IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 27TH DAY OF JANUARY, 2021

PRESENT

THE HON'BLE MR. ABHAY S. OKA, CHIEF JUSTICE

AND

THE HON'BLE MR. JUSTICE R. DEVDAS

AND

THE HON'BLE MR. JUSTICE SACHIN SHANKAR MAGADUM

WRIT APPEAL NO. 1145 of 2015 (T-IT)

Between:

Dell India Private Limited
(Now Dell International Services
India Private Limited)
Divyashree Greens
No.12/1, 12/1A
Koramangala Inner Ring Road
Domlur, Bangalore -- 560 071
Represented herein by its
Tax Director, Mr. Amit Gupta

... Appellant

(By Shri Percy Pardiwalla, Senior counsel for
Shri Suryanaryana T., Advocate)

And:

1. The Joint Commissioner of Income Tax
Large Tax Payers Unit (LTU)
JSS Towers, 100 Feet Ring Road
Banashankari III Stage,
Bangalore – 560 085

2. The Commissioner of
Income Tax – II
Large Tax Payers Unit (LTU)
JSS Towers, 100 Feet Ring Road
Banashankari III Stage
Bangalore – 560 085 … Respondents

(By Shri K.V. Aravind, Advocate)

This Writ Appeal filed under Section 4 of the Karnataka High Court Act praying to set aside the order passed in Writ Petition No.8901/2015 dated 23rd March 2015.

As per the order of Hon'ble the Chief Justice dated 5th January 2016, this Writ Appeal is ordered to be posted before the Full Bench to consider the questions of law formulated by the Division Bench by the order dated 2nd September 2015.

This writ appeal having been heard on the questions referred and reserved for Judgment, coming on for pronouncement of Judgment, this day, **Chief Justice** delivered the following:

JUDGMENT

By the order dated 2nd September 2015, a Division Bench of this Court directed that this Writ Appeal should be placed before the Chief Justice for considering the issue of referring following three questions to a larger Bench. The said three questions are as under:

"1. Whether the Division Bench judgment in the case of **Commissioner of Income Tax Vs Rinku Chakraborthy** (2011) 242 ITR 425 lays down good law?

2. Whether the judgment in the **Rinku Chakraborthy** (supra) is *per incurium* in view of the fact that it relies upon the judgment of the Apex Court in the case of **Kalyani Mavi & Co. Vs Commissioner of income Tax** 1976 CTR 85, which has been specifically overruled by the Apex Court in the case of **Indian & Eastern Newspaper Society Vs Commissioner of Income Tax** (1979) 110 ITR 996?

3. Whether 'reason to believe' in the context of Section 147 of the Income Tax Act can be based on mere 'change of opinion' of the Assessing Officer?"

2. By an order dated 31st October 2017, the then Chief Justice placed the Appeal before a Full Bench. The constitution of Full Bench underwent change from time to time. The reference was heard on 8th January 2021.

3. Though, the scope of adjudication is limited to decide three questions of law framed by the Division Bench and this Bench is not really concerned with the merits of the case, it is necessary to

make a brief reference to the facts of the case only for the purpose of understanding how the controversy arises.

4. The appellant manufacturers and sells computer hardware and other related products. The appellant provides warranty services to the customers and the price of the standard warranty period is covered by the sale price of the computer hardware and other products. The appellant provides extended or upsell warranty which covers the period beyond the standard warranty. The appellant charges additional amount of consideration for the extended warranty provided to the customers. Though, the appellant recovers the consideration for extended warranty with the price of the products along with sales tax or service tax, as the case may be, the revenue in connection with extended warranty is recognized and offered to Income Tax proportionately over the period of the service contract, which spreads beyond the financial year in which the sale in relation to the product in respect of which extended warranty is issued is made. The appellant has adopted “deferred revenue” system under the mercantile system of accounting.

5. Scrutiny assessment proceedings as per Sub Section (3) of Section 142 of the Income Tax Act, 1961 (for short "the said Act") were held for the Assessment Year 2009-10. According to the case of the appellant, at that stage, the Assessing Officer examined the issue of deferred revenue by calling for details from the appellant. According to the case of the appellant, the Assessing Officer agreed with the said accounting system followed by the appellant as regards accounting of the consideration for extended warranty. A notice dated 27th March 2014 under Section 148 of the said Act was issued to the appellant by the Joint Commissioner of Income Tax stating therein that he had reason to believe that the income in respect of which the appellant is assessable to tax for the Assessment Year 2009-10 has escaped assessment within the meaning of Section 147 of the said Act. By a communication dated 25th April 2014, the joint Commissioner of Income Tax communicated the reasons to the appellant for reopening the assessment for Assessment Year 2009-10. While arriving at net revenue of Rs.31,10,85,96,000/- for the Assessment Year 2009-10, reduction of Rs.2,16,89,00,773/- was made as smart debits deferred revenue account. It is alleged in the reasons that the

said income of Rs.2,16,89,00,773/- had escaped assessment for the Assessment Year 2009-10.

