessment, vide order dated 31.03.2015 and it is relevant to extract the same:

Total Income as per Order dt.25.11.2011	Rs. 24,17,818.00
Add: Deemed Dividend U/s.2(22)(e)	Rs.2,29,00,539.00
Assessed Total Income	Rs.2,53,18,357.00
Balance Tax Payable	**Rs.1,09,30,440.00**

2.8. The respondent/assessee, aggrieved by the said Assessment

Order, filed an appeal in ITA.No.55/CIT(A)-15/15-16 dated 25.05.2016 before the Commissioner of Income Tax (Appeals) -15, Chennai-600 034. The appellant/assessee before the CIT (Appeals) contended among other things that the notice under Section 148 of the IT Act was issued after 4 years from the Assessment Order despite the fact that there was no failure on the part of the assessee to furnish truly and fully all material facts necessary for assessment. The appellant/assessee also took a stand that reopening of the assessment is purely on account of audit objections for which the Assessing Officer himself sent a reply that there is no justification for raising objections and the assessment can be reopened only if the Assessing Officer is in possession of tangible materials/facts on the basis of which, he had reason to believe that income had escaped assessment. The appellant/assessee also contended as to the sustainability of addition of Rs.2,29,00,539/- as deemed dividend under Section 2(22)(e) of IT Act and that apart, also took a stand that the credit balance in the accounts of RSC cannot be treated as deemed dividend under Section 2(22)(e) of IT Act. The Appellate Authority had allowed the appeal partly, vide order dated 25.05.2016 by directing the deletion of Rs.2,29,00,530/- towards deemed dividend.

2.9. The Revenue, aggrieved by the order of CIT in partly allowing the appeal filed by the assessee and dismissal of their grounds pertaining to the assessment, filed ITA No.2276/Mds/2016 before the Income Tax Appellate Tribunal 'C' Bench, Chennai [ITAT], wherein the assessee/respondent filed cross objection in C.O.No.129/Mds/2016. ITAT, Chennai, vide impugned common order dated 10.08.2017, taking note of the fact that there is an audit objection, for which the Assessing Officer, vide response dated 04.03.2014, had given reasons for dropping audit objections and therefore, it is obvious that the Assessing Officer, after applying his mind, found that there is no escapement of income to assessment and subsequently, issued the notice under Section 148 of IT Act for reopening of assessment.

2.10. The Tribunal had recorded a finding that the Assessing Officer has not independently satisfied himself about the escapement of income and further found that in the absence of any material, is of the considered opinion that the reopening of assessment is not justified and accordingly, quashed the order of the Assessing Officer. The Tribunal, in the light of the decision taken in the cross-objection filed by the assessee, found that it is

not necessary to go into the merits of the appeal filed by the Revenue.

2.11. The Revenue, aggrieved by the dismissal of the appeal filed by them and allowing of the cross-objection filed by the assessee, vide common order dated 10.08.2017 made in ITA.No.2276/Mds/2016 and C.O.No.129/Mds/2016, has filed these appeals.

3. The Tax Case Appeals were admitted on 20.03.2018 on the following Common Substantial Question of Law:-

> *"Whether assessment can be reopened under Section 147 of the Income Tax Act, 1961, on the basis of audit objection pointing out factual omissions in the original assessment order?"*

4. Mr.J.Narayanaswamy, learned Senior Standing Counsel assisted by Mr.T.R.Senthil Kumar, learned counsel appearing for the Revenue made the following submissions:

- In the audit objection, it was pointed out that the assessee debited only the expenditure incurred such as Salary etc., without any profit /

commission and it was only a system/colourable device adopted by the assessee to reduce the tax liability, for which the balance amount of Rs.6,01,84,164/- is to be treated as Net Profit and it had to be taxed under Section 69 of the IT Act.

➔ The Audit Party has also considered the reply submitted by the Assessing Officer and found that RSC is making reimbursement for expenses incurred by the assessee company year after year and if that is so, RSC would have reimbursed the exact expenses incurred by the respondent/assessee and not any additional amount year after year and that apart, RSC did not make payment for rendering services and the entire amount was required to be brought to tax and therefore, the balance amount of Rs.6,01,84,164/- is required to be brought to tax and reiterated the said fact.

➔ The Assessing Officer had submitted his response dated 04.03.2014 reiterating their earlier stand for which there was a communication dated 20.03.2014 from the Deputy Director (DT) to the Officer of the CIT, Chennai (VI), vide letter dated 03.04.2014. The Assessing Officer, has submitted his response dated 10.04.2014 stating among

other things that the assumption that there is no agreement between the assessee company and RSC is not correct and it will not be possible to tax the advance received as a revenue receipt even without the service having been rendered.

➔ The Deputy Director, DTI has sent a reply for which Mr.K.Krishna Kumar, Income Tax Officer, Corporate Ward -6(3), Chennai-34, has sent his response dated 30.01.2015 through proper channel stating among other things as to the justification of the Assessment Order and requested for dropping of audit objection for all the Assessment Years viz., 2007-08 to 2010-11.

