A Comprehensive Guide To The law Of Reopening Of Assessments Under Sections 147 To 153 Of The Income-tax Act, 1961 (Updated: July 2020)

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The scope and effect of a reopening of assessment is still shrouded in mystery even after various judgments of the Supreme Court and High courts. Reassessment is one of the distinguishing weapons in the armoury of the Department, empowers the Assessing Officer to assess, reassess or recompute income, turnover etc, which has escaped assessment. A number of intricate issues crop up during the reassessment proceedings. Inspite of various guidelines laid down by courts, dept constantly prefer to disobey the same leading to quashing of the notice . It seems dept claim as a matter of right to reopen the assessments without appreciating the real intend or purpose behind enacting such provision . Assessment orders are not a scrap of paper which can be overturned by reopening the assessment in casual manner. Finality to assessment must be recognized as matter of principle and reopening should be an exception. Similarly we see assessment are completed merely based on information received from various investigation department without application of mind by the Assessing officer . Some of the issues are been dealt with here under:

I. PRECONDITIONS:

1.1 It is well known that powers of the Assessing Officer to re-open a completed assessment are not unfertile. Sec. 147 and Section 148 of the Act contains the perquisite conditions to be fulfilled for invoking the jurisdiction to reopen the assessment.

1.2 The general principle is that once an assessment is completed it becomes final. Section 147 empowers the Assessing Officer to reopen an assessment if the conditions prescribed therein are satisfied. The conditions are:

i) The **Assessing Officer** has to **record the reason** for taking action under section 147. It is on the basis of such reasons recorded in the file that the validity of the order reopening a assessment has to be decided. Recorded reasons must have a live link with the formation of the belief.

ii) The Assessing Officer has **reason to believe** that **any income** chargeable to tax **has escaped assessment** for any assessment year.

iii) The jurisdictional condition under section 147 is the **formation of belief by the Assessing Officer** that income chargeable to tax has escaped assessment for any assessment year.

iv) No action can be initiated under section 147 **after the expiry of 4 years** from the end of the relevant assessment year ***unless*** the income chargeable to tax has escaped assessment by reason for the failure on the part of the **taxpayer to disclose fully and truly all material facts** necessary for his assessment..

II PROCEDURE TO CHALLENGE THE REASSESSMENT PROCEEDINGS:

2.1 The Apex Court in the case of **GKN Driveshafts (India) Ltd. v/s D.C.I.T. (2003) 259 ITR 19 (SC)** has laid down the procedure to challenge the reassessment proceedings.

When a notice under section 148 of the Income-tax Act, 1961, is issued, the proper course of action

(a) is to file the return ,

(b) if he so desires, to seek reasons for issuing the notices.

(c) The assessing officer is bound to furnish reasons within a reasonable time.

(d) On receipt of reasons, the assessee is entitled to file objections to issuance of notice , and

(e) the assessing officer is bound to dispose of the same by passing a speaking order.

(f) the assessee if desires can file a writ challenging the order or can proceed with the assessment . However the assessee has still a right to challenge the reopening of assessment after the assessment order is passed, before appellate authority.

2.2 The courts have consistently held that the pre condition are jurisdiction conferring on the AO to reopen the assessment and their non fulfillment renders the initiation itself

ab-initio void. The High Court in appropriate cases has power to issue an order prohibiting the Income-tax Officer from proceeding to reassess the income when the conditions precedent do not exist. It is well-settled however that though the writ of prohibition or certiorari will not issue against an executive authority, the High Courts have power to issue in a fit case an order prohibiting an executive authority from acting without jurisdiction. Where such action of an executive authority acting without jurisdiction subjects or is likely to subject a person to lengthy proceedings and unnecessary harassment, the High Courts, will issue appropriate orders or directions to prevent such consequences.

The Courts have consistently warned the department not to harass taxpayers by reopening assessments in a mechanical and casual manner. The Pr CIT were directed to issue instructions to AO's to strictly adhere to the law explained in various decisions and make it mandatory for them to ensure that an order for reopening of an assessment clearly records compliance with each of the legal requirements. The AO's were also directed to strictly comply with the law laid down in GKN Driveshafts (supra) as regards disposal of objections to reopening assessment:

Pr. CIT v. Samcor Glass Ltd. Delhi High Court **www.itatonline.org**
CIT .v. Trend Electronics(2015) 379 ITR 456 (Bom.)(HC).
Bayer Material Science Pvt. Ltd.v. DCIT(2016) 382 ITR 333 (Bom.)(HC)

2.3 Strictures passed against the AO for making comments which are highly objectionable and bordering on contempt and for being oblivious to law. As the very same ACIT had passed series of orders reopening assessments in ignorance of legal position:

Zuari Foods and Farms Pvt. Ltd vs. ACIT (2018) 408 ITR 279(Bom.)(HC),

III. ALTERNATIVE REMEDY NOT A BAR TO ENTERTAIN A WRIT :

3.1 The Income-tax Act provides a complete machinery for the assessment/re-assessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities. The assessee cannot be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he has adequate remedy open to him by an appeal to the Commissioner of Income-tax (Appeals). As the said statutory remedy is an effective and efficacious one, the Writ Court should not entertained the Writ Petition.

However this principle of alternate remedy ought not to apply to a case where the Assessing Officer passes a reassessment order without following the GKN Driveshafts (India) Ltd .v. ITO (2003) 259 ITR 19 (SC) procedure of passing an order on objections and waiting 4 weeks thereafter as held in **Allana Cold Storage Ltd v.ITO (2006) 287 ITR 1 (Bom.)(HC), Kamlesh Sharma (Smt.) v. B.L.Meena, ITO (2006) 287 ITR 337 (Delhi)(HC).**

3.2 In the case of **CIT v. Chhabil Das Agarwal.** ***(2013) 357 ITR 357*** **(SC)** the Assessing Officer issued a notice u/s 148 reopening the assessment and pursuant thereto passed

a re-assessment order u/s 147. The assessee filed a Writ Petition in the High Court to **challenge the said notice and re-assessment order**. The High Court entertained the Writ Petition and quashed the re-assessment order. On appeal by the department to the Supreme Court HELD reversing the High Court:

The assessee cannot be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he has adequate remedy open to him by an appeal to the CIT (Appeals). As the said statutory remedy is an effectual and efficacious one, the Writ Court ought not to have entertained the Writ Petition filed by the assessee .

Similarly in the case of **Annamalai University v. ITO** (**2018) 401 ITR 80 (Mad) (HC)** the assessee had applied for exemption under section 10(23C)(vi) and final orders were awaited. The assessee was issued notices under section 148 for reopening of the assessments for the assessment years 1999 - 2000 to 2004 - 05. On writ petitions, the Court held, that the assessee was entitled to seek reasons for reopening of the assessment, under section 147 and on receipt of the reasons, the assessee was entitled to file its objections.

3.3 The Hon Bombay High Court in the case of ***Aroni Commercials Ltd vs. ACIT [2017] 393 ITR 637*** observed that the argument, based on **JCIT vs. Kalanithi Maran, [2014] 366 ITR 453(Mad) (HC)** that this Court should not exercise its writ jurisdiction under Article 226 of the Constitution of India and the petitioner should be left to avail of the statutory remedies available under the Act is not acceptable. Writ Petition challenging lack of jurisdiction to issue s. 148 notice on the ground that it is based on 'change of opinion' & preconditions of s. 147 are not satisfied is maintainable .

3.4 A similar view has been taken in yet another case by the Hon Bombay High court in case of ***Crompton Greaves Ltd. v. ACIT (2015) 275 CTR 49 / 229 Taxman 545 (Bom)(HC).*** Thus the facts in the case of **Chhabil Das Agarwal (Supra)** were different and distinguishable namely that the reassessment order was passed and thereafter the notice and the said order was challenged by way of writ. Similarly in **Annamalai University(supra)** the assessee had not followed the procedure to challenge the reopening notice, therefore distinguishable.

Thus an assessee is entitled to writ remedy under Article 226 of the Constitution, if the action of the authorities in reopening the assessment was beyond their jurisdiction. **Cedric De Souza Faria. v. DCIT (2018) 400 ITR 30 (Bom) (HC)**

3.5 In yet another decision where there was m*ixed question of facts and law involved* - Writ is held to be not maintainable :

Dismissing the petition the Court held that , certain mixed questions of law could not be decided in favour of the assessee nor could the Department be deprived of its right to probe the matter further and formulate an opinion with reference to the provisions of the Act and pass orders. The assessee's case was one of mixed questions of law and facts and therefore, the Assessing Officer had to consider all the materials available

on record for the purpose of reopening the assessment including the objections submitted by the assessee, before passing an assessment order. The assessee was entitled to submit all its objections and legal grounds and materials before the Assessing Officer enabling him to consider them and pass an assessment order. The contention of the assessee that it was entitled to the benefit of the proviso to section 147 could be considered only with reference to the facts and materials on record before the Assessing Officer and that exercise could not be done by the court in writ jurisdiction under Article 226 of the Constitution of India. Court also held that, section 149(1)(a) was not applicable to the assessee since the purported escapement of income chargeable to tax was beyond Rs. 1 lakh. S. 149(1)(b) was applicable to the assessee. Accordingly the notice issued within a period of six years is held to be within the period of limitation . (AY. 1996 -97)

T. C. V. Engineering Pvt. Ltd. v. ACIT (2019) 413 ITR 319 (Mad)(HC)

IV. REASONS – RECORDED TO BE SUPPLIED - COMMUNICATION OF REASONS – MANDATORY:

4.1 **Recording of reasons before issue of notice is mandatory hence Reassessment was held to be bad in law [CIT v. Blue Star Ltd. (2018) 162 DTR 302 / 301 CTR 38 (Bom) (HC)**

It is now a settled position of law that for passing an order under section 147 recording of reasons u/s. 148 and communication thereof to party concern is mandatory.

