IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/TAX APPEAL NO. 1091 of 2008

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE J.B.PARDIWALA Sd/-
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA Sd/-

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

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ARUN MUNSHAW HUF
Versus
INCOME TAX OFFICER, WARD 7(1)

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Appearance:
MRS SWATI SOPARKAR with MR BS SOPARKAR for the Appellant(s) No. 1
MRS MAUNA M BHATT(174) for the Opponent(s) No. 1

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CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE BHARGAV D. KARIA

Date : 13/01/2020

ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)

This Tax Appeal under Section 260A of the Income Tax Act, 1961 (for short, 'the Act 1961') is at the instance of an assessee

and is directed against the order dated 9th March 2007 passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'D' in the ITA No.1113/Ahd/2001 for the Assessment Year 1991-92.

The facts giving rise to this Appeal may be summarised as under :

The assessment was completed under Section 143(3) of the Act 1961 on 28th March 1994 on the total income of Rs.75,404=00, which included the long term capital gains of Rs.61,812=00. The assessee sold a property being an agricultural land admeasuring 7986 sq.yards in the form of a farmhouse along with water tank, servant quarter, etc., constructed on it for a consideration of Rs.30,00,000=00 during the Accounting Year relevant to the Assessment Year 1991-92. The assessee claimed deduction under Sections 53(b), 54(1)(i) and 54E of the Act, 1961 (as amended by the Finance Act, 1992) from the capital gains arising from the sale of the property. The deductions as claimed were allowed. The claim of the assessee was that the sale was of a residential house along with the land appurtenant thereto. Later, it was noticed by the Assessing Officer that the property in question was agricultural land and, therefore, the deduction under Sections 53(b) and 54(1)(i) of the Act had been wrongly allowed. In such circumstances, the Assessing Officer reopened the assessment by issuing a notice under Section 148 of the Act. The reassessment was accordingly completed withdrawing the deductions under Sections 53(b) and 54(1)(i) respectively of the Act. The long term capital gains was determined at Rs.17,11,363=00.

The assessee, being dissatisfied with the assessment order, preferred an appeal before the Commissioner of Income Tax

(Appeals) VIII, Ahmedabad. The appeal preferred by the assessee came to be allowed by the CIT(A) vide order dated 13th March 2001. While allowing the appeal, the CIT(A) held as under :

> *"4. During the course of hearing of appeal, which was attended both by the Authorised Representative of the appellant and the present Assessing Officer, a report dt.15.1.2000 was sent by the Assessing Officer. In the said report, it was submitted that the department's view with regard to the property sold by the appellant is that it was agricultural land and not residential property. The Assessing Officer has stated that in the Deed of Conveyance submitted at the time of assessment proceedings the property has been shown as agricultural land along with farm house and servant quarters, etc. and nothing has been mentioned about the nature of the construction or the area under construction described as farm house. It is also stated that during the course of assessment proceedings the assessee had not furnished any evidence whereby it could be held that the property in question was residential property and the same was actually used for the purpose. The A.O. has further submitted that the wealth tax return of the appellant for A.Y. 1990-91 shows that a bungalow mentioned as 'Avanti' has been disclosed in the statement of net wealth and at present also the assessee is staying in that bungalow i.e. 'Avanti'. The A.O. has, therefore, opined that the property declared in the Conveyance Deed as farm house was not the bungalow which was mentioned in the wealth tax return for A.Y. 1990-91. Accordingly, the A.O. was of the view that there was a failure on the part of the assessee to disclose fully and truly all material facts*

necessary for assessment. The A.O. has further submitted that though in the reasons recorded for the issue of notice u/s.148 specific words regarding 'failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment' have not been mentioned, his action was only as a result of the same. The A.O. has also referred to the judgment of the Hon'ble Gujarat High Court in the case of Praful Chunilal Patel and Vasant Chunilal Patel v. M.J.Makwana, ACIT (236 ITR 832) for justifying the reopening of assessment in this case.