➔ In the Assessment Order dated 31.03.2015, the Assessing Officer, on an independent application of mind, had given cogent reasons as to the credit balance of Rs.5,30,00,960/- in the account of RSC as on 31.03.2007 as deemed income and the audit objections pointed out did not dealt with the said issue at all and as such, reopening of the case on factual error pointed out by the Audit Party is also permissible under law.

- In sum and substance, it is the submission of the learned Senior Standing Counsel appearing for the appellant that in the light of the points urged, the Substantial Question of Law raised in this appeal is to be answered positively in favour of the appellant.

The learned Senior Standing Counsel appearing for the appellant, in support of his submissions, has placed reliance upon the judgment rendered by the Hon'ble Apex Court in ***Commissioner of Income-Tax v. P.V.S.Beedies (P). Ltd.[(1999) 237 ITR 13 (SC)]***.

5. *Per contra*, Mr.R.Sivaraman, learned counsel appearing for the respondent/assessee/company made the following submissions:

- The Assessing Officer, in response to the audit objections, reiterated the grounds for completing the assessment and in fact, response to the audit objections dated 30.01.2015 was submitted by Mr.S.Krishna Kumar, ITO, Corporate Ward -6(3), Chennai-34, but quite contrary to the said stand had passed the re-assessment order dated 31.03.2015 under Section 143(3) read with 147 of the IT Act for the Assessment Year 2007-2007 and it virtually amounts to change of opinion and it

is totally impermissible under Law.

- ➔ It is not even the case of the Assessing Officer that the respondent/assessee had failed to disclose truly and fully the materials facts necessary for assessment and in the absence of any such reason, the notice for reopening of assessment under Section 143(3) r/w. 147 of the IT Act cannot be recorded as a valid material.

- ➔ Admittedly, notice under Section 148 of IT Act came to be issued after 4 years from the end of the Assessment Year and the Assessing Officer has also failed to furnish reasons for issuance of notice under Section 148 and only after the representation was submitted, reasons were furnished that too after the completion of the assessment.

- ➔ As regards the deemed dividend, the credit balance in the account of RSC cannot be treated as deemed dividend under Section 2(22)(e) of the IT Act for the reason that RSC had enlisted the services of the assessee for the purpose of selling road safety equipments which are basically insurance products to promote road safety and the said

amount has been advanced to the assessee without any interest and debited to RSC account and the said arrangement was supported by an agreement dated 01.04.2005 and since it is in the nature of fresh advance for the purpose of commercial transaction, the said advance do not attract Section 2(22)(e) of the said Act and the said aspect was also considered by CIT (Appeals) and a direction was given to delete the said addition.

The learned counsel appearing for the respondent/assessee, in support of his submissions, has placed reliance upon the following decisions:

(i) Judgment dated 21.03.2017 made in Civil Appeal No.5390 of 2007 [M/s.Larsen & Toubro Ltd. v. State of Jharkhand and Ors.] ;

(ii) ICICI Home Finance co. Ltd. v. Assistant Commissioner of Income Tax [(2012) 25 taxmann.com 241 (Bom.)]

(iii) Adani Infrastructure & Developers (P.) Ltd. v. Assistant Commissioner of Income Tax [(2019) 101 taxmann.com 256 (Gujarat)]

Attention of this Court was also invited to Instruction No.9/2006 dated 07.11.2006 issued by the Central Board of Direct Taxes (CBDT), New Delhi and modification of the instructions No.9/2009 dated 17.03.2016

issued by CBDT, New Delhi and Circular No.19/2017 issued by CBDT in F.No.279/Misc./140/2015/ITJ dated 12.06.2017.

6. This Court has carefully considered the arguments advanced on either side and also perused and considered the materials placed as well as the decisions relied on either side.

7. In ***Income-Tax Officer, I Ward, Distt. VI, Calcutta and Others v. Lakshmani Mewal Das [(1976) Vol. 103 ITR 437 (SC)],*** quashment of the notice issued under Section 148 of IT Act came up for consideration and a perusal of the said judgment would disclose that the respondent/assessee made a challenge to the notice issued under Section 148 of the IT Act before the Calcutta High Court and it was referred to a Full Bench of Calcutta High Court reported in ***VI [1975] 99 ITR 296 [FB]***, which had quashed the said notice and therefore, Revenue preferred a Special Leave Petition, which was entertained and converted as Civil Appeal. The Hon'ble Supreme Court of India, having taken note of Sections 147 and 148 of the IT Act, 1961 and Section 34(1)(a) and (b) of the Income Tax Act, 1922, observed in Paragraph 445 as follows:

"It would appear from the perusal of the provisions

reproduced above that two conditions have to be satisfied before an Income-tax Officer acquires jurisdiction to issue notice under section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year, viz., [1] the Income-tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and [2] he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee [a] to make a return under section 139 for the assessment year to the Income-tax Officer, or [b] to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must co-exist in order to confer jurisdiction on the Income-tax Officer. It is also imperative for the Income-tax Officer to record his reasons before initiating proceedings as required by section 148[2]. Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax Officer with regard to the inference which he should drawn from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.

