

THE HON'BLE SRI JUSTICE C.V. NAGARJUNA REDDY
AND
THE HON'BLE SMT. JUSETICE KONGARA VIJAYA LAKSHMI

I.T.T.A. No.158 of 2005

DATED:09-02-2018

Between:

M/s. Kumar's Metallurgical Corporation Ltd.,
Having its Registered Office at
Vattimarathi Village, Chityal Mandal,
Nalgonda District,
Represented by its Chairman &
Managing Director
Mr. Satish Kumar Aggarwal ... Appellant

And

The Joint Commissioner of Income Tax (Assts.)
Special Range-4
Hyderabad ... Respondent

COUNSEL FOR THE APPELLANT: Mr. Ch. Pushyam Kiran

COUNSEL FOR THE RESPONDENTS: Ms. K. Mamata,
Special Standing
Counsel for Income
Tax Department

THE COURT MADE THE FOLLOWING:

JUDGMENT: *(per the Hon'ble Sri Justice C.V. Nagarjuna Reddy)*

In this assessee's appeal against order dt.27.1.2005 in I.T.A. No.192/Hyd/2002, on the file of the Income Tax Appellate Tribunal, Hyderabad (for short, "the Tribunal"), the following substantial questions of law have been raised.

1. "Whether on the facts and circumstances, whether the Income Tax Appellate Tribunal is correct in law in upholding the order of reassessment against the order of assessment under Section 143(3) of the Income Tax Act, 1961, in the absence of any finding that the appellant had withheld the material information for concluding the assessment or had not filed material information for completing the assessment?"
2. Whether the Income Tax Appellate Tribunal is correct in law in holding that there was no change of opinion on part of Assessing Officer in spite of the fact that all material was available on record with the Assessing Officer who took a considered decision to allow the expenditure after considering the decision of this Hon'ble Court in the assessment concluded under Section 143(3) of the Act?
3. Whether the Income Tax Appellate Tribunal is correct in law in holding that the expenditure incurred by the appellant are capital in nature and hence cannot be claimed as revenue expenditure against the interest income earned on short-term deposits invested out of share application money in view of the fact that the appellant was a running company and had earned business income for the year under consideration?"

2. We have heard Mr. Ch. Pushyam Kiran, learned counsel for the appellant, and Ms. K. Mamata, learned Senior Standing Counsel for the Income Tax Department.

3. The averments in the memorandum of appeal are briefly stated as under:

The appellant is a public limited company dealing in the business of manufacturing and trading in pig iron. During the year 1991-92, the appellant went for a public issue. The issue was oversubscribed and the excess application money received was kept in short-term deposits in various banks. The funds invested earned interest in a sum of Rs.1,02,47,553.21 ps. The appellant claimed deduction of Rs.85,60,000/- being the expenditure incurred by way of interest, advertisement, business promotion, printing and stationery, share application forms, traveling and other expenses. The assessing officer concluded the assessment treating the interest income earned on the short term deposit under the head “income from other sources” and allowed deduction for the expenditure of interest paid on bridge loans, collection charges, advertisements and printing and stationery as he was convinced that there was a nexus between the income earned and the expenditure incurred. The assessing officer considered all the facts and the judgment of the jurisdictional High Court and concluded the assessment under Section 143(3) of the Income Tax Act, 1961 (for short, “the Act”). On 10.09.1996, the assessing officer re-opened the assessment under Section 147 of the Act proposing to revise the assessment order passed earlier under Section

143(3). The Assessing Officer on a change of opinion wanted to disallow the expenditure allowed earlier. It is evident from the reasons cited for reopening the assessment that the Assessing Officer acted upon an audit objection. It is also evident that the Assessing Officer did not apply his mind independently and the purported action to revise the assessment was not on account of any new material that has come on record and which material has been withheld by the appellant. It is also pertinent to mention that it was not the case of the Assessing Officer in the reassessment proceedings that the appellant had not filed the necessary material or has withheld the material evidence from the Income Tax Department. The Assessing Officer thus passed a revised order almost at the end of 4 years by disallowing the expenditure that was earlier allowed. The appellant carried the matter to the Commissioner of Income Tax (Appeals) and further to the Income Tax Appellate Tribunal, unsuccessfully. Aggrieved by the revised order passed on the reopening of the assessment, the present appeal is filed.