Gujarat Fluorochemicals Ltd vs. DCIT (2008) 15 DTR (Guj) 1

Nandlal Tejmal Kothari vs. Inspecting ACIT (1998) 230 ITR 943 (SC)

4.2 However if assessee does not ask for s. 147 reasons & object to reopening, ITAT cannot remand to AO & give assessee another opportunity**:**

CIT vs. Safetag International India Pvt Ltd [2012] 332 ITR 622 (Delhi High Court)

4.3 In the case of **CIT v. Videsh Sanchar Nigam Ltd. (2012) 340 ITR 66 (Bom.) (HC) t**he Tribunal following the judgment of Bombay High Court in CIT v. Fomento Resorts and Hotels Ltd ITA no 71 of 2006 dated 27th November, 2006 , has held that though the reopening of assessment was within three years from the end of relevant assessment year, since the reasons recorded for reopening of the assessment were not furnished to the assessee till date the completion of assessment, the reassessment order cannot be upheld, moreover, Special Leave Petition filed by revenue against the decision of this court in the case of CIY v. Fomento Resorts and Hotels Ltd , has been dismissed by Apex Court, vide order dated July 16, 2007. The court dismissed the appeal of the revenue.

- **The Hon. ITAT followed the above decision and quashed the reassessment proceedings in the following cases :**
- Tata International Ltd. vs. Dy. CIT (2012) 52 SOT 465 (Mum.)(Trib)
- DCIT Vs.Telco Dadajee Dhakjee Ltd. [2012] 49 SOT 549 (Mum) (TM)
- Muller & Philpps (India) Ltd. v. ITO (Mum.)(Trib.); (2016) 47 ITR 69 (Mum) (Trib)

- Jeevanlal Jain ITA No. 910/M/2014 dt 13/01/2016, Bench J; (Mum) (Trib)
- Inderjeet Singh Sachdeva v. DCIT [2017] 49 ITR(T) 1(Delhi)(Trib),
- Ujagar Holding Pvt. Ltd. v. ITO[2017] 51 ITR(T) 343 (Delhi)(Trib)
- M/s. Synopsys International Ltd (Bang) ITA no. 549/Bang/2011.
- In absence of recorded reasons for reopening the assessment, the notice issued under section 148(2) of the Act would be bad-in-law.
  Prashanth Projects Ltd v. CIT,[2011] 333 ITR 368 , (Bom) (HC)

4.4 **Not giving copy of recorded reasons – Assessment records not traceable.**

Before the Tribunal the question of supply of reasons recorded by the AO was raised by the assessee and it went to the root of the matter, the Bench directed the Departmental Representative to produce the records to verify as to whether the reasons were recorded by the AO and whether same were supplied to the assessee. The AO appeared with the assessment records but the relevant records were not traceable or were not available.

It was found that even after completion of the assessment/appellate proceedings the assessee was requesting the AO to supply him the copy of the reasons. But, till the date of hearing i.e. on 19.09.2014 i.e. even after 18 years of the issuance of notice u/s. 148 of the Act, the AO is not been able to prove that the assessee was supplied copy of the reasons recorded. Hence, the assessment was quashed.

Vinoda B. Jain v. JCIT, ITA No. 676/M/2014 dt. 24/9/2014, AY 1991-92, (Mumbai ITAT) (www.ctconline.org)

4.5 Recorded reasons not communicated – Produced before the Tribunal - Reassessment is bad in law .

Dismissing the appeal of the revenue the Court held that , Tribunal is justified in quashing the reassessment order on ground that reasons recorded by assessing authority for reopening were never communicated to assessee though same were produced before Tribunal. (AY.2009 -10)

PCIT v. Ramaiah (2019) 103 taxmann.com 201 / 262 Taxman17 (Karn) (HC)

Editorial : SLP of revenue is dismissed . PCIT v. Ramaiah (2019) 262 Taxman 16 (SC)

4.6 On the day of furnishing the recorded reasons – Reassessment order is passed - Order passed in hasty manner – Order is set a side.

AO issued notice to initiate reassessment . On day of furnishing reasons, re-assessment order was passed. Assessee filed preliminary objections on 27-12-2018. On writ the Court held that since assessee was not provided breathing time to furnish objections, and AO proceeded to conclude re-assessment in hasty manner, re-assessment set aside and matter remanded. (AY. 2013-14) **Kanchan Agarwal (Mrs.) v. ITO (2019) 263 Taxman 682 (Karn.)(HC)**

4.7 Actual reasons recorded were not communicated - matter was remanded

The actual reasons recorded were not communicated to the assessee for filing its objections Hence, in the interest of justice and fair-play, matter was remanded to the file of ld. AO for *de novo* adjudication in respect of issues contested . The. AO is directed to supply the actual reasons recorded for reopening of the assessment to the assessee. The assessee, if it so desires, may file objections to the same.

M/s Tata Motors Limited (Formerly Known as Tata Engineering & Locomotive Company Ltd) v ACIT, Cir-2(1), ITA No.3334/Mum/2011, dated: 03/05/2019

4.8 The revenue played a subterfuge in trying to cover up its omission and in ante dating the record. The court hereby directs the Chief Commissioner to cause an inquiry to be conducted as to the involvement of the officials or employee in the **manipulation of the record,** and take strict disciplinary action, according to the concerned rules and regulations. This inquiry should be in regard to the conduct of the concerned AO posted at the time, who issued the notice u/s. 147/148 as well as the officers who filed the affidavits in these proceedings .

Prabhat Agarwal vs. DCIT, (2018) 169 DTR 282 (Delhi)(HC),

V. NEW REASONS CANNOT BE ALLOWED TO BE INTRODUCED OR SUPPLIED:

5.1 It is settled position in law that a new reasons cannot be allowed to be introduced or supplied by way of affidavit. Validity of an order must be judged by the reasons so mentioned therein. Reasons recorded cannot be supplemented by filing affidavit or making oral submission. Dept cannot amend or change the notice or reasons , noticee or the assessee should not be prejudiced or be taken by surprise . If the reopening is based on some information or material, the same should have a reference in the reasons recorded which will have to be the basis for reopening. The AO is expected to deal with the assessee's objection vis a vis the reasons recorded and not to any external material.

New Delhi Television Ltd vs. DCIT

[CIVIL APPEAL NO. 1008 OF 2020 ; dated : 3rd April , 2020 Supreme court]

***Hindustan Lever Ltd. vs. R.B. Wadkar[2004] 268 ITR 332 (Bom)* (HC)**

Mohinder Singh Gill vs. Chief Election AIR 1978 SC 851

***Mrs. Usha A Kalwani vs. S.N. Soni[2004] 272 ITR 67 (Bom)* (HC)**

Godrej Industries Ltd. v. B.S. Singh, Dy. CIT (2015) 377 ITR 1 (Bom.) (HC)

Aroni Commercial Ltd v/s DCIT (2014) 362 ITR 403 (Bom) (HC).

Northem Exim Pvt Ltd v/s Dy.CIT (2013) 362 ITR 586 (Del) (HC).

Best Cybercity (India) Pvt. Ltd. v. ITO (2019) 414 ITR 385 (Delhi)(HC) - Deficiency in reasons recorded cannot be rectified in affidavit

Capri Global Advisory Services Pvt. Ltd. v DCIT-1(1)(1), ITA No. 170/Mum/2017, DOH: 10/04/2019 (Mum)(Trib)

5.2 Reason must be based on the relevant material on record at the time of recording reasons. ***3i Infotech Ltd v/s. ACIT (2010) 329 ITR 257 (Bom.)*** **(HC)**

5.3 If the recorded reasons show contradiction and inconsistency it means necessary satisfaction in terms of the statutory provision has not been recorded at all. The Court cannot be called upon to indulge in guess work or speculate as to which reason has enabled the AO to act . On said issue reassessment was quashed:
Plus Paper food Pac Ltd. v. ITO(2015) 374 ITR 485 (Bom.)(HC)

5.4 Proper Reasons to believe is must, even if there is no assessment u/s. 143(3) – Only reasons recorded by Assessing officer must be considered.
Prashant s. Joshi vs. ITO[2010]324 ITR 154 (Bom) **(HC)**

5.5 It is well settled that the reasons recorded for reopening the assessment have to speak for themselves. The reasons must provide a live link to the formation of the belief that income had escaped assessment. These reasons cannot be supplied subsequent to the recording of such reasons either in the form of an order rejecting the objections or an affidavit filed by the Revenue
Sabharwal Properties Industries Pvt. Ltd. v. ITO (2016) 382 ITR 547 (Delhi)(HC)

5.6 It is not open to the AO to improve upon the reasons recorded at the time of issuing the notice either by adding and/or substituting the reasons by affidavit or otherwise- Once a query has been raised during the assessment proceedings and the assessee has responded to the query to the satisfaction of AO, it must apply that there is due ***application of mind*** by the AO to the issue raised- Reassessment was quashed
GKN Sinter Metals Ltd. v. Ramapriya Raghavan (Ms.), ACIT (2015) 371 ITR 225 (Bom.)(HC)

5.7 In the case **Pransukhlal Bros. v. ITO (2015) 229 Taxman 444 (Bom.)(HC)** where in Assessment of the assessee was reopened. The recorded reasons stated that the assessee had taken accommodation entries from a Surat based diamond concern and this information (according to the recorded reasons) was obtained by the Department from search and survey action on the said diamond concern. The assessee objected to the recorded reasons which were disposed off the by AO referring to investigation carried out by Sales Tax authorities, display of names of parties on the website of Sales Tax department. Held, since these facts were even remotely adverted to in the recorded reasons, and hence, the order disposing off objections was held unsustainable in law with fresh opportunity to AO to dispose off the objections keeping in mind the recorded reasons.

