

Entee Builders Vs. Deputy Commissioner of Income Tax

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Court : Income Tax Appellate Tribunal ITAT Lucknow

Decided On : Oct-07-2002

Reported in : (2003)78TTJLuck952

Judge : P Parashar, M Singh

Appellant : Entee Builders

Respondent : Deputy Commissioner of Income Tax

Judgement :

1. These four appeals have been filed by the assessee against a combined order of the learned CIT(A), Bareilly dt. 18th Aug., 2000, for the asst. yrs. 1988-89, 1989-90, 1990-91 and 1991-92. Since common issues are involved in these appeals, for the sake of convenience, these appeals are being decided by this order.

2. Shri K. Sampat, learned counsel, appeared on behalf of the assessee, whereas Shri D.K. Srivastava, CIT/Tribunal/Departmental Representative, represented the Department.

3. The appeals were heard on 31st July, 2001, and 6th Sept., 2001.

Subsequently, the assessee filed two volumes of paper book and the written submissions dt. 9th Jan., 2002, and 28th Jan., 2002. The assessee also filed copies of certain decisions.

4. The Department filed written submissions dt. 27th Dec., 2001, and 8th Jan., 2002. The learned Senior Departmental Representative also filed copy of the decision of the Hon'ble Supreme Court of India in the case of Kalyan Kumar Ray v. CIT (1991) 191 ITR 631 (SC).

5. These appeals are, therefore, being decided after considering the oral arguments of the learned representatives of the parties, their written submissions and the material on which reliance has been placed by them.

6. Since identical grounds have been taken in these appeals, we consider it proper to take up ITA No. 20/Luc/2000 for asst. yr. 1988-89 as the leading appeal.

7. Ground Nos. 1 to 3 taken in this appeal challenge the validity of notice issued under Section 148 of the IT Act, 1961, for reopening of the assessment under Section 147 of IT Act, 1961, and the validity of reassessment order. As these grounds involve legal issues also, we consider it proper to take up these preliminary grounds together for disposal. These grounds are being reproduced below : "On the facts and in the circumstances of the case and in law the following actions of the authorities below are arbitrary, erroneous and illegal and must be quashed : 1. In holding that the assessment framed under Section 147/143(3) of the IT Act, 1961, was valid and proper in law; 2. In not providing the grounds for reopening of the assessment under Section 147 and in completing the assessment under Section 143(3) without such disclosure; 3. In holding that the case was covered under Section 147 of the Act and that the reassessment proceedings were validly initiated and undertaken;" 8. The assessee has given details of various orders relating to these four appeals at p. 1 of the paper book. According to these details, the position of asst. yr. 1988-89 is as under: 9. Since the order of learned CIT(A) dt. 18th Aug., 2000, is in challenge before us, we are required to examine the legality of reopening of the assessment in the second round that is, the notice issued under Section 148 on 26th March, 1998, and the reassessment order dated 25th Jan., 2000.

10. The facts concerning this matter are being narrated in brief as under: 11. The assessee-firm was carrying on business of builders, contractors and land developers. It entered into an agreement with Methodist Church of India for

constructing a shopping complex on the land of the church with its own funds. As per agreement dt. 28th July, 1983, the yield of the commercial shopping complex was to be divided between constructing agency i.e., the assessee and the land owner i.e., the M.C.I. The manner in which the yield was to be distributed has been given in paras 7 and 11 of the agreement, which has been reproduced in para 3 of the order of the learned CIT(A). We do not consider it proper to reproduce the relevant extracts of the agreement in this order.

12. It may be pointed out that by virtue of the said agreement, the contractor i.e., the assessee was to get the cost of the construction on deferred basis. Such payments were out of rents received from the tenants of the proposed building. The assessee was thus to earn income from rent after amortizing the work-in-progress. Vide para 13 of the agreement, it was also agreed that the prospective tenants shall be recommended by the developers i.e., the assessee to the owners who shall be accepted by the owners and thereafter the agreement of the tenancy shall be executed.

13. The assessee filed return for asst. yr. 1990-91 on total loss of Rs. 1,29,230. The assessment was completed in the status of AOP and was later on revised under Section 251 of the IT Act, 1961. A notice dt.

13th Jan., 1992, was issued to the assessee under Section 148.

14. On perusal of the order-sheet dt. 13th Jan., 1992, available at p.

2 of the paper book, it appears that the ground for reopening were secured and unsecured loans and deposits and advances received by the assessee. The reassessment order under Section 153(3)/148 was passed on 10th Jan., 1994. Against this order, the assessee went in appeal before the learned CIT(A), who decided the appeal vide order dt. 30th Dec., 1994.

15. A perusal of the order of the learned CIT(A) goes to show that the issue relating to security deposit to the tune of Rs. 68,01,694 as on 31st March, 1991, from the tenants was considered by the AO as well as by the learned CIT(A). This is clear from para 1.C and 1.E of the order of the learned CIT(A).

16. It is informed that the Department has filed appeals against the order of learned CIT(A) before the Tribunal, which are pending.

17. The AO issued second notice under Section 148 on 26th March, 1998.

A perusal of the letter of AO dt. 3rd March, 1998, available at pp. 4 and 5 of the paper book goes to show that the CIT vide his order under Section 263 of IT Act, 1961, had held that the security deposits were of revenue nature and liable to tax for the year of its receipt. The basis of initiation of reassessment proceedings, therefore, appears to be the order of the learned CIT(A) under Section 263 of IT Act, 1961, as is evident from the following portion of his letter dt. 10th March, 1998: "On detailed examination of the matter the learned CIT had held vide his order under Section 263 of the IT Act, 1961, that the said security deposits are of revenue nature and liable to tax in the year of receipt. The net amount of such deposits had escaped assessment. As such I have reason to believe that the assessee's income to the tune of said security deposits have to be included in its income as indicated above." 18. During the reassessment proceedings, the assessee challenged the action of the AO and vide letter dt. 14th Jan., 2000, available at pp.

6 to 16 of the paper book, submitted that it has not concealed any part of its income.

19. Before the learned CIT(A) also, the assessee took specific ground in this regard, which has been adjudicated by him by observing as under: "2. The first issue objected to in all the above assessment years is against the action of the AO in initiating the proceedings under Section 147/148. It was also submitted that the AO did not record any reason before taking action under s. 147. The AO was not justified in changing his view and restart already completed proceedings. A perusal of assessment order shows that during the course of assessment proceedings the authorized representative of the appellant submitted a detailed reply on 14th Jan., 2000, stating therein that the return filed earlier may be treated as return in compliance to notice under s. 148. Thereafter, on 18th Jan., 2000, the AO showed to Sri S.N. Mehrotra, C.A., the reasons recorded by him under Section 148. Thereafter, on 18th Jan., 2000, the AO showed to Sri S.N. Mehrotra, C.A.,

the reasons recorded by him under Section 147 of the IT Act, 1961. A notice issued under Section 143(2) by the AO was complied by Sri S.N. Mehrotra, who appeared before the AO on 21st Jan., 2000. The AO started reassessment proceedings on the basis of valid information and following the correct procedure. Thus, the grounds relating to this issue do not have any substance and are dismissed." 20. The assessee has challenged the above findings of the learned CIT(A) before us by taking three grounds, which have been reproduced above.

21. Shri Sampat, learned counsel, while assailing the validity of the notice issued under Section 148 and the reassessment order also contended that the learned CIT(A) has not decided the issue properly and has ignored the relevant legal provisions and the other material placed before him. In particular, he took following pleas to challenge the validity of the notices issued by the AO under Section 148 on 26th March, 1998.

1. The notice was issued under Section 148 on 26th March, 1998, for asst. yr. 1988-89 and in view of the provisions contained under Section 149, the notice was issued after the expiry of more than 6 years from the end of the assessment year under consideration.