4.1 In view of the above report of the A.O., the Assessing Officer was again asked to be present for the hearing on 15.2.2001 wherein the issue pertaining to the reopening of assessment in this case was discussed with him and with the Authorised Representative of the appellant. In view of various doubts expressed by the Assessing Officer regarding the failure on the part of the assesee to disclose fully and truly all material facts during the original assessment proceedings, the A.O. was required to make further inquiry with the appellant as to whether it was 'Avanti' bungalow which was sold or whether it was some other farm house on agricultural land which was the property in question. It was clarified by the appellant that the bungalow sold by the assessee was named as 'Avanti' and was situated at block no.518. It is also stated that reference to bungalow situated at block no.518 is made at various places in the Deed of Conveyance. It is also stated that in Form No.37I, there is a specific reference to a farm house along with water tank, servant quarter, etc against column – 'Description and location of the property'. It is

further clarified that on page no.16 of the Conveyance Deed, it is specifically stated that there is block no.512 situated on the eastern side of block no.518. The assessee has also clarified that he had constructed a new bungalow on block no.512, which has also been named as 'Avanti' by him and the assessee is presently living in that bungalow. The above clarifications of the assessee were forwarded to me by the A.O. vide letter dt.7.3.2001. The Assessing Officer has, however, not refuted these clarifications.

5. I have considered the facts of the case and the contentions of the appellant and also heard the Assessing Officer in the matter. I have also considered the reports of the A.O. dtd.15.1.2001 and 7.3.2001. The reasons recorded by the Assessing Officer for reopening the assessment u/s.147 of the Income-tax Act have also been gone through. The reasons show that on scrutiny of record the Assessing Officer noticed that during the year under consideration the assessee had sold agricultural land along with farm house built on it and deductions u/s.53(b); 54(1)(i) and 54E had been claimed from the capital gains. The A.O. has further noticed that deductions u/s.53(b) and 54(1)(i) were not applicable to the assessee as these relate to residential property.

The above reasons show that the assessment was reopened because of the belief of the A.O. that certain statutory deductions had been wrongly claimed and allowed. The reasons, however, do not indicate that the assessment was reopened on account of any material fact relating to the claim, which was not before the A.O. at the time of original

assessment and which came to the notice of the A.O. subsequently. As far as the submissions made by the present Assessing Officer during the course of hearing of appeal are concerned, it is seen that the inquiry conducted on various points with the appellant shows that what was sold was an agricultural land having a farm house built on it, which was named by the assessee as 'Avanti'. The comparison of the information furnished during the original assessment proceedings with that of the wealth tax records of the assessee (statement of net wealth for A.Y. 1990-91) does not show that the assessee had any other residential house besides this farm house built on agricultural land. Thus, what was required to be considered was, whether the farm house could be treated as bungalow more specifically as a residential house for the purposes of deduction u/s.53(b) and 54(1)(i) of the Income-tax Act or not. The facts do not, however, reveal that the appellant had himself mis-informed the department or failed to disclose any of the material facts. Even if a view is subsequently taken that the property sold was agricultural land and not a residential house with the land appurtenant thereto, it could only be inferred that a wrong claim for deduction was made but, it cannot be said that there was a failure on the part of the assessee to disclose all material facts relevant to the assessment. The relevant documents i.e. Conveyance Deed; permission of the Appropriate Authority giving the nature of the property sold, had been filed by the appellant at the time of original assessment proceedings. No new information or document came to the notice of the Assessing Officer so as to now hold that the deductions had been wrongly allowed, because the property sold was agricultural land and not

residential house. It was only a change of opinion on the basis of same factual information that the property in question was to be considered as agricultural land and not residential house for the purposes of capital gains. There was however, no failure on the part of the appellant to disclose fully and truly all material facts necessary for assessment.

5.1 In the case of Garden Silk Mills Ltd. v. DCIT 222 ITR 27, which was before the Hon'ble Gujarat High Court, the assessee had claimed depreciation on increase in cost of machinery due to fluctuation in rate of foreign exchange. Depreciation was allowed by the I.T.O. after considering the matter and allowance was also upheld on revision by the CIT. The re-assessment proceedings were however initiated after 4 years on the ground that excessive depreciation had been allowed. It was held by the Hon'ble High Court that the A.O. was aware about the investment and fluctuations in the exchange rate and there was no failure on the part of the assessee to disclose any material facts necessary for assessment. The notice of re-assesssment was not valid and was required to be quashed.