5.8 Similarly in the case **Varshaben Sanatbhai Patel v. ITO (2016) 282 CTR 75 (Guj.)(HC)** it was observed that since the belief of the AO was not based upon the

material on record, but on some other material from an external source which did not find reference in the reasons recorded by him, it was held that the basic requirement of section 147 was not satisfied.

5.9 The reopening of assessment u/s. 147 is a potent power not to be lightly exercised. It certainly cannot be invoked casually or mechanically. The heart of the provision is the formation of belief by the Assessing Officer that income has escaped assessment. The reasons so recorded have to be based on some tangible material and that should be evident from reading the reasons. It cannot be supplied subsequently either during the proceedings when objections to the reopening are considered or even during the assessment proceedings that follow. This is the bare minimum mandatory requirement of the first part of section 147(1) of the Act. Hon'ble High Court thus dismissed the appeal observing that the reasons recorded by the AO for reopening the assessment under section 147 did not meet the statutory conditions and there was non-application of mind on the part of the A.O
Pr. CIT vs. SNG Developers Ltd. [2018] 404 ITR 312 (Delhi) (HC)

5.10 Court cannot allow the AO to improve upon the reasons in order to support the notice of reassessment
Amarjeet Thapar v.ITO (2019) 411 ITR 626 (Bom) (HC)

VI. ***SUCCEEDING ASSESSING OFFICER CANNOT IMPROVE UPON THE REASONS WHICH WERE ORIGINALLY COMMUNICATED TO THE ASSESSEE*.**

6.1 In the case of ***Indivest PTE Ltd v. ADDIT (2012) 250 CTR 15 / 206 Taxman 351 (Bom.)(HC)*** **t**he assessee company filed its return of income for the A.Y. 2006-07 on 31st Oct. 2006 declaring nil income. The assessee claimed that profits earned from the transactions in Indian securities are not liable to tax in India in view of art 7 of the India- Singapore treaty because the assessee company did not have PE in India. The assessment was reopened on the ground that no foreign companies are allowed to invest through stock exchange in India unless it is approved as FII by the regulatory authorities Viz- RBI, SEBI. Etc .According to the Assessing Officer the gain earned on investment as FII is liable to be taxed under section 115AD. The reassessment notice was challenged before the Court, the Court held that the attention was drawn to the notice of Assessing Officer that the assessee is not an FII and that provisions of section 115AD would not be attracted. The Assessing Officer attempted to improve upon the reasons which were originally communicated to the assessee. Those reasons constitute the foundation of action initiated by the Assessing Officer for reopening of assessment .Those reasons cannot be supplemented or improved upon subsequently . The court held that in the absence of any tangible material assessment could not be reopened under section 147, further succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee which was not permissible.

VII. ***REOPENING IS NOT PERMISSIBLE ON BORROWED SATISFACTION OF ANOTHER ASSESSING OFFICER:***

7.1. Assessing officer recording reasons for assessment and assessing officer issuing notice under section 148 must be the same person. **Successor assessing officer cannot issue notice under section 148 on the basis of reasons recorded by predecessor assessing officer.** Notice issued invalid and deserves to be quashed.

- **Hyoup Food and Oil Industries Ltd. vs. ACIT (2008) 307 ITR 115 (Guj.)**
- **Charanjiv Lal Aggarwal v. ITO (2017) 54 ITR 349 (Amritsar) (Trib.)**
- **CIT & Anr vs. Aslam Ullakhan (2010) 321 ITR 150 (Kar)**

  Notice u/s. 148 invalid as it was issued on direction of CIT

Reasons to be formed only by Jurisdictional Assessing Officer and not any other Assessing Officer ,and issuance of notice is mandatory:

7.2 The basic requirement of section 147 is that the assessing officer must have a reason to believe that any income chargeable to tax has escaped assessment and such belief must be belief of jurisdictional assessing officer and not any other assessing officer or authority or department. Therefore the jurisdiction of AO to reopen an assessment under section 147 depends upon issuance of a valid notice and in absence of the same entire proceedings taken by him would become void for want of jurisdiction.(A.Y. 2006-07)

ACIT v. Resham Petrotech Ltd. (2012) 136 ITD 185 (Ahd.)(Trib.)

7.3 Assessment in Kolkata- Reassessment notice in Delhi, such reassessment is held to be without jurisdiction. (S. 127)

Assessment having been made by AO in Kolkata, in the absence of any order under section 127 transferring the case, reassessment notice issued by AO at Delhi and all subsequent proceedings based on said notice are without jurisdiction.

Smriti Kedia (Smt.) v. UOI (2012) 71 DTR 245 / 250 CTR 221 (Cal.)

7.4 Similarly in the case of ITO vs. Rajender Prasad Gupta (2010) 48 DTR 489 (JD)(Trib)

Assessee was assessed at Suratgarh, Notice issued by ITO at Delhi , matter later transferred to ITO Suratgraph , however AO did not issued fresh notice or recorded reasons – Held ITO did not have jurisdiction notice invalid.

7.5 The assessment framed by AO who had not issued notice u/s 148 of the Act is void-ab-initio –Notice was issued by the AO who had no jurisdiction- Reassessment is held to be bad in law . [S.2(7A),148]

The ITO-1 (5), Ludhiana reopened the assessment and issued notice dated 30.03.2017 u/s 148 of the Act on the basis of reasons so recorded. In response to such notice, assessee filed return of income declaring income of Rs. 49,320/-. Thereafter, the assessment was framed by ITO-1(5), Jalandhar assessing the income at Rs. 6,71,915. The Tribunal observed that ITO-1 (5), Ludhiana issued the notice u/s 148 r.w.s. 147

and thereafter the jurisdiction was transferred to ITO-1(5), Jalandhar who never issued the notice u/s 148 of the Act but framed the assessment u/s 143 of the Act. The Tribunal further relying on the decision of the ITAT Agra Bench in case of Jawahar Lal Agarwal vs. ITO where the issue was similar held that the AO may assess or reassess any income escaping assessment, if he has reason to believe such escapement of income. The section starts with the words 'If the Assessing Officer has reason to believe'. As per section 2(7A) of the Act, 'Assessing Officer means an Officer, as named therein, who is vested with the relevant jurisdiction. Thus, it was only the Officer having jurisdiction of the matter who u/s 147 of the Act, could have formed any reason to believe escaping assessment and none other. In view of the above, Tribunal held that since the reasons were recorded by the AO who did not exercise the relevant jurisdiction, such reasons were non-est, being in-flagrant violation of the express provision of section 147 r.w.s 2(7A) of the Act. Thus the reassessment order was quashed. (AY. 2010-11)
Gaurav Joshi v. ITO(2019) 174 DTR 353 / 197 TTJ 946 (Asr.) (Trib.)

VIII ASSESEE CAN FILE HIS OBJECTIONS/REPLY TO THE REASONS RECORDED FOR REOPENING – AO HAS TO DISPOSE OFF THE ASSESSEE OBJECTION AND SERVE THE ORDER ON ASSESSEE:

8.1 Once the reasons are provided to the assessee , the assessee may choose to file objections against the reasons recorded for reopening the assessment . It is mandatory for the Assessing officer to dispose off the assessee objection and serve the order on assessee. Assessing officer should not proceed with assessment for 4 weeks thereafter. Reference can be made to decision of Hon. Bombay High Court **Asian Paint Ltd. vs. Dy. CIT [2009] 296 ITR 90 (Bom)(HC) ;**

However if the ***assessee delays filing objections*** to the reasons and leaves the AO with little time to dispose of the objections and pass the assessment order before it gets time barred, it destroys the formula provided in Asian Paints (Supra) that the AO should not pass the assessment order for 4 weeks. A writ petition to challenge the reopening will not be entertained

Cenveo Publisher Services India Ltd vs. UOI, (2019) 180 DTR 244 (Bom.)(HC),

8.2 Reassessment framed by the assessing officer without disposing of the primary objection raised by the assessee to the issue of reassessment notice issued by him was liable to be quashed. In the case of of **IOT Infrastructure and Eng. Services Ltd. vs. ACIT (2010) 329 ITR 547 (Bom) (HC)** the Hon. Bombay High Court set-aside the assessment for fresh hearing in case .