4. The stand of the assessee as reflected from the submissions of the learned counsel for the appellant is that reopening of the assessment and revising the same are bad as

the same were done on a mere change of opinion. That while passing the assessment order under Section 143(3) of the Act, the Assessing Officer has considered the judgment of this Court in **CIT v. Derco Cooling Coils Ltd.**¹ and taken an informed decision allowing deduction of the expenditure incurred by the appellant in raising the share capital and that the reasons given for reopening of the assessment would clearly reveal that the same was done on a mere change of opinion based on audit objection and that no fresh material was made available to the Assessing Officer for differing from his earlier view. On merits, it is the case of the appellant that the expenditure was incurred in the form of interest on bridge loans, advertisement, business promotion, printing and stationery, share application forms, traveling and other expenses which have direct nexus with the interest that accrued to the appellant and that as such expenditure was directly connected with the public issue, the same was eligible to the set off against interest earned on the short term deposits. The learned counsel to support his submissions, has placed reliance on the judgments in **Commissioner of Income Tax, Delhi v. Kelvinator of India Limited**², **Jindal Photo Films Ltd. v.**

¹ (1992) 198 ITR 375 (AP)

² [2010] 320 ITR 561 (SC)

The Deputy Commissioner of Income Tax³,
Commissioner of Income Tax v. Kelvinator of India Ltd.⁴,
Century Enka Ltd. v. Income Tax Officer, Central Circle⁵,
and State of Uttar Pradesh and Ors. v. Aryaverth Chawl
Udyoug and Ors.⁶

5. Opposing the above submissions, the learned Senior Standing Counsel for the Income Tax Department submitted that when the Assessing Officer has passed the order, true and correct legal position was not available to him and that on being apprised of the correct legal position, the Assessing Officer has revised his assessment, that the revised assessment order was not based on mere change of opinion, but, on information gathered from the judgments of the Apex Court as well as of this Court and that therefore both the appellate fora have rightly rejected the appeals of the appellant. The learned Standing Counsel sought to derive support of her submissions from the judgments of the Supreme Court in **Maharaj Kumar Kamal Singh v. Commissioner of Income Tax, Bihar and Orissa**⁷, **Kalyanji Mavji & Co. v. Commissioner of Income**

³ [1998] 234 ITR 170 (Del.)

⁴ [2002] 256 ITR 1 (Del.)

⁵ [1983] 143 ITR 629 (Cal.)

⁶ [2016] 91 VST 1 (SC)

⁷ [1959] 35 ITR 1 (SC)

Tax, West Bengal II⁸ and A.L.A. Firm v. Commissioner of Income Tax, Madras⁹

6. We have considered the respective submissions of the learned counsel for the parties with reference to the record.

7. Section 147 of the Act, as it stood at the relevant point of time, which is relevant for the present case on hand, reads as under:

“147. If the assessing officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance of any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 118 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of sec. 143 or this section has been made for the relevant asst. year, no action shall be taken under this section after the expiry of four years from the end of the relevant Asst. Year, unless any income chargeable to tax has escaped assessment for such Asst. Year by reason of the failure on the part of assessee to make a return under section 139(1) in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that Asst. year.”

8. This provision is subject matter of interpretation in a slew of judgments. The Legislative history of Section 147 of the Act has been explained by the Supreme Court in **Kelvinator of India Limited** (2 supra) as under:

⁸ [1976] 102 ITR 287 (SC)

⁹ [1991] 189 ITR 285 (SC)

“6. 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 herein below 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.”