2. That the entire relevant material on the subject relating to security deposit was placed before the AO at the time of original assessment proceedings and the AO had considered the same and, therefore, the subsequent proceedings to reopen the completed assessment were made only on the basis of change of opinion.

3. The learned counsel further submitted that even the learned CIT(A) had considered the issue relating to deposit, but did not consider it proper to make any addition on that count. According to the learned counsel, the Department has filed appeal against the order of learned CIT(A) dt. 30th Dec., 1994, for asst. yrs. 1988-89, 1989-90, 1990-91 and 1991-92. The learned counsel further submitted that the order of AO merged into the order of learned CIT(A), and on account of this fact also, the AO was not entitled to exercise power under Section 147/148.

4. That the AO was not justified in disregarding the view of the learned CIT(A) and in treating the amount of security deposit as income.

5. That since the notice for reopening the assessment is based on the findings of the learned CIT in his order under Section 263, it is the belief of the CIT and not that of the AO. According to the learned counsel, Section 147 gives power to initiate reassessment proceedings to the ITO on the basis of his independent belief, but in the present case, the belief is not that of the ITO, but that of the CIT, which is the basis for issuing notice.

6. The grounds for initiating reassessment proceedings are irrelevant and nonspecific.

7. The security deposit cannot be treated as income as there was no proof that it is the income of the assessee. Mere status or character of deposit cannot lead to the conclusion that income has escaped assessment.

8. The aspect of security deposit was explained to the AO and the CIT in the first round of proceedings and no new fact or material came to the notice of the AO, which was not dealt with during the original assessment proceedings and, therefore, there was no justification for reconsideration of the same in the reassessment proceedings.

9. Even if it is presumed that there was omission on the part of the AO in considering the nature of deposit, then also the power for reopening cannot be exercised on the basis of error of judgment.

10. The reasons recorded for initiation of reassessment proceedings were not supplied before completion of the assessment and these irregularities also invalidate the notice as well as the reassessment proceedings.

11. The reassessment proceedings have been made in violation of rules of natural justice and 'any action done in violation of rules of natural justice is non est in law.

12. That the belief entertained by the AO must be based on reasonable grounds and it should be an honest belief. It should not be a product of imagination or speculation.

13. That the assessee is responsible to disclose only primary facts and if the AO draws wrong conclusions on such primary facts, he cannot exercise power under Section 147 to revise his judgment or conclusions and to correct the erroneous findings by taking recourse to the provisions contained under Section 147.

14. If entire material and all the aspects were considered while making original assessment, then reopening is not permissible for reconsidering the same material. A mere failure or omission to notice the material facts does not justify the action of reopening.

15. While invoking jurisdiction under Section 147 of the IT Act, 1961, the AO cannot exercise the revisional power available under Section 263 to the CIT. 16. The AO has no power to undo the effect of the appellate orders by taking recourse to Section 147 of IT Act, 1961.

22. In support of the above pleas, the learned counsel for the assessee has made reference to a large number of cases, the details of which are contained in the list of cases available at pp. 1 to 5 of the list which has been placed on record. For the sake of brevity, we do not consider it proper to reproduce the entire list of cases in this order.

Only relevant cases will be considered and referred to while discussing the issues involved in these grounds of appeal 23. The learned CIT(A)/Tribunal/Senior Departmental Representative, Shri D.K. Srivastava supported the order of the learned CIT(A) and has made written submissions dt. 27th Dec., 2001, and supplementary written submissions dt. 8th Jan., 2002. These written submissions are in detail and we do not consider it proper to reproduce the written submissions in this order. On the basis of these written submissions, the main pleas of the Department are as under: (a) The original assessments for asst. yrs. 1988-89, 1989-90, 1990-91 and 1991-92 were completed under Section 143(3)/148 on 10th Jan., 1994, 1st Feb., 1994, 26th March, 1994, and 10th Feb., 1994, respectively. The appeals of the assessee against these original assessments were decided by the CIT(A) by a common order dt. 30th Dec., 1994, against which order, the Department has filed appeal before the Tribunal. The reasons recorded by the AO are available in his proposal dt. 3rd March, 1998, addressed to the CIT, a copy of

which is available at pp. 4 and 5 of the paper book, a perusal of which shows that the AO took cognizance of the order passed by the learned CIT under Section 263. He also took note of the significant development which was on account of receipt of appellate order dt.

26th March, 1997, passed by CIT(A) in respect of asst. yr. 1992-93.

(b) The assessee had not disclosed the material facts properly in relation to capital receipts. He created a smoke screen so as to prevent the discovery of true state of affairs. Although the assessee was aware of the receipts credited to the account of security deposits but he was successful in his ingenuity in using the nomenclature of security deposit to create a device or smoke screen. It is, thus, clear that the assessee had failed to disclose fully and truly all material facts necessary for his assessment for the assessment years under appeal and camouflaged the receipts in such a way that it did not appear to be taxable.

(c) The initiation of reassessment proceedings was justified and supported by provisions of Sub-section (1) of Section 150. Notice under Section 148 was issued/served on the assessee on 26th March, 1998, for the purpose of making reassessment in consequence of finding/direction contained in the order passed by the CIT under Section 263 of IT Act, 1961. The AO was statutorily required to take cognizance of the finding/direction recorded by the CIT(A) in his order dt. 26th March, 1997, for asst. yr. 1992-93. Notices under Section 148 were issued/served so as to give effect to them. Thus, the action of the AO is covered by provisions of Section 450 of IT Act, 1961.

(d) The action of the AO in issuing notice under Section 148 is based upon objective consideration and not on mere change of opinion.

(e) The assessee was supplied copy of reasons. The assessee had also sought copy of reasons vide letter dt. 4th Jan., 2000, without filing return.

(f) The AO had also shown the reasons to Shri S.M. Malhotra, authorised representative of the assessee on 14th Jan., 2000. The CIT(A) has also made observations regarding this fact in para 2 of her order dt. 18th Aug., 2000. The

reasons so shown to the counsel of the assessee were also supplied to the assessee, a copy of which has been filed by the assessee before the Tribunal also.

(g) The impugned notices were issued on relevant grounds and bona fide considerations based on definite, relevant and reliable information reaching the AO after completion of the original assessment.

(h) The notice was not time-barred as Explanation First (sic) to Section 147 was applicable in the case of the assessee. According to him, Section 150 of IT Act, 1961, also enabled the AO to initiate reassessment proceedings at any time and there is no limitation prescribed in exercise of power under Section 147 for making reassessment in pursuance of order of appeal, etc.

(i) The notice was issued by the AO under Section 148 after approval of CIT as is clear from the proposal dt. 3rd March, 1998, available at pp. 4 and 5 of the paper book, which contains reasons for reopening.

(j) Since the proposal to initiate reassessment proceedings was based on the findings of the learned CIT recorded in his order dt.

25th March, 1997, passed under Section 263 for asst. yr. 1992-93, the said order shall be deemed to be a part of the order for reopening the assessment proceedings.

(k) The belief of the AO in reopening the assessment cannot be treated to be irrational as it is based on sound material.

Sufficiency of reason is not to be adjudged.

(1) Since the assessee has not questioned the proceedings under Section 147 on the ground that reasons were not shown, he cannot take such plea before the Tribunal, 24. In support of the above specific pleas and other pleas contained in the written arguments submitted by the Department, reliance has been placed on the following cases: (4) ITO v. Selected Dalurband Coal Co. (P) Ltd. (1996), 217 ITR 597 (SC); (7) Indo-Aden Salt Manufacturing & Trading Co. (P) Ltd. v. CIT

(1986) 159 ITR 624 (SC); (10) Kantamani Venkata Narayana & Sons v. ITO (1967) 63 ITR 638 (SC); and 25. In reply, the learned counsel for the assessee submitted that Section 150(1) of the Act shall not be applicable in the case of the assessee, because provisions of Section 147 have been invoked for reopening the assessment proceedings.