8.3 Similar view was taken in the case of ***Allana cold storage vs. ITO (2006) 287 ITR 1 (Bom.)*** **(HC)** wherein following the order passed by Supreme Court in the case of

GKN Driveshaft *matter was set-a-side to pass fresh order holding that the* Reasons for notice must be given and objections of assessee must be considered **.**

8.4 Where the Order passed within four weeks from date of rejection of assessee's objections- Reassessment was held to be bad in law in the case of ***Bharat Jayantilal Patel v. UOI (2015) 378 ITR 596 (Bom.)(HC)***

8.5 **In the case Bayer Material Science Pvt. Ltd.v. DCIT(2016) 382 ITR 333 (Bom.)(HC)** observed that providing the assessee with the recorded reasons towards the end of the limitation period and passing a reassessment order without dealing with the objections results in gross harassment to the assessee which the Pr. CIT should note & remedy.

8.6 Similarly the Madras High court observed that the order passed without disposing of objections raised by assessee for reopening was improper and null and void. The law laid down by the Supreme Court is of binding nature and is a source of law unto itself, which would bind on all the authorities. GKN Driveshafts (India) Ltd. v. ITO lays down a law and failure to comply would render the assessment order without jurisdiction **Jayanthi Natarajan (Ms.) v. ACIT** (**2018) 401 ITR 215 (Mad) (HC)**

8.7 S. 147/148: It is mandatory for the AO to follow the procedure laid down in GKN Driveshafts 259 ITR 19 (SC) and to pass a separate order to deal with the objections. The disposal of the objections in the assessment order is not sufficient compliance with the procedure. The failure to follow the procedure renders the assumption of jurisdiction by the Assessing Officer ultra vires (Bayer Material Science 382 ITR 333 (Bom) & KSS Petron (ITXA No. 224 of 2014 dt 20-03-2017 (Bom) followed)

Fomento Resorts & Hotels Ltd vs. ACIT (Bom)(HC) (Goa Bench) www.itatonline.org

8.8 However the Apex court in the case of **Home Finders Housing Ltd. v. ITO (2018) 256 TAXMAN 59(SC)** held that Reassessment Order passed without following the procedure , said Order passed before disposal of objections raised by assessee on reasons recorded for reopening is curable irregularity does not vitiate the proceedings. Matter can be remitted for compliance with procedure .

8.9 In a subsequent judgement the Hon. Bombay High Court in an Tax Appeal held that ; an Order passed without disposing of objections raised by assessee to the report of DVO - reopening was improper and null and void.

Pr CIT-17 v Urmila Construction Company [ITA no 1726 of 2016 dt : 18/03/2019 (Bom)(HC)].

In my view remitting the matter for compliance with procedure will lead only to harassment and delay . The direction laid down by Supreme Court in GKN Driveshafts 259 ITR 19 (SC) is law of the land under Article 141 of the Constitution and the same must be followed in letter and spirit . The Courts have consistently warned the department directing the AOs to strictly comply with the law laid down in GKN Driveshafts (supra) as regards disposal of objections to reopening assessment .

IX **Disposal of objections – To be linked with recorded reasons.**

9.1 In the case **Pransukhlal Bros. v. ITO (2015) 229 Taxman 444 (Bom.)(HC)** where in Assessment of the assessee was reopened. The recorded reasons stated that the assessee had taken accommodation entries from a Surat based diamond concern and this information (according to the recorded reasons) was obtained by the Department from search and survey action on the said diamond concern. The assessee objected to the recorded reasons which were disposed off the by AO referring to investigation carried out by Sales Tax authorities, display of names of parties on the website of Sales Tax department. Held, since these of these facts were even remotely adverted to in the recorded reasons, and hence, the order disposing off objections was held unsustainable in law with fresh opportunity to AO to dispose off the objections keeping in mind the recorded reasons.

9.2 AO can make a reference to the TPO only after rejecting the assessee's objections filed against the reopening by passing a speaking order.

It held that the AO had missed out the very important aspect with regard to powers exercisable by the AO and the powers exercisable by the TPO. The AO could refer the matter to the TPO only after disposing off the objections filed by the assessee by passing a speaking order in accordance with the decision in the case of *GKN Driveshafts (India) Ltd. vs. ITO (2003) 259 ITR 19 (SC).* (ii) Thus, the Court disposed of the Writ Petition directing the TPO to keep the impugned notice in abeyance and further directing the AO to dispose off the assessee's objection by passing a speaking order and proceed in accordance with law.

Alden Prepress Services Private Limited vs. DCIT - Writ Petition No.13815 of 2011 and WMP. Nos.7943 and 7944 of 2017 (Mad.) (HC)

Rejection of objection without assigning reasons:

9.3 In case of Scan Holding P. Ltd. v. ACIT (2018) 402 ITR 290 (Delhi) (HC) held allowing the appeal that; the Assessing Officer had merely observed and recorded that the objections raised by the assessee were untenable and wrong, without elucidating and dealing with the contentions and issues raised in the objection. The Assessing Officer had not applied his mind to the assertions and contentions raised by the assessee and the core issue to be examined and considered. The reassessment proceedings were not valid.

9.4 Similarly in case of **Karti P. Chidambaram v. ACIT (2018) 402 ITR 488 (Mad.)(HC)** the court observed that, since reassessment order was passed without disposing of assessee's objections to reopening of assessment and without passing a speaking order, same was unjustified. Court also held that where claim of assessee of exemption of income under section 10(1) on proceeds from sale of coffee subjected to only pulping and drying was accepted for several years and there were hundreds of coffee growers whose income were also exempted, reopening notice issued only against assessee during relevant assessment year was unjustified.

9.5 Order on disposal of objections must deal with the objection- The mere fact that the return is processed u/s 143(1) does not give the AO a carte blanche to issue a reopening notice-.Reassessment notice is quashed.
Ankita A. Choksey v. ITO (2019) 411 ITR 207 (Bom)(HC)

9.6 Not considered the objections raised by the Assessee- Proceedings stayed –Matter remanded to the AO to pass speaking order .[S. 10(38) ,45, 143(1), 148, Art .226.]
Allowing the petition the Court held that the Assessing Officer did not consider objections raised by assessee that shares which were sold were held for a period in excess of one year before sale entitling exemption under section 10(38), reassessment was stayed and directed the AO to pass speaking order considering all objections of the assessee. (AY. 2011-12)
Swastik Safe Deposit and Investments Ltd. (2019)263 Taxman 303 / 176 DTR 423 (Bom)(HC)

9.7 In the case of **Venkatesan Raghuram Prasad v ITO (2018) 94 taxmann.com 249(Madras)(HC),** Where A.O reopened assessment of assessee and assessee participated in assessment proceeding **without raising any objection** before A.O to effect that there was no valid issuance or service of reassessment notice upon assessee, such an objection could not be raised before first Appellant Authority.

9.8 No objection raised - Deemed to have acquiesced to reopening assessment — Existence of alternative statutory remedy- Writ is held to be not maintainable [S.148 , Art. 226]
Hanon Automotive Systems India Pvt. Ltd. v. DCIT (2019) 413 ITR 431/ 263 Taxman 417 (Mad) (HC)

9.9 Reassessment -Failure to file return- Huge loss – National and multi commodity exchange – **Objections stating that no income was earned and suffered heavy loss not considered –**the assessee did communicate to Assessing Officer that he had no taxable income and, therefore, there was no requirement to file return however the **AO did not carry out any further inquiry before issuing impugned reopening notice**. **Reassessment is held to be bad in law.**
Mohanlal Champalal Jain v. CIT (2019) 102 taxmann.com 293 (Bom) (HC)

Editorial: SLP of revenue is dismissed ITO v. Mohanlal Champalal Jain (2019) 267 Taxman 391 (SC) /417 ITR 61 (St.)(SC)

X. Irrelevant and non existing reasons : Vague and General reasons not permissible:

10.1 **Balakrishna H. Wani vs. ITO 321 ITR 519 (Bom)(HC)**
Notice based on suspicion and surmise - Notice is not valid. The requirement of law is "reason to believe" and not reason to "suspect".
Krown Agro Foods P. Ltd.v. ACIT (2015) 375 ITR 460 (Delhi) (HC)
DCIT v. Dr. M.J. Naidu (2017) 59 ITR 13 (SN) (Vishakha) (Trib)
Suresh M. Bajaj v. ITO ITA NO. 7/Del/2013, AY 2005-06, dtd: 19/02/2016 (Delhi)(Trib.) www.itatonline.org

10.2 In the case of **PCIT v. Rajesh D. Nandu (HUF) (2019) 261 Taxman 110 (Bom.)(HC)** it was observed that since reasons as recorded in support of impugned notice to doubt genuineness of gift was not based on any material so as to form belief that assessee's income had escaped assessment on account of gift not being genuine and it was only a suspicion subject to enquiry, impugned reopening notice issued by Assessing Officer was unjustified

