Santosh

***IN THE HIGH COURT OF BOMBAY AT GOA***

***WRIT PETITION NO.1000 OF 2017***

Zuari Foods and Farms Pvt. Ltd.,
373, D B Marg, Miramar, Panaji
Goa 403 001. ..... Petitioner.

V/s.

1. Asst. Commissioner of Income-tax,
Circle 1(1), Panaji, Goa.

2. Commissioner of Income-tax,
having his office at
Patto, Panaji-Goa. ..... Respondents.

Mr. K. Gopal with Mr. Shivan Desai, Advocates for the Petitioner.

Ms. Susan Linhares, Junior Central Govt. Standing Counsel for the Respondents.

***Coram : N .M. Jamdar &***
***Prithviraj K. Chavan, JJ.***

***Date : 13 March 2018.***

***ORAL JUDGMENT*** : (Per N.M. Jamdar, J.)

Rule. Rule made returnable forthwith. The respondents waive service. Taken up for final disposal.

2. The Petitioner-Assessee has challenged the notice under Section 148 of the Income Tax Act, 1961 issued by Respondent No.1

-Assistant Commissioner of Income-tax, dated 17 October 2016 and the order passed on 3 October 2017, disposing of the objections raised by the Petitioner.

3. The Petitioner filed its return of income for the Assessment Year 2011-12, declaring its total income as Nil, after claiming exemption under Section 10(1) of the Act. The date of the assessment order was 31 March 2012. Scrutiny assessment proceedings were initiated and a notice was issued on 22 February 2013. The Petitioner filed its response on 13 July 2013. Thereafter, the explanation given by the Petitioner was accepted and the scrutiny assessment proceedings were closed by an order dated 30 December 2013.

4. A notice under Section 148(1) of the Act was issued to the Petitioner on 17 October 2016. The Petitioner made a representation seeking reasons. The Petitioner received the reasons supplied by Respondent No.1 for reassessment and the Petitioner filed its objections on 14 September 2017. Thereafter, Respondent No.1 passed an order rejecting the objections, on 3 October 2017. The Petitioner has challenged the reassessment proceedings.

5. In a series of decisions of the Apex Court and of this Court, have explained contours of the jurisdictional requirement

under Sections 147, 148 of the Act. Some of these are, *CIT vs. Benoy Kumar Sahas Roy*,[1] *Praful Patel vs. ACIT*,[2] *Dr. Amin's Pathology Lab. v.s, JCIT*,[3] *Kalyanji Mavji vs. CIT*,[4] *S. Narayanappa vs. CIT*[5], *Revathy CP Equipment Ltd. vs. DCIT*[6], *Rakesh Aggarwal vs. ACIT*,[7] *Income Tax Officer vs. Biju Patnaik*[8], *CIT Vs. Mahaliram Ramjidas*,[9].

6. In the case of *Godrej Industries Ltd. vs. B.S. Singh, Deputy Commissioner of Income-tax and ors.*[10], the Division Bench (Sanklecha and Jamdar, JJ) has summarised the position of law as regards the jurisdiction under Sections 147, 148 of the Act, as under :

> *"9 We have considered the rival submissions. The law with regard to reopening of assessment is fairly settled. An assessment can be reopened under section 147 and section 148 of the Act only on the jurisdictional requirement for reopening of an assessment being strictly satisfied. This is for the reason that a reopening of an assessment would disturb an settled position by reopening a completed*

1 1975 (0) Supreme (SC) 66

2 [1999] 236 ITR 832

3 [2001] 252 ITR 673

4 1976 ITR 0287

5 [1967] 63 ITR 219

6 [2000] 108 Taxman 279

7 [1996] 87 Taxman 306 (Del)

8 [1991] 56 Taxman 165 (SC)

9 [1940] 8 ITR 442 (PC)

10 [2015] 377 ITR 1 (Bom)

*proceeding. Normally, the jurisdictional requirements to be satisfied for issuing of an reopening notice are as under:*