5.3 The Assessing Officer in his report dt.15.1.2000 has relied on the judgment of the Hon'ble Gujarat High Court in the case of Praful Chunilal Patel and Vasant Chunilal Patel v. M.J.Makwana, ACIT (236 ITR 832). A perusal of the judgment shows that the power to make an assessment or re-assessment within four years from the end of the relevant assessment year has been upheld by the Hon'ble Gujarat High Court even in a case where there has been a complete

disclosure of all relevant facts upon which a correct assessment might have been passed in the first instance irrespective of whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the re-assessment proceedings. This judgment is not applicable in the case of the appellant as re-assessment proceedings in this case have been initiated beyond four years from the end of the relevant assessment year.

6. Undisputedly the notice u/s.148 has been issued beyond the period of 4 years from the end of the assessment year ended on 31.3.1992 as the notice u/s.148 has been issued on 22.1.98. Also as discussed in the preceding paras, there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The mistake, if any, committed by the Assessing Officer, is on account of improper appreciation of facts before him. Accordingly, the notice issued u/s.148 is not a valid notice and any assessment framed in pursuance thereof is also not a valid assessment and is required to be annulled. The appellant succeeds on this point."

The Revenue, being dissatisfied with the order passed by the CIT(A), went in appeal before the Income Tax Appellate Tribunal. The appellate tribunal, vide order dated 9th March 2007, allowed the appeal of the Revenue, thereby quashing and setting aside the order passed by the CIT(A). We may quote the relevant part of the order passed by the appellate tribunal thus :

"5.1 The reopening in the present case is clearly after the expiry of four years from the end of relevant assessment

year, so that the same could only be, in terms of the relevant section (s.147), where the assessee has failed to make a full and true disclosure of all material facts necessary for his assessment for the relevant year. In this regard, the scope and ambit of the words 'full and true' have to be properly appreciated, even as emphasized by the Apex Court in the case of Calcutta Discount Co. Ltd, 41 ITR 191. Further, due regard has also to be given to Explanation I to Section 147 of the Act, which reads as :

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

5.2 If, therefore, as per the disclosure by the assessee, it can be said that he has disclosed all material facts necessary for his assessment for the relevant year, fully and truly, escapement of income, even if so, would only be attributable to the A.O., and for which the law protects the assessee by placing a cap of four years from the end of relevant assessment. The issue under reference is thus one of fact, to be decided in consideration of the material on record at the time of the original assessment, in which the assessee claimed and stood allowed the impugned deductions. In the present case, assessee has not stated, as is apparent, in his return of income (copy of which is not placed on record, in spite of being specifically called for from the assessee at the time of hearing) :

a) that what was sold stood described invariably as an agricultural land in the relevant conveyance deed, the primary document transferring the title to the capital asset under transfer;

b) the total area of the land subject to conveyance, including the area on which the residential house stood constructed;

c) the manner in which the sale rate of the property stood arrived at, i.e. whether as per the rates applicable to the agricultural land, or as a private land forming part of a residential house, and which stood separately valued (as the entire sale consideration, and thus, capital gains, stood considered as in respect of the residential property only);

d) whether, the house, or a part of it was used as a farm house, i.e. for the beneficial user of the said land for agricultural purposes; and

e) whether the dominant user of the house property was for residential purpose.

Further, he has also not explained the basis on which he considered the capital asset under transfer as a residential house and not an agricultural land, i.e. in whole or in part, in spite of agricultural operations being carried thereon, and further, being so stated in the conveyance deed itself, as well as the permission sought by the assessee from the Appropriate Authority (AA) for selling the same, by treating

the said land only as appurtenant to the residential building situate thereon, entitling him, thus, to claim of deduction u/s 53(b) and 54(1)(i) of the Act with respect to the total amount of capital gains realized on the transfer of the capital asset.