The facts in **Kelvinator of India Limited** (2 supra) are almost similar to that in the present case. The order of assessment in the said case was passed by the Assessing Officer on 17.11.1989 wherein upon making additions and disallowances the taxable income was determined at Rs.21,14,082/-. Subsequently, based on a tax audit report, a notice under Section 148 of the Act was issued on 20.04.1990. A reassessment order was passed based on subsequent order dt.27.7.1990 of the Commissioner (Appeals) for the assessment year 1986-87, although the assessment was reopened on 20.04.1990. The assessee's appeal was allowed by the Commissioner (Appeals) on the ground that the reassessment was made on a mere change of opinion on the part of the Assessing Officer and that therefore such reassessment proceedings could not have been validly initiated. The Income Tax Appellate Tribunal has dismissed the appeal of the Revenue and upheld the first appellate order. On an application filed by the Department, for reference of the question of law, a Full Bench of the Delhi High Court in **Kelvinator of India** (4 supra) has decided the case on merits. The High Court on interpretation of Section 147 of the Act

held that as it stood upto 31.3.1989, to confer jurisdiction under Section 147(a) of the Act, the following conditions were required to be satisfied viz., (i) the assessing officer must have reason to believe that income chargeable to tax has escaped assessment; and (2) he must also have a reason to believe that such escapement occurred by reason of either (a) omission or failure on the part of the assessee to make a return of his income under Section 139; or (b) omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year. The High Court held that the aforementioned requirements of law must be held to be conditions precedent for invoking the jurisdiction of the assessing officer to reopen the assessment under Section 147 of the Act and that both the conditions are cumulative. The Delhi High Court differed with the view of the Gujarat High Court in **Garden Silk Mills (P) Ltd. v. Dy. C.I.T.**¹⁰ expressed in the following terms.

“12. We may also notice that a Division Bench of the Gujarat High Court in *Garden Silk Mills Pvt. Ltd. (supra)*, while expressing similar views observed:

"The reasons recorded by the Assessing Officer which led to the belief about the escapement of assessment disclose that the present case is nothing but mere change of opinion on the facts which were already before the Assessing Officer while making the first assessment to which conscious application of mind is reflected from the

¹⁰ [1999] 237 ITR 668 (Guj.)

proceedings, and allowed in the computation and which has not been disputed by the Revenue."

Although the referring Bench had *prima facie* agreed with the decision of this Court in *Jindal Photo Films* (supra), but a doubt was sought to be raised by the revenue in view of a decision of the Gujarat High Court in *Praful Chunilal Patel's* case (supra). Therefore let us now consider the decision of the Division Bench of Gujarat High Court in the said case, wherein it was held:

"It will thus be seen that in the proceedings taken under Section 147, the Assessing Officer may make an assessment or reassessment, or recomputation, as the case may be. The word "assess" refers to a situation where the assessment was not made in the normal manner while the word "reassess" refers to a situation where an assessment is already made, but it is sought to be reassessed on the basis of this provision.

In cases where the Assessing Officer has not made an assessment of any item of income chargeable to tax while passing the assessment order in the relevant assessment year, it cannot be said that such income was subjected to an assessment. In the assessment proceedings, the Assessing Officer would ascertain on consideration of all relevant circumstances the amount of tax chargeable to a given taxpayer. The word "assessment" would mean the ascertainment of the amount of taxable income and of the tax payable thereon. In other words, where there is no ascertaining of the amount of taxable income and the tax payable thereon, it can never be said that such income was assessed. Merely because during the assessment proceedings the relevant material was on record or could have been with due diligence discerned by the Assessing Officer for the purpose of assessing a particular item of income chargeable to tax, it cannot be inferred that the Assessing Officer must necessarily have deliberated over it and taken it out while ascertaining the taxable income or that he had formed any opinion in respect thereof. If looking back it appears to the Assessing Officer (albeit within four years of the end of the relevant assessment year) that a particular item even though reflected on the record was not subjected to assessment and was left out while working out the taxable income and the tax payable thereon, i.e., while making the final assessment order, that would enable him to initiate the proceedings irrespective of the question of non-disclosure of material facts by the assessee."

