Judgment Reserved on 23.7.2009.
Judgment Delivered on 25.8.2009.
(Court No. 37.)

Civil Misc. Writ Petition No. 32 of 2005.

M/s Desh Raj Udyog ....Petitioner.

Versus

Income Tax Officer, Ward-1 (2), Ghaziabad .....Respondent.

Connected with

Civil Misc. Writ Petition No. 31 of 2005.

M/s Chaman Udyog through its partner Om Prakash ....Petitioner.

Versus

Income Tax Officer, Ward-1 (2), Ghaziabad ....Respondent.

Hon'ble R.K. Agrawal, J.
Hon'ble S.K. Gupta,J.

(Delivered by Hon'ble S.K. Gupta,J.)

1. Writ petition no. 32 of 2005 has been filed interalia for the following reliefs:-

> *"(i) That a suitable writ, order or direction be issued quashing the notices dated 15.12.2003, for reassessment under Section 147 of Income Tax Act, 1961 for the assessment years 2001-02 and 2002-03, both under Section 148 of Income Tax Act, 1961;*
> *(ii) That a suitable writ, order or direction in the nature of mandamus or prohibition be issued restraining or prohibiting the Income Tax Officer, Ghaziabad, respondent from passing any reassessment order in pursuance of the notices dated 15.12.2003 both under the Income Tax Act, 1961;*

2. Writ petition no. 31 of 2005 has been filed interalia for the following relief:-

> "(i) That a suitable writ, order or direction be issued quashing

> the notices dated 8.1.2004, for reassessment under Section 147 of Income Tax Act, 1961 for the assessment years 2001-02 and 2002-03, both under Section 148 of Income Tax Act, 1961;
> (ii) That a suitable writ, order or direction in the nature of mandamus or prohibition be issued restraining or prohibiting the Income Tax Officer, Ghaziabad, respondent from passing any reassessment order in pursuance of the notices dated 8.1.2004 both under the Income Tax Act, 1961;"

3. In these writ petitions similar questions of fact and law are involved and with the consent of the parties they are taken up together and are being disposed of by a common judgment and order.

4. These writ petitions relate to the assessment year 2001-02 and 2002-03.

5. All the facts of the aforesaid writ petitions are more or less the same, therefore, facts of the leading writ petition no.32 of 2005 are briefly stated as under:-

6. The petitioner is a partnership firm engaged in the business of manufacture and sale of RCC Pipes. The return of income declaring total receipt as business receipts for the assessment year 2000-01 was accepted under Section 143 (1) of the Income Tax Act, 1961 (hereinafter referred to as the 'Act'). Later on a notice under Section 148 of the Act was issued and assessment order dated 26th February, 2002 was passed for the assessment year 2000-01 under Section 143 (3)/148 of the Act. The petitioner filed an appeal against the addition of Rs. 27,876/- before the Commissioner of Income Tax (Appeals), Ghaziabad [hereinafter referred to as the CIT(A)]. The CIT(A) not only dismissed the appeal but enhanced the assessment by taking recourse of the report of Income Tax Officer, vide ex-parte order dated 29.7.2003.

7. The returns of income for the assessment years 2001-02 and 2002-03 were duly filed on 21.7.2001 & 7.10.2002respectively declaring the total income under the head "income from business". The aforesaid returns for the years 2001-02 & 2002-03 were accepted by the Income Tax Officer vide intimation under Section 143 (1) of the Act dated 29.4.2002 and 31.1.2003 respectively. On 10.1.2004 notices dated 15.12.2003 were issued under Section 148 of the Act for the assessment year 2001 to 2003.

8. In the mean time CIT(A) recalled the order dated 29.7.2003 (2000-01) for rectification and passed a fresh order on 30.1.2004 and held that the income of assessee is assessable only under the head "income from business' as has been declared by the assessee.