*(a) the Assessing Officer must record his reasons/grounds for issuing a reopening notice before issuing the same;*

*(b) the Assessing Officer should have reason to believe that income chargeable to tax has escaped assessment and the same must be recorded/revealed in his reasons/grounds;*

*(c) the Assessing Officer should not have considered the issue on which the reopening is sought during the regular assessment proceedings. In case the issue has been considered even if evidenced by asking questions then such an attempt to reconsider would not be permitted on ground of being a mere change of opinion;*

*(d) the reopening of an assessment must be on tangible material and the grounds/reasons for reopening must be recorded before the issuing of notice for reopening of an assessment;*

*(e) these grounds/reasons recorded for reopening of an assessment must disclose a live link between the tangible material and the reason to believe that income chargeable to tax has escaped assessment;*

*(f) in case of assessments sought to be reopened are beyond a period of four, years from the end of the relevant assessment year then there should have been a failure on the part of the assessee to truly and fully disclose all material facts necessary for assessment; and*

*(g) sanction of a superior officer to the reasons recorded, where required, in terms of section 151 of the Act should have been obtained before issuing of the impugned notice.*

> *10. Therefore, the reasons recorded at the time of issuing notice is the only evidence of the Assessing Officer's reason to believe that income chargeable to tax has escaped assessment. These reasons cannot be added to, deleted from or supplemented. Besides when a notice for reassessment is challenged, the burden is on the Revenue to establish that the jurisdictional requirement stands satisfied. So far as the reason to believe on the part of the Assessing Officer is concerned, at the stage of issuing the notice only a prima facie and not a conclusive case of income escaping assessment should be established to turn down a challenge to the reopening notice."*

7. In *Tao Publishing Pvt. Ltd. vs. Deputy Commissioner of Income-tax and anr.*[11], the Division Bench of this Court (Sanklecha and Jamdar, JJ) has observed thus :

> "***9.*** *The learned counsel for the petitioner rightly pointed out that the ground that the petitioner had failed to disclose all the relevant material was not incorporated in the reasons supplied to the petitioner. The object of furnishing reasons for reopening, is to put the assessee to notice as to why the Assessing Officer has reason to believe that income has escaped assessment. Apart from this position, in the present case, the reasons supplied do not state that there was any failure on the part of the petitioner to provide material particulars. That an assessee has not made a full and true disclosure of facts, is one of the jurisdictional requirement for proceeding with reassessment after a period of four years. In the case of Hindustan Lever Ltd. v. R.B. Wadkar, Asst. CIT (No. 1)reported in [2004] 268 ITR 332 (Bom), this court had held that the notices for reassessment would stand or fall on the basis of reasons and the reasons cannot be improved upon, substituted or supplemented. This view has been followed by this court in several other*

11 [2015] 370 ITR 135 (Bom)



Corrected pursuant to the order dated 27 March 2018 on the praecipe for Speaking to Minutes.

*cases.*

> *10. As stated above, the reasons supplied to the petitioner do not disclose that there was any failure on the part of the petitioner to provide all the material facts. That being the position, this ground could not have been taken up against the petitioner at the time of disposing of the objections. Once this was not the basis for issuance of notice for reassessment, it cannot be held against the petitioner that the petitioner had failed to make a true and full disclosure. It will have to be held that the petitioner did not fail to make full and true disclosure of all material facts. The jurisdictional requirement for carrying out the reassessment, after the expiry of the period of four years, is not fulfilled in the present case."*

8. Thus Section 147 of the Act empowers the Assessing Officer, if he has a reason to believe that any income chargeable to tax has escaped assessment, to reassess the income. Section 147, however, contains a proviso that no action under section 147 will be taken after a period of expiry of four years of the end of the relevant assessment year, unless the assessee had failed to disclose fully and truly all material facts necessary for his assessment for that assessment year. It is settled law that the conditions specified in section 147 are jurisdictional requirements and unless they are fulfilled no proceeding under these sections can be taken. It is open for the assessee to challenge the initiation of the reassessment proceedings, if the assessee is able to show that the jurisdictional requirements are not met. The Assessing Officer must disclose reasons why

reassessment proceedings are being taken out. The Assessing Officer is not permitted to improve upon the reasons so furnished to the assessee. The validity of the initiation of the assessment proceedings will be determined only by the reasons furnished by the Assessing Officer to the assessee. If the reassessment proceedings are to be initiated after a period of four years on the ground that the assessee failed to make full and true disclosure of all necessary facts, then the Assessing Officer must state so in the reasons and the action must be founded on such reasons.