5.3 There is no discussion in the assessment order of the nature of the capital gains, or of the deductions claimed there against, and which would necessarily be the case had there been a disclosure on any one or more of the foregoing aspects of the transaction, all of which are unarguably material for the proper assessment of income under the said head (of income) for the relevant year. No doubt, as explained by the Hon'ble jurisdictional High Court, the assessee's obligation is restricted to the disclosure of the primary facts only, with the inferential facts being left to the discretion of the A.O. Each of the aforesaid fact is a primary fact in relation to the assessment of the income arising on the aforesaid fact is a primary fact in relation to the assessment of the income arising on the transfer of the capital asset under question, lead as it does, to the determination of its nature as also the deductions exigible there against. There is no expression of opinion in the original assessment order in the matter, for one to hold that the reason to believe of the escapement of income as being on account of a change of opinion, as stated by the Ld CIT(A). As such, we are of the firm view that the assessee has failed to make a full and true disclosure of all the material facts, necessary for his assessment, which he is obliged to in order to debar the initiation of reassessment proceedings in relation to the impugned assessment.

5.4 In fact, the arguments led by the assessee while contesting the reopening of his assessment, i.e. of having not sold a farm house, and of the same being described in his wealth tax return as a residential house, were necessitated only by the fact of the aforesaid non-disclosure of the basic facts in relation to the impugned asset and its user, and which were necessary to arrive at a proper decision in the matter. Further, as would be apparent, the assessee has also cited thereat the decisions in the case of Hajee Mohamed Ibrahim vs. Gift-Tax Officer (supra) and C.I.T. vs. Zibunnisa Begum (supra), contending their applicability to the facts of the present case. However, what is lost sight of, irrespective of the merits of the assessee's claim of the applicability of those decisions, is that the disclosure of facts as made, besides being inconsistent with the primary record, i.e. the conveyance deed, land revenue record, permission from the AA, was not sufficient or adequate to be able to apply the ratio of those decisions to the same. And which, on merits, rather, appear to be supportive of the Revenue's case, though by stating as much, we may clarify, that this may not be construed as an expression of opinion in the matter.

5.5 The Ld. CIT(A) has directed investigation by the A.O. on the basis of the assertions made by the assessee before him in the appellate proceedings and with reference to the material adduced by him, being the wealth tax return for A.Y. 1990-91, and in relation to the construction of a new residential house, similarly named, on an adjacent piece of land. The same, to our mind, is misdirected, as the said material was not before the A.O. at the time of original

assessment, so that, irrespective of the validity of the assessee's claims, what is to be seen is whether he has made at the time of original assessment a full and proper disclosure of all material facts. In fact, the verification as directed, relates to pertinent facts only, and which only bears out to the absence adequate material on record to support the assessee's claims. Further, the permission from the Appropriate Authority, for the sale of the capital asset(s) under reference, and which stands sought by the assessee himself, state of the same as an agricultural land, i.e. as described in the conveyance deed, which being a part of the original return; it was held by him that there has been a full & true disclosure, with no new information or document coming to the notice of the A.O. for initiation of re-assessment proceedings. We find that to be a contradiction in terms. Firstly, the assessee has not pleaded of the submission of the said permission at the time of the original assessment proceedings before the A.O. Secondly, even so, the same stating the subject-matter of the purported transfer to be an agricultural land, in agreement with the conveyance deed, the primary document transferring the title, while the assessee contends it to be only a residential house, an explanation for this contrary view is incumbent on the assessee, being a primary and material factual matter, i.e. if it were to be stated, as contended, that there is a full & true disclosure of all material facts, and which has it clearly failed to. This is more so considering that he has claimed deduction under sections which were only applicable for capital gain arising on a transfer of residential property. Thirdly, this becomes unarguably so as the Explanation I to the Proviso to section

147(1) clearly obliges the assessee to make an explicit/express disclosure, as against an implicit or a covert one.

