



issued under Section 142(1) or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further the Assessing Officer may assess or reassess such income, other than the income involving matter which are the subject matter of any appeal, reference or revision, which is chargeable to tax and escaped assessment.”

The reassessment is subject to the provisions contained in Sections 148 to 153. Section 148 deals with the issue of notice where income has escaped assessment.

### Scope and Effect of Section 147

The scope and effect of Section 147 as substituted with effect from 01-04-1989, as also Sections 148 to 152, are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(1), two conditions were required to be satisfied:

- (1) the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment; and
- (2) he must have also reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of the year.

But under the substituted Section 147, existence of only the first condition suffices. In other words, if the Assessing Officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147.

### Reason to Believe

The expression ‘reason to believe’ used in Section 147 is analysed in this part. The Assessing Officer must have ‘reason to believe’ that an income chargeable to tax has escaped assessment. This is mandatory and the ‘reasons to believe’ are required to be recorded in writing by the Assessing Officer. Sufficiency of reasons is not a matter, which is to be decided by the writ court, but existence of the subject matter of the scrutiny. A

notice under Section 148 can be quashed if the ‘belief’ is not bona fide, or one based on vague, irrelevant and non-specific information. The basis of the belief should be discernible from the material on record, which was available with the Assessing Officer, when he recorded reason. There should be a link between the reasons and the evidence/material available with the Assessing Officer. The ‘reason to believe’ would mean cause or justification of the Assessing Officer should have finally ascertained the said fact by legal evidence or reached a conclusion, as this is determined and directed in the assessment order, which reached the final stage before the Assessing Officer.

### Escaped Assessment

According to *Explanation 2* to Section 147, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

- (a) where no return of income has been furnished by the assessee, although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year, exceeded the maximum amount which is not chargeable to income tax;
- (b) where a return of income has been furnished by the assessee, but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;
- (c) where an assessment has been made, but-
  - (i) income chargeable to tax has been unaddressed; or
  - (ii) such income has been assessed at too low rate; or
  - (iii) such income has been made the subject of excessive relief under this Act; or
  - (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

In *Liberty India Limited Vs. Commissioner of Income Tax*, (2009) 317 ITR 218 the Supreme Court considered the scheme of duty drawback and held that the duty drawback received from the Central Government under the scheme does not fall within the purview of income derived from the business of the industrial undertaking so as to entitle the assessee to deduction under Section 80-IB of the Act. In this view of the matter, the petitioner was not entitled for the deduction on the duty drawback amount under Section

80-IB of the Act and since it had been allowed in the assessment order passed under Section 143(1) of the Act, it had escaped assessment. On these facts, the initiation of the proceedings under Section 148 read with Section 147 of the Act for the assessment years 2005-06 and 2006-07 was legal and in accordance with the law.

### Information

The Assessing Officer, based on the information which comes to his notice subsequently may issue notice for reassessment. The following case laws envisage what amounts to 'information' and that may be relied upon by the Assessing Officer.

In *Assistant Commissioner of Income Tax Vs. Dhariya Construction Co. (2010) 328 ITR 515*, the Supreme Court held that the Department sought reopening of the assessment based on the opinion given by the District Valuation Officer. The opinion of the DVO *per se* is not information for the purposes of reopening assessment under Section 147 of the Act. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon.

In *Income Tax Officer Vs. Saradhai M. Lakshmi, (2000) 243 ITR 1*, the Supreme Court held that the decision of the High Court would constitute information and the initiation of reassessment proceeding on the basis of the decision of the High Court has been justified.

In *Ess Ess Kay Engineering Co. P. Limited Vs. Commissioner of Income Tax, (2001) 247 ITR 818*, the Supreme Court held that the income tax officer is not precluded from reopening of the assessment of an earlier year on the basis of his finding of fact, made on the basis of the fresh materials in the course of assessment of the next assessment year.