9. Turning now to the facts of the case, when the case was taken up for scrutiny, the Petitioner was confronted with the query as regards the agricultural income from the mushroom farming and the Petitioner had relied upon certain certificates. The Assistant Commissioner disposed of these scrutiny proceedings observing thus:

> *"3. The assessee Zuari Foods and Farms Pvt. Ltd. is engaged in Mushroom farming activities in Cancona, Goa. Mushroom grows from long fine white grey threads called mycelium which ultimately develop fruiting bodies when treated under specific/controlled conditions. Mushrooms are grown in a closed chamber and various other aspects of cultivation of Mushroom are discussed with Shri Verlekar, CA & AR of the assessee. Shri Verlekar also produces various Certificates/Letters issued by different Govt. Authorities in support of assessee disclosing its income from Mushroom Cultivation as*

*Agricultural Income. These include -*

*a) Certificate from Directorate of Agriculture certifying that Mushroom growing is agricultural activity.*

*b) Registration Certificate from Ministry of Civil Supplies, Consumer Affairs and Public Distribution (Weight and Measures) stating the product to be fresh mushrooms (vegetable).*

*c) VAT assessment order confirming that the assessee is dealing in mushroom and that gross turnover is exempt from tax as per entry no.23 (fresh vegetables and fruits) of Schedule D of VAT Act, 2005 being Agricultural Sale/Income.*

*d) Letter from Goa State Pollution Control Board stating that since growing and processing of tropical mushrooms is an agricultural activity, clearance from Board is not required.*

*4. Hence from a perusal of details filed by the assessee in the course of hearing as well as facts of the case, it is inferred that the assessee is deriving Agricultural Income. Hence the total income assesse*d for income tax purpose is assessed at NIL."

10. Thereafter, the reassessment proceedings have been initiated after a period of four years. The first requirement is that there must be failure on the part of the assessee to disclose fully and truly, all material facts. The reasons supplied to the Petitioner do not contain even the usual formal statement that there has been failure to disclose material information by the Petitioner. The legal position is settled that even if such a statement is made, it is only a

reproduction of the section and does not necessarily show the existence of this fact. But in the present case, even that statement is missing. Therefore, the Petitioner was not put to notice as to which information the Petitioner had failed to disclose which led to invocation of Sections 147, 148 of the Act. Thereafter, when the order was passed on 3 October 2017, it only refers to the decision which treated the mushroom farming as not an agricultural income.

11. The learned Standing Counsel submitted that it is a legal position that mushroom farming is not an agricultural activity and consequently, the Petitioner is not entitled to any exemption. That, however, is on the merits of the reassessment proceedings. The Respondents will have to first show whether the Respondent is entitled to invoke jurisdiction under Sections 147, 148 of the Act. In the order disposing of the objections, after referring to some decisions, many of them relate to the reopening of assessment prior to four years, the respondent No.1 has observed in two lines thus :

> *"Further, the income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee, on account of not disclosing fully and truly all material facts necessary for the assessment year. Hence, such omission on your part tantamounts to failure due to non-disclosure of full & true material facts by you. Re-opening proceedings were initiated with approval of higher authorities."*

12. By only stating in one line that these omissions on the part of the Petitioner tantamount to failure on the part of the Petitioner to disclose fully and truly all material facts, the jurisdictional requirement is not satisfied. The Petitioner had placed all the primary facts before the Assessing Authority in the scrutiny assessment proceedings and the Authority had taken a particular view of the matter. It is only by change of opinion that the reassessment proceedings are sought to be initiated. In view of the settled law, we hold that the Respondent-Authority had no jurisdiction to proceed under Sections 147, 148 of the Act.

