**Judgment reserved on 11.8.09**
**Judgment delivered on 16.9.09**
**Court No. 37**

**Civil Misc. Writ Petition No. 181 (Tax) of 2004**

**M/s Ema India Ltd. .Petitioner**

**Vs.**

**Asstt. Commissioner of Income Tax Central Circle-I .Respondents**

**<u>Hon'ble R. K. Agrawal, J.</u>**
**<u>Hon'ble Shashi Kant Gupta, J.</u>**

(Delivered by Hon'ble Shashi Kant Gupta, J.)

01- This writ petition has been filed, inter alia, for the following reliefs;

> "(i) Issue a suitable writ, order or direction for quashing the notice under Section 148 of the Income Tax Act dated 10.07.2003 for the assessment year 2000-01.
>
> (ii) Issue a suitable writ, order or direction in the nature of writ of mandamus restraining Assessing Officer for taking any further proceeding in pursuance of notice under Section 148."

02- Brief facts as enumerated in the writ petition are as follows;

The petitioner is a public limited company engaged in the manufacture of Hi-tech engineering equipments and machines especially Honing and Induction Heating Equipments which are used by automobile and other such industries, and has a registered office at C-37, Panki Industrial Area, Kanpur Nagar.

03- The petitioner submitted a return of income for the assessment year 2000-01 disclosing his income of Rs. 34,21,360/- The return was accompanied by a final balance sheet, profit and loss account and the Tax Audit Report along with other documents. The returns were dully processed under Section 143 (1) (a) of the Income Tax Act (in short "the Act") vide intimation dated 17.1.01 and refund of Rs. 2,77,716/- was granted in favour of the assessee/petitioner. Subsequently, the case of the petitioner was picked up for scrutiny assessment and the Assessing Officer issued questionnaire on 6.2.01 which was dully replied and the Assessing Officer assessed the income of the petitioner under Section 143 (3) of the Act vide his order dated 21.3.01 determining the income tax of the assessee at Rs. 37,42,540/- and the refund which was originally granted for an amount of Rs. 2,77,716/- was reduced to Rs. 1,50,403.

04- Subsequent thereto, notice dated 10.7.03 was issued by the Assessing Officer under Section 148 of the Act stating that the income amounting to Rs. 13,76,570/- has escaped assessment for the assessment year 2000-01. The petitioner submitted the return of its income under protest on 4.8.03 in compliance of the aforesaid notice under section 148 of the Act and also requested the Assessing Officer to furnish a copy of the reasons recorded for issuing notice under the said Act. The Assessing Officer disclosed reasons recorded by him in his order sheet for initiating proceedings under

Section 147 of the Act for assessing the income of Rs. 13,76,570/- alleged to have escaped assessment. Whereafter, the petitioner filed his objections before the Assessing Officer for initiating proceedings under Section 147 of the Act which was rejected by order dated 14.10.03, hence, the present writ petition.

05- Learned counsel for the petitioner has submitted that the initiation of proceedings under Section 147 of the Income Tax Act and issuance of notice under Section 148 is based on mere change of opinion and is totally without jurisdiction. It has further been submitted that the action of the Assessing Officer amounts to review of the earlier order, passed under Section 143 (3) of the Income Tax Act. It was further submitted that, while completing the assessment under Section 143 (3) of the Income Tax Act, the Assessing Officer had examined in detail the balance sheet, profit and loss account, tax Audit Report and other documents which were submitted before the Assessing Officer in arriving at the taxable income of the assessee. Even though, the Assessing Officer had noticed that Rs. 5,41,850/-, prior period of adjustment, was claimed as an expenditure and also that the interest receivable from M/s Track Parts of India was not shown as income in the profit and loss account, he did not assess the amount nor added the same to the income disclosed by the assessee for the purpose of assessment.

06- On the other hand, learned counsel for the respondent has

submitted that the initiation of reassessment proceedings is permissible when it is found that certain items of income though chargeable to tax have escaped the notice of the Assessing Officer and no discussion of chargeability of the tax on the said items of income was made by the Assessing Officer in the assessment order, the same may be held to have been rendered without any application of mind.