9. On the request of the petitioner, reasons for issuance of notices under Section 148 for the assessment year 2001-02 and 2002-03 were supplied in the end of February, 2004. For ready reference, reasons for issuance of notice under Section 148 of the Act as supplied by the respondent for the assessment year 2001-02 is quoted below:-

> "M/s Desh Raj Udhyog, Site-3 C-19, Meerut Road Industrial Area, Ghaziabad for Assessment Year 2002-03. Reasons for issue of notice U/s 148
>
> On perusal of the P & L A/c in the above mentioned case for A.Y. 2001-02, it reveals that the assessee firm has credited misc. receipt as rent from property amounting to Rs. 8,83,080/- and sales of Rs. 30,82,001/- and gross profit of Rs. 6,28,459/- only and debited business expenditure to the tune of Rs. 11,20,413/- giving a net profit of Rs. 3,91,158/- which is less than the rent received. Which shows that assessee has claimed excessive business expenditure with the motive to reduce the taxable property income. Thus the assessee is entitled to get the benefit of deduction as allowable under the head income from house property and not as business expenditure as claimed by the assessee in the P & L A/c . The same

> view has been held by the Ld. C.I.T. (Appeal) Ghaziabad vide her order at 29.07.2003 in the case of assessee in assessment year 2000-01. This view also finds support from the decision of Hon'ble Apex Court in the case of East India Housing and Land Development Trust Ltd. Vs. C.I.T., West Bengal reported in 42 ITR 49 as cited by the Ld. C.I.T. (Appeals) Ghaziabad in her above mentioned order. It appears that the interest paid to partners is not entirely on account of business activity but a major part of the capital has been invested towards the purchase of the property. Thus it is the investment made by these persons the so called partners and no interest can be allowed on their investments as there is no borrowing of capital. Therefore, I have reasons to believe that excessive relief from the income from house property has been allowed U/s 147 explanation C (iii) of the I.T. Act, 1961. I have reasons to believe that assessee has escaped income with in the meaning of section 147 Read with Section 148 of the I.T. Act, 1961. Hence notice u/S 148 is being issued separately."

10. Similar reasons were also assigned by the respondent for the assessment year 2002-03.

11. The objections were raised by the petitioner by letter dated 5.7.2004. The respondents by letter dated 10.12.2004 rejected the objections of the petitioner against the issuance of notice under Section 148 of the Act for the assessment years 2001-02 and 2002- 2003. Hence the present writ petition.

12. It was submitted by the petitioner that the initiation of the proceedings under Section 147/148 of the Act is a 'change of opinion' and as such proceedings are liable to be quashed. It was further contended that the issue pertaining to "income from property" has already become final by the order of the respondent for the assessment year 2000-01 under Section 147/148 of the Act, as much as the CIT(A) has recalled the earlier order dated 29.7.2003 and passed a fresh order on 30.1.2004 whereby the petitioner has been assessed for the assessment year 2000-01 only under the "head income from business" and not under the "head property income". It has been further contended that the reassessment proceedings initiated under Section 148 is

absolutely illegal and without jurisdiction. The learned counsel for the petitioner has also cited number of decisions in support of his contention which will be discussed in the latter part of the judgment.

13. In contra, learned counsel for the Revenue submitted that the notices issued under Section 148 of the Act is in accordance with law and the Assessing Authority had validly exercised its jurisdiction to reopen the assessment.

14. Heard learned counsel for the parties and perused the record.

15. It is not disputed that the returns filed for the assessment year 2001-02 and 2002-03 were accepted under Section 143 (1) which indicate that mind was not applied by the Assessing Authority and after accepting the return in the routine manner the intimation was sent to the petitioners as provided under Section 143 (1) of the Act. Since the returns were accepted and the intimation was issued under Section 143 (1) of the Act to the petitioner as such when no opinion was formed by the Assessing Authority, therefore, there is no question of change of opinion.

16. In this regard, it will be useful to refer to aforesaid circular No. 549 dated 31st October, 1989. The relevant ex293tract of the said circular is reproduced below:-

> ***"Income escaping assessment***
>
> *7.1 Simplification of the provisions relating to assessment or reassessment of income escaping assessment (section 147).- Under the old provisions of section 147 of the Income tax Act, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed, as follows:-293*