13. In these circumstances, the Petitioner is entitled to succeed. The petition is accordingly allowed. Rule is made absolute in terms of prayer clause (a). No costs.

14. Before parting, we have to note that we have come across series of orders passed by the same Assistant Commissioner wherein reassessment proceedings are initiated after the period of four years and the reasons supplied and the actions taken are not in consonance with the settled law. We request the learned Standing Counsel to supply compilation of the above referred judgments to the concerned Commissioner.

***Prithviraj K. Chavan, J.*** ***N.M. Jamdar, J.***

***IN THE HIGH COURT OF BOMBAY AT GOA***

***WRIT PETITION NO. 1001 of 2017***

Zuari Foods and Farms Pvt. Ltd.,
373, DB Marg, Miramar,
Panaji
Goa – 403 001 … Petitioner.

*Versus*

1. Asst. Commissioner of Income-Tax
   Circle 1(1), Panaji, Goa.

2. Commissioner of Income-Tax
   having his office at Patto,
   Panaji – Goa … Respondents.

Mr. K. Gopal, Advocate with Mr. Shivan Dessai, Advocate for the Petitioner.

Ms. Susan Linhares, Junior Standing Counsel for the Respondents.

***Coram : N. M. Jamdar,***
***Prithviraj K. Chavan, JJ.***

***Date : 11 April 2018.***

***Oral Judgment*** **( *Per N. M. Jamdar, J* )**

Rule. Rule made returnable forthwith. Respondents waive service. Taken up for disposal.

2. By this Petition, the Petitioner has challenged the order passed by the Respondent no. 1 dated 3 October 2017 under Section 148 of Income Tax Act, 1961 and also sought writ of prohibition against the Respondent no. 1 from proceedings pursuant to notice under Section 148 of the Act, dated 28 September 2016.

3. The Petitioner is a private limited company incorporated under the Companies Act. The Petitioner is carrying on activity of mushroom farming. The Petitioner had filed return of Income Tax for the assessment year 2013-14 on 26 September 2013. A notice was issued by the Respondent authorities under Section 143(2) of the Act and the Petitioner was subjected to scrutiny assessment. Notice was issued on 27 July 2015 under Section 142(1) to the Petitioner to substantiate his claim. The Petitioner responded by letter dated 11 August 2015 and placed its explanation regarding the activity carried out by the Petitioner. Thereafter, the assessment order was passed on 27 August 2015 under Section 143(3) accepting the contention raised by the Petitioner and the Assessing Officer, from the perusal of the record and after hearing the Petitioner, held that the assessee is deriving an agricultural income, and the activity of mushroom farming is agricultural activity. On 28 September 2016, a notice was issued to the Petitioner under Section 148(1) of the Act on the ground that income chargeable to tax for the assessment year 2013-

14 has escaped assessment. The Petitioner by letter dated 24 October 2016 submitted his objections to the notice. The Petitioner also sought for the reasons to issue notice under Section 148(1). The Respondent no. 1 furnished reasons by letter dated 31 August 2017, primarily stating mushroom farming is not agriculture, which was served on the Petitioner on 7 September 2017. The Petitioner submitted his objections which were rejected by the impugned order dated 3 October 2017. The Petitioner, thereafter, filed the present Petition for the above mentioned relief.