The grounds or reasons which lead to the formation of the belief contemplated by section 147[a] of the Act must have a material bearing on the question of escapement of

income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the Court to investigate. The sufficiency of the grounds which induce the Income-tax Officer to act is, therefore, not a justifiable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of the reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reasons must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a court of law. [See observations of this Court in the cases of ***Calcutta Discount Co.Ltd Vs. Income-tax Officer [1961] 41 ITR 191 [SC]*** *and* ***S.Narayanappa V. Commissioner of Income Tax [1967] 63 ITR 219 [SC],*** *while dealing with the corresponding provisions of the Indian Income Tax Act, 1922].”*

8. In ***New Excelsior Theatre Pvt. Ltd. v. M.B.Naik, Income Tax Officer and Others [1990 Vol.185 ITR 159 (Bom.)]***, the Writ Court while quashing the notice issued under Section 147(a) of the IT Act has held that the condition for reopening of assessment was that formation of belief that income had escaped assessment must be by reason of either the assessee's

omission to file a return of income or non-disclosure of full and material facts necessary for assessment and having taken note of the fact that the assessee had furnished full particulars, had quashed the notice.

9. In ***Commissioner of Income-Tax v. Akbarali Jummabhai [1992 Vol.198 ITR 69]***, Gujarat High Court had considered the reference made by ITAT under Section 256(2) of the IT Act for answering the following Questions of Law:

> *"1. Whether, on the facts and in the circumstances of the case, the Income Tax Appellate Tribunal was justified in law in holding that the reopening of assessment under Section 147(a) of the Income Tax Act, 1961, was not justified?*
>
> *2. Whether, on the facts and in the circumstances of the case, it can be said that the assessee had disclosed fully and truly all the material necessary for the assessment and, therefore, the reassessment under Section 147(a) of the Income Tax Act, 1961, was not justified?*

The Assessing Officer therein had passed an Assessment Order and thereby, notice under Section 148 was issued on the assessee for the reason that the income returned was understated compared to the assets held by the

assessee and it was overruled and passed revised order of assessment and the assessee therein filed an appeal and the Appellate Assistant Commissioner allowed the appeal of the assessee holding that the Income Tax Officer was not within his power and jurisdiction to invoke Section 147A of the IT Act and the appeal filed by the revenue before the ITAT had ended in dismissal. It is relevant to extract the observations made in Page No.75 of the said judgment:

> *"...Two distinct conditions precedent are required to be fulfilled before the Assessing Officer can exercise jurisdiction under clause [a] of section 147, namely, [i] he must have reason to believe that income has escaped assessment, and [ii] he must have reason to believe that such escapement is by reason of omission or failure on the part of the assessee to make a return or to disclose fully and truly all the material facts necessary for his assessment for the relevant years.*
>
> *The next question which is required to be examined in order to arrive at a proper determination of the questions referred to us is the question as to what is meant by the expression "material facts" which it is the duty of the assessee to disclose before the Income Tax Officer at the time of assessment. In the case of* ***Calcutta Discount Co.Ltd V. ITO [1961] 41 ITR 191,*** *the Supreme Court had occasion to consider this very provision. As per the said decision of the Supreme Court, the "material facts" which are required to be disclosed by the assessee at the time of his assessment are "primary facts" mainly necessary for the purpose of his assessment. The duty of the assessee is to disclose only primary facts and it is for the Assessing Officer to decide what inferences of facts can be reasonably drawn from the primary facts, and*

what legal inferences must ultimately be drawn from the primary facts and other facts inferred from them. The assessee is not bound to tell the assessing authority what inferences, whether of fact or law, should be drawn and his failure to communicate to the assessing authority the proper and correct inferences to be drawn from the primary facts cannot be regarded as failure to disclose "material facts". The assessee is required to disclose only primary facts and the primary facts to be disclosed by him must be material or relevant to the decision of the question before the assessing authority so that the non-disclosure of such facts would have a material bearing on the question of escapement of income from assessment. If the assessee has disclosed the primary facts which are material and necessary for the purpose of his assessment, his assessment cannot be reopened by the Income-tax Officer by resorting to section 147[a], but, if there is omission or failure on the part of the assessee to disclose any material or relevant primary facts and, in consequence, there is escapement of income from assessment, such income can be got taxed by the Revenue by reopening the assessment under section 147[a].

.....

From the aforesaid observations in the case before the Supreme Court, it becomes clear that to confer jurisdiction under section 147[a] to issue notice in respect of an assessment beyond the period of four years from the end of the relevant year, two conditions have to be satisfied. The first is that the Income Tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and the second is that he must also have reason to believe that such escapement has taken place by reason of either [i]omission or failure on the part of the assessee to make a return of his income under section 139, or [ii] omission on the part of the assessee to disclose fully and truly all the material facts necessary for his assessment for that year. Both these conditions are

conditions precedent to be fulfilled for the Income Tax officer to have jurisdiction to issue notice for the assessment or reassessment beyond the period of four years from the end of the assessment year."

The High Court of Gujarat had found that the Tribunal as well as the Appellate Tribunal were justified in holding that the Assessing Officer was not justified in exercising powers under Section 147(a) of the IT Act and accordingly, answered the Questions of Law in favour of the assessee and against the Revenue.