26. That Expln. 1 to Section 147 is not applicable because it is not the case of the AO that the assessee did not produce books of account, etc. According to the learned counsel, even in the original assessment proceedings, notice was taken of the security deposit by the AO which shows that the assessee had disclosed the entire relevant material, 27. That in accordance with the scheme of the IT Act, 1961, the provisions of Section 263 are to operate in different area and on different grounds and for justifying action under Section 147, it should be shown that escapement of income was on account of an act or omission on the part of the assessee.

28. That the reasons should be supplied during the assessment proceedings and not during the appellate proceedings as has been done in this case. In support of the above arguments, the learned counsel placed reliance on several decisions including the following: (A) Smt. Jamila Ansari v. IT Department and Anr. (1997) 225 ITR 490 (All); 29. We have considered the facts and circumstances relating to the issues involved in the ground Nos. 1 to 3 reproduced in para 7 of this order, the entire material placed before us and the written as well as oral submissions made by the learned representatives of both the parties before us in relation to these grounds of appeal. For proper appreciation of the arguments raised before us in relation to these grounds, we consider it proper to formulate the following issues: (i) Whether the grounds for reopening of the assessment under Section 147 were provided to the assessee.

(ii) Whether the notice was issued on the ground of failure on the part of the assessee to disclose the material facts truly and fully, etc. in view of the provisions contained under Section 147(a) of IT Act, 1961, or on the ground that the AO came in possession of some information and in consequence of such information, he believed that the income chargeable to tax has escaped assessment.

(iii) Whether the notice issued under Section 148 was time-barred in view of the provisions contained under IT Act, 1961.

(iv) Whether the notice under Section 148 was issued on the basis of facts coming subsequently to the notice of the AO or on the basis of mere change of opinion, as contended by the assessee.

(v) Whether the notice issued under Section 148 is invalid and illegal and if so, whether the order of reassessment can be treated as illegal and invalid.

30. Before adjudicating the above issues, we consider it proper to lay down the undisputed facts, which are as under: (1) For asst. yr. 1988-89, the original return was filed on 30th Aug., 1991.

(3) The reasons for initiation of reassessment proceedings are contained in the proposal of ITO dt. 3rd March, 1998, mentioned above.

(4) The provisions contained under Sections 147 to 151 were modified and amended w.e.f. 1st April, 1989.

(5) So far as the asst. yr. 1988-89 is concerned, since the amendment became effective from 1st April, 1989, the amended provisions has been applicable to asst. yr. 1989-90 and not to asst.

yr. 1988-89.

31. So far as the issue No. 1 is concerned, the contention of the assessee was that the reasons for reopening the assessment proceedings were not disclosed to the assessee. On the other hand, the Department's stand is that the reasons have been duly conveyed and communicated to the assessee. The learned CIT(A) has observed in para 2 of his order that the reasons recorded by the AO under Section 147 of IT Act, 1961, were shown to Shri S.N. Malhotra. During the course of hearing, the assessment record was produced before the Bench and it was found that the order-sheet entry dt. 18th Jan., 2001, was signed by Shri Malhotra.

Thus, it is established that reasons recorded by the AO were duly shown to the authorised representative of the assessee. In view of these facts, the plea of the

assessee, that reasons recorded by the AO for reopening the assessment, were not shown, is liable to be rejected. Had the assessee demanded copy of the reasons recorded, then the same might have been supplied to him. It is not the case of the assessee that despite request, the copy of reasons recorded was not supplied. Hence, we do not find any force in this plea of the assessee, which is rejected. This issue is, therefore, decided against the assessee.

32. The contention of the learned counsel for the assessee was that the notice for reassessment was not issued on the ground of failure on the part of the assessee to disclose the material facts truly and fully. It was further submitted that this ground was also not available for reopening the assessment, because the assessee had disclosed all the material facts while filing the return for the assessment year under consideration.

33. After going through the entire material on record and the orders of the Departmental authorities, we find that the assessee had made full disclosure of the relevant facts. The agreement executed between the assessee and the Methodist Church of India was placed before the AO. Para 13 of the agreement enable the assessee to recommend the prospective tenants to M.C.I. The assessee had also disclosed the fact relating to security deposits during the original assessment proceedings, which is clear from the order-sheet dt. 13th Jan., 1992, which relates to the issuance of notice under Section 148, in the first round of proceedings. This entry is being reproduced below: "The assessee is a registered firm has filed return of income on 30th Aug., 1991, for the asst. yr. 1988-89 declaring Nil income. The return is delayed. A perusal of balance sheet shows that there are secured and unsecured loans of creditors exceeding Rs. 10 lakhs and security deposit and banking advances exceeding Rs. 18.80 lakhs.

Therefore, in order to regularize the return of income issue notice under Section 147 of the IT Act, 1961." It may also be pointed out that in original assessment for asst. yrs.

1988-89 to 1991-92, the AO has made reference to security deposits.

34. In the combined order of the learned CIT(A) dt. 30th Dec., 1994 for asst. yrs. 1988-89 to 1991-92 also, reference has been made to the security deposits. A relevant portion of his observations on this point as contained in para I(c) of his order is being reproduced as under: "The AO also noted that the appellant had taken security deposits to the tune of Rs. 68,01,694 (as on 31st March, 1991) from the tenants which was interest-free and was refundable after 20 years and that this deposit had been utilized for the construction of the property.

He observed that a sum of only Rs. 3,56,368 had been invested by Nijhavan Hotels (P) Ltd. and a further sum of Rs. 4,87,087 (asst.

yr. 1990-91) had been obtained as loan from banks. The other three partners had debit balances. Shri Dalip Nijhavan, Shri Ravinder Singh and Shri Mahesh Talwar had debit balances of Rs. 85,026, Rs. 74,736 and Rs. 2,38,295 as on 31st March, 1990, respectively. In the face of these facts and placing reliance on the decisions of the Supreme Court in G. Murugesan & Bros. v. CIT (1973) 88 ITR 432 (SC) and Commr. of Agil IT v. Raja Gopal (1966) 59 ITR 728 (SC) the AO held that the entire income belonged to M/s Nijhavan Hotels (P) Ltd. He also observed that appropriate action was being taken against the AOP and that a protective assessment was being made in the hands of the appellant without prejudice to the real ownership and nature of income." 35. The assessee had filed balance sheet as on 31st March, 1988, a copy of which is available at p. 163 of the paper book, security deposit and booking advance of Rs. 18,80,551/-has been shown under the head 'Security Deposits and Booking Advances', It appears that a list was also attached in relation to this advance as is evident from the balance sheet.

36. In view of the above, it is established that the assessee had placed entire material before the AO and, therefore, it cannot be said that there was any non-disclosure on the part of the assessee or there was failure on its part in disclosing the material facts fully and truly, relating to security deposits.

In the case of CIT v. A.R. Enterprises (2002) 255 ITR 121 (Raj), the Hon'ble Rajasthan High Court has explained the meaning of expression "material facts" by observing as under : "The expression "material facts" refers only to the primary facts.

There is no duty cast on the assessee to indicate or draw the attention of the AO to what factual or legal or other inferences can be drawn from the primary facts. Relying on the decision of the apex Court in *Calcutta Discount Co. Ltd. v. ITO and Anr.* (1961) 41 ITR 191 (SC), the apex Court in a later decision, viz., *Associated Stone Industries (Kotah) Ltd. v. CIT* (1997) 224 ITR 560 (SC), held that the duty of the assessee is only to fully and truly disclose all material facts. Explaining the expression "material facts" as contained in Section 34(1)(a), the Court observed that it refers only to the primary facts and the duty of the assessee is to disclose such primary facts. The Court further observed that there is no duty cast on the assessee to indicate or draw the attention of the ITO to what factual or legal or other inferences can be drawn from the primary facts disclosed. There is not a word in the order of assessment if the respondent-assessee omitted to disclose any material fact." The ratio of the above decision is fully applicable to the facts of the present case.