4. When the case of the Petitioner was taken up in scrutiny, the Petitioner submitted the material in respect of the queries raised by the Respondent authorities as to whether its income can be treated as agricultural income. The Assistant Commissioner of Income Tax while accepting the contention of the Petitioner that his income is to be treated as an agricultural income, in the order dated 27 August 2015 observed thus:

> "2. *In response to notices issued, Shri. Ashish Prabhu Verlekar, Chartered Accountant appeared from time to time and produced various details asked for and the case was discussed vis-a-vis assessee showing its income as Agricultural Income.*
>
> *3. The assessee Zuari Foods and Farms Pvt. Ltd. is engaged in Mushroom farming activities in Cancona,*

*Goa, Mushroom grows from long fine white grey threads called mycelium which ultimately develop fruiting bodies when treated under specific/controlled conditions. Mushrooms are grown in a closed chamber and various other aspects of cultivation of Mushroom are discussed with Shri Verlekar, CA & AR of the assessee. He also produces various Certificates/Letters issued by different Govt. Authorities in support of assessee disclosing its income from Mushroom Cultivation as Agricultural Income. These include –*

*a) Certificate from Directorate of Agriculture certifying that Mushroom growing is agricultural activity.*

*b) Registration Certificate from Ministry of Civil Supplies, Consumer Affairs and Public Distribution (Weight and Measures) stating the product to be fresh mushrooms (vegetable).*

*c) VAT assessment order confirming that the assessee is dealing in mushroom and that gross turnover is exempt from tax as per entry no. 23 (fresh vegetables and fruits) of Schedule D of VAT Act, 2005 being Agricultural Sale/Income.*

*d) Letter from Goa State Pollution Control Board stating that since growing and processing of tropical mushrooms is an agricultural activity, clearance from Board is not required.*

*4. Hence from a perusal of details filed by the assessee in the course of hearing as well as facts of the case, it is*

*inferred that the assessee is deriving Agricultural Income. After perusal of the details submitted and discussion, the Total Income of the assessee is computed as under:*

*Returned Total Income :- Rs. 13,238/-*
*(Income from other sources)*
*Assessed Total Income :- Rs. 13,240/-."*

After the notice was issued seeking reopening of the assessment, the Petitioner requested for reasons for the same. The Respondent no. 1 furnished the reasons. In the reasons it was stated by the Respondent no.1 that mushrooms are grown by the assessee in wooden containers & bags inside closed chamber, using different layers of artificial soil filled in wooden trays and temperature controlled to a specific degree by closing the inlet and outlets of air to provide necessary humidity for cultivation of mushrooms, and there is no connection with land. The Respondent No.1 then gave his interpretation of the term "agriculture". It was stated that when there is no connection with land, the activity of the assessee cannot be called as Agriculture. It was, inter alia, stated that the activity cannot be stated to be in a "nursery". The Respondent No.1 stated that the income arising from Mushroom farming is not covered under explanation 3 to sec. 2(1A) of I. Tax Act 1961, and also not exempt u/s 10(1) of I. Tax Act 1961.

5. The Petitioner objected to the reopening of the assessment and submitted that it was merely a change of opinion and there is no new tangible material that has come to light subsequently and therefore there is no jurisdiction that the Respondent authorities to proceed with the re-assessment. The Petitioner also gave explanation as to why the mushroom farming activity has been rightly considered as agricultural income in the earlier assessment order and the consistent view has been taken in respect of the Petitioner. The Petitioner also pointed out that the CBDT Circular no. 258 dated 14 June 1979 which was made basis of reopening the assessment on the grounds that tangible material, was not applicable as it has lost its relevance after promulgation of Section 80JJA and in view of the subsequent circular dated 27 March 2009.

6. While dealing with the objections the Assistant Commissioner of Income-Tax – Respondent no. 1, reiterated the objections raised and sought to base its order on the premise that mushroom farming cannot be considered as Nursery, neither it can be considered as agricultural income and in view of the circular dated 14 June 1979, which ought to have been considered, the reassessment proceedings need to be continued. With this reasoning the Respondent no. 1 passed the impugned order.

7. We have heard Mr. K. Gopal, the learned Counsel for the Petitioner and Ms. S. Linhares, the learned Standing Counsel for Respondent no. 1.