10. In ***United Electrical Co. P. Ltd. v. Commissioner of Income-Tax and Others [2002 Vol.258 ITR 317 (Delhi)]***, a writ petition was filed before the Delhi High Court challenging the notice dated 30.04.2002 issued under Section 148 of the IT Act. Hon'ble Mr.Justice D.K.Jain [As the Hon'ble Judge then was] had spoken for the Bench and it is relevant to extract the following:

"11. Section 147 of the Act authorises the Assessing Officer to assess or re-assess income chargeable to tax, if he has reason to believe that the said income for any assessment year has escaped assessment. The power conferred under the said section, particularly after 1st April, 1989, is no doubt very wide but it cannot be said to be plenary. True, the amended provisions of Section 147 are contextually different from the pre-1989 provision, inasmuch as the cumulative conditions

spelt out in Clause (a) of old Section 147 namely, that income chargeable to tax had escaped assessment by reason of: (i) omission or failure on the part of the assessee to make a return of his income under Section 139 of the Act for any assessment year or (ii) failure to disclose fully and truly all material facts necessary for his assessment for that year, are not present in the new main section but the crucial expression "reason to believe" still exists in the new provision. The amended Section 147 provides that where the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may apply the provisions of Sections 148 to 153 and assess or re-assess the income which has escaped assessment. For the present purpose, only Sections 148 and 151 are relevant. Cub-section (2) of Section 148 of the Act mandates that before issuing notice to the assessee under Subsection (1), for filing the return, the Assessing Officer shall record his reasons for doing so. Therefore, formation of reason to believe and recording of reasons are imperative before the Assessing Officer can re-open the completed assessment. Proviso to Sub-section (1) of Section 151 of the Act provides that after the expiry of four years from the end of the relevant assessment year, notice under Section 148 shall not be issued unless the Chief Commissioner or the Commissioner, as the case may be, is satisfied, on the reasons recorded by the Assessing Officer concerned, that it is a fit case for the issue of such notice. These are some in-built safeguards to prevent arbitrary exercise of power by an Assessing Officer to fiddle with the completed assessment.

12. In *Bawa Abhai Singh* v. *Deputy Commissioner of Income-tax*, (2002) 253 ITR 83, a Division Bench of this Court, speaking through Chief Justice Arijit Pasayat (as his Lordship then was), has said that the crucial expression "reason to believe" predicates that the Assessing Officer must hold a belief…….by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which the belief is founded and not merely a belief in the existence of reasons, including the belief. Such a belief may not be based merely on reasons but it must be founded on information.

13. In *Ganga Saran & Sons P. Ltd.* v. *Income Tax Officer*, (1981) 1.30 ITR 1 SC, their Lordships of the Supreme

Court, *inter alia*, observed that the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the Assessing Officer should not be irrational or arbitrary. Alternatively put, it must be reasonable and must be based on reasons which are material.

14. Thus, existence of tangible material, for the formation of opinion is a prerequisite for initiation of action under Section 147 of the Act. Therefore, what Section 147 of the Act postulates is that the Assessing Officer must have reason to believe that income has escaped assessment. There should be facts before hi??? that reasonably give rise to the belief, but the facts on the basis of which he entertains the belief need not at this stage be rebuttably conclusive to support his tentative conclusion. In case of challenge, it is open to the Court to examine whether there was material before the Assessing Officer, having rational connection or relevant bearing to the formation of the belief that is claimed to have been held at the time when he issued the notice. But the Court cannot for the purpose of ascertaining validity of the notice examine the sufficiency of the reasons for the belief (See: *S. Narayanappa* v. *Commissioner of Income-tax, Bangalore*, (1967) 63 ITR 219).

15. Explaining the scope of the expression "information", in the background of Section 132 of the Act, which logic is equally applicable to a case under Section 147 of the Act, in *L.R. Gupta* v. *Union of India*, (1992) 194 ITR 32, a Division Bench of this Court observed thus:

> "The expression "information" must be something more than a mere rumour or a gossip or a hunch. There must be some material which can be regarded as information which must exist on the file on the basis of which the authorising officer can have reason to believe that action under Section 132 is called for any of the reasons mentioned in Clauses (a), (b) or (c). When the action of issuance of an authorisation under Section 132 is challenged in a Court, it will be open to the petitioner to contend that on the facts or information disclosed, no reasonable person could have come to the conclusion that action under Section 132 was called for. The opinion which has to be formed is subjective and, therefore, the jurisdiction of the Court to interfere is very limited. A Court will not act as an Appellate Authority and examine meticulously the information in order to decide for itself as to whether action under Section 132 is called for. But the Court would be acting within its jurisdiction in seeing whether the act of issuance of an authorisation under Section 132 is arbitrary or *mala fide* or

whether the satisfaction which is recorded is such which shows lack of application of mind of the Appropriate Authority. The reason to believe must be tangible in law and if the information or the reason has no nexus with the belief or there is no material or tangible information for the formation of the belief, then, in such a case, action taken under Section 132 would be regarded as bad in law."

16. It is thus, trite that when a challenge is made to the action under section 147 of the Act what the court is required to examine is whether some material exists on record for the Assessing Officer to form the requisite belief and the reasons for the belief have a rational nexus or a relevant bearing to the formation of such belief and are not extraneous or irrelevant for the purpose of the said section. But the sufficiency of the grounds, which induced the Assessing Officer, to act under the said section is not section is not a justiciable issue."