37. The learned Senior Departmental Representative has placed reliance on the decision of Hon'ble Supreme Court of India in the case of *Shri Krishna (P) Ltd. v. ITO and Ors.* (supra). In that case, the assessee had shown certain Hundi loans totalling to Rs. 8,53,258 said to have been taken from a number of persons. The ITO accepting the averments made the assessment. During the course of assessment proceedings for the subsequent year, the assessee adopted the same method and showed Hundi loans for more than Rs. 1.7 lakhs. The ITO enquired into the truth of the averments of the assessee and found that many of them were bogus claims, while some of the alleged lenders were found to be near relations of directors or principal shareholders of the assessee. On enquiry the AO found that loans totalling to more than Rs. 11,15,275 were not established to be the genuine loans and accordingly, he added that amount as income from undisclosed sources. Having regard to similarity of the claim and the persons, who were said to have "advanced the unsecured Hundies, the ITO issued a notice under Section 148 calling upon the assessee to file a revised return for asst. yr.

1959-60. The assessee challenged the notice in writ petition before the Hon'ble High Court. The writ petition was allowed by the Hon'ble Single Judge, but the Division Bench of the High Court reversed the said decision. On appeal to Hon'ble

Supreme Court of India by special leave, it was held by the Hon'ble Supreme Court of India that having created and recorded bogus entries of loans, the assessee could not say that it has truly and fully disclosed all material facts necessary for his assessment for that year and the ITO could have investigated the truth of the assertion, which he actually did in subsequent assessment years.

38. So far as the instant case is concerned, the facts are different.

In the instant case, no bogus deposit was found. On the other hand, the assessee had disclosed the security deposit. Thus, the disclosure was there on the part of the assessee of all the material facts. In our view, therefore, the ratio of decision in the case of Shri Krishna (P) Ltd. (supra) is not applicable to the facts of the present case.

39. The learned Senior Departmental Representative also placed reliance on the decision of Hon'ble Supreme Court of India in the case of Indo Aden Salt Mfg. & Trading Co.(P) Ltd. v. CIT (supra). In that case, in the original assessment proceedings for the asst. yrs. 1955-56 to 1962-63 in relation to assets consisting of reservoirs, salt pans, pears and condensers, the assessee had not disclosed either by its valuation report or by a statement before the ITO as to what portions of those were of earth work and what portion was of masonry work, the ITO had allowed depreciation at 6 per cent to the entire assets. The depreciation at 6 per cent was allowable and available only in respect of masonry assets and not in respect of earth work. The ITO sought to reopen the original assessment under Section 147(a). The question was whether excessive depreciation had been allowed and income had escaped assessment for those years owing to the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. It was held that since excess depreciation had been allowed on the entirety of the assets on the basis of material supplied by the assessee, the ITO could reasonably be said to have material to form the belief that there was underassessment owing to the failure on the part of the assessee to disclose fully and truly all material facts.

41. The learned Senior Departmental Representative has also placed reliance on the decision of Hon'ble Gujarat High Court in the case of Praful Chunnilal Patel, v.

M.J. Makwana, Asst. CIT (supra).

42. It may be pointed out that this decision has been dissented from by the Full Bench of Hon'ble Delhi High Court in the case of CIT v. Kalvinator of India Ltd. (2002) 256 ITR 1 (Del)(FB). A reference to this decision of Hon'ble Delhi High Court shall be made in this order, while considering issue No.4.

43. In the case of Phool Chand Bajrang Lal v. ITO and Anr. (supra), on making subsequent enquiry, bogus transactions were detected and after obtaining fresh information relating to a concluded assessment, the falsity of the statement made by the assessee was exposed. On that basis, the reopening of the assessment was made. Hence, this case is also distinguishable on facts.

44. The other cases on which reliance has been placed by the learned Senior Departmental Representative are also not applicable to the facts of this case.

45. In view of the above, it is held that there was no failure on the part of the assessee to disclose the material facts fully and truly and the notice was not issued by the AO on that basis under Section 147(a) rather it was issued under Section 147(b).

46. At the outset, it may be pointed out that so far as the asst. yr.

1988-89 is concerned, the old provisions shall be applicable. In the case of KM. Sharma v. ITO (2002) 254 ITR 772 (SC), the Hon'ble Supreme Court of India while considering the amendment made to Sub-section (1) of Section 150 of IT Act, 1961, which became effective from 1st April, 1989, has held that the amended provisions shall be applicable prospectively. According to the Hon'ble Supreme Court of India, the provisions of fiscal statute, more particularly one regulating the period of limitation, must receive a strict construction. The relevant observations of the Hon'ble Court are being reproduced below: "On a proper construction of the provisions of Section 150(1) and the effect of its operation from 1st April, 1989, we are clearly of the opinion that the provisions cannot be given retrospective effect prior to 1st April, 1989, for assessments which have already become final due to the bar of limitation prior to 1st April, 1989. The taxing provision imposing a liability

is governed by the normal presumption that it is not retrospective and the settled principle of law is that the law to be applied is that which is in force in the assessment year, unless otherwise provided expressly or by necessary implication. Even a procedural provision cannot in the absence of clear contrary intendment expressed therein be given greater retrospectivity than is expressly mentioned so as to enable the authorities to effect the finality of tax assessments or to open up liabilities, which have become barred by lapse of time. Our conclusion therefore, is that Sub-section (1) of Section 150, as amended w.e.f. 1st April, 1989, does not enable the authorities to reopen assessments which have become final due to bar of limitation prior to 1st April, 1989, and this position is applicable equally to reassessments proposed on the basis of orders passed under the Act or under any other law." 47. In the case of Ranchi Handloom Emporium v. CIT and Anr., (1999) 235 ITR 604 (Pat) the Hon'ble Patna High Court has held that amendment to Section 147 w.e.f 1st April, 1989, will not be applicable to asst. yr, 1988-89. The following observations of the Hon'ble Court are being reproduced below: "that the submission that the present case would be governed by the amended provisions of Section 147 of the Act was completely misconceived. Having regard to the fact that the amended provisions, as substituted by the Direct Tax Laws (Amendment) Act, 1987, came into force from 1st April, 1989, and the present case related to the asst. yr. 1988-89, the relevant accounting year being 9th July, 1986, the 27th June, 1987, it would be the unamended provisions which would govern the case." 48. The learned Senior Departmental Representative has not placed any contrary view before us.

49. In view of the unamended provisions, the notice for reopening of the assessment could either be issued under Section 147(a) or under Section 147(b) and while, issuing a notice, the AO was required to specifically point out as whether the reassessment is being made on the ground of failure on the part of the assessee to disclose the material facts truly and fully as provided under Section 147(a) or on the ground mentioned under Section 147(b). So far as the proposal for initiating reassessment proceedings dt. 3rd March, 1998, available at pp. 4 and 5 of the paper book is concerned, this proposal does not specify as to whether the notice has been issued under Section 147(a) or 147(b). It appears that the reopening has been made on the basis of the view taken by the learned

CIT while passing the order under Section 263. The contention of the learned CIT(A)/Departmental Representative that the reopening has been made on account of failure on the part of the assessee to disclose the material facts is, therefore, not found to be substantiated. From the assessment order as well as from the order of learned CIT(A) also, it is not made out that the notice was issued under Section 147(a) by the AO. The specific argument/submission of the learned Senior Departmental Representative was that the reasons recorded for initiating the reassessment proceedings are contained in the proposal of the Dy. CIT, Bareilly, dt. 3rd March, 1998, available at pp. 4 and 5 of the paper book. A perusal of this proposal goes to show that the ITO has nowhere mentioned that the notice for reopening the assessment is being issued on the ground of non-disclosure of material fact on the part of the assessee. In his letter dt. 3rd March, 1998, he has also not recorded any finding to the effect that the assessee has failed to disclose fully and truly all material facts necessary for his assessment. On the other hand, he has made the following observation : "As such I have reason to believe that the assessee's income to the tune of said security deposit have to be included in its income as indicated above." These observations/findings mean that he has impliedly applied Clause (b) of Section 147, according to which, notwithstanding, any omission or failure on the part of the assessee, the AO can entertain a belief, in consequence of information in his possession that income chargeable to tax has escaped assessment for any assessment year.