In *Dr. Lata Chouhan Vs. Income Tax Officer and another, (2010) 329 ITR 400 (MP)*, the petitioner filed her return for the assessment year 1997-98. On 25-12-1999, a survey under Section 133A of the Act was conducted by the Department in the business premises of the petitioner. In the course of the survey, it was noticed that the petitioner had made substantial investment in the construction of her hospital building. It was estimated by the ITO at ₹27,70,000/- where as the petitioner disclosed ₹3,65,310/-. A notice for reassessment was issued under Section 147. In the writ petition filed by the assessee, the High Court held that when survey was conducted in the premises, the department came into possession of material for proceeding to reopen the assessment. The fact was thus

rightly made the basis for making reassessment. Once there existed a basis for forming a *prima facie* opinion for escape assessment then it is sufficient to issue notice under Section 147. The Court cannot examine the adequacy or sufficiency of reasons on facts like an appellate court for deciding as to whether on such facts, notice would be issued or not unless the reasons are found to be totally perverse or absurd or against any provision of law. Such was not the case here. The return was filed and hence notice under Section 147 could be issued on satisfying the requirement of Section 147. The notice was thus valid.

### Sanction for Notice

Section 151 of the Act deals with the sanction for issue of notice. Section 151 reads as follows:

“**151.** (1) In a case where an assessment under sub Section (3) of Section 143 or Section 147 has been made for the relevant assessment year, no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Assistant Commissioner or Deputy Commissioner, unless the Joint Commissioner is satisfied on the reasons recorded by such Assessing Officer that it is a fit case for the issue of such notice:

**Provided** that, after the expiry of four years from the end of the relevant assessment year, no such notice shall be issued unless the Chief Commissioner or Commissioner is satisfied, on the reasons recorded by the Assessing Officer aforesaid, that it is a fit case for the issue of such notice.

(2) In a case other than a case falling under subsection (1), no notice shall be issued under Section 148 by an Assessing Officer, who is below the rank of Joint Commissioner, after the expiry of four years from the end of the relevant assessment year, unless the Joint Commissioner is satisfied, on the reasons recorded by such Assessing Officer, that it is a fit case for the issue of such notice.

*Explanation* — For the removal of doubts, it is hereby declared that the Joint Commissioner, the Commissioner or the Chief Commissioner, as the case may be, being satisfied on the reasons recorded by the Assessing Officer about fitness of a case for the issue of notice under Section 148, need not issue such notice himself.”

### Limitation

For a notice under Section 148 of the Act after the expiry of a period of four years from the end of the relevant assessment year as laid down in the proviso

to Section 147 of the Act, the following conditions are required to be satisfied:

- The income chargeable to tax should have escaped assessment;
- Such escapement should have been by reason of failure on behalf of the petitioner to file the return under either Section 139 (1), 142 (1) or 148 or
- Failure to disclose fully or truly material facts necessary for assessment.

In *Deputy Commissioner of Income Tax Vs. Purolator India Limited*, (2011) 11 ITR (Trib) 434 (Delhi), it was held that where the assessee had claimed relief under Section 80HHC on the basis of audited accounts with accompanied return and such relief was allowed in regular assessment after considering the materials on record, there could be no justification for issuing notice under Section 148 after the four year time limit.

In *Kalyan Ala Barot Vs. M.H. Rathod*, (2010) 328 ITR 521 (Guj), the High Court dismissed the writ petition holding that in consequence of and with a view to give effect to the finding contained in the order made by the Commissioner (Appeals) in appeal for assessment year 1984-85, the Assessing Officer has issued notice under Section 148 for assessing the income which was excluded from the total income of the petitioner for the assessment year 1984-85, to assess such income for the assessment year 1983-84. Thus, the case fell within the ambit of provisions of Section 150 as well as Section 153(3)(ii) read with *Explanation 2* to Section 153 of the Act and as such, there was no infirmity in the action of the Assessing Officer in initiating reassessment proceedings, the same being in consonance with the provisions of law and within the prescribed time limit.

In *Deputy Commissioner of Income Tax Vs. Gopal Ramnarayan Kasat*, (2010) 328 ITR 556 (Bom), the High Court held that Section 148 had been amended by the Finance Act, 2006 with retrospective effect from 01-10-1991 and all such notices which has been served under Section 143(2) after expiry of 12 months have been saved. It is thus clear that on the basis of law, as it stood, the notices under Section 143(2), concerning a return furnished during the period commencing from 01-10-1991 and ending 30-09-2005 had been saved provided such a notice was issued before the expiry of time limit for making the assessment, reassessment or recomputation as specified in Section 153 (2). It was not the case of the assessee that the notice

issued was after the expiry of the time limit provided in Section 153 (2). The reassessment proceedings were valid.