11. In ***Commissioner of Income Tax and Another v. Foramer France [2003 Vol.264 ITR 567]***, the issue relating to notice of assessment issued beyond 7 years as well as re-assessment notice especially for failure on the part of the assessee to disclose true and full particular necessary for assessment came up for consideration. The Hon'ble Apex Court had dealt with the said issues in the appeal filed by the Revenue, challenging the order of the Allahabad High Court reported in ***Foramer v. CIT [(201) 247 ITR 436]*** and dismissed the civil appeals with costs. It is relevant to extract the above cited decision of the Allahabad High Court which came to be confirmed by the above cited decision of the Apex Court as under:

"From the decision of the High Court [see (2001) 247 ITR 436] that (i) section 147 substituted in the Income Tax Act,

1961 by the Direct Tax Laws (Amendment) Act, 1987, had made a radical departure from the original Section 147, inasmuch as clauses (a) and (b) had been deleted and under the proviso thereto notice for reassessment would be illegal if issued more than four years after the end of the assessment year, if the original assessment were made under Section 143(3); (ii) section 153 related to the passing of an order of assessment and not to the issuing of a reassessment notice under Section 147/148 (iii) the direction or finding contemplated by Section 153(3)(iii) had to be a finding in relation to the particular assessee and the particular year and to be a finding it had to be directly involved in the disposal of the case; (iv) on the facts, the notices issued under Section 148 on November 20, 1998; to the assessee for reopening the original assessments for the assessment years 1988-89, 1989-90 and 1990-91, on the basis of the Appellate Tribunal's decision rendered in the case of Boudier Christian relating to the assessee's technicians deputed to India, the income of the assessee was to be treated as fee for assessments for those assessment years, were without jurisdiction as they were barred by limitation in view of the proviso to section 147, as amended by the Direct Tax Laws (Amendment) Act, 1987, as that was the provision that was applicable on November 20, 1998, when the reassessment notices were issued, and admittedly there was no failure on the part of the assessee to disclose fully and truly all material facts for assessment ; (v) on the facts, notices were bad as they were only on the basis of a change of opinion and the law that an assessment could not be reopened on a change of opinion was the 1987, of Section 147, and (vi) as the notices were without jurisdiction, the assessee should not be relegated to the alternative remedy, the Department preferred appeals to the Supreme Court. The Supreme Court saw no reason to differ and dismissed the appeals."

12. In ***Commissioner of Income-Tax v. A.V.Thomas Exports Ltd.*** ***[(2008) 296 ITR 603 (Mad)]***, a Division Bench of this Court had considered

the challenge made to the notice issued after 4 years viz-a-viz Sections 147 and 148 of the IT Act. The Division Bench of this Court has also considered the decision in ***CIT v. Foramer France [(2003) 264 ITR 566 (SC)]*** (cited supra) as well as ***CIT v. Elgi Finance Ltd. [(2006) 286 ITR 674 (Mad)]*** and during the course of arguments, had also extracted the relevant portion of the judgment in ***CIT v. Elgi Finance Ltd. [(2006) 2876 ITR 674]*** as under:

> "5. Heard the counsel. The original assessment was completed under section 143(3) of the Act. The Assessing Officer applied his mind and completed the said original assessment. There is no finding by the Assessing Officer that there is any failure on the part of the assessee resulting in the escapement of income. The Assessing Officer must give categorical finding for the purpose of initiating reassessment under the proviso to section 147 of the Act. In this case the reassessment proceedings were initiated after March 31, 1995, and hence the proceedings initiated by issue of notice under section 148 is ab initio barred by limitation. In this case, the initiation of proceedings is after a period of four years and the finding given by the Tribunal is that no income has escaped assessment by reason of failure on the part of the assessee. Hence, there is no jurisdiction to reopen the assessment under the proviso of section 147 of the Act. The scope of the said provision has been considered by this court in the case of *CIT* v. *Elgi Finance Ltd.*, [2006] 286 ITR 674, and the same reads as follows (page 678):
>
> "The law relating to the reassessment has undergone a change from April 1, 1989. The change was brought in by the Direct Tax Laws (Amendment) Act, 1987. Two sets of provisions were available under section 147 in clause (a) and clause (b). This distinction has now been taken away by the Amendment Act. Previously, the line of distinction was a

limitation period of four years and the limitation period exceeding four years. The Assessing Officer would reopen a back assessment within a period of four years as long as he had reason to believe in consequence of any information, that income has been underassessed or income has escaped assessment. In the case of limitation, providing for a period exceeding four years, there should have been a failure on the part of the assessee to disclose fully and truly all material facts leading to the escapement of income. But as a result of the amendment brought with effect from April 1, 1989, the above distinction had been obliterated and the Assessing Officer could reassess the income as long as he had reason to believe that income chargeable had escaped assessment. The new law has inserted a proviso to section 147 in the following words:

'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 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.'

In addition to the time-limits provided for under section 149, the law has provided another limitation of four years under the proviso to section 147. As far as the above proviso to section 147 is concerned, the law prescribes a period of four years to initiate reassessment proceedings, unless the income alleged to have escaped assessment was made out as a result of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment."