With reference to the above view of the Gujarat High Court, the Delhi High Court in paragraphs 13, 14 and 15 held as follows:

“13. We are, with respect, unable to subscribe to the afore-mentioned view. If the contention of the Revenue is accepted the same, in our opinion, would confer an arbitrary power upon the Assessing Officer. The Assessing Officer who had passed the order of assessment or even his successor officer only on slightest pretext or otherwise would be entitled to re-open the proceeding. Assessment proceedings may be furthermore re-opened more than once. It is now trite that where two interpretations are possible, that which fulfills the purpose and object of the Act should be preferred.

14. It is well settled principle of interpretation of statute that entire statute should be read as a whole and the same has to be considered thereafter Chapter by Chapter and then Section by Section and ultimately Word by Word. It is not in dispute that the Assessing Officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in Section 154 of the Act. The power of rectification of mistake conferred upon the ITO is circumscribed by the provisions of Section 154 of the Act. The said power can be exercised when mistake is **apparent**. Even mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Income Tax Appellate Tribunal has limited jurisdiction under Section 254(2) of the Act. Thus when the Assessing Officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

15. It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the ITO does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of re-assessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the Revenue.”

The judgment of the Delhi High Court in **Kelvinator of India Ltd.** (4 supra) has been upheld by the Supreme Court in **Kelvinator of India Ltd.** (2 supra).

8. Referring to the judgment of the Supreme Court in **Calcutta Discount Co. Ltd. v. I.T.O.**¹¹, the Delhi High Court in **Jindal Photo Films Ltd.** (3 supra) held that law does not require the assessee to state the conclusion that could reasonably be drawn from the primary facts. That once assessment order is framed, the Assessing Officer cannot at a later point of time merely on forming an opinion, by giving a second thought to the primary facts disclosed by the assessee, arrive at a finding that he had committed an error in computing the taxable income of the assessee and reopen the assessment by resort to Section 147 of the Act and that discovery of new and important matters for knowledge of fresh facts which were not present at the time of original assessment would constitute a 'reason to believe the income having escaped assessment' within the meaning of Section 147. That even while discovering new and important matters, if such facts could have been discovered by the assessing authority but were not so discovered at the time of original assessment, such matters do not constitute a new information. The Delhi High Court further held that the power to reopen an assessment was conferred by the Legislature not with the intention to enable the Income Tax Officer to reopen the final decision made

¹¹ [1961] 41 ITR 191 (SC)

against the Revenue in respect of questions that directly arose for decision in earlier proceedings and that if that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods. In conclusion, the Delhi High Court has stated the law as follows:

“18. Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the Assesses, the same could not be brought to tax by reopening the assessment merely on account of subsequently the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction; (See- *Siesta Steel Construction Pvt Ltd v. K.K.Shikare & Ors* : [1985] 154 ITR 547 (Bom); *Satpal Automobile Co. v. ITO*: [1983] 141 ITR 450 (All); *Gopal Films v. ITO* : [1983] 139 ITR 566(Kar.); *C.W.T. v. Manilal C. Desai* : [1973] 91 ITR 135(MP).”

9. In **Phool Chand Bajrang Lal v. I.T.O.**¹² the Supreme Court reiterated the legal position as under:

“An Income Tax Officer acquires jurisdiction to reopen an assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to Income Tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the

¹² [1993] 203 ITR 456 (SC)

Income Tax Officer, the sufficiency of reasons for forming the belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

10. In **Century Enka Ltd.** (5 supra), the Calcutta High Court has set aside the reassessment order on the ground that when the materials or facts relevant were admittedly and already available in the concerned original assessment proceedings and no new facts came to the possession of the assessing ITO, the said officer cannot be heard to say in the facts and background as mentioned hereinbefore that the legal position was not known to him even though the relevant facts and materials were available. The Court has held as under:

"17. In this case, when the materials or facts relevant were admittedly and already available in the concerned original assessment proceedings and they were not new facts, which came to the possession of the assessing ITO and the said officer cannot be heard to say in the facts and background as mentioned hereinbefore, that the legal position was not known to him even though the relevant facts and materials were available. Thus, the initiation as made, cannot be upheld and such initiation must be observed and held to have been made on a mere change of opinion and to be not covered by or under the circumstances as envisaged in Section 147 of the said Act. The ignorance of law, as laid down by the Supreme Court, would be no ground or any excuse for the ITO concerned under the provisions of the said Act."