In *Madras Gymkhana Club Vs. Deputy Commissioner of Income Tax*, (2010) 328 ITR 348 (Mad), the High Court held that the period of four year mentioned in Section 147 would have no application, where there was no order under Section 143(3) or any provisional order passed under Section 147 itself on the ground of escaped assessment. Hence the reassessments were within the time.

In *Hindustan Petroleum Corporation Limited Vs. Deputy Commissioner of Income Tax*, (2010) 328 ITR 534 (Bom), the High Court held that where the assessee had claimed relief under Section 80-IA on the income attributable to a generator used as a captive power plant, with all the particulars of such claim, reopening of assessment to withdraw the claim after four year time in such cases, where there is full and true disclosure, was not considered justified.

In *Smt. Raj Rani Gulati Vs. Union of India and another*, (2010) 329 ITR 370 (All), the High Court held that under proviso to Section 147 of the Act, notice under Section 148 of the Act can be issued beyond the period of four years only in a situation where there is failure on the part of the assessee to disclose all material facts necessary for the assessment. Unless such case is made out, no notice beyond the period of four years can be issued. The Court has gone through the findings recorded by the assessing authority in the assessment order. The findings recorded by the assessing authority in the assessment order reveal that the assessee has furnished complete details relating to the sale of 16,000 equity shares of M/s Viraj Credit Capital Limited through M/s J.R.D. Stock Brokers (P) Limited, Dariyaganj, New Delhi and on the basis of the material furnished, the assessing authority has also made necessary enquiry and therefore, the Court is of the view that there was no failure on the part of the assessee to disclose fully and truly the material in respect of equity shares of M/s Viraj Credit Capital Limited through M/s JRD Stock Brokers (P) Limited, Dariyaganj, New Delhi and therefore, the limitation available for initiation of proceeding was only four years. In the present case, the notice issued under Section 148 was beyond four years, and thus, barred by limitation.

### Validity of Notice

In *Commissioner of Income Tax Vs. Rajesh Jhaveri Stock Brokers (P) Limited*, (2007) 291 ITR 500, the Supreme Court held that failure of the officer to make

regular assessment under Section 143 will not render the Assessing Officer powerless to initiate reassessment proceedings.

In *Commissioner of Income Tax Vs. Chandrasekar Balagopal*, (2010) 328 ITR 619 (Kar) the assessee during the previous year, relevant for the assessment year 2000-01, received an income of ₹ 3.9 crore under restrictive covenant from a Japanese company which took over the business of an Indian company of which the assessee was the Managing Director. The assessee initially treated the receipt from the foreign company as his income and paid advance tax of ₹63,94,000/-. Later, the assessee remitted an amount of ₹5 lakh towards self assessed tax. The taxes so paid were in addition to the tax deducted at source in the assessee's account that was ₹63,347/-. Even though a huge amount towards advance tax and self assessed tax was paid by the assessee, while filing the return for the assessment year 2000-01 on 31-08-2000, the assessee returned an income of ₹17,79,850/- and claimed refund of the tax paid on the receipt from the foreign company that is ₹3.9 crore. The Assessing Officer re-opened the assessment and completed the reassessment under Section 147 including the amount received from the foreign company as income. According to the Tribunal, there was no processing of return under Section 143(1)(a) the Assessing Officer was barred from making a reassessment of income escaping assessment under Section 147. On appeal, the High Court held that the reassessment proceedings were valid. By virtue of *Explanation 2* to Section 147, if the Assessing Officer in the course of scrutiny of the return finds that the assessee has understated the income or has claimed excessive loss, deduction, allowance or other relief, in the return the Assessing Officer is free to initiate income escaping assessment under Section 147, no matter the assessment based on original return is not completed either through proceedings under Section 143(1)(a) or through regular assessment under Section 143(3) of the Act. Thus, income escaping assessment can be made based on the return filed by the assessee, pending for assessment.