8. Mr. Gopal, learned Counsel for the Petitioner relied upon the decision of the Apex Court in the case of *Commissioner of Income Tax vs. Kelvinator of India Ltd*[1] and on decisions of the Division Bench of this Court in the case of *NYK Line (India) Ltd. vs. Deputy Commissioner Income-Tax (No. 2)*[2], *B. M. Associates vs. Assistant Commissioner of Income-Tax*[3]. Mr. Gopal submitted that as regard reopening the assessment within four years, the law has been settled by the Apex Court in the case of *Kelvinator of India Ltd* and has been subsequently followed in various decisions of the High Courts. He submitted that in the case of *NYK Line (India) Ltd.,* the Division Bench has categorically stated the jurisdictional requirements for reopening the assessment is the new information or material brought on record which was not available when the assessment order was passed earlier. Mr. Gopal submitted that in the present case no fresh material has come before the Revenue in the course of the relevant assessment year which can justify reopening of the assessment. He submitted that since this jurisdiction requirement

1 [2010] 320 ITR 561 (SC)
2 [2012] 346 ITR 361 (Bom)
3 [2018] 90 taxmann.com 162 (Bombay)

is lacking, the writ of prohibition needs to be issued against the Respondent no. 1 and the impugned order needs to be quashed and set aside.

9. Ms. Linhares, the learned Standing Counsel for the Respondent submitted that new tangible material on the basis of which reassessment can be proceeded, is the fact of non consideration of the CBDT circular dated 14 June 1979. According to Ms. Linhares, this Circular ought to have been pointed out by the Assessee and once it has come to light that this Circular has been ignored, gives jurisdiction to the Respondent no.1 to proceed to reopen the assessment.

10. In rejoinder, Mr. Gopal submitted that firstly, the Circular of CBDT, which is binding on the Respondent authorities, cannot be considered as a new tangible material. Secondly, he submitted that even otherwise the Circular of 1979 has only dealt with certain exemptions and the circular was no longer valid after promulgation of Section 80JJA in the year 1984 as it stood and subsequent Circular of 27 March 2009. He submitted that these categorical assertions by the Petitioner, both in the objections to the notice and the petition, have gone unanswered, even assuming the Circular is to be considered as tangible material.

11. In the present case the reopening of assessment is sought to be made within a period of four years. The Sections 147 and 148 deal with Section of reopening of assessment. Section 147 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned. In respect of the reopening of Assessment after period of four years, Section 147 states that no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, reopening is sought before four years and therefore the proviso will not apply.

12. The mandate of Section 147 however is that the

Assessing Officer must have a 'Reason to Believe'. The meaning and connotation of the phrase 'Reason to Believe' arose for consideration of the Apex Court in the case of *Kelvinator India Ltd.* The Bench of the three learned Judges of the Supreme Court emphasized on the difference between Review and Power to Reassess. The Court held that the Assessing Officer has no power to Review, but he has the power to Reassess. The phrase 'Reason to Believe' has to be given schematic interpretation failing, which Section 147 would give arbitrary power to the Assessing Officer to reopen assessments on the basis of mere change of opinion, which cannot be *per se* reason to reopen the assessment. Reassessment has to be based on fulfillment on certain preconditions and the concept of change of opinion has to be treated as a test to check abuse of power by the Assessing Officer. The Court laid down that the reasons must have live link with the formation of belief. It was noted that, by Direct Tax Laws (Amendment) Act, of 1997, the Parliament had deleted the words 'Reason to Believe' from Section 147 and there were various representations from all over the country against the deletion. The Parliament reintroduced the words 'Reason to Believe' and deleted the word 'opinion'. Circular 549 dated 31 October 1989 explains the reintroduction of the word 'Reason to Believe' stating that omission might give arbitrary powers to reopen past assessments on mere change of opinion. Thus, the reintroduction of the words

'reason to believe' by the Parliament has been taken note of by the Apex Court in the decision of *CIT vs. Kelvinator India Ltd.,* to emphasize that the assessments cannot be reopened on a mere change of opinion.