> *(i) Clause (a) empowered the Income-tax Officer to assess or reassess the income escaping assessment, if he had reason to believe that income had escaped assessment on account of omission or failure on the part of the assessee to file a return of income for an assessment year or to disclose fully and truly all material facts necessary for assessment for that year.*
>
> *(ii) Clause (b) empowered the Income Tax Officer to reopen an assessment, notwithstanding the fact that there had been no omission or failure, as mentioned in clause (a), on the part of the assessee if the Income-tax Officer, on the basis of information in his possession, had reason to believe that income had escaped assessment for the relevant assessment year.*
>
> ***Since under the new scheme of assessment (refer to para5.1 of these Explanatory Notes), introduced by the Amending Act, 1987, returns filed will now be accepted as such and passing of assessment orders will not be necessary, it follows that in the majority of cases there would not be any application of mind by the Assessing Officer after the returns are filed, unless the case is picked up for scrutiny and a regular assessment order is passed under Section (143 (3). The Amending Act, 1987, has therefore, rationalised the provisions of section 147 and other connected sections to simplify the procedure for bringing to tax the income whi293ch escapes assessment, especially in non-scrutiny cases."***

17. Thus while accepting the return for the assessment year 2001 to 2003 there was no application of mind by the respondent, simply the intimation was sent and the assessment of the said years were not framed under Section 143 (3), therefore, it can not be said that the regular assessments for the year 2001 to 2003 were framed.

18. A bare perusal of the reasons supplied for issuance of notice under Section 148 by the respondent for the assessment years 2001-02, clearly indicate that the assessee firm had credited misc. receipts as rent from property amounting to Rs. 8,83,080 and sales of Rs. 30,82,001/- and gross profit of Rs. 6,28,459/- only and debitted business expenditure to the tune of Rs. 11,20,413/- giving a net profit of Rs. 3,91,158/- which was less than the rent, received. According to the Assessing Officer, assessee had claimed excessive business expenditure with the

motive to reduce the taxable property income. The Assessing Officer was further of the view that the assessee was entitled to get the benefit of deduction as allowable under the head income from house property and not as business expenditure as claimed by the assessee in the profit and loss account. The Assessing Officer had placed reliance on the order dated 29.7.2003 passed by CIT (A) , Ghaziabad in the case of the petitioner in the assessment year 2000-01 and also placed reliance upon the decision of the Apex Court in the case of East India Housing and Land Development Trust Ltd. V. CIT, W.B. 42 ITR page 49.

19. Further reasons assigned by the Assessing Officers were that the interest paid to the persons is not entirely on account of business activity but the major part of the capital was invested towards the purchase of the property thus the investment made by those persons, the so called partners and no interest can be allowed on their investment as there was no borrowing of capital.

20. During the assessment years 2001 to 2003, the assessee was in possession of the land and building which was partly being used for the purpose of its business as Godown, factory shed etc. whereas the remaining part was given on rent to third party. The rental income received from third party was shown by the petitioner firm under the head income from business. The return filed by the petitioner disclosing the entire income from business and not under the head property was accepted under Section 143 (1) without any application of mind thereafter the notice under Section 148 was issued and the Assessing Officer was of the opinion that the said income was chargeable under the “head property income” and was also of the opinion that the interest paid to partners was not entirely on account of business activity

but a major part of the capital was invested towards the purchase of the property thus it was the investment made by the partners and no interest can be allowed on the investment as there was no borrowing of the capital,therefore, the respondent on the basis of the aforesaid reasons called upon the assessee to explain as to why the same should not be taxed under the head income from house property instead of the income from business.

21. The main plank of the argument of the counsel for the petitioners is that, already in the earlier assessment year 2000-2001 it has been held by the CIT (A) and further confirmed by the Tribunal that the income should be treated as "business income" and not under the head "property income", therefore, the Assessing Authority was not justified to issue notice under Section 148 of the Act. We are not at all impressed by such submissions.

22. At this juncture it will be useful to refer to clause (b) & (c) of the Explanation-2 to Section 147 which read as follows:-

> *"Explanation-2. For the purpose of this section, 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 understand 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 under assessed; or*
>
> *(ii) such income has been assessed at too low a 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."

23. Here in the present case in fact no assessment order under Section 143 (3) was passed and simply the returns for the assessment years 2001-02 and 2002-03 were accepted without application of mind and the intimation was sent to the petitioners. It is also relevant to note that for the assessment year 2000-01, the CIT(A) Ghaziabad initially by order dated 22.7.2003 before the issuance of impugned notices under Section 148 had dismissed the appeal of the petitioner and held that the petitioner was not entitled for set off the business expenditure claimed to the extent of Rs. 4,72,256/- against the income from property and taxed the income under the head "income from property" instead of "income from business".