6. The appellant replied to the notice under Section 148 of the said Act and objected to the reasons recorded by its reply dated 9th May 2014. It was submitted in the reply that the reasons recorded for reopening the assessment for the Assessment Year 2009-10 are based on mere change of opinion and hence, cannot be termed as valid reasons. It was submitted that as the Assessing Officer has taken a different view for different Assessment Years, it amounts to merely a change of opinion. The Joint Commissioner of Income Tax by a letter dated 24th February 2015 rejected the objections raised by the appellant and directed the appellant to appear for the reassessment proceedings for the Assessment Year 2009-10. Being aggrieved by the said notice under Section 148 and the rejection of preliminary objections raised by the petitioners to the said notice, a writ petition was filed before the learned Single Judge. By the Judgment and order which is impugned in the present Appeal, the learned Single Judge rejected the petition on the ground that there was no error in initiation of the proceedings under Section 148 of the said Act.

7. By the judgment and order dated 2nd September 2015, by which the reference was made to the larger Bench, the Division Bench found that while passing the Assessment Order for the Assessment Year 2009-10, the Assessing Officer actually considered the accounting system followed by the appellant and that the Assessing Officer had assumed that deferred amount was subjected to tax in the subsequent Assessment Year 2010-11. Ultimately, the Division Bench was of the opinion that there was neither "reason to believe" for the Assessing Officer to issue the notice under Section 148 of the said Act for the Assessment Year 2009-10 nor reasons assigned by him satisfy the criteria for reopening the concluded assessment as laid down in Section 147 of the said Act. The Division Bench also observed that this is a case of mere change of opinion which will not warrant reopening of the concluded assessment for the Assessment Year 2009-10.

8. The Division Bench relied upon the decision of a Division Bench of this Court in the case of the ***Commissioner of Income Tax and another v. M/s. Hewlett-Packard Globalsoft Pvt. Ltd.***[1] decided on 14th of August 2015. The said decision holds that "reason to believe" cannot be based on a mere change of opinion

[1] ITA Nos.65/2014 C/w 66/2014 dt.14/08/2015

on the part of the Assessing Officer. However, attention of the Division Bench was invited to a decision of another Division Bench of this Court in the case of ***Commissioner of Income Tax and another v. Rinku Chakraborthy***[2]. The said decision of the Division Bench was based on the decision of the Apex Court in the case of ***Kalyanji Mavji and Company v. C.I.T. West Bengal – II***[3]. In the said decision, the Apex Court while interpreting clause (b) of Sub Section (1) of Section 34 of the Income Tax Act, 1922 (for short "the Old Act") held that concluded assessment can be reopened where in the original assessment, the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Assessing Officer. The Division Bench thereafter referred to a subsequent decision of the Apex Court of a Bench of three Hon'ble Judges in the case of ***M/s. Indian and Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New Delhi***[4]. In the said decision, it was held that the law laid down in the case of ***Kalyanji Mavji and Company*** (supra) was not correct. However, after finding that there was a conflict between the view taken by

[2] (2011) 242 CTR 425
[3] (1976) 1 SCC 985
[4] (1979) 4 SCC 248

two coordinate Division Benches in the cases of ***Hewlett-Packard*** (supra) and ***Rinku Chakraborthy*** (supra) respectively, the Division Bench referred the above quoted questions for decision of a larger Bench.

9. We have heard the submissions of the learned Senior Counsel Mr. Percy Pardiwalla for appellant-assessee and the learned counsel Shri K.V. Aravind for the respondents – revenue.

10. Following is the gist of submissions made by Shri Padiwalla:

(a) In the case ***Rinku Chakraborthy*** (supra), the Division Bench concluded that where an Assessing Officer erroneously fails to tax a part of the assessable income, there is an income escaping assessment and, accordingly, the Assessing Officer has jurisdiction under Section 147 to reopen the assessment. In doing so, it relied on the observations of the Apex Court in the case of ***Kalyanji Mavji and Company*** (supra). He submitted that the observations made in the case of ***Kalyanji Mavji and Company*** (supra) are no longer good law in their entirety, in the light of the subsequent decision of the Apex Court in the case of ***Indian and Eastern Newspaper Society*** (supra)**,** where the

Apex Court held that those particular observations in ***Kalyanji Mavji and Company*** (supra) did not lay down the correct position of law. In the light of the observations of the Apex Court in the case of ***Indian and Eastern Newspaper Society*** (supra), it is clear that a mistake, oversight or inadvertence in assessing any income would not give a power to an Assessing Officer to reopen the assessment by exercise of powers under Section 147 of the Act. That would amount to a review, which is outside the scope of Section 147 of the Act.