It may be pointed out that in the assessment order, the AO has not indicated provisions of Section 147(a) in the body of the order. The learned CIT(A)-n has also not recorded any finding to the effect that the reopening of the assessment was made on the ground that the assessee had failed to disclose material facts truly and fully.

In view of the above, the only inference can be drawn that the notice under Section 148 was issued to the assessee by the AO on the ground contained under Section 147(b) and not on the ground contained under Section 147(a) of the Act. The contention of the learned Senior Departmental Representative that the notice for reopening the assessment was issued on account of failure on the part of the assessee to disclose the material facts truly and fully is, therefore, not

acceptable.

50. The period of limitation is to be considered in view of the provisions of Section 149. Under the unamended law, the notice for reopening of the assessment could be issued under Section 149 only before the expiry of 4 years from the end of the relevant assessment year. The relevant provisions as contained under Section 149, before the amendment which became effective w.e.f. 1st April, 1989, were as under: "Substituted for the following Sub-section (1) by the Direct Tax Laws (Amendment) Act, 1987, w.e.f. 1st April, 1989: (i) for the relevant assessment year, if eight years have elapsed from the end of that year, unless the case falls under Sub-clause (ii).

(ii) for the relevant assessment year, where eight years, but no more than sixteen years, have elapsed from the end of that year, unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to rupees fifty thousand or more for that year: (b) in case falling under Clause (b) of Section 147, at any time after the expiry of four years from the end of the relevant assessment year." 51. Since the notice has not been issued on the ground contained under Section 147(a) the period of limitation available for reopening of the assessment was only four years from the end of the relevant assessment year in accordance with the provisions contained under Section 149.

Even if the order of learned CIT passed under Section 263 of IT Act, 1961, is treated as "information" within the meaning of Section 147(b), then also the period of limitation in view of Section 149 as well as in view of proviso to amended Section 147 cannot be more than 4 years. In view of the above position, the notice issued on 26th March, 1998 under Section 148 for asst. yr. 1988-89 is patently barred by limitation period provided under Section 149 of the IT Act, 1961.

52. So far as the contention of the learned Senior Departmental Representative that in view of Section 150(1), the notice can be issued under Section 148 at any time is concerned, we are unable to accept his contention on the following grounds:.

(1) The provisions of Section 150 have been amended w.e.f. 1st April, 1989, and as held in the case of K.M. Sharma (supra), the amended provision shall not apply to the asst. yr. 1988-89.

(2) The contention of the learned Senior Departmental Representative that notice under Section 148 was issued to give effect to the order of the learned CIT passed under Section 263 is not acceptable because the AO has not stated while issuing notice under Section 148 that the notice is being issued to carry out the order of learned CIT passed under Section 263 or to give effect to the same. A mere mention of the order of learned CIT under Section 263 only shows that the AO has been influenced by the opinion of the learned CIT and proceeded to make reassessment on the basis of such provision.

Had he acted only on the basis of orders of CIT under Section 263 of IT Act, he would have given details of this order and also relevant findings of CIT and could have also specifically pointed out in the proposal of reassessment that the proceedings are reinitiated to give effect to the order of learned CIT. Likewise, the plea of the learned Senior Departmental Representative that the AO has also had the order of learned CIT(A), dt. 30th Dec., 1994, as ground for reopening the assessment is concerned, the same is not acceptable inasmuch as the AO has made no reference to such order in his proposal to initiate reassessment proceedings. It may also be pointed out that the reassessment can be made only on the basis on which a notice under Section 148 was issued and no subsequent reasons or developments can be assigned for justifying the basis of issuance of notice under Section 148.

53. The contention of the learned Senior Departmental Representative that no time-limit is fixed for reopening the assessment if such reopening is made in consequence of the order of learned CIT passed under Section 263 of IT Act, 1961, is not legally tenable, firstly because the revisional jurisdiction contained under Section 263 is to be exercised on different grounds, for specific purpose and the powers contained under Section 263 are to operate in different areas.

Secondly, because the limitation for implementation of such order is also prescribed in Section 263(2), Relevant portion of Section 263 is being reproduced

below : "263(1) The CIT may call for and examine the record of any proceeding under this Act, and if he considers that any order passed therein by the AO is erroneous insofar as it is prejudicial to the interests of the Revenue, he may, after giving the assessee an opportunity of being heard and after making or causing to be made such inquiry as he deems necessary, pass such order thereon as the circumstances of the case justify, including an order enhancing or modifying the assessment, or cancelling the assessment and directing a fresh assessment.

(2) No order shall be made under Sub-section (1) after the expiry of two years from the end of the financial year in which the order sought to be revised was passed." 54. The issue relating to period of limitation for reopening the assessment order was considered by the Hon'ble Rajasthan High Court in the case of CIT v. A.R. Enterprises (P) Ltd. (supra). In that case, the assessee, who was engaged in the business of drilling of tubewells and construction activities, was allowed investment allowance and due to insufficient profit for that year, the same was allowed to be carried forward and set off against the income of the asst. yr. 1987-88. In view of the decision of Hon'ble Supreme Court of India in the case of CIT v. N.C. Budharaja & Co. (1993) 204 ITR 412 (SC), the AO issued notice under Section 148 and reopened the assessment under Section 147 to withdraw the investment allowance by passing reassessment order dt.

15th March, 1995. On appeal, the learned CIT(A) cancelled the reassessment order on the ground that the provisions of Section 147(b) could not be invoked after a lapse of 4 years, merely on the basis of the decision of the Hon'ble Supreme Court of India. The Tribunal affirmed the order of CIT(A). On appeal under Section 260A of the Act, the Hon'ble Rajasthan High Court rejected the appeal and held that even in consequence of information based on relevant judicial decision, no notice under Section 148 can be issued, because of the time-limit of four years, as provided under Clause (b) of Section 149(1). The view of the Tribunal in cancelling the reassessment order was upheld. The relevant observation of the Hon'ble Court are being reproduced below; "Turning to Clause (b) of Section 147 of the Act, irrespective of the fact that there has been no omission or failure as provided under Clause (a), the AO in consequence of information in his possession can still consider a case of escaped assessment for

any assessment year. The word "information" has been explained by the apex Court in *Maharaj Kumar Kamal Singh v. CIT* (1959) 35 ITR 1 (SC).

It is observed 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. Even in consequence of such an 'information', no notice under Section 148 can be issued because of the time-limit of four years as provided under Clause (b) of Section 149(1), i.e., at any time after the expiry of four years from the end of the relevant assessment year.

There appears to be a public policy behind providing such a limitation that there must be a point of finality in the legal proceedings and that stale issues should not be reactivated beyond a particular stage and that lapse of time must induce repose and set at rest judicial and quasi-judicial controversies as it must in other spheres of human activity. Reference be made to *Parashuram Pottery Works Co. Ltd. v. ITO* (1977) 106 ITR 1 (SC)" The same view has been taken by the Hon'ble Madras (Rajasthan) High Court in the case of *CIT v. A.R. Enterprises (P) Ltd.* (supra).