07- Learned Standing Counsel has also taken through the provisions of Section 147 as it stood prior to April 1, 1989 and after April 1, 1989, and had tried to impress upon this Court that in view of the amended provisions of Section 147, the scope of section 147 has been widened and the initiation of reassessment proceedings in the present case is permissible, where it is found that certain items of the income have not been subjected to assessment.

08- Heard Sri V. B. Upadhayay, learned Senior Advocate assisted by Sri Rithik Upadhya, learned counsel for the petitioners and Sri Dhananjay Awasthi, learned Standing Counsel appearing on behalf of the Department and perused the record.

09- Before adjudicating the controversy involved in the matter, it would be useful to refer to reasons recorded by the Assessing Officer while issuing the notice under Section 148 of the Act, which are

reproduced hereinbelow;

***<u>"Reasons recorded for issue of notice U/s 148.</u>***
*Dt. 10.7.03-*
*The assessment in this case was completed u/s 143 (3) of the Income tax Act, 1961 on 21.3.01. at a total income of Rs. 37,42,540/-.*

*A perusal of balance sheet shows that prior period adjustments amounting to Rs. 5,41,850/- have been debited to profit & loss account. As per section 209 of the Companies Act, 1956 and as also submitted by the company in column four part IV of its Income Tax return, the company is following a mercantile system of accounting. As such the expenses related to only the period under review can be allowed as expenditure while computing the income of the current year. Any expenses relating to any earlier period or a subsequent year can only be claimed, allowed as a reduction in the respective financial year to which it relates. Thus sum of Rs. 5,41,850/- is, therefore, not an allowable deduction for assessment year 2000-01 and the same has wrongly been allowed.*

*A perusal of item no. 09 of schedule K to the balance sheet and also item no. 2 of auditors report shows that the company has not provided for interest on corporate deposits in respect of loan advanced to M/s. Trakparts of India Ltd. This interest was regularly provided in the earlier years <u>and as mentioned substantial amount has been repaid during the period under review</u>. There has not been any change in the terms and conditions of the deposits and although the matter is pending before the Allahabad High Court for the recovery of the remaining amount. There has not been any bar on the other of the court against the charging/recovery of interest from M/s. Trackparts of India Ltd. The company is following a*

*mercantile system and on the basis of the same an interest of Rs. 8,34,720/- has accrued in respect of inter corporate deposit. The same should have been provided in the books of account in accordance with the method of accounting employed and should be offered as part of the assessable income. This has not been done by the company. As a result, an income of Rs. 8,34,720/- has further escaped assessment.*

*Therefore, I have reason to believe that income of Rs. 13,76,570/- has escaped assessment and requires to be reassessed as per provisions of section 147.*

*Issue Notice U/s 148*

*Sd/-(ACIT)"*

10- The mere perusal of the reasons recorded by the Assessing Officer reveals that the prior period of adjustments amounting to Rs. 5,41,850/- was debited to profit and loss account. Since the company was following a mercantile system of accounting, as such any expenses relating to any earlier period or subsequent year can only be claimed/allowed as the deduction in the respective financial year to which it relates. Thus according to the Assessing Officer Rs. 5,41,850/- was not allowable deduction for assessment year 2000-01 and the other reason assigned was that the petitioner has not provided for interest of Rs. 8,34,720/- on corporate deposit in respect of loan advanced to M/s Track Parts India Ltd., although the said interest was regularly provided in the earlier years. As a result, an

income of Rs. 8,34,720/- further escaped assessment and on the basis of the aforesaid facts, the reason to believe was formed by the Assessing Officer, that total income of Rs. 13,76,570 had escaped assessment and required reassessment as per section 147.