XI. REASONS RECORDED FOR REOPENING OF THE ASSESSMENT BASED ON FACTUAL ERROR:

11.1 ***Sagar Enterprises vs. ACIT (2002) 257 ITR 335 (Guj)*** (HC)- Notice u/s 148 issued on the ground of factually incorrect basis that the assessee had not filed its return could not be sustained even on the basis of alternative reason since it could not be said with certainty as to which factor weighed with the concerned officer when he issued the impugned notice and when the respondent authority was himself unsure as to the year of taxability of the income which is stated to be undisclosed income.
ALSO SEE:
PCIT vs. Shodiman Investments Pvt. Ltd, (2018) 93 taxmann.com 153/ 167 DTR 290 (Bom.)(HC)
Shri Harakchand K. Gada (HUF) v. ITO ; ITA No.2800/Mum/2014, date: 09/12/2015 (Mum.) (Trib.)
KMV Collegiate Sr. Sec. School v. ITO (2017) 163 ITD 653 (Asr.) (Trib.)
Baba Kartar Singh Dukki Educational Trust v. ITO (2016) 158 ITD 965 (Chd.)(Trib.)
Van Oord Dredging and Marine Contractors BV vs. ADIT – ITA No. 495, 496/Mum/2016 (Mum)(Trib.) dtd. February 28, 2018 .
Reasons recorded mentioned incorrect amount – Ambey Construction Co. v. ACIT (2019) 176 DTR 396/198 TTJ 969/ 71 ITR 422 (Asr.)(Trib.)
Ankita A. Choksey v. ITO (2019) 411 ITR 207(Bom)(HC),

11.2 The assessment cannot be reopened (within 4 years) on the ground that the AO lost sight of a statutory provision like 50C. This amounts to a review. A.L.A. Firm 55 TM 497 (SC) distinguished on the basis that the reopening in that case was because the AO was unaware of a binding High Court judgement. Here it is not the case of the Revenue that the AO was not aware of s. 50C at the time of passing the S. 143(3) assessment order

The basis of reopening the assessment in A.L.A. Firm (Supra) was the decision in the case of G.R.Ramachari & Co. (Supra) coming to the knowledge of the Assessing Officer subsequent to the completion of assessment proceedings. In this case it is not the case of the Revenue that the Assessing Officer was not aware of Section 50C of the Act at the time of passing the Assessement Order dated 26.12.2007 under Section 143 of the Act. ***In this case the trigger to reopen assessment proceedings as recorded in the reasons is non furnishing of copy of the sale deed by the Respondent. This has been found factually to be incorrect***. Therefore, once the sale deed was before Assessing Officer and enquiries were made during the assessment proceedings regarding the quantum of capital gains, it must follow that the Assessing Officer had while passing the order dated 26.12.2007 u/s. 143(3) of the Act had taken view on facts and in law as in force at the relevant time. Thus, this is a case of change of opinion

PCIT vs. Inarco Limited, INCOME TAX APPEAL NO.102 OF 2016, dtd: 23/07/2018 (Bombay High Court)

11.3 If the AO reopens the assessment on the incorrect premise that the assessee has not filed a return, the reopening is invalid. The fact that the AO may be justified in the view that income has escaped assessment owing to the capital gains not being computed u/s 50C cannot save the reopening is the reasons do not refer to s. 50C

Reasons recorded, in fact, ignored the fact that the sale consideration as per the sale deed was Rs.50 lakhs and that the assessee had by filing the return offered his share of such proceeds by way of capital gain. In the result, impugned notice is quashed

Mumtaz Haji Mohmad Memon vs. ITO (2018) 408 ITR 268 (Guj) (HC)

XII. <u>REASONS – REASSESSMENT MERELY ON THE BASIS OF INVESTIGATION WING :</u>

12.1 Notice issued after the expiry of four years from the end of the relevant assessment year by the assessing officer merely acting mechanically on the information supplied by the Investigation wing about the accommodation entries provided by the assessee to certain entities without applying his own mind was led to be not justified.(A.Y.2004-05, 2006-07)

CIT v. Kamdhenu Steel & Alloys Ltd. (2012) 248 CTR 33 (Del)(HC)
CIT v. Multiplex Trading & Industrial Co Ltd (2015) 128 DTR 217 (Del)(HC)
Pr. CIT v G. Pharma India Ltd.[2017] 384 ITR 147 (Del) (HC)
CIT vs. Insecticides (India) Ltd. (2013) 357 ITR 300 (Del.)(HC)
CIT v/s Meenakshi Oversea's Pvt Ltd (2017) 395 ITR 677(Del) (HC)
CIT vs. Fair Invest Ltd. (2013) 357 ITR 146 (Del.)(HC)
Sarthak Securities Co. (P.) Ltd. vs. ITO (2010) 329 ITR 110(Del.)(HC)
Pr. CIT vs. SNG Developers Ltd. [2018] 404 ITR 312 (Del.)(HC)
PCIT vs. Shodiman Investments Pvt. Ltd, (2018) 93 taxmann.com 153/ 167 DTR 290 (Bom.)(HC)

12.2 In the case of **ACIT v. Dhariya Construction Co (2010) 328 ITR 515 (SC)** wherein it was held that the opinion of DVO per se is not an information for the purpose of reopening assessment under section 147 of the Act

12.3 Similarly in the case of **CIT v. Indo Arab Air Services (2016) 130 DTR 78/ 283 CTR 92 (Delhi)(HC) it was held that** mere information that huge cash deposits were made in the bank accounts could not give the AO prima facie belief that income has escaped assessment. The AO is required to form prima facie opinion based on tangible material which provides the nexus or the link having reason to believe that income has escaped assessment. The AO was also required to examine whether the cash deposits were disclosed in the return of income to form an opinion that income has escaped assessment.

Reassessment-After the expiry of four years-Shah Commission's report-Cash credit-Under invoicing-Merely on basis of Shah Commission's Report opining that there was under-invoicing of export price by iron-ore miners and exporters, reassessment could not be initiated when there was nothing to indicate that any particular income had accrued to anyone as a result of price difference-Notice based on report of commission is held to be not valid.
Sesa Sterlite Ltd. v. ACIT (2019) 417 ITR 334 / 267 Taxman 275 (Bom.)(HC)

12.4 Reassessment-After the expiry of four years - Share capital- Mauritius based company - Supplied certificate of foreign inward remittance of funds, tax residence certificate of foreign company, copy of ledger account showing share application money being credited in bank account and source – Merely on the basis of information from investigation Wing ,reassessment is bad in law .[S.68]
On facts, assessee had disclosed all material facts in course of assessment . Accordingly the initiation of reassessment proceedings after the expiry of four years , merely on basis of information received from Investigation Wing was not permissible. (AY. 2011-12)
NuPower Renewables (P.) Ltd. v. ACIT (2019) 264 Taxman 27 (Mag)(Bom)(HC)

12.5 Whether where Assessing Officer has merely issued a reassessment notice on basis of intimation regarding reopening notice from DDIT (Inv.), this is clearly in breach of settled position in law that reopening notice has to be issued by Assessing Officer on his own satisfaction and not on borrowed satisfaction.

Where reasons as made available to assessee for reopening assessment merely indicated information received from Director (Investigation) about a particular entity, entering into suspicious transactions and, that material was not further linked by any reason to come to conclusion that assessee had indulged in any activity which could give rise to reason to believe on part of Assessing Officer that income chargeable to tax had escaped assessment, reassessment was an evidence of a fishing enquiry and not a reasonable belief that income chargeable to tax had escaped assessment - Held, yes

PCIT vs. Shodiman Investments Pvt. Ltd, (2018) 93 taxmann.com 153/ 167 DTR 290 (Bom.)(HC)

12.6 The power to reopen an assessment is conditional on the formation of a reason to believe that income chargeable to tax has escaped assessment. **The power is not akin to a review.** The existence of tangible material is necessary to ensure against an arbitrary exercise of power.

Aventis Pharma Ltd. vs. ACIT (2010) 323 ITR 570 (Bom)(HC)

INFORMATION RECEIVED FROM INVESTIGATION WING : BOGUS PURCHASES : ACCOMMODATION ENTRIES: PENNY STOCK :

12.7 **In the case of PCIT v. Manzil Dineshkumar Shah[2018] 95 Taxmann.com 46 (Guj) HC),** the Court held that; even the assessment which is completed u/s 143(1) cannot be reopened without **proper 'reason to believe'**. If the reasons state that the information received from the VAT Dept that the assessee entered into bogus purchases ***"needed deep verification",*** it means the AO is reopening for doing a 'fishing or roving inquiry' without proper reason to believe, which is not permissible. Court also observed that, before closing, we can only lament at the possible revenue loss. The law and the principles noted above are far too well settled to have escaped the notice of the Assessing Officer despite which if the reasons recorded fail the test of validity on account of a sentence contained, it would be for the Revenue to examine reasons behind it. (Tax A No. 541 of 2018, dt. 7 - 5. 2018)

If the AO is of the opinion that **the issue requires verification, it tantamount to fishing or roving inquiry**. He is not permitted to reopen merely because in the later year, he took a different view on the basis of similar material-.Even if the question of taxing interest income under the DTAA was not in the mind of the AO when he passed the assessment, he cannot reopen if there is no failure to disclose truly and fully all material facts- Reassessment is held to be not valid -DTAA-India -Cyprus . [S.148, Art. 11(2)]

Precilion Holdings Ltd v. DCIT (2019) 412 ITR 43 (Bom)(HC),

Editorial : SLP of revenue is dismissed, DCIT v. Precilion Holdings Ltd (2019) 418 ITR 15 (St)

12.8 One may now consider the latest decision of Supreme Court in case of **New Delhi Television Ltd. Vs. DY.CIT (CA NO. 1008 of 2020 ; dated : 3rd April , 2020 (AY:2008-09) (SC)** where in the court held that subsequent facts which come to the knowledge of the assessing officer can be taken into account to decide whether the assessment proceedings should be re-opened or not. Information which comes to the notice of the assessing officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer u/s. 147 of the Act.