As observed earlier, the return of income as furnished, and the claim(s) made per it, is apparently inconsistent with the conveyance deed, which is the primary document in relation to the subject matter of transfer under reference, conveying the title to the capital asset as well as evidencing its character (and which in the facts of the case is based on its actual user), so that it cannot be said that there is a true and full disclosure of the material facts relevant for assessment by the assessee, and would, besides, warrant an explanation as referred to earlier (at para 5.2 above) and which the assessee pleads in the reassessment proceedings, placing reliance for the purpose on the decision in the case of Hajee Mohamed Ibrahim vs. Gift-Tax Officer (supra) and CIT vs Zibunnisa Begum (supra). In fact, the said decisions also; the land, or a good part of it, being put to agricultural operations, prima facie support the Revenue's case, and not of the assessee. There is no expression of opinion in the original assessment order in the matter to hold it as a case of change of opinion.

5.7 In view of the foregoing, we are of the unequivocal view that there has not been a full and true disclosure of all material facts necessary for his assessment for the current assessment year by the assessee, so that the initiation of reassessment proceedings, the law in the matter being patently clear, by the issue of notice u/s.148 of the Act, is not bad in law, as held by the first appellate authority.

5.8 The Ld. CIT(A) has not decided the issue on merits as he had annulled the reassessment as made. Under the circumstances, having upheld the validity of the reassessment proceeding, the matter would necessarily have to go back to his file for adjudication on merits, which also stand agitated before him as per the grounds of appeal as enumerated at page-2 of his order. We decide accordingly."

Being dissatisfied with the order passed by the appellate tribunal, the assessee has come up with the present appeal.

On 29th April 2009, this Court admitted the appeal on the following two substantial questions of law :

"(i) Whether on the facts and in the circumstances of the case, the ITAT was right in holding that the reopening of the assessment was rightly made ?

(ii) Whether in the facts and in the circumstances of the case, the ITAT was right in holding that the Assessee had not made full and true disclosure of all material facts necessary for his assessment ?"

Mr.Soparkar, the learned counsel appearing for the appellant, vehemently submitted that the appellate tribunal committed a serious error in passing the impugned order. He would submit that the appellate tribunal ought not to have disturbed the well-reasoned order passed by the CIT(A). According to Mr.Soparkar, it cannot be said by any stretch of

imagination that there was no full and true disclosure. According to Mr.Soparkar, there was no tangible material before the Assessing Officer for the purpose of reopening the assessment. The case is one of mere 'change of opinion'. In such circumstances referred to above, Mr.Soparkar prays that there being merit in his appeal, the same be allowed and the substantial questions of law as formulated by this Court be answered in favour of the assessee and against the Revenue.

On the other hand, Ms.Mauna Bhatt, the learned standing counsel appearing for the Revenue, has vehemently opposed this appeal. Ms.Bhatt would submit that no error, not to speak of any error of law, could be said to have been committed by the appellate tribunal in passing the impugned order.

Ms.Bhatt would submit that the assessee could be said to have sold an agricultural land and not a residential house. The assessee is not entitled to claim deduction under Sections 53(b) and 54(1)(i) of the Act. According to Ms.Bhatt, there was no full and true disclosure of the particulars and, therefore, the Assessing Officer was justified in reopening the assessment.

Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is, whether the appellate tribunal committed any error in passing the impugned order.

We take notice of the fact that at many places in the deed of conveyance there is a reference of bungalow situated on the land bearing Block No.518. It is not in dispute that the assessee had filled in Form No.37-I as provided in Rule 48 of the Income Tax Rules. In the said form, there is a specific reference of a

farmhouse along with water tank, servant quarter, etc. Form 37-I reads thus :

"FORM NO.37-I

(See rule 48L)

Statement of transfer of immovable property to be furnished to the appropriate authority under section 269UC

I/We, _____ intend to transfer the immovable property located at _____ to _____. The total apparent consideration for the transfer of the above property is _____. The particulars of the agreement for transfer of the said property are furnished in the annexure to the statement.

Verification

In my/our opinion and to the best of my/our knowledge and information, the particulars furnished above and in the annexure hereto are true and correct.