11. In **Aryaverth Chawl Udyoug** (6 supra), the Supreme Court holding that discovery of an inadvertent mistake or non-application of mind during the assessment would not be a justifiable ground to initiate reassessment proceedings, has observed:

“27. This court has consistently held that such material on which the assessing authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. It must bring home the appropriate rationale of action taken by the assessing authority in pursuance of such belief. In case of absence of such material, this Court in clear terms has held the action taken by assessing authority on such "reason to believe" as arbitrary and bad in law. In case of the same material being present before the assessing authority during both, the assessment proceedings and the issuance of notice for reassessment proceedings, it cannot be said by the assessing authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See DCM v. State of Rajasthan: [1980] 4 SCC 71).

28. The standard of reason exercised by the assessing authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Limited, Kerala v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore: [2007] 15 SCC 435 : [2007] 6 VST 783 (SC) and A.L.A. Firm v. Commissioner of Income-tax: [1991] 2 SCC 558 : [1991] 189 ITR 285 (SC). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.”

12. In **Maharaj Kumar Kamal Singh** (7 *supra*), on which reliance has been placed by Ms. K. Mamata, the Supreme Court interpreting the word “information” in Section 34(1) of the Income Tax Act, 1922, which is analogous to Section 147 of the Income Tax Act, 1961, held as under:

“9. ...Where, in consequence of information in his possession, the Income-tax Officer has reason to believe that income has been assessed as too low a rate, he is empowered to revise the assessment; and there can be no doubt that the belief of the Income-tax Officer that any given income has been assessed as too low a rate may in many cases be due to information about the true legal position in the matter of the relevant rates. If the word "information" in reference to this class of cases must necessarily include information as to law, it is impossible to accept the argument that, in regard to the other cases falling under the same provision, the same word should have a narrower and a more limited meaning. We would accordingly hold that the word "information" in section 34(1)(b) includes information as to the true and correct state of the law and so would cover information as to relevant judicial decisions. If that be the true position, the argument that the Income-tax Officer was not justified in treating the Privy Council decision in question as information within section 34(1)(b) cannot be accepted.

The Supreme Court further held:

“10. ...Even if the assessee has submitted a return of his income, cases may well occur where the whole of the income has not been assessed and, such part of the income as has not been assessed can well be regarded as having escaped assessment. In the present case, the rents received by the assessee from his agricultural lands were brought to the notice of the Income Tax Officer; the question as to whether the said amount can be assessed in law was considered and it was ultimately held that the relevant decision of the Patna High Court which was binding on the department justified the assessee's claim that the said income was not liable to be assessed to tax. There is no doubt that a part of the assessee's income had not been assessed and in that sense, it has clearly escaped assessment. Can it be said that, because the matter was considered and decided on the merits in the light of the binding authority of the decision of the Patna High Court, no income has escaped assessment when the said Patna High Court decision has been subsequently reversed by

the Privy Council?. We see no justification for holding that cases of income escaping assessment must always be cases where income has not been assessed owing to inadvertence or oversight or owing to the fact that no return has been submitted. In our opinion, even in a case where a return has been submitted, if the income-tax officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment. The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word "escape" in S. 34(1)(b) cannot therefore succeed."

13. In **Kalyanji Mavji & Co.** (8 supra), the Supreme Court held that to the following categories of cases, provisions of Section 34(1)(b) would apply.

"(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."