13. In the case of *NYK Line India Limited* the assessee before the Bombay High Court was a wholly owned subsidiary of a non-resident shipping line. Under an agreement dated April 1, 1993, the assessee was under a contractual obligation to render services to its foreign principal including, inter alia, in relation to vessel operations and towards collection and remittance of freight. The assessee collected container detention charges which were levied upon importers on behalf of the foreign principal. Under the agreement, the assessee was entitled to a commission for services rendered to its foreign principal. For the assessment year 2006-07, the assessee had filed its return. The assessee had not allocated for its use certain container detention charges in accordance with the RBI circular. This fact was disclosed in the returns. The order of assessment contained a specific discussion on items in respect of which the Assessing Officer made disallowances. However, as regards the submission of the assessee on an amount representing US dollars of the container detention charges, the Assessing Officer did not make any specific observation. A notice of reassessment was issued

on the ground that in the assessment for the year 2007-08 this amount had been added to the income of the assessee. With this factual backdrop the question that arises for consideration before the Division bench was whether the assessment of the Assessee therein could be reopened under Section 147 of the Act within the period of four years. It was contended on behalf of the Assessee that there is no tangible material on the basis of which reassessment is sought to be reopened and full disclosure was made and all the material was placed before the Assessing Officer. The Division Bench upheld the conclusion that there should be tangible material to come to the conclusion that there is escapement of income from assessment. The Division bench followed the decision of the Apex Court in the case of *Kelvinator India Ltd.* These decisions have been followed subsequently in various decisions of this Court.

14. Thus, even though power of the Assessing Officer to reopen the assessment exist and that it is wider within a period of four years, there are certain jurisdictional requirements that must exist before this power is exercised. The reintroduction of the phrase 'Reason to Believe' on the Statute book has been construed as a check on the arbitrary powers. The phrase 'Reason to Believe' cannot be considered as a mere change of opinion. The Assessing Officer does not have power to Review on the basis of the same material which

was available earlier. Ultimately, what is required for reopening the assessments is that there must be tangible material to come to the conclusion that there has been escapement of income from assessment. There cannot be a mere change of opinion on the part of the Assessing Officer, but the Revenue must demonstrate that, subsequently some new information or material had been brought on record which was not available when the assessment order was passed earlier. If no fresh material was before the revenue in the course of assessment subsequently, the revenue cannot justify reopening of the assessment. This is the position of law as regard the jurisdiction of the Assessing Officers to reopen the assessment.

15. In the case of *GKN Driveshafts ( India ) Ltd., v Income Tax Officer and others*[4] the Apex Court has laid down that unless jurisdictional requirements are met, the Assessing Officer cannot proceed to reopen the assessment. If the Assessing Officer proceeds without jurisdiction then the Assessee can approach the constitutional courts invoking the writ jurisdiction to seek writ of prohibition and also a writ of certiorari to quash such an exercise. This law laid down by the Apex Court is followed by all the High Courts in the country and it is now a firmly established principle of law in the matters of reopening of assessment.

4 2002 Supp(4) SCR 359

16. It is in this background, that the facts of the present case will have to be evaluated. We have reproduced the order passed by the Assessing Officer dated 27 August 2015. The issue whether the activity of the Petitioner is agriculture or not clearly arose before the Assessing Officer. The Assessing Officer considered the aspect of mushroom cultivation. The Petitioner had produced various certificates and letters including that of the Pollution Control Board stating that growing and processing tropical mushroom in Goa is not an agricultural activity. Based on this material the Assessing Officer accepted the case of the Petitioner and recording a categorical finding treated the income as an agricultural income.

17. When the impugned notice was served on the Petitioner and reasons were supplied, the Respondent no. 1 -Commissioner stated in the reasons that mushroom cultivation cannot be treated as agricultural activity as it has no connection with land. Apart from the comments on the manner of cultivation, as it can be seen from the reasons given and which is also the argument of Ms. Linhares, substantial emphasis was placed on Circular of the year 1979. When the Petitioner submitted his explanation to the Reasons, the Petitioner pointed out that there was no tangible material before the Respondent Assessing Officer and what is sought to be done is mere change of opinion. While rejecting the objections the Assessing

Officer has only referred to the Circular dated 14 June 1979 again.