### Objection to Reassessment

An assessee may raise objection on the issue of notice for reassessment. The Assessing Officer is to take note of objections and to dispose of his objection before reassessment. In *GKN Driveshafts (India) Limited Vs. ITO*, (2003) 259 ITR19 (SC), the Supreme Court held that the Court saw no justifiable reason to interfere with the order under challenge. However, the Court clarified that-

- When a notice under Section 148 of the Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices;
- The Assessing Officer is bound to furnish reasons within a reasonable time;
- On receipt of reasons, the noticee is entitled to file objections to issuance of notice;
- The Assessing Officer is bound to dispose of the same by passing a speaking order;

In *IOT Infrastructure and Energy Services Limited Vs. Assistant Commissioner of Income Tax and another*, (2010) 329 ITR 547 (Bom), the notice for reopening the assessment was issued on 16-03-2009 and the reasons in support of the notice were dated 18-06-2009. On 18-12-2009, the assessee lodged its objections to the reopening of the assessment, stating that a copy of the letter dated 18-06-2009 had been handed over only on 16-12-2009. The order of assessment was passed on 23-12-2009. In the writ petition filed by the assessee, the High Court held that there was absolutely no reason or justification for the Assessing Officer not to deal with the objections filed by the assessee to the reopening of the assessment, particularly in view of the binding principle of law laid down by the Supreme Court in that regard. The order of reassessment was therefore set aside. The High Court directed the Assessing Officer to pass a fresh order on the objections raised by the assessee to the proposed reassessment in accordance with the law.

### Enquiry without Opportunity

In *Vira Properties (Madras) Private Limited Vs. Assistant Commissioner of Income Tax*, (2010) 329 ITR 389 (Mad), the petitioner filed return for the assessment years 2003-04 and 2004-05. The Department processed the return under Section 143(1) of the Act and granted refund as claimed in the return. On 04-08-2006, the Department issued a notice under Section 148 seeking to reassess the income under Section 147 of the Act. The petitioner sought for the reason for the same and the Department on 22-08-2006 informed that certain income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act. The petitioner filed objections on 06-10-2006 which was over ruled by the Department on 13-03-2007. The petitioner challenged the said order before the High Court. The High Court orally instructed the Department not to proceed with the assessment pending disposal of the interim applications, but the Department went ahead and completed the assessments

without affording the petitioner a personal hearing. The petitioner filed a writ petition against this assessment. For oral directions of High Court, the Department contended that the Court directed not to take any action for two weeks and the last days fell on 11-10-2007. Beyond that no oral direction was there from the Court to extend the stay. In the absence of the stay order, the Department proceeded with the assessment and completed on 31-12-2007. The High Court held that there was an oral direction from the Court not to proceed with the enquiry and after that period as there was no notice of hearing, the Department has proceeded in conducting the enquiry without affording an opportunity to the petitioner. Therefore, the impugned order suffers from legal infirmity and it cannot be sustained. The Court set aside the order and directed to cause fresh assessment after affording an opportunity of hearing to the petitioner.

### Reasons Recorded must be on Evidence

In *Hindustan Lever Limited Vs. R.B. Wadkar, Asst. Commissioner of Income Tax, (2004) 268 ITR 332 (Bom)*, a Division Bench has opined the followings:

- The reasons are required to be read as they were recorded by the Assessing Officer;
- No substitution or deletion is permissible;
- No additions can be made to those reasons;
- No inference can be allowed to be drawn on reasons not recorded;
- It is for the Assessing Officer to disclose and open his mind through reasons recorded by him;
- It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year;
- The reasons recorded should be clear and unambiguous and should not suffer from any vagueness;
- The reasons recorded should be self explanatory and should not keep the assessee guessing for the reasons;
- Reasons provide the link between conclusion and evidence;
- The reasons must be based on evidence;
- The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record;
- He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment

year, so as to establish the vital link between the reasons and evidence;

- That vital link is the safeguard against arbitrary reopening of the concluded assessment;
- The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission;
- If the reasons were lacking in the material particulars, the same would get supplemented by the time the matter reaches to the court, on the strength of affidavit or oral submission advanced.

### Change of Opinion

The Assessing Officer may as per Section 147 proceed on reassessment if he has **reason to believe** that any income chargeable to tax has **escaped assessment** for any assessment year but not on the basis of changed opinion. The following case laws discussed what would amount to 'change of opinion' which bars reassessment.