24. The notices under Section 148 for the assessment year 2001 to 2003 were issued on 15.12.2003 much prior to the subsequent order dated 30.1.2004 passed by the CIT(A) Ghaziabad recalling its order dated 22.7.2003 for Assessment Year 2000-01 and allowing the appeal of the petitioner. It is a settled law that res-judi-cata does not apply to income tax proceedings and each assessment year being a separate unit and is new and is based on different facts and circumstances. It is also relevant to note that when the objections raised by the petitioner against the issuance of notice under Section 148 for the assessment years 2001 to 2003, even at that time the case of Chaman Udhyog for the assessment year 2000-01 was sub-judice. Moreover the assessment order for the assessment year 2000-01 was passed under section 143 (3) read with section 147 of the Act, however, for the assessment years in question (assessment year 2001-2002 and 2002-03) the returns were accepted under Section 143 (1) of the Act.

25. In view of the aforesaid reasons the petitioner can not get any advantage of the fact that in the assessment year 2000-01 the income of the petitioner was treated as 'income from business' and not under the head income from property.

26. The petitioner has placed reliance on the decision of **Radhasoami Satsang V. Commissioner of Income Tax 193 ITR page 321,** but I am afraid, that the petitioner can not get any help from the decision of the said case due to following observations made by the Apex Court before concluding the judgment :-

> "The counsel for the Revenue had told us that the facts of this case being very special, nothing should be said in a manner which would have general application. We are inclined to accept this submission and would like to state in clear terms that the decision is confined to the facts of case and may not be treated as an authority on aspects which have been decided for general application."

27. The petitioner has further placed reliance on the decision of this Court in the case of **J.P. Bajpai, HUF V. Commissioner of Income Tax and another 269 ITR page 40**, this case is clearly distinguishable and has no bearing in the facts of the present case. In the case of J.P. Bajpai HUF one Atul Traders which was a partnership firm concern in Etawah, and managed by Sri Om Prasad Purwar, fraudulently and without the consent of the petitioner started an account in the books of his firm styled as J.P. Bajpai, Hindu undivided family, Etawah. The aforesaid amount allegedly shown deposited in the books of M/s Atul Traders fraudulently and with nefarious design had illegally shown the bogus deposit in the name of the petitioner on the liability side of its balance-sheet. The Assessing Authority while passing the assessment order in the case of M/s Atul Traders treated the deposit as bogus and the entire amount along with

interest was added in the hands of the firm, M/s Atul Traders, Etawah. Despite the aforesaid fact the Assessing Authority issued notice under Section 147 of the Act to J.P. Bajpai HUF as well as to M/s Atul Traders.

28. Thus, it is obvious that in the case of J.P. Bajpai (HUF) the impugned notice under Section 148 was issued only on the basis of a change of opinion on the part of the Assessing Officer, consequently the impugned notices were quashed.

29. The aforesaid facts and circumstances of the case of J.P. Bajpai (HUF) clearly suggest that the present case is clearly distinguishable and has no bearing on the case in hand.

30. The petitioner has further placed reliance on the case of **Commissioner of Income Tax V. Pateshwari Electrical and Associated Industries (P) Ltd. 2006 282 ITR 61**. This case has absolutely no application to the facts of the present case. The said case was not directed against the issuance of notice issued under Section 148 of the Act. In the present matter, the matter is still to be decided finally by the Assessing Authority, whether the income should be treated under the head “business income” or “property income”. The petitioner will get ample of opportunity to show sufficient cause to the Assessing Authority during the course of assessment.

31. The petitioner has placed further reliance on the decision of the **Universal Plast Ltd. V. Commissioner of Income Tax 237 ITR 454 (S.C.).** In this case also, the validity of notice issued under Section 148 of the Act was not under consideration,

therefore, it has no application to the facts and circumstances of the present case.