(b) The subsequent Judgment of the Apex Court in the case of ***Indian and Eastern Newspaper*** (supra) was not brought to the notice of this Hon'ble Court in the case of ***Rinku Chakraborthy*** (supra). He urged that there are specific provisions in the Act for correcting errors/mistakes, like the power of rectification under Section 154 of the Act and one cannot resort to Section 147 to correct errors or to review an earlier order.

(c) Further, the learned Senior Counsel relied upon various other decisions in support of his submission including the decision in the case of ***Commissioner of Income-tax, Delhi v.***

Kelvinator of India Limited[5]. He would, therefore, submit that the first and third questions framed by the Division Bench will have to be answered in the negative and the second question will have to be answered in the affirmative.

11. The learned counsel appearing for the respondents – revenue relied upon various decisions on the question of scope of interference with the proceedings under Section 148 of the said Act by a Writ Court. His submission is that the Court cannot go into the sufficiency or correctness of the material on the basis of which concluded assessment is sought to be reopened. He relied upon decisions of the Apex Court in the case of ***S. Narayanappa v. CIT***[6] and ***Reymond Woollen Mills Ltd., v. ITO and others***[7]. He urged that whether reopening of the assessment is based merely on change of opinion or not is a question which depends on facts of each case. He urged that while deciding the reference, this Court ought not to go into the merits of the case.

12. We have given careful consideration to the submissions. We are dealing with a reference to a larger bench where we have been called upon to decide the questions formulated by a Division

[5] (2010) 320 ITR 561
[6] (1967) 63 ITR 219 (SC)
[7] (1999) 236 ITR 0034 (SC)

Bench of this Court. The first two questions revolve around the issue whether the Division Bench of this Court in the case of ***Rinku Chakraborthy*** (supra) has laid down the correct law. We must, therefore, refer to the decision in the case of ***Rinku Chakraborthy*** (supra). This was a case where the Tribunal had interfered with proceedings initiated in accordance with Section 147 of the said Act. The Tribunal held that reopening of an assessment on the basis of a mere change of opinion was not justified. The submission before the High Court was that it was not a case of change of opinion by the Assessing Officer, but it was a case of an income escaping the assessment. In paragraph 17 of the said decision, the Division Bench held thus:

> "17. It is in this background, it is necessary to look into the judgment of the Apex Court, where the scope of reassessment has been explained. The leading case on the point is *Kalyanji Mavji & Co. v. CIT,* 1976 CTR (SC) 85 : (1976) 102 ITR 287 (SC). The Supreme Court dealing with s. 34(1)(b) of 1922 Act, has held as under*:*
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> "On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of s. 34(1)(b) to the following categories of cases:

(1) where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the ITO. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;

(3) where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

If these conditions are satisfied then the ITO would have complete jurisdiction to reopen the original assessment. It is obvious that where the ITO gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry

into the materials which form part of the original assessment, s. 34(1)(b) would have no application."

(Underlines supplied)

Based on the said decision of the Apex Court, this Court held that:

(a) Where in the original assessment, the income liable to tax escapes assessment due to oversight or inadvertence or a mistake committed by Assessment Officer, the jurisdiction to reopen the original assessment vests in the Assessment Officer.

(b) A tax payer should not be allowed to take advantage of an oversight or mistake committed by Assessment Officer.

13. Thus, what is held in the case of ***Rinku Chakraborthy*** is clearly based on the decision of the Apex Court in the case of ***Kalyanji Mavji and Company*** and in particular what is held in Clause (2) highlighted above.

In paragraph 13 of the decision of ***Kalyanji Mavji and Company*** (supra) it was held thus:

"13. On a combined review of the decisions of this Court the following tests and principles would apply

to determine the applicability of Section 34(1)(b) to the following categories of cases:

"(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income Tax Officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;

(3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law."

If these conditions are satisfied then the Income Tax Officer would have complete jurisdiction to reopen the original assessment. It is obvious that where the

> Income Tax Officer gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, Section 34(1)(*b*) would have no application."
>
> (Underlines supplied)

14. In the case of ***M/s. Indian and Eastern Newspaper Society*** (supra), one of the issues which arose for consideration was whether reassessment is justified on the basis of an error found by the Assessing Officer on the reconsideration of the same material, which was before him when he made the original assessment. Another issue before the Apex Court was whether a view expressed by an internal auditor of the Income Tax Department on a point of law can be regarded as an information within the meaning of Clause (b) of Section 147 of the said Act. The Apex Court considered its several earlier decisions and in paragraph 14 of the said decision, the Apex Court held thus:

> **"14.** Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a

change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147(*b*). Reliance is placed on **Kalyanji Mavji & Co. v. CIT**, where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(*b*) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in **Maharaj Kumar Kamal Singh v. CIT**, **CiT v. Raman & Co**. and **Bankipur Club Ltd. v. CIT** and we do not believe that -the law has since taken a different course. Any observations in **Kalyanji Mavji & Co. v. CIT** suggesting the contrary do not, we say with respect, lay down the correct law."