12.9 Even in a case where return is accepted without scrutiny, the AO cannot proceed mechanically and on erroneous information supplied to him by investigation wing. If AO acts merely upon information submitted by investigation wing and on total lack of application of mind, the reopening is invalid

Akshar Builders and Developers vs. ACIT, (2019) 411 ITR 602 (Bom.)(HC)

12.10 **In case of Amar Jewellers Ltd. v. Dy. CIT (2018) 254 Taxman 384 (Guj.)(HC)** the Court held that; On verifying the record it was found that, there was no nexus with reasons recorded for initiating reassessment proceedings and the information received by the AO from the investigation wing, accordingly, reassessment was held to be bad in law.

12.11 **In case of Deepraj Hospital (P) Ltd. v. ITO, (2018) 65 ITR 663 (Agra)(Trib.),** the Tribunal held that; If the reopening is based on information received from the investigation dept, the reasons must show that the AO independently applied his mind to the information and formed his own opinion. If the reopening is done mechanically, it is void. Also, if the reasons refer to any document, a copy should be provided to the assessee. Failure to do so results in breach of natural justice and renders the reopening void.

12.12 Reassessment solely made on the basis of information received from investigation wing as assessee was beneficiaries of accommodation entries was held to be not valid when no cross examination allowed to the assessee. **ITO v. Reliance Corporation (2017) 55 ITR 69 (SN) (Mum.) (Trib.)**

12.13 Share application money-Reopening of assessment to make roving inquiry is impermissible and negative burden that purchasers not relatives cannot be put to assessee-Reasons of reopening recorded by Assessing Officer not sustainable**.** Negative burden that purchasers not relatives cannot be put to assessee hence reasons

of reopening recorded by Assessing Officer not sustainable. (AY.2009-2010) **Laxmiraj Distributors Pvt. Ltd. v. ACIT (2017) 53 ITR 376 (Ahd.) (Trib.)**
DCIT v. VSB Investment Pvt. Ltd. (2018) 61 ITR 16 (Delhi) (Trib)

12.14 **Reassessment-After the expiry of four years- AO had made elaborate enquiry during original assessment and the Assessee had fully and truly disclosed all material facts – Reassessment is held to be bad in law . [S.68 , 148]**
The Tribunal observed that during the course of original assessment proceedings u/s. 143(3), the Assessee was specifically asked by the AO to discharge its onus u/s. 68 of the Act for the share application money received by it and after satisfying himself, he had accepted the transaction as genuine. Therefore, in the light of the proviso to u/s. 147 of the Act, there was no failure on part of the Assessee to disclose fully and truly, all material facts relating to the information regarding accommodation entries which was considered as new tangible material by the AO to validate the reopening of the assessment. Further, there was no such allegation in the reasons recorded by the AO for reopening that the Assessee had failed to disclose fully and truly the material facts necessary for assessment. In view of the above, the Tribunal held that the notice issued u/s. 148 was bad in law and the assessment framed u/s. 147 was rightly quashed by the first appellate authority.
ACIT v. Kad Housing P. Ltd. (2019) 69 ITR 550 (Delhi) (Trib)

12.15 Reassessment-After the expiry of four years- Penny stock – Shares-No failure to disclose all material facts- Merely on basis of information received from Investigation Wing without conducting any independent enquiries.[S.69A, 148]
The Court held that, there was no failure on the part of the assessee to disclose material facts. It was found that at relevant time period, there was no company by name of Nivyarh Infrastructure & Telecom Services Ltd was in existence and merely on basis of information received from Investigation wing without conducting any independent enquiries issue of notice for initiating reassessment proceedings is held to be bad in law (AY. 2011-12)
South Yarra Holdings v. ITO (2019) 263 Taxman 594 (Bom.)(HC)

12.16 **Reopening for bogus purchases & accommodation entries**: The omission of the AO to make an assertion in the reasons that there was a failure to disclose fully and truly all material facts necessary for the assessment is sufficient to set aside the reassessment notice. Also, a notice issued on change of opinion is bad

Usha Exports vs. ACIT (2020) 312 CTR 237/ 185 DTR 87 (Bom.)(HC),

Share premium amount-No lack of disclosure or suppression of any material facts - No tangible reasons in notice - Notice not valid.
Alliance Space P. Ltd. .v. ITO (2015) 375 ITR 473 (Bom.)(HC)

12.17 The information given by DIT (Inv) can only be a basis to ignite/ trigger "reason to suspect". ***The AO has to carry out further examination to convert the "reason to suspect" into "reason to believe".*** If the AO acts on borrowed satisfaction and without application of mind, the reopening is void

Devansh Exports vs. ACIT, I.T.A no. 2178/Kol/2017, dtd: 15/10/2018 (ITAT)(Kol)

Case u/s. 143(1): Reopening for taxing bogus share capital:

12.18 The AO cannot reopen without establishing prima facie that assessee's own money has been routed back in form of share capital. While he can rely on the report of the Investigation Wing, he has to carry out further examination and analysis in order to establish the nexus between the material and formation of belief that income has escaped assessment. In absence thereof, the assumption of jurisdiction u/s 147 has no legal basis and resultant reassessment proceedings deserve to be set-aside
Balaji Health Care Pvt. Ltd. vs. ITO, (2019) 199 TTJ 966 (Trib)(Jaipur),

12.19 Even in a s. 143(1) intimation, the AO is not entitled to reopen on the ground that the assessee has received "huge share premium" which was not "examined" by the AO. The AO cannot reopen in the absence of tangible material that shows income has escaped assessment
DCIT vs. Kargwal Products P. Ltd, (2019) 69 ITR 77 (SN) (Mum.)(Trib.)

12.20 AGAINST DECISIONS :

- **However In the case of Jayant Security & Finance Ltd. v. ACIT (2018) 254 Taxman 81 (Guj.)(HC)** the court held that; Information from investigation Wing stating that loan from company working as an entry operator and earning bogus funds to provide advances to various persons. **Reassessment was held to be valid**.

- Similarly in the case of **Ankit Agrochem (P.) Ltd. v. JCIT (2018) 253 Taxman 141 (Raj)(HC)** the Court held that; reassessment on the basis of information for DIT stating that the assessee had received share application money from several entities which were only engaged in business of providing bogus accommodation entries to beneficiary concerns, **reassessment on basis of said information was justified.**

- Similarly in case of reopening for bogus share application money **Bombay High Court in case of Kalsha Builders Pvt Ltd vs. ACIT, WRIT PETITION NO. 3656 OF 2018, FEBRUARY 8, 2019 www.itatonline.org ; held** : Merely because AO examined the transactions does not preclude him from subsequent inquiry if additional material prime facie shows that disclosures made by assessee were not true. Requirement of true and full disclosure runs through the entire assessment and does not end on filing of return. Reasons have to read as a whole. Mere non recitation of allegation regarding failure of full & true disclosure does not invalidate the reasons or the fact that the reasons are based on allegations of lack of true and full particulars

- Similar where Unsecured loans are there – on Subsequent information discovered as bogus- Reassessment was held to be justified. **Virbhadra Singh v. Dy.CIT (2017) 291 CTR 439/ 146 DTR 65 (HP)(HC)**

12.21 Law on whether reopening to assess alleged Bogus Capital gains from penny stocks is permissible explained in the context of Rajesh Jhaveri 291 ITR 500 (SC) & Zuari Estate 373 ITR 661 (SC)

In the present case the Assessing Officer has heard the material on record which would prima facie suggest that the assessee had sold number of shares of a company which was found to be indulging in providing bogus claim of long term and short term capital gain. The company was prima facie found to be a shell company. The assessee had claimed exempt of long term capital gain of Rs.1.33 crores by way of sale of share of such company

Purviben Snehalbhai Panchhigar vs. ACIT, SPECIAL CIVIL APPLICATION NO. 16725 of 2018 (Guj)(HC)

12.22 <u>Also refer other cases where reopening has been held to be justified</u> :

PCIT v. Paramount Communication P. Ltd. (2017) 392 ITR 444 (Del)(HC)
Aravali Infrapower Ltd. v. DCIT (2017) 390 ITR 456 (Del)(HC)
Max Ventures Investments Holdings (P.) Ltd. v. ITO (2019) 415 ITR 395 (Del)(HC)
Aradhna Estate Pvt. Ltd. v. DCIT (2018) 404 ITR 105 (Guj) (HC)
Rajnish Jain. v. CIT (2018) 402 ITR 12 (All) (HC)

Etiam Emedia Limited vs. ITO, (2019) 412 ITR 87 (MP)(HC)

Meghavi Minerals (P.) Ltd. v. CIT (2019) 267 Taxman 1 (Guj.)(HC)

Avirat Star Homes Venture (P) Ltd v. ITO (2019) 411 ITR 321 (Bom) (HC)

RDS Project Limited vs. ACIT, (2020) 312 CTR 345 / 185 DTR 180 (Del)(HC)- Reassessment is held to be valid - Cost of 2 lakh was imposed on assessee for wasting Court's time.

XIII. <u>REOPENING - CLIENT CODE MODIFICATION :</u>

13.1 On the basis of information from investigation wing, in order to verify the genuineness of transaction in modification of clients code, reassessment was held to be bad in law.