11- At this juncture, it will be useful to refer to amended section 147 which reads as follows;

> *"**147. Income escaping assessment-** If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of 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 (hereinafter 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 section148 or to disclose fully an truly all material facts necessary for his assessment, for that assessment year.*

*Explanation 1.- Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.*

*Explanation 2. -For the purposes 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 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 under assessed; or*
*(ii) such income has been made the subject of excessive relief under this Act; 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."*

12- It has not been disputed by the learned counsel for the

petitioner that while framing assessment under Section 143 (3) of the Act, the Assessing Officer did not discuss in the assessment order about the “Prior period of adjustment” amounting to Rs. 5,41,850/- and also did not deal with the actual interest of Rs. 8,34,720/- in respect of Inter-Corporate deposit. Therefore, there was no application of mind of the Assessing Officer about the aforesaid subject.

13- Learned counsel for the petitioner has heavily relied upon the Full Bench decision of Delhi High Court in the case of **Commissioner of Income Tax Vs. Kelvinator of India Ltd. (DELHI) [F.B.] V 256 ITR Page 1** wherein it has been observed by the said Court as follows;

> *“We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been*

*regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.*

*For the reasons aforementioned, we are of the opinion that the answer to the question raised before this Bench must be rendered in the affirmative, i.e. in favour of the assessee and against the Revenue. No order as to costs."*

14- On the basis of the aforesaid observations made in the aforementioned case, it has been argued by the learned counsel for the petitioner that even if it is held that the order which has been passed purportedly without application of mind would not itself confer jurisdiction to the Assessing Officer to reopen the proceedings, and the same would amount to giving a premium to the authority exercising quasi judicial functioning to take benefit of its own wrong. Before discussing the aforesaid case cited by the petitioner it would be useful to refer to few authorities which are very relevant for adjudicating upon the issue raised by the petitioner. First of all, we would like to refer to the decision in ***Kalyanji Mavji & Co. Vs. Commissioner of Income-Tax, West Bengal II (1976) 102 ITR 286 (S.C.).*** wherein the Apex Court observed as follows;

*"On a combined review of the decisions of this Court the following tests and principles would apply to determine*

*the applicability of s. 34(1) (b) to the following categories of cases:*

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

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

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

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

15- The aforesaid decision in the case of ***Kalyanji Mavji & Co. Vs. Commissioner of Income-Tax, West Bengal II (supra)*** came up for consideration before a three Judges Bench of the Apex Court in ***Indian and Eastern Newspaper Society Vs. Commissioner of Income-Tax, New Delhi (1979) 119 ITR 996,*** wherein it was held as follows;

"Now, in the case before us, the Income Tax officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view

> taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. Commissioner of Income Tax, [1976] 102 ITR 287 (SC) where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax officer must fall within section 34(1) (b) of the Indian Income Tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax officer discovers that he has committed an error in consequence of which income has escaped assessment, it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and not more) does not give him that power. That was the view taken by this Court in Maharaj Kamal Singh v. Commissioner of Income Tax [1959] 35 ITR 1 (SC), Commissioner of Income Tax v. A. Raman and Company [1968] 67 ITR 11 (SC) and Bankipur Club Ltd. v. Commissioner of Income Tax [1971] 82 ITR 831 (SC) and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji & Co. v Commissioner of Income Tax [1976] 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law.

16- The three Judges Bench decision in Indian Eastern Newspaper Society (supra), subsequently came up for consideration before a three Judges Bench of the Apex Court in the case of ***A. L. A. Firm***

***Vs. Commissioner of Income Tax (1991) 189 ITR 285,*** and the Apex Court explained the effect and implication of the principles laid down in ***Kalyanji Mavji & Co. Vs. Commissioner of Income-Tax, West Bengal II (supra)*** and ***Indian and Eastern Newspaper Society Vs. Commissioner of Income-Tax, New Delhi (supra),*** and observed as follows;