32. The petitioner has also placed reliance on the decision of Full Bench of Delhi High Court in **the case of Kelvinator of India reported in 2002 256 ITR Page 1**, This case is also not at all applicable and it is distinguishable. In that case the regular assessment order was passed in terms of Sub-section 3 of Section 143 but in the present case no such assessment under Section 143 (3) was passed, simply the returns filed by the petitioner was accepted under section 143 (1) of the Act and consequently intimation was sent to the petitioner.

33. In the case of **Maharaj Kumar Kamal Singh V. Commissioner of Income-Tax, Bihar and Orissa reported in 1958 (IT-2) GJX-0133-SC.** The Apex Court examined the provisions of Section 34 (1B) of the Income Tax Act, 1992 (as is stood at the relevant time)

> *"The next question that remains to be considered is in regard to the other conditions prescribed by section 34 (1) (b). When can income be said to have escaped assessment ?*
>
> *We see no justification for holding that case of income escaping assessment must always be cases where income has not been assessed owing to inadvertence or oversight or owing to the fact that no return has been submitted.* ***In our opinion, even in a case when a return has been submitted, if the Income-tax Officer erroneously fails to tax a part of assessable income, it is a case where the said part of the income has escaped assessment.*** *The appellant's attempt to put a very narrow and artificial limitation on the meaning of the word 'escape' in section 34 (1) (b) cannot therefore, succeed." (emphasis supplied)"*

34. The Apex Court in the case of Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (p) Ltd., AIR 1973 SC 370 in a case

arising out of Section 21 of the U.P. Trade Tax Act which related to the escaped assessment, has held as follows:-

> *"9. The controversy between the parties has centred on the point as to whether the assessing authority in the present case had reason to believe that any part of the turnover of the respondent had escaped assessment to tax for the assessment year 12957-58. Question in the circumstances arises as to what is the import of the words" reason to believe, as used in the section. In our opinion, these words convey that there must be some rational basis for the assessing authority to form the belief that the whole or any part of the turnover of a dealer has, for any reason escaped assessment to tax for some year. If such a basis exists, the assessing authority can proceed in the manner laid down in the section. To put it differently, if there are, in fact, some reasonable grounds for the assessing authority to believe that the whole or any part of the turnover of a dealer has escaped assessment, it can take action under the section. Reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous character, the same would not warrant initiation of proceedings under the above section. If,however the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under the section. Whether the grounds are adequate or not is not a matter which would be gone into by the High Court or this Court for the sufficiency of the grounds which induced the assessing authority to act is not a justiciable issue. What can be challenged the existence of the belief but not the sufficiency of reasons for the belief. At the same time, it is necessary to observe that the belief must be held in good faith and should not be mere pretence.*
>
> *10 It may also be mentioned that at the stage of the issue of notice the consideration, which has to weigh is whether there is some relevant material giving rise to prima facie inference that some turnover has escaped assessment. The question as to whether, that material in sufficient for making assessment or reassessment under Section 21 of the Act would be gone into after notice is issued to the dealer and he has been heard in the matter or given an opportunity for that purpose. The assessing authority would then decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary."*

35. Thus the Apex Court in the aforesaid case has clearly held that what can be challenged, is the existence of the believe not sufficiency of reasons for the belief.

36. A bare perusal of the record shows that it can not be said that there was not relevant material to initiate proceedings under

Section 147 of the Act. At the stage of issuance of the notice under Section 148 of the Act, the consideration which has to weigh is whether there is some relevant material giving prima facie inference that some turn over has escaped assessment. The question as to whether material is sufficient for making reassessment under Section 147 of the Act could not be gone into at the time of issuance of notice. The Assessing Authority while reassessing has to decide the matter in the light of material already in its possession as well as fresh material procured as a result of the enquiry which may be considered necessary.

37. In view of the above discussions, we do not find any illegality or infirmity in initiating the proceedings under Section 147 of the Act against the petitioner. For the aforementioned reasons these writ petitions are accordingly dismissed.

38. Before parting with the judgment it is made clear that the respondent will not be influenced by any of the observations made in this judgment. It will be independent exercise of the concerned authority to pass appropriate orders in accordance with law in the proceedings under Section 147/143 (3) of the Act.

Dated :- 25th August, 2009.
Shiraz.