14. Two three-Judge Benches of the Supreme Court did not agree with the view of the two-Judge Bench in **Kalyanji Mavji & Co.** (8 supra) that income escaping 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. The first judgment is **Indian & Eastern Newspaper Society, New Delhi v. Commissioner of Income Tax, New**

Delhi¹³ and the second one is **A.L.A. Firm** (9 supra). In **Indian & Eastern Newspaper Society** (13 supra), the Supreme Court held as under:

“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 and Co. v. Commissioner of Income Tax* [1976] 102 ITR 287 (SC), 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 in so far 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 Kamal Singh v. Commissioner of Income Tax* (supra), *Commissioner of Income Tax v. Raman and Company* (supra) and *Bankipur Club Ltd. v. Commissioner of Income Tax* : [1971] 82 ITR 831(SC), and we do not believe that the law has since taken a different course. Any observations in *Kalyanji Mavji and Co. v. Commissioner of Income Tax* (supra) suggesting the contrary do not, we say with respect, lay down the correct law.”

Interpreting the word “information” in Section 147(b) of the Act, the Supreme Court has held as follows:

In that view, therefore, when Section 147(b) of the Income Tax Act is read as referring to "information" as to law, what is contemplated is information as to the law created by a formal source. It is law, we must remember, which because it issues from a competent legislature or a competent judicial or quasi-judicial authority, influences the course of the assessment and decides any one or more of those matters which determine the assessee's tax liability.”

¹³ [1979] 119 ITR 996 (SC)

Considering whether the report of the internal audit party of the Income Tax Department falls within the expression “information” the Supreme Court held that the part of the report of the internal audit party which expresses its view does not constitute information, while the part of the report which mentions the law which escaped the notice of the Income Tax Officer constitutes “information”.

15. Another three-Judge Bench of the Supreme Court in **A.L.A. Firm** (9 supra), referred to the judgment in **Kalyanji Mavji & Co.** (8 supra), and observed that category 2 in the said case was somewhat widely stated. It, however, approved category 4 in **Kalyanji Mavji & Co.** (8 supra) by explaining the difference between the two categories as under:

“What then, is the difference between the situations envisaged in propositions (2) and (4) of *Kalyanji Mavji* (supra)? The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the I.T.O. initiates reassessment proceedings in the light of "information" obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier, for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the I.T.O., having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in *IENS* case, it also ropes in cases of a "bare or mere change of opinion" where the I.T.O. (very often a

successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor I.T.O.) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and the IENS case (supra) has warned that this line of cases cannot be taken to have been overruled by *Kalyanji Mavji* (supra). The second paragraph from the judgment in the IENS case earlier extracted has also reference only to this situation and insists upon the necessity of some information which make the ITO realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in *Anandji Haridas* [1986] 21 S.T.C. 326. Even making allowances for this limitation placed on the observations in *Kalyanji Mavji*, the position as summarised by the High Court in the following words represents, in our view, the correct position in law:

The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of Section 147(b) of the Act.

16. In **Jindal Photo Films Ltd.** (3 supra) the Delhi High Court held that the view in **Kalyanji Mavji & Co** (8 supra) that if the income liable to tax had escaped assessment due to oversight, inadvertence or a mistake committed by the ITO, the assessment can be reopened, was clarified in **Indian Eastern Newspaper Society** (13 supra) and **A.L.A. Firm** (9 supra), by holding that the said view cannot be taken to have overridden the consistently laid down law that where the ITO (very often successor officer) attempts to reopen the assessment because

the opinion formed earlier by himself (or more often, by a predecessor ITO), was in his opinion incorrect, such a course is not permissible. It is further interesting to note that in **Aryaverth Chawl Udyoug** (6 supra) the Supreme Court held:

“It is trite that subsequent change in law according to which the assessment proceedings were conducted, cannot constitute "change in opinion" of the assessing authority so as to initiate reassessment proceedings. In fact the same is impermissible if the Act does not specify the operation of law as retrospective.”

This view appears to come in conflict with the view taken in **Maharaj Kumar Kamal Singh** (7 supra), as reproduced hereinbefore. However, this aspect need not detain this Court as the reassessment proceedings in the instant case were not initiated based on the subsequent change of law. On the contrary, it is the pleaded case of the appellant with respect to which there is no denial that all the details based on which the Assessing Officer has re-assessed the tax were already in existence before the original assessment was made.