> ***"We have pointed out earlier that Kalyanji Mavji [1976] 102 ITR 287 (SC) outlines four situations in which action under S.34(1)(b) can be validly initiated. The Indian Eastern Newspaper Society's [1979] 119 ITR 996 (SC) case has only indicated that proposition (2) outlined in this case and extracted earlier may have been somewhat widely stated; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji's case. The facts of the present case squarely fall within the scope of propositions 2 and 4 enunciated in Kalyanji Mavji's case. Proposition (2) may be briefly summarised as permitting action even on a "mere change of opinion". This is what has been doubted in the IENS case (supra) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Mavji & Co. (supra). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which the I.T.O. had not earlier been conscious of.*** *To give a couple of illustrations, suppose an I.T.O., in the original assessment, which is a voluminous one involving several contentions,*

*accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the I.T.O. derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose if I.T.O. accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under s.147(b) by virtue of proposition (4) of Kalyanji Mavji.* ***The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.***

*What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Mavji (supra)? The difference, if one keeps in mind the trend of the judicial decisions, is this.* ***Proposition (4) refersto a case where the I.T.O. initiates reassessment proceedings in the light of "information" obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier,*** *for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the I.T.O., having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been*

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

***"The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the***

> ***reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of section 147(b) of the Act."***

17- Thus from the bare perusal of the aforesaid decision in the case of A. L. A. Firms (supra) it is quite clear that the tests and principals as laid down in Kalyanji Mavji (supra) was not completely overruled but only the proposition No.(2) viz., "where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;" outlined in the case of Kalyanji Mavji & Co. (supra) was not approved by a three Judges Bench of the Apex Court in the case of Indian Eastern Newspaper Society (supra). However, it did not cast any doubt on the propositions No. 1, 3 & 4 as laid down in Kalyanji Mavji & Co. (supra).

18- On a combined reading of the judgments of the Apex Court in Kalyanji Mavji (supra), Indian Eastern Newspaper Society and A. L. A. Firm (supra), would make it clear that the proposition No. 4 viz., "where the information may be obtained even from the record of the original assessment from an investigation of the materials on

the record, or the facts disclosed thereby or from other enquiry or research into facts or law." still holds goods and the facts of the present case clearly indicates that certain items of income though chargeable to tax had escaped the notice of the assessing officer and no discussion of chargeability of the tax on the said items of income was made by the Assessing Officer in the order. Therefore, in the light of the judgment of the Apex Court in A. L. A. Firm (supra) the initiation of proceedings under Section 147 of the Act is in accordance with law and no fault can be found with the approach adopted by the Assessing Officer.

19- Now, let us consider the decision of Delhi High Court in the case of Commissioner of Income Tax Vs. Kelvinator of India Ltd (supra) in the light of the decision of Apex Court as noticed hereinabove. With deep respect to the learned Judges who decided the aforementioned case of Kelvinator of India Ltd (supra), we regret our inability to agree with the view taken by the Delhi High Court in the said case for the following reasons;

> *(i) Firstly, as we have noticed hereinbefore that the proposition laid down in the case of Kalyanji Mavji (supra) was not completely overruled in the case of Indian Eastern Newspaper Society (supra) wherein the proposition No. 2 as laid down in the Kalyanji*

*Mavji (supra) was only disapproved not the other propositions particularly the proposition No. 4, as extracted earlier, was not disapproved.*

*(ii) Secondly, in the case of Kelvinator of India Ltd. (supra), the later decision of a three Judges Bench of the Apex court in A. L. A. Firm (supra) was not considered wherein the implication and effect of the decision in Indian Eastern Newspaper Society (supra) & Kalyanji Mavji &Co. (supra) were considered and explained and it was categorically held that the decision in Indian Eastern Newspaper Society has not cast any doubt on the other three propositions No. 1, 3 & 4 laid down in Kalyanji Mavji's case.*

*(iii) Thirdly, where the assessment order has been passed and certain items of income were not at all discussed and it escaped the notice of the assessing officer as a result of which, the reassessment order is passed in respect to those items of income, in the circumstances, it cannot be said that it would amount to review. Since, the assessing officer in the original assessment order did not form any view or any opinion with regard to the items of income which escaped its notice, it will not amount, to review of the order or change of opinion. When no opinion was formed by the Assessing Authority*