Transferor(s)	*Transferee(s)*
1._____	*1._____*
2._____	*2._____*
3._____	*3._____*

**Note : Any change in the address of the transferor(s) or the transferee(s) should be communicated in writing immediately to the appropriate authority to whom this statement of transfer has been furnished."*

Section 53 of the Act reads thus :

"53. Exemption of capital gains from a residential house.- Notwithstanding anything contained in section 45, where in the case of an assessee being an individual [or a Hindu undivided family], the capital gain arises from the transfer of [long-term capital asset], being buildings or lands appurtenant thereto, and being a residential house, the income of which is chargeable under the head "Income from house property", the capital gain arising from such transfer shall be dealt with in accordance with the following provisions of this section, that is to say,-

(a) in a case where the full value of the consideration received or accruing as a result of the transfer of such capital asset does not exceed two hundred thousand rupees the whole of the capital gain shall not be charged under section 45;

(b) in a case where the full value of such consideration exceeds two hundred thousand rupees, so much of the capital gain as bears to the whole of the capital gain the same proportion as the amount of two hundred thousand rupees bears to such consideration shall not be charged under section 45:

Provided that nothing contained in this section shall apply to a case where the assessee owns on the date of such transfer any other residential house.

[Explanation.- In this section and in sections 54, 54B, 54D, 54E, 54F and 54G, references to capital gain shall be construed as references to the amount of capital gain as computed under clause (a) of sub- section (1) of section 48.]"

Section 54(1)(i) of the Act reads thus :

"54. Profit on sale of property used for residence.

(1) xxx xxx xxx

(i) if the amount of the capital gain is greater than the cost of the residential house so purchased or constructed (hereinafter in this section referred to as the new asset), the difference between the amount of the capital gain and the cost of the new asset shall be charged under section 45 as the income of the previous year; and for the purpose of computing in respect of the new asset any capital gain arising from its transfer within a period of three years of its purchase or construction, as the case may be, the cost shall be nil; or"

The principles of law governing re-assessment may be summarised thus :

(i) The Court should be guided by the reasons recorded for the reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. To put it in other words, having regard to the entire scheme and the purpose of the Act, the validity of the assumption of jurisdiction under Section 147

can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred or gathered from the records. The Assessing Officer is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others upto his sleeves to be disclosed before the Court if his action is ever challenged in a court of law.

(ii) At the time of the commencement of the reassessment proceedings, the Assessing Officer has to see whether there is prima facie material, on the basis of which, the department would be justified in reopening the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

(iii) The validity of the reopening of the assessment shall have to be determined with reference to the reasons recorded for reopening of the assessment.

(iv) The basic requirement of law for reopening and assessment is application of mind by the Assessing Officer, to the materials produced prior to the reopening of the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied - a postmortem exercise of analysing the materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.

(v) The crucial link between the information made available to the Assessing Officer and the formation of the belief should be present. The reasons must be self evident, they must speak for themselves.

(vi) The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. To put it in other words, something therein, which is critical to the formation of the belief must be referred to. Otherwise, the link would go missing.

(vii) The reopening of assessment under Section 147 is a potent power and should not be lightly exercised. It certainly cannot be invoked casually or mechanically.

(viii) If the original assessment is processed under Section 143(1) of the Act and not Section 143(3) of the Act, the proviso to Section 147 will not apply. In other words, although the reopening may be after the expiry of four years from the end of the relevant assessment year, yet it would not be necessary for the Assessing Officer to show that there was any failure to disclose fully or truly all the material facts necessary for the assessment.

(ix) In order to assume jurisdiction under Section 147 where assessment has been made under sub-section (3) of section 143, two conditions are required to be satisfied;

(i) The Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment;

(ii) Such escapement occurred by reason of failure on the part of the assessee either (a) to make a return of income under section 139 or in response to the notice issued under sub-section (1) of Section 142 or Section 148 or (b) to disclose fully and truly all the material facts necessary for his assessment for that purpose.

(x) The Assessing Officer, being a quasi judicial authority, is expected to arrive at a subjective satisfaction independently on an objective criteria.

(xi) While the report of the Investigation Wing might constitute the material, on the basis of which, the Assessing Officer forms the reasons to believe, the process of arriving at such satisfaction should not be a mere repetition of the report of the investigation. The reasons to believe must demonstrate some link between the tangible material and the formation of the belief or the reason to believe that the income has escaped assessment.