In the said judgment, the Division Bench of this Court has dealt with the issue relating to mere change of opinion and relied upon the decision

rendered by a Division Bench of this Court in ***CIT v. Annamalai Finance Ltd. [(2005) 275 ITR 451 (Mad)]***, wherein it was held that ***"section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceedings upon a mere change of opinion. It is incumbent on the Assessing Officer to prove that there was a failure to disclose material facts necessary for the assessment for the issuance of notice beyond the period of four years.***"

13. Let this Court considers the decisions cited by the learned counsel appearing for the contesting party/Assessee.

14. In ***Commissioner of Income Tax v. P.V.S.Beedies (P.) Ltd. [(1999) 237 ITR 13(SC)]***, it was held that reopening of case on factual errors pointed out by the audit party is permissible in law and therefore, reopening of the case under Section 147(b) of IT Act, in the facts and circumstances of the case, found to be justified.

15. The said issue was also considered in the judgment in ***M/s.Larsen & Toubro Ltd. v. State of Jharkhand and Ors. [Judgment dated 21.03.2017 made in Civil Appeal No.5390 of 2007] (cited supra)*** and the

Hon'ble Apex Court after taking into consideration the Para 23 of the ***P.V. Beedies case (cited supra)*** and its earlier decisions, observed as follows in Para 27 :

> "27.The expression 'information' means instruction or knowledge derived from an external source concerning facts or parties or as to law relating to and/or after hearing on the assessment. We are of the clear view that on the basis of information received and if the assessing officer is satisfied that reasonable ground exists to believe, then in that case the power of the assessing authority extends to re-opening of assessment, if for any reason, the whole or any part of the turnover of the business of the dealer has escaped assessment or has been under assessed and the assessment in such a case would be valid even if the materials, on the basis of which the earlier assessing authority passed the order and the successor accessing authority proceeded, were same. The question still is as to whether in the present case, the assessing authority was satisfied or not."

It was also observed from the materials that the Assessing Officer had to issue notice on the ground of directions issued by the audit party and not on his personal satisfaction which is not permissible under law and accordingly, allowed the appeal filed by the assessee.

16. In ***ICICI Home Finance Co. Ltd. v. Assistant Commissioner of Income-tax, 10(1) [(2012) 25 taxmann.com 241(Bom.)]***, the order passed by the Assessing Officer under Section 143(3) of IT Act as well as the scope

of Section 147 of IT Act came up for consideration and on facts found that the reasons for reopening of the assessment are identical to the objections raised by the audit party and in para 7 had dealt with the law on the said subject and it is relevant to extract the same:

> "7. However, as submissions were made on other issues also we are examining them also. It is a settled position in law that where assessment sought to be reopened is before the expiry of four years from the end of the relevant assessment year, then in such cases the power to reopen an assessment is very wide. However, even though such a power is very wide yet such a power would not justify a review of the assessment order already passed. The Supreme Court in the matter of the Commissioner of Income Tax v. Kelvinator (India) Ltd, reported in 320 ITR page 561 has observed that the power to reassess is conceptually different from a power to review. The Assessing Officer under the said Act has only power to reassess on fulfillment of certain precondition namely, he must SNC 15/20 WP 430-12.doc have reason to believe that income has escaped assessment and that there must be tangible material to come to the conclusion that there is an escapement of income from assessment. The Apex Court cautioned that in the garb of reopening an assessment review should not take place. This court following the Apex Court in the matter of Cartini India Ltd. v. Addl. C.I.T. reported in 314 ITR 275 has also held that even where reassessment is sought to be done within four years from the end of the relevant assessment year, there must be reason to believe that income has escaped assessment and such reason to believe should not be on account of mere change of opinion. Therefore, where facts have been viewed during the original proceeding and an assessment order has been passed then in such cases, reopening of an assessment on the same facts without anything more would be a review and not permitted under the garb of reassessment. This would be a mere change of opinion in the absence of any tangible material and is

> not sufficient to assume jurisdiction to issue SNC 16/20 WP 430-12.doc the impugned notice. In fact, our court in the matter of Idea Cellular Ltd v. Deputy Commissioner of Income tax reported in 301 ITR 407 has held that once all the material with regard to particular issue is before the Assessing Officer and he chooses not to deal with the same, it cannot be said that he had not applied his mind to all the material before him. Further, as observed by the Full Bench of Delhi High Court in the matter of C.I.T. v. Kelvinator of India Ltd. Reported in 256 ITR 1, when the entire material is placed before the Assessing Officer at the time of original assessment and he passes an assessment order under Section 143(3) of the Act a presumption can be raised that he applied his mind to all the facts involved in the assessment."

The appeal filed by the assessee was allowed by the Bombay High Court in the said decision.

17. In ***Fis Global Business Solutions India Pvt. Ltd. v. Principal Commissioner of Income Tax-3 [(2018) 409 ITR 560]***, a Division Bench of Delhi High Court, after taking note of the above quoted judgment of the Hon'ble Apex Court in Commissioner of ***Income Tax v. Kelvinator of India Ltd. [320 ITR 561]*** wherein it was held that review of the completed scrutiny can be done only if tangible material is made available to the Revenue and on the facts of the case found that reassessment notice is solely based on an audit opinion and accordingly, allowed the appeal filed by the assessee.