> *how can there be any change of opinion.*
>
> *(iv) Fourthly, in the case of Kelvinator of India (supra), the effect and implication of Explanation 1 and Explanation 2 appended to section 147 of the Act has not been considered. This aspect of the matter shall be dealt with by us at an appropriate place in the latter part of this judgment.*

20- It is pertinent to note that although the proposition No. 2 laid down in Kalyanji Mavji & Co. case had been held to be too wide by the Apex Court in ***Indian Eastern Newspaper Society Vs. CIT*** (supra), however, there is nothing in the judgment by way of disapproval of the other propositions, particularly proposition No. 4.

21- Initiation of reassessment proceeding is permissible where it is found that the Assessing Officer had passed an order of assessment without any application of mind and such application of mind can be found out from the order of assessment itself inasmuch as , in the event the order of assessment does not contain any discussion on a particular issue, the same may be held to have been rendered without any application of mind.

22- In this context, at this juncture, it is useful to refer to the decision of Gujarat High Court in ***Praful Chunilal Patel Vs. M. J. Makwana/Assistant Commissioner of Income-Tax (1999) 236***

***832;***

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

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

> *working out the taxable income and the tax payable thereon, i.e., while making the final assessment order, that would enable him to initiate the proceedings irrespective of the question of non-disclosure of material facts by the assessee"*

23- When the proceedings are initiated under Section 147/148 within a period of four years, the conduct of the assessee regarding disclosure or material facts need not be the basis for initiating the proceedings and it can be commenced if the Assessing Officer has reason to believe that the income has escaped assessment notwithstanding that there was full disclosure of material facts on record. The assessee in such cases cannot defend the initiation of action on the ground that the facts were already placed on record and the Assessing Officer must have or ought to have considered *Explanation 2* which is quoted hereinbelow;

24- In this context, in the case of Praful Chunilal Patel (supra), Gujarat High Court has further observed as follows;

> *"Explanation 2 to section 147 of the Act applies to the entire section and it enumerates deemed cases where income has escaped assessment. Clause (a) thereof covers a case where no return is filed though the income had exceeded the maximum amount which is not chargeable to income-tax. In such cases, in order to put it beyond the pale of doubt or controversy, the provision is made that they will be deemed to be cases of escaped assessment so as to warrant the proceedings even beyond the said period of four years,*

*since in that event, the case would fall in the enabling part of the proviso. Clause (b) deals with cases where no assessment is made and the Assessing Officer notices that the income is understated or excessive loss, deduction, allowance or relief is claimed in the return. These would be cases where the return is accepted without scrutiny and no formal assessment is made. Clause (c) would cover cases where in the assessment already made, income was underassessed or assessed too low or excessive relief is given or excessive loss or depreciation allowance or other allowance under the Act has been computed. In the aforesaid deemed cases of escapement of income, the Assessing Officer can initiate the proceedings on finding or discovering such cases and no debate whether they constitute cases of escapement of income, would be permissible.................*

*"The cases of underassessment or excessive relief which are deemed cases of escapement of income leave no scope for an argument that they are not cases of income having escaped assessment. If the Assessing Officer prima facie finds or discovers that the case falls in any of the clauses of Explanation 2 , then those cases will be deemed cases of income that has escaped assessment and without anything more beyond such finding or discovery, he can initiate the proceedings under section 147 of the Act. On a proper interpretation of section 147 of the Act, it would appear that the power to make assessment or reassessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the*

*belief required to initiate the proceedings.....................*

*As noted above, the provisions of section 147 require that the Assessing Officer should have reason to believe that any income chargeable to tax has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has a cause or justification to think or suppose that income had escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words "reason to believe" cannot mean that the Assessing Officer should have finally ascertained the facts by legal evidence. They only mean that the forms a belief from the examination he makes and if he likes from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification for his belief is not to be judged from the standards or proof required for coming to a final decision."*

25- In view of the aforesaid Explanation 1 appended to section 147 of the Act it is quite clear that the mere production of account books or other evidence from which material evidence could with due diligence have been discovered by the assessing authority will not necessarily amount to disclosure. This aspect of the matter as provided in the amended section 147 of the Act was not also considered in Kelvinator of india Ltd. (supra).