(xii) Merely because certain materials which is otherwise tangible and enables the Assessing Officer to form a belief that the income chargeable to tax has escaped assessment, formed part of the original assessment record, per se would

not bar the Assessing Officer from reopening the assessment on the basis of such material. The expression "tangible material" does not mean the material alien to the original record.

(xiii) The order, disposing of objections or any counter affidavit filed during the writ proceedings before the Court cannot be substituted for the "reasons to believe".

(xiv) The decision to reopen the assessment on the basis of the report of the Investigation Wing cannot always be condemned or dubbed as a fishing or roving inquiry. The expression "reason to believe" appearing in Section 147 suggests that if the Income Tax Officer acts as a reasonable and prudent man on the basis of the information secured by him that there is a case for reopening, then Section 147 can well be pressed into service and the assessments be reopened. As a consequence of such reopening, certain other facts may come to light. There is no ban or any legal embargo under Section 147 for the Assessing Officer to take into consideration such facts which come to light either by discovery or by a fuller probe into the matter and reassess the assessee in detail if circumstances require.

(xv) The test of jurisdiction under Section 143 of the Act is not the ultimate result of the inquiry but the test is whether the income tax officer entertained a "bona fide" belief upon the definite information presented before him. Power under this section cannot be exercised on mere rumours or suspicions.

(xvi) The concept of “change of opinion” has been treated as a built in test to check abuse. If there is tangible material showing escapement of income, the same would be sufficient for reopening the assessment.

(xvii) It is not necessary that the Income Tax Officer should hold a quasi judicial inquiry before acting under Section 147. It is enough if he on the information received believes in good faith that the assesee's profits have escaped assessment or have been assessed at a low rate. However, nothing would preclude the Income Tax Officer from conducting any formal inquiry under Section 133(6) of the Act before proceeding for reassessment under Section 147 of the Act.

(xviii) The “full and true” disclosure of the material facts would not include that material, which is to be used for testing the veracity of the particulars mentioned in the return. All such facts would be expected to be elicited by the Assessing Officer during the course of the assessment. The disclosure required only reference to those material facts, which if not disclosed, would not allow the Assessing Officer to make the necessary inquiries.

(xix) The word “information” in Section 147 means instruction or knowledge derived from the external source concerning the facts or particulars or as to the law relating to a matter bearing on the assessment. An information anonymous is information from unknown authorship but

nonetheless in a given case, it may constitute information and not less an information though anonymous. This is now a recognized and accepted source for detection of large scale tax evasion. The non-disclosure of the source of the information, by itself, may not reduce the credibility of the information. There may be good and substantial reasons for such anonymous disclosure, but the real thing to be looked into is the nature of the information disclosed, whether it is a mere gossip, suspicion or rumour. If it is none of these, but a discovery of fresh facts or of new and important matters not present at the time of the assessment, which appears to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance of the expense, such disclosure would constitute information as contemplated in clause (b) of Section 147.

(xx) The reasons recorded or the material available on record must have nexus to the subjective opinion formed by the Assessing Officer regarding the escapement of the income but then, while recording the reasons for the belief formed, the Assessing Officer is not required to finally ascertain the factum of escapement of the tax and it is sufficient that the Assessing Officer had cause or justification to know or suppose that the income had escaped assessment [vide Rajesh Jhaveri Stock Brokers (P.) Ltd.'s case (supra)]. It is also well settled that the sufficiency and adequacy of the reasons which have led to the formation of a belief by the Assessing Officer that the income has escaped the assessment cannot be examined by the court.

Mr.Soparkar seeks to rely upon a decision of this Court in the case of Nilamben Sandipbhai Parikh v. Assistant Commissioner of Income Tax, Circle-4(2) [2019]109 taxmann.com 336 (Gujarat). We quote the relevant observations relied upon by Mr.Soparkar thus :

> *"6.1 Short question which arises for determination in this petition is, whether the concept of "change of opinion" stands obliterated with effect from 1st April, 1989, i.e., after substitution of Section 147 of the Income Tax Act, 1961 by Direct Tax Laws (Amendment) Act, 1987 ?*
>
> *6.2 To answer the above question, we need to note the changes undergone by Section 147 of the Income Tax Act, 1961 [for short, "the Act"]. Prior to Direct Tax Laws (Amendment) Act, 1987, Section 147 reads as under:*
>
> *"147. Income escaping assessment.-- If-*
>
> *[a] the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or*
>
> *[b] notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the*

assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."