55. It may be added here that exemption from bar of limitation laid down under Section 149 for reopening the assessments, under Section 149 is granted under Section 150 only to give effect to particular order of CIT or any other superior authority for a particular assessment year as is clear from the legislative intent behind this section. The provisions of Section 150 of IT Act, 1961, are reproduced below: "Sec. 160--(1) Notwithstanding anything contained in Section 149, the notice under Section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision or by a Court in any proceeding under any other law.

(2) The provisions of Sub-section (1) shall not apply in any case where any such assessment, reassessment or recomputation as is referred to in that sub-section relates to an assessment year in respect of which an assessment, reassessment or recomputation could not have been made at the time the order which was the

subject-matter of the appeal, reference or revision, as the case may be, was made by reason of any other provision limiting the time within which any action for assessment, reassessment or recomputation may be taken." If the contention of the learned Senior Departmental Representative is accepted, then it will mean that on the basis of order of any superior authority or Court, assessment for any year can be reopened at 'any time'. This interpretation will render the provisions under Section 149 redundant without being repealed which can never be the intention of legislature while enacting Section 150 of IT Act, 1961.

In the case of Gaurishankar Choudhary v. Addl. CIT and Anr. (1998) 234 ITR 865 (Pat), the Hon'ble High Court of Patna, while explaining the scope of Section 150 has observed as under: "Sec. 150 of the IT Act, 1961, provides that notwithstanding anything contained in Section 149, the notice under Section 148 may be issued at any time for the purpose of making an assessment or reassessment or recomputation in consequence of or to, give effect to any finding or direction contained in an order passed by any authority in any proceeding under this Act by way of appeal, reference or revision, or by a Court in any proceeding under any other law. Resort to Sub-section (1) of Section 150 of the Act can be taken only in cases where it becomes necessary to make assessment or reassessment or recomputation in consequence of, or to give effect to, any finding or direction pursuant to an appellate order passed by the appellate authority or pursuant to any order in reference or revision or by a Court in any proceeding under any other law. Obviously, the appeal, reference or revision or any other proceedings before a Court must relate to the assessee in question, and not any direction or assessment made in appeal, reference or revision in the case of any other assessee or in a proceeding in which the assessee in question is not a party." It may also be observed that for making compliance of order passed by CIT under Section 263, a separate order under Section 263/143(3) is to be passed by the concerned AO and that too within the period of limitation prescribed for that purpose and not beyond it. It, therefore, follows that jurisdiction under Section 147 can neither be invoked for implementation of the order passed under Section 263 for the assessment year for which such order is passed nor for any subsequent year, because the purpose and object of revisional jurisdiction available to CIT under Section 263 is different. In view thereof, the contention of the learned Senior

Departmental Representative that the reopening of assessment can be made for any year on the basis of order of CIT under Section 263 'at any time' in accordance with the provisions contained under Section 150 cannot be accepted, as such an argument appears to be fallacious on face of it.

We are, therefore, unable to accept the contention of learned Senior Departmental Representative on this point.

56. In view of the above, it is clear that the AO issued notice under Section 147(b) and not under Section 147(a) and, therefore, the period of limitation for issuing notice under Section 148 expired on the expiry of 4 years from the end of the relevant assessment year. Thus, we are of the considered opinion that the notice issued by the AO was time-barred and, therefore, the same cannot be treated to be a valid notice in the eye of law and since the notice for reopening the assessment was itself invalid as being time-barred, the reassessment proceedings done in consequence of such invalid notice are to be treated as illegal and invalid.

57. So far as issue No.4 is concerned, the emphatic submission of the learned counsel for the assessee, Shri K. Sampat was that the notice was issued by the AO merely on the basis of change of opinion and not on the basis of any subsequent information coming to his notice. On facts, it was submitted by the learned counsel for the assessee that all the relevant facts relating to deposits were already submitted by the assessee and were available to the AO at the time of original assessment and no further material fact or change in law was brought to his notice or came to his notice for initiating reassessment proceedings. According to the learned counsel, the notice issued under Section 148, only on the basis of change of opinion, cannot be treated to be a valid notice.

58. In support of the above contention, the learned counsel for the assessee has placed reliance on the following rulings: 2. Calcutta Discount Co. Ltd. v. ITO and Anr. (1961) 41 ITR 191 (SC); 8. Noorbari Tea Company (P) Ltd. v. ITO and Anr. (1988) 172 ITR 162 (Gau); 11. H.H. Maharaja Shri Lokendra Singji v. CIT (1987) 166 TTR 407 (MP); 12. Jay Shree Tea and Industries Ltd. vs Dy CIT and Ors. (2000) 245 ITR 567 (Cal); 13. Jindal Photo Films Ltd v. Dy. CIT and Anr. (1998) 234 ITR 170 (Del); 19. Bidar Sahakar Sakkare Karkhane Ltd v. State of Karnataka

58 ITR 65 (sic); 23. Hum Boldt Wedag India Ltd. and Ors. v. Asstt. CIT and Ors.

(1999) 236 ITR 845 (Cal); 29. Keshav Narayan Banerjee v. CIT and Anr. (1999) 238 ITR 694 (Cal); 32. Hotel Ashoka and Anr. v. Union of India and Anr. (1997) 226 ITR 388 (MP); 34. Smt. Laxmibai A. Wagle (Deed.) v. ITO and Anr. (1999) 240 ITR 427 (Bom); 36. Walliawarum Plantations v. Agrl. ITO & STO (1999) 237 ITR 325 (Ker); 38. Pala Marketing Co-operative Society Ltd. v. State of Kerala and Anr. (1999) 236 ITR 604 (Ker); 39. Ranchi Handloom Emporium v. CIT and Anr. (1999) 235 ITR 604 (Pat); and 59. After going through the material on record, we find ourselves in agreement with the learned counsel for the assessee that the assessee had disclosed all the material facts during the course of original assessment proceedings. To repeat, the assessee had placed the agreement before the AO. It had shown the security deposit in the balance sheet and, therefore, nothing was concealed by the assessee.

Hence, the allegation of non-disclosure of material facts by the, assessee relating to deposits is not made out or established. On the basis of record, it is found that the AO somehow or other, did not treat the security deposits as income of the assessee and this conclusion or omission (sic-opinion) was subsequently changed on account of the opinion of the learned CIT expressed in his order passed under Section 263 for some assessment year. Hence, even the opinion is not that of the AO, rather it is the opinion of the other officer, namely, CIT.60. This issue has been dealt with by various Courts. In the case of Andhra Bank Ltd. v. CIT (supra) the assessee who was doing banking business, had purchased Government securities and sold them from time to time. Although interest was payable on security on specified dates, the bank adopted a method of calculating the interest which had accrued and paying/receiving the interest on the date of and upto the date of purchase and sale. This method was accepted by the ITO upto asst. yr.

1958-59. From the asst. yr. 1959-60, the bank changed its method of returning income from transactions in securities. It attached a note to its return stating that by following the earlier method, it was experiencing several difficulties. Under the changed method, the bank ignored accrued amount of interest paid or received relating to the broken periods. The bank also claimed that the excess amount

received from the sale of securities was capital receipt. The ITO accepted this change in the method of accounting the assessment order. However, in the course of assessment proceedings relating to 1963-64, the ITO objected to this change and took the view that the excess realized on the transactions in securities constituted revenue receipt. The ITO, on this basis retained (sic-reopened) the assessment for asst. yrs.