18. In the decision in ***Commissioner of Income Tax-17, Mumbai v. Shri Rajan N.Aswani [(2018) 403 ITR 30]***, the appeal filed by the Revenue was dismissed on the ground that reopening of the assessment was solely based upon audit objections.

19. The decision in ***Adani Infrastructure & Developers (P.) Ltd. v. Assistant Commissioner of Income Tax [(2019) 101 taxmann.com 256 (Gujarat)]*** relied on by the learned counsel appearing for the respondent/assessee, it was held that re-opening of the assessment merely upon audit objection and was not based upon the satisfaction of the Assessing Officer is unsustainable.

20. CBDT, New Delhi had issued Instruction No.9/2006 dated 07.11.2006 pertaining to Instruction on Receipt / Revenue Audit Objections and in para 4 had dealt with remedial action and in Modification of Instruction 9/2006, CBDT, New Delhi had issued Circular No.8/2016 dated 17.03.2016 and it is relevant to extract the same:

> "Instruction 9 of 2006 lays down the guidelines and procedure for attending to Revenue Audit Objections. The Instruction inter-alia mandates the initiation of remedial action in case the Revenue Audit Objection is not accepted by the

Department. The Board has considered the effect of such remedial action and its ultimate fate in appeal. Accordingly, to mitigate the effects of the Instruction, para 4 and para 5 of the Instruction are deleted with immediate effect and replaced by the following:

4.Remedial Action:

(i) An Audit Objection should be accepted and remedial action should be taken in a case where the audit objection relating to an error of facts or an issue of law is found to be correct.

(ii) Appropriate remedial action should invariable be initiated within two months of the receipt of the Local Audit Report, and necessary orders should be passed within six months thereafter.

(iii) Where the PCIT/CIT does not accept the Audit Objection, he may record his reasons for doing so and inform the AG accordingly within two months from the date of receipt of the LAR. No remedial action needs to be taken in such cases."

21. It is the submission of the learned Senior Standing Counsel appearing for the Revenue by inviting the attention of this Court to sub-para No.3 to Para 4 of Circular No.8/2016 dated 17.03.2016 that such an exercise was contemplated by the Principal Commissioner of Income Tax / Commissioner of Income Tax and whereas the order for reopening of the assessment was passed by the Assessing Officer / Income Tax Officer and as such, the said instructions will not apply to the facts of this case.

22. It is also pointed out by the learned Senior Standing Counsel appearing for the Revenue that the Assessing Officer, after reopening of the assessment, had recorded a categorical finding that the credit balance as on 31.03.2007 amounting to Rs.5,30,99,960/- is treated as deemed dividend in the hands of the respondent/assessee and it is an independent finding recorded *dehors* the contents of the audit objections and the Tribunal, in the impugned common order, had failed to deal with the said issue and merely recorded a finding that the Assessing Officer did not apply his mind as to the income escaping assessment. The Assessing Officer, after application of mind, found that there was no escapement of income and also requested the Audit Wing to dropping proceedings did change his mind and the said finding is *per se* unsustainable.

23. The Income Tax Officer, Company Ward-VI(1), Chennai-600 034 had issued a notice dated 31.03.2014 stating that she had reason to believe that the income chargeable to tax for the Assessment Year 2007-2008 had escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961 and the respondent/assessee, in response to the said notice, sent a reply dated 19.04.2014, enclosing copy of the Profit & Loss Account,

Balance Sheet and Statement of Computation of Income and requested reasons for issuance of notice under Section 148 of IT Act dated 31.03.2014 and since it was not furnished, the respondent/assessee invoked the provisions of Right to Information Act and vide communication dated 30.06.2015, the Assessing Officer, namely Mr.S.Krishna Kumar, Income Tax Officer, Corporate Ward-6(3), Chennai-34 had furnished the audit objections in Para No.6/IIA. The contents of the audit objections has already been dealt with in the earlier paragraphs.

24. Income Tax Officer, Company Ward VI(1), Chennai, namely Ms.R.Bhooma, vide communication dated 31.03.2014 had responded to the audit objections dated 04.03.2014 and after referring to the Balance Sheet of RSC observed that the entire work of RSC carried out by the assessee is not correct and along with the said communication had enclosed Income Statement filed by RSC for the Assessment Years 2007-2008 and 2010-2011 and copy of Balance Sheet of RSC.

25. The Deputy Director (DT), vide communication dated 4.3.2014 had called for certain particulars for which the Ms.R.Bhooma, ITO, Company Ward VI, Chennai has responded through proper channel dated

10.04.2014. The Deputy Director (DT) has sent his response dated 24.04.2015, for which Mr.S.Krishna Kumar, ITO, Corporate Ward -6(3), Chennai has passed the order of assessment dated 31.03.2015 and for the reasons stated, requested for dropping of the audit objections for all the Assessment Years 2007-2008 and 2010 – 2011. The very same official, as already pointed out, has passed the order of assessment dated 31.03.2015 under Section 143(3) r/w. 147 of the IT Act holding that the credit balance as on 31.03.2007 of Rs.5,30,99,960/- is treated as deemed dividend in the hands of the respondent/assessee and calculated the balance tax payable as Rs.1,09,30,440/-.