In *Deputy Commissioner of Income Tax Vs. Manak Shoes Co. P. Limited, (2011) 11 ITR (Trib) 673 (Del)*, the Tribunal held that where regular assessment had been made under Section 143(3) allowing depreciation of factory building, plant and machinery, reassessment proceedings were initiated on the ground that depreciation was not admissible, since the assessee had no manufacturing activity during the year. The Tribunal found that the matter had been examined during the assessment stage and that there was no fresh information to justify a different inference and notice under Section 143. Though action was initiated within the four year time limit, it was found that it was based on mere change of opinion and reassessment proceedings was, therefore, not justified.

In *Consolidated and Finvest Limited Vs. Asst. Commissioner of Income Tax, (2006) 281 ITR 394 (Delhi)*, the High Court held that a mere change of opinion could not be a basis for reopening completed assessments and would be applicable only to situations where the Assessing Officer had applied his mind and taken conscious decision on a particular matter in issue, and it would have no application, where the order of assessment did not address itself to the aspect which was the basis for re-opening of the assessment. The High Court further held that mere production of books of account or other evidence from which the Assessing Officer could have, with due diligence, discovered the material evidence does not necessarily amount to a disclosure within the meaning of the proviso to Section 147 of the Act.



In *Jai Hotels Co. Limited Vs. Asst. DIT*, (2009) 24 DTR 37 (Del), the Delhi High Court has held that there being no new material in the hands of the Revenue leading to view that there was reason to believe that income had escaped assessment, the case is a classic instance of a change of opinion. The High Court further observed that when copies of statement of income, trading account, profit and loss account, audit report etc., were appended to the return filed by the assessee, taking resort to Section 147/148 was unwarranted as it constituted a change of opinion, since the material acted upon had been made available along with return of income.

In *Satnam Overseas Limited Vs. Additional Commissioner of Income Tax*, (2010) 329 ITR 237 (Delhi), the High Court held that the only reason which has been given seeking reopening of the assessment for the years 1997-98 and 1998-99 is that suppression of sales has taken place on account of the fact that, when average price of the closing stock is multiplied with the quantity of the sales in the year then the value of the sales would be at a higher figure, as declared by the assessee. Clearly, there is no new material which is alleged to have come to the notice of the Assessing Officer which has caused him to seek reopening of the assessment. Admittedly, the reasons given for seeking reopening of the assessment contains the expression 'perusal of the case record reveals' clearly showing that it is on the basis of the same assessment record as was filed by the assessee, during the relevant assessment years and also scrutinised by the Assessing Officer before passing the orders under Section 143(3) is the basis for seeking reopening of the assessment. Further, the new logic, rationale and opinion which has been formed by the Assessing Officer for seeking reopening of the assessment is nothing but a change of opinion and a new approach to the existing facts and material which the Assessing Officer could well have done during the regular assessment proceedings of the relevant assessment years.

In *Commissioner of Income Tax Vs. Eicher Limited*, (2007) 294 ITR 310 (Del), the High Court has taken a view that since the facts and materials were before the Assessing Officer at the time of framing of the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounted to a change of opinion, which would not form the basis for permitting the Assessing Officer or his successor to re-open the assessment of the assessee. The Honorable High Court further observed that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did not express this in the assessment order, that by itself would not give him a ground to conclude that income had escaped assessment and, therefore, the assessment needed to be reopened. The assessee had no control over the way an assessment order is drafted.

In *Commissioner of Income Tax Vs. Kelvinator of India Limited*, (2010) 320 ITR 561, the Supreme Court observed that post 01-04-1989, the power to reopen is much wider. However, one needs to give a schematic interpretation to the words 'reason to believe' failing which, Section 147 would give arbitrary powers to the Assessing Officer to reopen the assessments on the basis of 'mere change of opinion' which cannot be *per se* reason to reopen. The conceptual difference between the power to review and power to reassess is to be kept in mind. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on the fulfillment of certain pre conditions and if the concept of 'change of opinion' is removed, 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 01-08-1989, the Assessing Officer has power to reopen, provided there is 'tangible material' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief.

### Conclusion

The issues discussed above in respect of reassessment are not exhaustive and still more issues are raised in this area. Studying of case laws of this nature from time to time will help the professionals practicing in income tax area and will be of much helpful in their practice. ■