1960-61 to 1962-63 under Clause (b) of Section 147 of IT Act, 1961. The assessee-bank appealed to the AAC but without success. On further appeal, the issue was decided by the ITO (sic-ITAT) in favour of the bank. On reference, at the instance of the Department, the High Court held that the retaining (sic-reopening) of the assessment was valid. On appeal to the Hon'ble Supreme Court of India, the following observations were made by the Hon'ble Supreme Court of India: "Held, reversing the decision of the High Court, that the ITO had allowed the change in the method of accounting for the asst. yrs.

1960-61, 1961-62 and 1963-64 knowingly. It was not a case of an inadvertent mistake which was discovered later on after completion of the assessment or oversight. Once the change in the method of accounting had been knowingly allowed by the ITO after taking into account all the relevant facts it was not permissible for the ITO or his successor, to reopen the assessment at a later point of time under Section 147(b) of the IT Act unless any information came from an extraneous source. There was no information available with ITO on the basis of which he could reopen the assessments. This was a case of mere change in opinion, and, therefore, the assessments had not been validly reopened under Section 147(b) of the IT Act, 1961." 61. In the case of CIT v. Bhanji Lavji (supra), the Hon'ble Supreme Court of India has observed that it is not for the assessee to satisfy the ITO that there is no concealment with regard to any question and it was for the ITO, if that issue was raised, to establish that the assessee had failed to disclose fully and truly certain facts material to the assessment of income which had escaped assessment.

62. In the case of Garden Silk Mills (P) Ltd v. Dy. CIT (supra), the Hon'ble Gujarat High Court has observed as under: "However wide the scope of taking action

under Section 148 of the IT Act, 1961, it does not confer jurisdiction on change of opinion on the interpretation of a particular provision earlier adopted by the assessing authority. For coming to the conclusion that there has been excessive loss or depreciation allowance or that there has been underassessment or assessment at a lower rate or for applying other provisions of Expln. 2 to Section 147, it must be on material and it should have nexus for holding such opinion contrary to what has been expressed earlier. Even after the amendment of Section 147 mere change of opinion does not confer jurisdiction on the ITO to initiate proceedings for reassessment merely by resorting to Expln.

1 to Section 147." 63. The Hon'ble Gauhati High Court has also considered the issue and held that mere change of opinion cannot be regarded as ground for entertaining the plea that the income chargeable to tax has escaped assessment.

64. In the case of Sharadbhai M Lakhani v. ITO (supra), the Gujarat High Court has also held that before issuing notice under Section 148 of IT Act, 1961, the AO should have reason to believe that income has escaped assessment. According to the Hon'ble High Court, the reason to believe can never be the outcome of a change of opinion. It was further observed that the validity or otherwise of the reason should be gone into on the basis of facts mentioned therein and it is not open to the authorities to justify the action on the basis of further reasons supplied in the form of affidavits.

65. The Madhya Pradesh High Court (Indore Bench) in the case of Dr.

Santosh Kumar Dey (Deed) v. ITO (supra) has observed as under: "Held, that, in the instance case, the petitioner had not only disclosed the facts relating to sale of his immovable properties but also filed true copies of the sale deeds along with his returns and computation sheets. The sale deeds contained all necessary particulars, i.e., full description of the properties sold, the names and other particulars of the purchasers and the sale price for which the sale was effected. All basic and primary facts were placed before the ITO for making the assessments for the relevant years.

Whether or not the sale price indicated in the sale deeds was correct and commensurate with the prevailing market price of such property, was a question of inquiry and inference to be made by the ITO. So far as the petitioner was concerned, his only obligation was to place the necessary basis facts before the ITO for the relevant assessment years with regard to the value of the properties sold by him. The petitioner having done so, there was no failure on his part which would give jurisdiction to the ITO to reopen the assessment under Section 147(a). The notices of reassessment were not valid and were liable to be quashed." 66. It was also considered by the Calcutta High Court in the case of Jay Shree Tea and Industries Ltd. v. Dy. CIT and Ors. (supra). In that case, the assessee was a public limited company deriving its income from business of growing and manufacturing tea in India and from other activities. For the asst. yr. 1990-91, the assessee filed its return along with audit report and claimed deduction under Section 32AB(5) of IT Act, 1961. The AO completed the assessment and allowed deductions.

Subsequently, the AO issued notice under Section 148 on the ground that income had escaped assessment as deduction under Section 32AB(5) allowed was more than the amount permissible under that section. The assessee challenged this action of the AO in writ petition on the ground that notice had been issued after four years from the end of relevant assessment year and also on other grounds. The Hon'ble Calcutta High Court allowed the petition accepting the plea of the assessee and it was held that the Department failed to prove that the assessee had failed to disclose fully and truly all material facts required for assessment of its income and assuming that there was some mistake in calculation either on the part of the assessee or on the part of the ITO, that did not mean that the assessee had not disclosed fully and truly the material facts regarding his income.

67. In the case of Mohini Bai M Sarda v. ITO (supra) the Karnataka High Court has held as under: "Under the provisions of Section 147(a) of the IT Act, 1961, assessee is required to furnish such particulars of income and all other material facts necessary for his/her assessment. The burden is on Department to show that the escapement of income has occurred on account of failure on the part of the assessee to disclose the full particulars of the income. The ITO must have reason to believe that escapement had occurred on account of the omission or failure on

the part of the assessee. The formation of belief must have a nexus to the failure of the assessee to disclose true and full particulars.

It is difficult if the assessee has disclosed all the primary facts and any other enquiry or investigation that is called for should be done by the ITO." 68. The Hon'ble Allahabad High Court considered the issue in the case of Smt. Jamila Ansari v. IT Department and Anr. (supra) and observed as under: "It is settled law that an ITO has no power to review his order and he could not do so in the purported exercise of the authority under Section 147 of the Act. The mere fact, that for another year, the Tribunal had taken another view on the facts relating to that year, could not be a ground for having reason to believe that the same conclusions can be drawn for the year under consideration. We are, therefore, of the view that the issue of a notice under Section 148 of the Act was unauthorized." 69. The issue has again been thoroughly discussed by the Hon'ble Allahabad High Court in its latest decision in the case of Foramer v. CIT and Anr. (2001) 247 ITR 436 (All) In that case the Hon'ble Court also considered the amended provisions of Sections 147 and 148, etc.

and held that mere change of opinion cannot justify assessment proceedings. It was also held that so far as the legal position is concerned, there was no difference between the law prior or after substitution by Direct Tax Laws (Amendment) Act, 1987.

70. In a recent case of CIT v. Kalvinator of India (supra) the Full Bench of Hon'ble Delhi High Court has considered the issue relating to reopening of assessment proceedings. The Full Bench of Hon'ble Court after considering the relevant provisions of Section 34 of the old Act, the amended provisions of Section 147 and also the amended provisions of Section 148 has considered and observed as under: "From a bare perusal of the provisions contained in Section 147 of the said Act, as it stood upto 31st March, 1989, it is evident that to confer jurisdiction under Section 147(a) of the Act two conditions were required to be satisfied, viz., (1) the AO 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 aforementioned requirements of law must be held to be conditions precedent ...for. invoking jurisdiction of the AO to reopen the assessment under Section 147 of the said Act. It is trite that both the conditions aforementioned are cumulative. It is also a well-settled principle of law that, in the event it is found that any of the said two conditions is not fulfilled the notice issued by the AO would be wholly without jurisdiction. The expression "reason to believe" finds place both in Clauses (a) and (b) of Section 147 of the Act. Sub-section (2) of Section 148 of the Act mandates, that before jurisdiction under Section 147 of the Act is invoked by the AO he is to record his reasons for doing so or before issuing any notice under Section 147 of the said Act. Therefore, formation of reason to believe and recording of reasons were imperative before the AO could reopen a completed assessment. Since assessment has been reopened on 20th April, 1990, Section 147 as amended w.e.f. 1st April, 1989, would apply." 71. The Lucknow Bench of Tribunal has also considered the issue in a latest case of Leatherage, Kanpur v. ITO in ITA No. 53 and 54/Luck/2002 for asst. yr, 1994-95 and 1995-96 and in its decision dt. 31st July, 2002 [reported at (2003) 78 TTJ (Luck) 937--Ed.] after following the relevant case law including the decision of Full Bench of Hon'ble Delhi High Court, it was held that reassessment cannot be opened merely on the basis of change of opinion.