Sunita jain (Smt) v. ITO, ITA NO. 502/Ahd/2016, AY 2008-09 dtd: 09/03/2017 (Ahd.)(Trib.);www.itatonline.org
Rachna Sachin jain(Smt.) v. ITO (Ahd.)(Trib.);www.itatonline.org

13.2 Reassessment - After the expiry of four years -Client code modifications (CCM) –Recorded reasons being vague merely on the basis of information received from the office of DIT(Intell CR Inv.) reassessment is held to be bad in law . [S.148]

Followed Chhigamal Rajpal v.S.P Chaliha (1971) 79 ITR 603 (SC) , Sheo Nath Singh v ACIT (1971) 82 ITR 147 (SC) . (Refer Coronation Agro Industries Ltd v Dy .CIT (2017) 390 ITR 464 (Bom) (HC) (AY.2009-10)
Dy.CIT v. Sertu Securities Pvt Ltd (Mum) (Trib) (UR)

XIV **Amendments made By Finance Act 2016.**

- Pr. DGIT / DGIT has power to collect information as per section 133C. Now provided that Pr. DGIT / DGIT may process such information or document and make available the outcome to the AO
- Expln. 2 to 147 : Additional clause (ca) inserted

XV **Statement of third / unconnected person :**

15.1 In the absence of any material before the AO a statement by an unconnected person did not constitute reason to believe that assessee income had escaped assessment especially when the assessee had produced all the material and relevant facts and therefore the reassessment proceedings could not be sustained.
Praful Chunilal Patel vs. M.J. Makwana, ACIT (1999) 236 ITR 832 (Guj)(HC)
JCIT & Ors vs. George Williamson (Aassam) Ltd (2002) 258 ITR 126 (Guj)(HC)

15.2 Reassessment based on statement of third party-Assessee not given opportunity to be heard-Reassessment not valid**.**
Kothari Metals v. ITO (2015) 377 ITR 581 (Karn.)(HC)

15.3 **In the case of Subhash Chander Goel v. ITO (2016) 156 ITD 808 (Chd.)(Trib.) it was observed that** Statement recorded by Police Officer under section 161 of Code of Criminal Procedure, 1973, is neither given 'on oath' nor it is tested by cross examination. Therefore, such a statement cannot be treated as substantive evidence to reopen assessment proceedings.

15.4 **In the case of AMSA India P. Ltd. v. CIT (2017) 393 ITR 157 (Delhi)(HC)** the Court held that; the statement of third person not having live link with assessee's suspected income, the reassessment was held to be bad in law . The material should have a live link with the assessee`s suspected income or non-disclosure of a material fact. That kind of live link was absent. Therefore the notice under section 148 read with section 147 of the Act was to be quashed.

15.5 **In case of Kamla Devi S. Doshi v. ITO (2017) 57 ITR 1 (Mum.) (Trib)** the tribunal observed that the Statement of third party cannot be the sole basis for disallowing the claim of the assessee in respect of capital gains . The s. 131 statement implicating the assessee is not sufficient to draw an adverse inference against the assessee when the documentary evidence in the form of contract notes, bank statements, STT payments etc prove genuine purchase and sale of the penny stock. Failure to provide cross-examination is a fatal error. Additions made by the AO was deleted**.** Reassessment was held to be invalid .

15.6 Reassessment-Survey-Merely on the basis of statement of partner addition cannot be made in respect of difference between stamp valuation and sale price of property on basis of such offering made by partner-Reassessment was quashed.

As noted, S. 43CA was inserted with effect from 1-4-2014 and therefore, had no applicability to the assessment year in question. The attempt on the part of the Assessing Officer to make the addition with the aid of the statement of the partner of the assessee and reference to the correct stamp valuation, is simply invalid. What the Assessing Officer wishes to do is to adopt a stamp valuation for the properties in question, superimpose the statement of the partner of the assessee of the declaration of certain additional income and extrapolate such statement to fit within the scheme of S. 43CA

Zain Constructions v. ITO (2019) 265 Taxman 82 (Mag) (Bom.)(HC)

XVI INCRIMINATING MATERIAL FOUND IN SEARCH OF THIRD PARTY : 153C vis a vis 148

16.1 In the case of Rajat Saurabh Chatterji v. ACIT ITA NO. 2430/Del/2015, AY 2007-08 dtd: 20/05/2016(Delhi)(Trib) www.itatonline.org . the Tribunal observed that where the AO detects incriminating material in search, he has to be processed only u/s 153C and not u/s 147. A notice u/s.148 to assess such undisclosed income is void ab initio.

16.2 We have a contrary view . Search operations in premises of third person – Documents found belonging to third person and not to assessee - Reassessment was held to be justified **Yamuna Estate P.Ltd. v. ITO (2016) 45 ITR 517 (Mum.)(Trib.)**

16.3 The Tribunal held that when the AO had issued a notice u/s 153C to which the assessee had complied with. Thereafter the AO did not continue with the proceedings u/s 153C. Subsequently the AO issued a notice u/s 148, which was held to be bad in law. (ITA No. 3275/Mum/2015 & 3276/Mum/2015) (. Y. 2003 - 04, 2005 - 06) **Rayoman Carriers Pvt. Ltd. v. ACIT (Mum) (Trib.)**

XVII INFORMATION FROM FOREIGN TAX AUTHORITY

17.1 In the case of CIT v. Late K.M. Bijli (2017) 390 ITR 402 (Delhi) (HC),the Court held that; the exclusive reliance placed upon the U.K. revenue authorities' information was not sufficient to conclude that the amount which was attributed to the deceased assessee belonged to him. The materials showed that the amounts were brought to tax in the hands of the assessee's relative. There were pointers to omissions, leads that could have been developed by the Assessing Officer, such as queries to the bank for foreign inward remittances and their source. Having received information the Department could have proceeded through reassessment proceedings at the earliest opportunity. However, the Department chose to wait for three years and sought to

reopen a decade late completed assessment and by then the assessee had died. The order of the Appellate Tribunal deleting the additions was not perverse.

XVIII. **REASON TO BELIEVE OF THE AO:**

As per the provision of the Act the AO has to form reason to believe that income has escaped assessment on basis of the material before him . This aspect of reopening has been a subject matter of litigation time and again before various courts and Tribunal . Some of the important decisions are discussed herein below:

18.1 The Apex Court in the case of **Calcutta Discount Co. Ltd. (1961) 41 ITR 191 (SC)** analysed the Phrase **"reason to believe"** and observed that "It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn."

It is not for somebody else to tell the assessing authority what inferences, whether of facts or law, should be drawn.

18.2 In the case of CIT Vs. Greenworld Corporation (2009) 314 ITR 81 (SC) it was held that the assessment order passed on the dictates of the higher authority being wholly without jurisdiction, was a nullity..

18.3 Reopening of assessment on basis of letter of Commissioner (Appeals) containing identical facts stated by assessee was held not valid. [**United Shippers Ltd. v. ACIT (2015) 371 ITR 441 (Bom.)]**

18.4 Similarly in case of **Sun Pharmaceutical Industries Ltd. v. Dy.CIT (2016) 381 ITR 387 (Delhi)(HC) .**The notice under section 148 was issued as a result of Instruction No. 9 of 2006 dated November 7, 2006 issued by the Central Board of Direct Taxes. These audit objections were not accepted by the Assessing Officer. CBDT instruction directing remedial action in case of audit objections - Notice based solely on such instruction not valid.

INFORMATION RECEIVED FROM ANOTHER AO:

18.5 Similarly where Notice is issued in a mechanical manner, based on information received from another AO, and sanction is accorded by the CIT in a mechanical, reopening is bad in law. **[Banke Bihar Properties Pvt. Ltd. v. ITO (Delhi)(Trib)(supra) www.itatonline.org**] Also see [**Sunil Agarwal v. ITO ITA NO. 988/Del/2018, AY 2008-09 dtd: 24/05/2018 (Delhi)(Trib), www.itatonline.org**]

18.6 Where A.O accepted loss declared by the assessee on sale of immovable property in which she was one of co-owners, he could not reopen assessment subsequently on ground that in case of another co-sharer of same property, Assessing Officer had disputed value and referred question to DVO and, on basis of valuation so presented, he had computed certain capital gain and, on basis of valuation so presented, he had computed certain capital gain.

Kalpana Chimanlal Shah v. ITO,[2018] 94 taxmann.com 252 (Guj) (HC)

18.7 Finding in case of another assessee - No failure to disclose material facts – Reassessment is not valid.

Dismissing the appeal of the revenue the Court held that ,reassessment on the basis of finding in case of another assessee is held to be bad in law . **Even in recorded reason the AO has not linked any material** and the assessment order in Abode Builders was set aside by CIT(A). As there was no failure to disclose material facts . Reassessment is held to be bad in law. (AY. 2004 -05)(ITA No. 678 of 2016 dt. 27 -11-2018) Arising in ITA No. 5584/ Mum/ 2012 dt 15-07 -2015)

PCIT v. Vaman Estate (2020) 113 taxmann.com 405 (Bom) (HC) (UR)

<u>REASONS TO BELIEVE – SURVEY :</u>

18.7 Detection of excess stock or unaccounted expenditure on renovation of business premises at the time of survey u/s. 133A in a subsequent year, could not constitute reason to believe that such discrepancies existed in earlier years also and, therefore, reopening of assessments for those years on the basis of aforesaid reason to believe was not valid.