17. From the case law discussed above, the following legal position emerges.

- (i) The Income Tax Officer is conferred with the jurisdiction to reopen the assessment under Section 147(a) read with Section 148 of the Act only on the basis of a specific, reliable and relevant

information coming to his possession subsequently, and he has reason to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income tax has escaped assessment;

(ii) Reassessment proceedings could be initiated either because some fresh facts had come to light, which were not previously disclosed, or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts.

(iii) The jurisdiction under Section 147 of the Act is not akin to the power of review and it cannot be exercised based on mere change of opinion.

(iv) After the assessment order is framed, the Assessing Officer cannot at a later point of time reopen the assessment merely on forming an opinion that after giving a second thought to the primary facts disclosed by the assessee, he arrived

at a finding that he had committed an error in computing the taxable income of the assessee under Section 147 of the Act.

(v) Even while discovering new and important matters, if the same could have been discovered by the assessing authority but were not so discovered at the time of original assessment, such matters do not constitute a “new information”.

(vi) Proceedings for reassessment cannot be initiated merely because income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income Tax Officer.

18. Keeping in view the above deduced legal principles, we need to consider whether the order of the Assessing Officer as confirmed in the appeals, is legally correct.

The impugned assessment order rejected the plea of the appellant that reassessment proceedings cannot be initiated unless there is fresh material based on which the Assessing Officer has a reason to believe that any part of the income escaped assessment. He has in fact relied upon the judgment in **Kalyanji Mavji & Co.** (8 supra) in coming to the conclusion

that when there is a mistake in interpretation of a statute or law at the time of completion of original assessment, the same can be rectified by making reassessment. The Assessing Officer, in our opinion, has committed a serious legal error in ignoring the judgments of the three-Judge Benches of the Supreme Court in **Indian & Eastern Newspaper Society, New Delhi** (13 supra) and **A.L.A. Firm** (9 supra) which did not accept the view in **Kalyanji Mavji & Co.** (8 supra). When it is not the case of the Assessing Officer that the reassessment was necessitated on account of a fresh information, either with regard to the facts or law received by him, he is denuded of the jurisdiction to initiate reassessment proceedings merely because the previous assessment order was passed ignoring the existing judgments or materials. Non-noticing of the existing judgments squarely falls under the categories of oversight, inadvertence or mistake committed by the ITO and those reasons do not constitute a justifiable ground under Section 147(b) of the Act for initiating reassessment proceedings. As noted hereinbefore, the Assessing Officer has misguided himself by placing reliance on the judgment in **Kalyanji Mavji & Co.** (8 supra) ignoring the subsequent judgments in **Indian & Eastern Newspaper Society** (13 supra) and **A.L.A. Firm**

(9 supra) which did not approve the view in **Kalyanji Mavji & Co.** (8 supra) as regards category 2 therein. The Assessing Officer also misunderstood the judgment in **Maharaj Kumar Kamal Singh** (7 supra) inasmuch as the facts in that case reveal that the Assessing Officer has reopened the assessment based on the subsequent judgment of the Supreme Court which has set aside the judgment of the Patna High Court which formed the basis for the Assessing Officer to pass the original assessment order. The Assessing Officer in the instant case failed to notice that in the case before the Supreme Court the information relating to the judgment of the Supreme Court was received by the Assessing Officer subsequent to the passing of the assessment order, unlike in the present case where the reassessment was made based on the judgments which admittedly existed when the original assessment order was passed. The Commissioner (Appeals) and also the Income Tax Appellate Tribunal have mechanically upheld the order of the Assessing Officer without proper appreciation of true scope and purport of Sections 147 and 148 of the Act with reference to the relevant case law.

19. On the analysis as above, we hold that the impugned reassessment, on the facts of the case, was without jurisdiction

and accordingly we hold substantial questions of law Nos.1 and 2 in favour of the assessee and against the Revenue. In view of the findings on substantial questions of law Nos.1 and 2, it is not necessary to deal with the substantial question of law No.3.

20. In the result, the appeal is allowed and the impugned orders are set aside.

C.V. NAGARJUNA REDDY, J

KONGARA VIJAYA LAKSHMI, J

09-02-2018

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Note: LR copies to be marked.

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