26- In this regard, it is useful to refer to the decision in the case of

***Commissioner of Income-Tax, West Bengal Vs. National Sound Studio (P.) Ltd. (1979) 117 ITR 422*** ; wherein it has been held as follows:-

> *"From the order of the Tribunal it appears that the Tribunal found that no information came from any extraneous source on which the ITO could base his belief that the income has escaped assessment and on that ground held that the reopening in the instant case was invalid. The reassessment was accordingly cancelled. This conclusion of the Tribunal appears to be erroneous. The law as laid down by the Supreme Court is that an ITO can obtain information from materials already on record and it is lawful for him to reopen assessments on the basis thereof."*

27- The Apex Court in the case of A. L. A. Firm (supra) has also taken into consideration, the two decisions of the Madaras High Court namely ***Salem Provident Fund Society Ltd. Vs. CIT [1961] 42 ITR 547*** and in ***CIT Vs. Rathinasabapathy Mudaliar [1964] 51 ITR 204.***

28- In this connection, reference may be made to Salem Provident Fund (supra), where it has been observed by the Madras High Court as follows;

> *"We are unable to accept the extreme proposition that nothing that can be found in the record of the assessment, which itself would show escape of*

> *assessment or under-assessment, can be viewed as information which led to the belief that there has been escape from assessment or under-assessment. Suppose a mistake in the original order of assessment is not discovered by the Income-tax Officer himself on further scrutiny but it is brought to this notice by another assessee or even by a subordinate or a superior officer, that would appear to be information disclosed to the Income-tax Officer. if the mistake itself is not extraneous to the record and the informant gathered the information from the record, the immediate source of information to the Income-tax Officer in such circumstances is in one sense extraneous to the record. It is difficult to accept the position that while what is seen by another in the record is `information' what is seen by the Income-tax Officer himself is not information to him. In the latter case he just informs himself. It will be information in his possession within the meaning of section 34. In such cases of obvious mistakes apparent on the face of the record of assessment that record itself can be a source of information, if that information leads to a discovery or belief that there has been an escape of assessment or under-assessment."*

29- It is true that the books of account including audit report, profit and loss account, balance sheet and other documents were submitted along with return before the Assessing Officer who assessed the petitioner under Section 143 (3) of the Act. However, the amount of Rs. 8, 34,720 was not credited in the profit and loss account even though it was mentioned in the balance sheet, however, it cannot be said that mere production of the account books before the Assessing Officer would amount to discloser within the

meaning of explanation 1 to Section 147, since the same could have been discovered by the Assessing Officer only with due diligence.

30- There is one more aspect of the matter which cannot be ignored that the explanation 2 to section 147 enumerate the cases where it shall be deemed that income chargeable to tax has escaped assessment. For ready reference Explanation 2 appended to Section 147 is again reproduced hereinbelow;

> "*Explanation 2. -For the purposes 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 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 under assessed; or*

*(ii) such income has been made the subject of excessive relief under this Act; 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."*

31- Thus from the perusal of aforesaid Explanation 2 to section 147 of the Act it is clear that it enacts certain deeming provisions where in any of the circumstances stated above, income is deemed to have escaped assessment giving jurisdiction to the Assessing Officer to act under Section 147 (See, VXL India Ltd. Vs. Assistant CIT (1995) 215 ITR 295 and Birla VXL Ltd. Vs. Assistant CIT (1996) 217 ITR 1 (Gujarat).

32- "Explanation 1 to proviso to section 147 is explicit and clear on the point. The Explanation gives a quietus to contention that where account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence could be discovered by the Assessing Officer. Nor will the assesssee be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The position remains that so far as the primary facts are concerned,

it is the assessee's duty to disclose all of them- including particular entries in account books, particular portions of documents, and documents, and other evidence which could have been discovered by the assessing authority, from the document and other evidence disclosed.