26. It is very pertinent to point out at this juncture that the Income Tax Officer, namely S.Krishna Kumar, in his response dated 31.01.2015 to the audit objections would also state that after examining the details of the expenses incurred by the respondent and RSC during the financial year 2006-07 and it is relevant to extract the same:

> *The balance amount for this year amounting to Rs.2,39,16,129/- and the opening credit balance amounting to Rs.2,91,83,830/- together amounting to Rs.5,30,99,959/- is shown as creditor for services in the books of SKI Retail Capital Limited.* ***[Schedule "G" is Rs.5,30,99,959/- + other creditors amounting to Rs.6,01,84,164/- copy of relevance materials enclosed]. - "D"***

The very same official, in the above cited order dated 30.01.2015, had concluded that the amount in Schedule "G" of Rs.5,30,99,959/- [Rounded off to Rs.5,39,99,960/- in the said order of assessment should be treated as deemed dividend.

27. The primordial submission of the learned Senior Standing Counsel appearing for the Revenue is that the reasons recorded by ITO, in the order dated 30.01.2015 as to the treating of the amount of Rs.5,30,99,960/- as on 31.03.2007 came into being on an independent application of mind to the materials placed and he did not refer to the audit objections which pertain to some other issue and though it is obligatory on the part of ITAT to deal with the merits of the appeal also, did not go in the merits at all and prays for remanding of the matter.

28. The respondent/assessee, in the case on hand, did not burke/suppress any material and whatever materials in their possession, had submitted the same by enclosing in their reply dated 19.04.2014, in response to the notice under Section 148 of the IT Act dated 31.03.2014. The ITO has

passed the order of assessment dated 31.03.2015 and had also drawn the attention of the Deputy Director of Revenue Audit as to the said material, especially referring to the amount of Rs.5,39,99,960/- in Schedule "G" and prayed for dropping of the audit objections in respect of the Assessment Year from 2007-2008. In the light of the materials available, it is obligatory on the part of the Assessing Officer to record reasons for the purpose of believing that the income had escaped assessment and in the light of the judgment rendered by the Division Bench of Delhi High Court in ***United Electrical Co. P.Ltd. v. Commissioner of Income Tax and Others [2002 Vol.258 ITR 317]***, it is open to the Court to examine whether there was some material available for the Assessing Officer to form the requisite belief and further recorded a finding that even the Additional Commissioner had accorded approval for action under Section 147 of IT Act mechanically.

29. The Hon'ble Apex Court, in the decision in ***Commissioner of Income Tax and Another v. Foramer France [2003 Vol.264 ITR 566]***, while dismissing the appeal filed by the Revenue and thereby confirming the judgment of the Allahabad High Court, recorded reasons as to the non-failure on the part of the assessee to disclose fully and truly all material facts for assessment and further found that notices were bad as they were only on

the basis of a change of opinion and the law that an assessment could not be reopened on a change of opinion was the same before and after amendment by the Direct Tax Laws (Amendment) Act, 19867 of Section 147.

30. In the decision in ***Commissioner of Income Tax v.A.V.Thomas Exports Ltd. [(2008) 296 ITR 603 (Mad)]***, which pertains to Assessment Year 1990-1991, the Division Bench of this Court, while dealing with the appeal filed by the Revenue, had observed that the initiation of proceedings was after a period of four years by reason of failure on the part of the assessee and as such, there was no jurisdiction to reopen the assessment under the provision of Section 147 of IT Act.

31. In the considered opinion of the Court, the reasons recorded in the notice dated 31.03.2014 as to the income escaping assessment and the order of assessment dated 31.03.2015 passed under Section 143(3) r/w. Section 147 of the IT Act are unsustainable on facts as well on law.

32. The CIT (Appeals), in the order dated 25.05.2016 in ITA No.55/CIT(A)-15 has also ordered deletion of Rs.2,29,00,539/- on the ground that the provision of Sec.2(22)(e) of IT Act do not apply and the

reasons for arriving such a conclusion is sustainable in law.

33. The findings recorded by the ITAT, in the impugned common order as to the non-application of mind on the part of the Assessing Officer to apply his mind independently for the purpose of reopening of assessment is also sustainable for the reason that the very same official, namely Mr.S.Krishna Kumar, in response to the audit objection dated 31.01.2015, had taken into consideration all the materials placed and requested for dropping of the audit objection and therefore, passing of second order of assessment dated 31.03.2015 by him amounts to change of opinion on the very same set of facts.

34. This Court, on an independent application of mind and on thorough consideration of material aspects and legal position, is of the considered view that there is no error or infirmity in the reasons assigned by the ITAT in dismissing the appeal filed by the Revenue and allowing of the cross objection filed by the assessee.

35. Therefore, the Substantial Question of Law is answered in negative and against the appellant/Revenue.

36. In the result, the **Tax Case Appeals are dismissed**. No costs.

[M.S.N., J.,] **[A.Q., J.]**
07.05.2020

Index : No
Internet : Yes
Jvm

M.SATHYANARAYANAN, J.,
and
ABDUL QUDDHOSE, J.
Jvm

To
The Principal Commissioner of Income Tax-6
No.121, Nungambakkam High Road,
Chennai-34.

Common Judgment in
TCA.Nos.66 & 67 of 2018

07.05.2020