(Underlines supplied)

15. Hence, Apex Court expressly held that the law laid down by a Bench of two Hon'ble Judges of the Apex Court in the case of ***Kalyanji Mavji and Company*** (supra) was not correct. The Apex Court after noticing the view taken in its earlier decision in the case of ***Kalyanji Mavji and Company*** (supra) expressly held that an error discovered on reconsideration of the same material does not give the Income Tax Officer the power to reopen a concluded assessment.

16. At this stage, we may make a useful reference to a subsequent decision of the Apex Court in the case of ***CIT v. Kelvinator of India Limited*** (supra). It is a decision of the Bench of three Hon'ble Judges. In paragraphs 3.1 and 3.2 of the said decision, the Apex Court has quoted Section 147 which existed prior to 1st April 1989 and after 1st April 1989. Paragraphs 3.1 and 3.2 of the said decision read thus:

> "3.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1-4-1989, section 147 of the Act, reads as under:
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> "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)."

3.2 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 recomputed 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)."

(Underlines supplied)

We are concerned with the provision of Section 147 as amended with effect from 1st April 1989. In paragraph 4 of the said decision, the Apex Court held thus:

> **"4.** On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be *per se* reason to reopen.

We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and it the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

"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 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."
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> (Underlines supplied)

17. Thus, what is held by the Apex Court is that when a power under Section 147 is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of the Assessing Officer. Further, it is held that after 1st April 1989, the Assessing Officer has power to reopen provided there is a tangible material to come to the conclusion that there is escapement of income from assessment. The Apex Court held

that mere change of opinion on consideration of the same material is no ground to invoke Section 147 of the said Act.

18. As noted earlier, the decision in the case of ***Rinku Chakraborthy*** (supra) is based only on what is held in Clause (2) of paragraph 13 of the decision in the case of ***Kalyanji Mavji and Company*** (supra). The decision rendered in the case of ***Kalyanji Mavji and Company*** (supra) was by a Bench of two Hon'ble Judges. Subsequently, a larger Bench of three Hon'ble Judges in the case of ***M/s. Indian and Eastern Newspaper Society*** (supra) has clearly held that oversight, inadvertence or mistake of the Assessing Officer or error discovered by him on the reconsideration of the same material does not give him power to reopen a concluded assessment. It was expressly held that the decision in the case of ***Kalyanji Mavji and Company*** (supra), on this aspect does not lay down the correct law. The decision in the case of ***Rinku Chakraborthy*** (supra) is based solely on the decision of the Apex Court in the case of ***Kalyanji Mavji and Company*** (supra) and in particular what is held in Clause (2) of paragraph 13. The said part is held as not a good law by a subsequent decision of the Apex Court in the case of ***M/s. Indian and Eastern Newspaper Society*** (supra).

19. Therefore, in the light of law laid down in the case of ***M/s. Indian and Eastern Newspaper Society*** (supra). the first question will have to be answered in the negative by holding that the decision in the case of ***Rinku Chakraborthy*** does not lay down correct position law to the extent to which it follows what is held in clause (2) of paragraph 13 of the decision of the Apex Court in the case of ***Kalyanji Mavji and Company*** (supra). The second question will have to be answered in the affirmative. In view of the consistent decisions of the Apex Court holding that "reason to believe" in the context of Section 147 of the Income Tax cannot be based on mere change of opinion of the Assessing Officer, the third question will have to be answered in the negative. In fact, in view of settled law, framing of question No.3 was not warranted at all.

20. We make it clear that we have not made any adjudication on the controversy on the merits of Writ Appeal and now the Appeal will have to be placed before concerned Division Bench for deciding the same on merits in the light of what we have held above. The questions whether a case for reopening of the assessment in accordance with Section 147 of the said Act is

made out and whether a Writ Court ought to interfere with the impugned notice, are left to be decided by a Division Bench.

21. We conclude by recording following answers:

Question No.1 is answered in the negative.

Question No.2 is answered in the affirmative.

Question No.3 is answered in the negative.

Registrar (Judicial) shall place this Writ Appeal before the concerned Division Bench.

Sd/-
CHIEF JUSTICE

Sd/-
JUDGE

Sd/-
JUDGE

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