72. In view of the above, we find sufficient force in the contention of the learned counsel for the assessee that the notice under Section 148 of IT Act, 1961, has been issued in this case merely on the basis of change of opinion and, therefore, the same is not legally justified.

Thus, this issue is decided in favour of the assessee and against the Department.

73. So far as the last point is concerned, since the notice issued under Section 148 is found to be illegal, consequently the reassessment proceedings for asst. yr. 1988-89 are also held to be illegal and the same are liable to be quashed only on this ground.

74. Thus, in our view, the arguments of the learned counsel for the assessee for challenging the validity of the notice and the reassessment order carry much force and the same deserves to be accepted. In view of our findings recorded above on various issues formulated by us, ground Nos. 1 and 3 are decided in favour of the assessee, whereas ground No. 2 is decided against the assessee. Since on the basis of our findings on the preliminary legal grounds holding the notice to be illegal and consequently the assessment order also invalid, we are of the view that the assessment order dt. 25th Jan., 2000, is liable to be quashed as being non est in law. The order of learned CIT(A) is, therefore, to be set aside on these preliminary grounds alone and, therefore, we are not required to take up or adjudicate the remaining grounds taken in this appeal on merits.

75. In the result, the ITA No. 20/Del/2000 deserves to be allowed. On these grounds. Consequently assessment order dt. 25th Jan., 2000, passed under Section 143(3)/148 is also quashed.

76. These three appeals relate to asst. yrs. 1989-90, 1990-91 and 1991-92. The assessee has taken ground Nos. 1, 2 and 3 in these appeals as legal grounds to challenge the validity of the assessment framed under Section 147/143(3). These grounds are reproduced as under: "On the facts and in the circumstances of the case and in law the following actions of the authorities below are arbitrary, erroneous and illegal and must be quashed : 1 . In holding that the assessment framed under Section 147/143(3) of the IT Act, 1961, was valid and proper in law; 2. In not providing the grounds for reopening of the assessment under Section 147 and in completing the assessment under Section 143(3) without such disclosure; 3. In holding that the case was covered under Section 147 of the Act and that the reassessment proceedings were validly initiated and undertaken." 77. So far as ground No. 2 is concerned, while deciding this ground in ITA No. 20/Del/2000, we have held that the assessee was provided the grounds for reopening of the assessment under Section 147 and, therefore, adopting the same approach, we decide this ground against the assessee in these appeals also.

78. So far as ground Nos. 1 and 3 are concerned, these grounds are also identical to ground Nos. 1 and 3 taken by the assessee in ITA No.20/Del/2000, The AO has

initiated reassessment proceedings on the same ground in these years also and the reasons for initiating reassessment proceedings for all the four assessment years are contained in the letter of Asstt. GIT dt. 3rd March, 1998, the same ground is to be considered for examining the validity of the reassessment order in these assessment years. There is, however, a distinguishing feature so far as these assessment years are concerned. For asst. yr. 1988-89, unamended provisions of Section 147 were applicable and the point of limitation was to be decided in view of the provisions contained under Section 147(a) or 147(b) r/w provisions of Section 149. So far as subsequent assessment years are concerned, the amended provisions, which have been made, effective from 1st April, 1989, are to be made applicable. In accordance with the amended provisions, although two parts as contained in Clauses (a) and (b) of Section 147, have been done away with, but so far as the limitation is concerned, the proviso to amended Section 147 provides that no action shall be taken under Section 147 after the expiry of four years from the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make a return under Section 139 or 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 assessment year. The provision of amended Section 147 is as under; Section 147--If the AO has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Section 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): Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section

139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year." 79. In view of the proviso referred to above, the period of limitation is only open to four years, where the reassessment is not made on the ground of failure on the part of the assessee to disclose material facts fully and truly necessary for the assessment.

80. So far as the three assessment years under consideration are concerned, on facts it is found that there was no failure on the part of the assessee to disclose the material facts fully and truly necessary for the assessment. Since the facts and circumstances relating to these assessment years are similar to the facts of asst.

yr. 1988-89, we adopt the entire discussion and our reasons given in support of our finding on this issue in that appeal as our reasons to support our findings on the issue in these assessment years also.

81. Since we are of the view that assessment in these three assessment years has also been reopened by the AO on the basis of his information that income chargeable to tax has escaped assessment and not on the basis that such income escaped assessment on account of failure on the part of the assessee to disclose material facts fully and truly necessary for the assessment, the limitation of four years only is to apply.

82. In para 8 of our order, we have given the details, according to which for asst. yrs. 1989-90 to 1991-92, the notice under Section 148 were issued on 26th March, 1998. Since the notices were issued after the expiry of more than 4 years from the end of the assessment years under consideration, in view of the proviso to Section 147, the notices are to be treated as having been issued beyond the expiry of four years. In view of this factual position, the notices for these three assessment years are also time-barred.

83. It may be pointed out that the Expln. 1 to Section 147 is not applicable to the facts of these assessment years and the contention of the learned Senior Departmental Representative (CIT) that Expln. 1 to Section 147 is applicable, is not acceptable.

84. The contention of the learned Senior Departmental Representative that in view of the provisions contained under Section 150, no time-limit for making reassessment is fixed, is also not acceptable.

85. If we examine the facts relating to issuance of notice for reopening the assessment, which are contained in the common proposal of Asstt. CIT dt. 3rd March, 1998, we will find that the proposal is not based on any ground mentioned in Section 150 of IT Act, 1961. We have discussed the factual as well as legal aspects in detail on this issue, while deciding ITA No. 20/Del/2000 and adopting the same reasons, we observe that the provisions contained under Section 150 is not applicable in these assessment years, inasmuch as the notices for reassessment were not issued to give effect to any finding or direction of any authority in any appeal, reference or revision or by a Court in any proceedings, under any other law relating to these assessment years.

86. In view of the above, we hold that the notices issued under Section 148 for initiating the reassessment proceedings are barred by limitation and on that basis, we further hold that, since the notices itself were not legal and valid, the assessment proceedings for the three years under consideration completed on the basis of such legally defective and invalid notices cannot be sustained in the eye of law.

87. We further hold that since the proceedings for initiating reassessment were based only on the basis of mere change of opinion, the validity of the notices under Section 148 and the validity of reassessment proceedings and reassessment order cannot be upheld. On this issue also, elaborate discussion has been made by us, while deciding preliminary grounds in ITA No. 20/Del/2000. Since the, grounds for reopening the assessment are identical, rather common in these three assessment years to the ground of reopening of assessment in asst. yr. 1988-89, we are not required to reproduce our findings.

Hence, adopting the findings recorded by us, while deciding issue in that appeal and also, assigning the reasons in support of that finding in that appeal, we hold that the reassessment proceedings based on mere change of opinion are invalid in the eye of law and the orders of the AO for these three assessment years as well

as order of learned CIT(A) for these assessment years are liable to be set aside on this ground alone, as the assessment order passed under Section 143(3)/148 of the IT Act, 1961, based on mere change of opinion, is liable to be quashed as the same is non est in the eye of law.

88. In view of the above, ground Nos. 1 and 3 taken by the assessee in these three appeals are decided in favour of the assessee and against the Department.

89. Since the order of learned CIT(A) is set aside on these grounds alone in these three assessment years also, we are not required to decide the other grounds of appeals on merits. Consequently, the assessment orders passed after invoking the Jurisdiction under Section 147 are quashed.

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