6.2.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1st April, 1989, Section 147 of the Act, reads as under:

> *"147. Income escaping assessment.--*
>
> *If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."*

6.2.3 After the Amending Act, 1989, Section 147 reads as under:

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

6.3 Considering the above, the Apex Court in the case of Kelvinator of India Ltd. (supra) observed and held in para 4 as under :-

> *"4. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 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 re- open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 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 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."

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

6.4 Even this Court in the case of Giriraj Steel (supra) has held that reopening of assessment being based on a mere change of opinion, the assumption of jurisdiction on the part of the A.O. lacks validity and the notice u/s 148 of the Act cannot be sustained.

6.5 The Assessing Officer has power to reopen the assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment and the reasons must have a live link with the formation of belief. In the present case, there is no tangible material. The issuance of the impugned notice u/s.148 is nothing but mere change of opinion. In absence of any new tangible material available with the A.O., it is not open to the A.O. to change his opinion by issuing the notice of re-assessment.

6.6 From the reasons recorded it can be said that the original assessment is sought to be reopened in exercise of powers under section 147/148 of the Act on change of opinion by the AO, which is not permissible more particularly when the original assessment is sought to be reopened after a period of four years from the end of the assessment year. Under the circumstances, the conditions stipulated under first proviso to section 147 are not satisfied and therefore, on the aforesaid ground alone, the impugned notice deserves to be quashed and set aside."

Thus, having regard to the position of law and the materials emerging from the record of the case, it cannot be said that there was no full and true disclosure at the end of the assessee of the material facts. In such circumstances, it could be said that there was no tangible material with the Assessing Officer for the purpose of reopening the assessment except the change of opinion that the deductions could not have been claimed and allowed under Sections 53(b) and 54(1)(i) of the Act. The conveyance deed; permission of the appropriate authority to sell the property and other documents were filed by the appellant at the time of original assessment proceedings. Nothing was suppressed. The Form 37-I as referred to above speaks for itself. It is not in dispute that the notice under Section 148 of the Act came to be issued beyond the period of four years. The CIT(A) recorded a finding of fact that there was no failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment. Such finding of fact could not have been disturbed by the appellate tribunal without any basis for the same.

The Supreme Court in the case of Omar Salay Mohamed Sait v. CIT, reported in 1959(37) ITR 151 (SC), succinctly expressed the expectation from a tribunal while deciding the appeals. The following observations are important :

> *"We are aware that the Income Tax Appellate-Tribunal is a fact finding Tribunal and if it arrives at its own conclusion of fact after due consideration of the evidence before it this court will not interfere. It is necessary, however, that every fact for and against the assessee must have been considered with due care and the Tribunal must have given its finding in a manner which would clearly indicate what were the questions which arose for determination, what was*

the evidence pro and contra in regard to each one of them and what were the findings reached on the evidence on record before it. The conclusions reached by the Tribunal should not be coloured by any irrelevant considerations or matters of prejudice and if there are any circumstances which required to be explained by the assessee, the assessee should be given an opportunity of doing so. On no account whatever should the Tribunal base its findings on suspicions, conjectures or surmises nor should it act on no evidence at all or on improper rejection of material and relevant evidence or partly on evidence and partly on suspicions, conjectures or surmises and if it does anything of the sort, its findings, even though on questions of fact, will be liable to be set aside by this court."

In view of the aforesaid, we hold that the impugned order passed by the appellate tribunal is not sustainable in law.

In the result, this Appeal succeeds and is hereby allowed. The impugned order passed by the Income Tax Appellate Tribunal, Ahmedabad Bench 'D' dated 9th March 2007 in the ITA No.1113/Ahd/2001 for the Assessment Year 1991-92 is hereby quashed and set-aside. The two substantial questions of law as formulated by this Court are answered in favour of the appellant-assessee and against the Revenue.

(J. B. PARDIWALA, J.)

(BHARGAV D. KARIA, J.)

/MOINUDDIN