18. In view of the settled position of law referred to above the limited question that would arise as to whether there was any new tangible material which was discovered by the Respondent No.1. It is the contention of Ms. Linhares that the Circular of the year 1979 would be such new tangible material. We are unable to agree with this submission. In the facts of the present case when the Petitioner had categorically asserted both in the reply to the reasons as well as in the present petition that the Circular dated 14 June 1979 has no relevance, the contention of the Petitioner that this Circular was issued in context of Section 80JJA of the Act which was in operation prior to insertion of explanation 3 to Section 2(1A) and it had no relevance, has not been dealt with by the Respondent at all, except stating that it cannot be ignored. If by subsequent amendments, the Circular had lost its efficacy and that it was substituted by another circular dated 27 March 2009, the same cannot be considered as new and tangible material. Whether the Circular has lost its relevance and is substituted by a subsequent Circular has not been explained in the order rejecting the reasons, neither in the affidavit of reply. How a preexisting Circular amounts to discovery of new tangible material is also not explained.

19. Therefore, what is before us is only a change of opinion of the Assessing Officer, without any new material. The Petitioner had placed the material before the Assessing Officer. The Assessing Officer is supposed to apply law, including the Circulars, to the material placed before him. The Assessing Officer took a particular view and the Respondent no. 1 has merely on a change of opinion sought to reopen the proceedings. Since the criteria for exercise of the jurisdiction are not met, the action of the Respondent no.1 is without jurisdiction and will have to be set aside.

20. Before parting we must address a concern expressed by Mr. Gopal. Mr. Gopal has drawn our attention to the concluding paragraph of the impugned order where the Respondent No.1-Assistant Commissioner of Income-Tax has observed as under:

> *"The Income-Tax Act provides a complete machinery for the assessment-reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper order passed by the revenue authorities. The law says that, it is mandatory, to first exhaust all avenues under the Income-Tax Act (which are equally effective) before filing a Writ Petition (WP) before the Hon'ble High Court, and no assessee can bypass the alternate remedies availabel under the Income-Tax Act and file WP to bring interim order, to short circuit and circumvent the statutory procedure in*

> *finalization of the "re-assessment" order. It is, therefore clear, that, the assessee cannot be permitted to abandon the alternate remedies available to it, and to invoke the jurisdiction of the High Court under article 226 of the Constitution, and thus the Writ Court should not entertain the writ Petition.. Hence, you are not eligible to file writ petition* ***at this stage****, to get interim stay before the finality of re-assessment proceedings. Courts also do not encourage such short-cut methods to jeopardize re-assessment proceedings, as explained above."*

The underlining and emphasis is supplied by the Respondent No.1-the Assistant Commissioner himself.

21. The above observations made by the Assistant Commissioner of Income-Tax are highly objectionable and are bordering on contempt. We however, give him the benefit of doubt of being oblivious to law. We had, in fact, in an earlier Writ Petition No. 1000 of 2017, after noticing that the very same Assistant Commissioner of Income Tax had passed series of order reopening assessments in ignorance of legal position, had requested the learned Standing Counsel to furnish the compilation of judgments of reassessment proceedings to the learned Commissioner to study the same. The position of law regarding the writ remedy is so settled, that it is understood even by the law students. Registry is

directed to forward copy of this order and the order passed in Writ Petition no. 1000 of 2017 to the Principal Chief Commissioner of Income Tax, Karnataka & Goa Region, CR Buildings, Queens Road, Bangalore – 560 001, to be delivered to him directly for his perusal, more particularly the observations made by the Respondent No.1, which we have reproduced.

22. In the circumstances, the Writ Petition is allowed in terms of prayer clauses (a) and (c) and the notice under section 148 issued by the Respondent No. 1 dated 28/09/2016 being Exhibit-"D" and the order dated 03/10/2017 being Exhibit "H" are quashed and set aside. Rule is made absolute accordingly. No costs.

***Prithviraj K. Chavan, J*** ***N. M. Jamdar, J.***