33- In other words, the mere production of evidence before the Assessing Officer is not enough and there may be an omission or failure to make a *full and true disclosure* if some material for the assessment lies embedded in that evidence which the assessee can uncover but does not. However, if it be merely a question of interpretation of evidence, the assessee cannot be subjected to section 147, merely because the Assessing Officer miscarried in his interpretation of evidence.

34- To put it differently, if material evidence is not writ large on the document but is embedded in some voluminous records/books of account requiring a careful scrutiny and delving deep into it to notice the necessary material, it is quite possible that having regard to the nature of the documents, material evidence cannot be discovered from such records despite due diligence and the case would attract application of the said Explanation 1 to hold that mere production of the books of account or the documents, etc., without pointing out the relevant entries therein, does not amount to disclosure within the

meaning of section 147 (a) of the Act [See, Rakesh Agarwal v. Asst. CIT, (1996) 221 ITR 492, 499 (Del).]

35- The assessee does no discharge his duty by merely producing the books of account or other evidence. He has to further bring to the notice of the Assessing Officer particular items in the books of account or portions of document which are relevant. Even if it is assumed that, from the books produced, the Assessing Officer could have found out the truth, he is not on that account precluded from exercising the power to re-assess the escaped income [See, Kantamani Venkata Narayana & Sons v. Addl. ITO 1967 63 ITR 638 (SC); Sowdagar Ahmed Khan v. ITO, (1968) 70 ITR 79 (SC); ITO v. Lakhmani Mewal Das, (1976) 103 ITR 437, 445, 445 (SC).]

36- The fact that the Assessing Officer could have found out the correct position by further probing the matter does not exonerate the assessee from the duty to make a full and true disclosure of the material facts.

37- It is also relevant to refer to the decision of the Apex Court in ***Maharaj Kumar Kamal Singh Vs. Commissioner of Income-Tax, Bihar and Orissa*** reported in ***1958 (1959)35 ITR 1 SC***. The Supreme Court examined the provisions of Section 34 (1)(b) of the Income Tax Act, 1922 and observed as follows:-

*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)*

38- We are further fortified in our view by a decision of the Division Bench of this Court in **Shyam Bansal Vs. Assistant Commissioner of Income-Tax [2008] 296 ITR page 25 (All.)** wherein this Court has held as follows;

*"The essential requirement for initiating reassessment proceeding under section 147, read with section 148 is that the assessing authority must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year. It is well-settled that sufficiency of material to form reason to believe cannot be the the subject-matter of the writ*

*jurisdiction. The High Court in the exercise of its jurisdiction under article 226 of the Constitution of India can interfere in a writ petition against a notice issued under section 148 of the Act when it is of the opinion that there is no material in possession of the assessing authority on which reasonably an opinion can be formed that the income has escaped assessment. Keeping this principle of law in mind, we have considered the submissions of learned senior counsel for the petitioner and find that although the assessment of the petitioner was completed under section 143 (3) of the Act. But there is no discussion in the assessment order about the income earned by the assessee from the sale of shares by way of long-term capital gains. The entire assessment order is confined to the question relating to investment in the construction of house.*

*Explanation 2 to section 147 enumerates the cases where it shall be deemed that income chargeable to tax has escaped assessment. Clause (b) to Explanation 2 of section 147 provides that 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, it is one of the cases of deemed escapement of assessment. Therefore, the argument that the petitioner made all disclosures in the assessment proceeding regarding the income from the sale of shares by long term capital gains is of little consequence as the Assessing Officer has failed to examine the same."*

39- The aforementioned decision of this case in Shyam Bansal (supra) applies with full force to the facts and issue involved in the

present case. We do not see any reasons to deviate from the above referred decision. Respectfully following the same, we uphold the legality and validity of the impugned notice issued under section 148 of the Act.

40- In the result, the writ petition fails and is dismissed. There shall be no order as to costs.

Date:16.9.09
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