CIT vs. Gupta Abhushan (P) Ltd (2008) 16 DTR (Del) 76

18.8 Reasons recorded prior and subsequent to survey not satisfying requirement of law - Nothing before Assessing Officer to record belief that escapement has taken place - Notice is not valid.

Hemant Traders v.ITO (2015) 375 ITR 167 (Bom.)(HC)

18.9 AO can assume jurisdiction under this provision only if he has sufficient material before him; he cannot form belief on the basis of his whim and fancy and the existence of material must be real. Further, there must be nexus between the material and escapement of income. Statement recorded at the time of survey does not have evidentiary value, therefore, cannot be the basis for reopening. Reassessment proceedings initiated u/s 148 by AO based on survey statement was held to be invalid and thereby were quashed.

Alfa Radiological Centre Pvt. Ltd. v. ITO (2015) 44 ITR 184 (Chandigarh)(Trib.)

18.10 Reassessment not resulting in assessment of higher income - Reassessment notice not valid.[S. 115JB, 147, 148]

Held that ;Having regard to the fact that even if the entire amount which was proposed to be added by the AO were sustained, there would be no addition to the tax liability of the assessee and the assessee would still be governed by the provisions of section 115JB of the Act and assessed on the same book profits, it could not be said that there was sufficient material before the AO to form the belief that income chargeable to tax has escaped assessment. The notice issued under section 148 of the Act, therefore, could not be sustained by virtue of section 152(2): (AY .2011-2012)

Motto Tiles P. Ltd. v. ACIT (2016) 386 ITR 280 (Guj.)(HC)

XIX. PROCEDURAL DEFECT: ISSUE AND SERVICE OF NOTICE ETC : S. 292BB

19.1 No notice u/s. 148 having been served on the assessee prior to re-opening of assessment, Asst. made u/s. 147 was bad in law; argument based on S. 292BB was not sustainable on the facts of the case.
CIT vs. Mani Kakkar (2009) 18 DTR (Del) 145 (Asst Yr 2001-2002)

19.2 Issue of notice beyond limitation period : **Expression "to issue"** – Meaning send out – Notice signed on 31/3/2010 sent to speed post on 7/4/2010 – Notice issue after Six years for the relevant A.Y. 2003-04
Kanubhai M. Patel (HUF) vs. HIren Bhatt (2010) 43 DTR 329 (Guj.)

19.3 Notice issued within period of limitation but send after that period – Direction to ascertain when the notice had been dispatched by reg. post.
CIT vs. Major Tikka Khushwat Singh[1995] 212 ITR 650 (SC)
R.K. Upadhaya vs. Shanabhai P. Patel (1987) 166 ITR 163 (SC)

19.4 The notice prescribed by section 148 cannot be regarded as a mere procedural requirement. It is only if the said notice is served on the assessee that the ITO would be justified in taking proceedings against the assessee. If no notice us issued or if the notice issued is shown to be invalid, then the proceedings taken by the ITO would be illegal and void.
Y. Narayan Chetty vs. ITO (1959) 35 ITR 388 (SC),
CIT vs. Thayaballi Mulla Jeevaji Kapasi (1967) 66 ITR 147 (SC)
CIT vs. . Kurban Hussain Ibrahimji Mithiborwala (1971) 82 ITR 821 (SC)

19.5 Date of issue would be date on which notice is handed over to Postal Department-Notice handed over to Postal Department before expiry of time hence notice was not barred by limitation. [S. 148, 149] the Court held that; the date of issue of notice under section 149 of the Income-tax Act, 1961 would be the date on which it was handed over for service to the proper officer, i.e., the Postal Department. The approval was granted by the Principal Commissioner of the Income-tax also on March 30, 2015. The notice was valid. (AY. 2008-2009)
Rajesh Sunderdas Vaswani v. C.P. Meena, Dy.CIT (2017) 392 ITR 571 / 149 DTR 49 (Guj.)(HC) Editorial : SLP of the assesssee was dismissed, Rajesh Sunderdas Vaswani v. C.P. Meena, Dy.CIT (2016) 389 ITR 7(St.)

19.6 Notice issued to individual. His HUF cannot be assessed on the ground that notice was issued to individual who was Karta of HUF. Defect of jurisdiction.
Suraj Mal HUF vs. ITO (2007) 109 ITD 327 (Del.)(TM).

19.7 Service of notice on ***accountant of assessee-company*** - Power of attorney given to accountant to conduct assessment proceedings not including authority to accept any

fresh notice- Reassessment was not valid**. CIT v. Kanpur Plastipack Ltd. (2017) 390 ITR 381 (All) (HC)**

19.8 **Section 282, read with sections 147 and 292B, of the Income-tax Act, 1961 - Service of notice (Validity of service) – Plea raised first time before ITAT**

A notice under section 148 read with section 147 was issued - Service of said notice was done by registered post and through Inspector of Department - Thereupon, best judgment assessment was completed wherein additions were made to assessee's income - Commissioner (Appeals) confirmed said additions - In appellate proceedings, assessee raised a plea that service of notice by Inspector at factory premises on security guard was not proper service under provisions of section 282(2) - Tribunal having accepted assessee's plea, set aside impugned assessment order - High Court by impugned order held that in view of fact that assessee raised plea of improper service of notice for first time before Tribunal and, moreover, in response to notice issued under section 148, one director of assessee-company had appeared before Assessing Officer, it could be concluded that provisions of section 292B would apply to assessee's case and, thus, assessment proceedings could not be regarded as invalid for want of proper service of notice - Special Leave Petition against impugned order was to be dismissed - [In favour of revenue]

Sudev Industries Ltd. *v.* Commissioner of Income-tax [2018] 259 Taxman 221 (SC)

19.9 ***The officer recording the reasons u/s 148(2) for reopening the assessment & the officer issuing notice u/s 148(1) has to be the same person***

If the reasons are recorded by the DCIT but the notice is issued by the ITO, the reassessment proceedings are invalid. The s. 148 notice is a jurisdictional notice. Any inherent defect therein cannot be cured u/s 292B. The fact that the assessee participated in the proceedings is irrelevant

Pankajbhai Jaysukhlal Shah vs. ACIT (2020) 312 CTR 300 / 185 DTR 306 (Guj.)(HC)

XX. Notice issued non-existed company :

20.1 Reassessment – Merged with another company - Notice issued in name of assessee became invalid and quashed .

Allowing the petition the Court held that by time of issuance of said reassessment notice, assessee had already merged with another company and thereby lost its legal existence, notice issued in name of assessee became invalid and, therefore, impugned reassessment proceedings deserved to be quashed. (AY. 2010-11)

ACIT v. Dharmnath Shares & Services (P.) Ltd. (2019) 410 ITR 431 (Guj) (HC)

Editorial: SLP of revenue is dismissed, ACIT v. Dharmnath Shares & Services (P.) Ltd. (2019) 260 Taxman 174/ 409 ITR 4 (St) (SC)

20.2 Assessment – Amalgamation – Transferor company – Scheme of amalgamation sanctioned by the High Court – No proceedings can be initiated against the transferor company.
Khurana Engineering Ltd. v. DCIT (2013) 217 Taxman 75 (Guj.)(HC)

20.3 However the decision of SC in case of **Skylight Hospitality LLP v. ACIT (2018) 254 Taxman 390 (SC)** held that; notice issued in the name of a company which does not exist upon its conversion into a LLP is valid if there is material to show that the issue in the name of the company was a clerical mistake. The object and purpose behind S. 292B is to ensure that technical pleas on the ground of mistake, defect or omission should not invalidate the assessment proceedings, when no confusion or prejudice is caused due to non - observance of technical formalities. The Court also observed that, in the peculiar facts of this case, we are convinced that wrong name given in the notice was merely a clerical error which could be corrected under S. 292B of the Income-tax Act. (SLP No. 7409/2018, dt. 02. 02. 2018) (AY. 2010 - 11)
Editorial. Order in Skylight Hospitality LLP v. ACIT (2018) 254 Taxman 109 (Delhi) (HC) is affirmed

20.4 However a subsequent decision in case of Principal Commissioner of Income Tax, New Delhi *v.* Maruti Suzuki India Ltd [2019] 416 ITR 613 (SC) held that the Assessing Officer was informed of the amalgamating company having ceased to exist as a result of the approved scheme of amalgamation, the jurisdictional notice was issued only in its name. The basis on which jurisdiction was invoked was fundamentally at odds with the legal principle that the amalgamating entity ceases to exist upon the approved scheme of amalgamation. Participation in the proceedings by the appellant in the circumstances cannot operate as an estoppels against law. This position now holds the field in view of the judgment of a co-ordinate Bench of two judges which dismissed the appeal of the revenue in ***CIT* v. *Spice Enfotainment* [Civil Appeal No. 285 of 2014, dated 2-11-2017].**

20.5 Similarly in the case of **Techpac Holdings Ltd V/s Dy CIT [(2016) 135 DTR (Bombay H.C) 322]** it was held that service of notice u/s 148 on the ***assessee company's subsidiary*** was not valid service of notice,.

XXI ***NOTICE ISSUED IN NAME OF DECEASED ASSESSEE:***

21.1 **Notice issued in name of *deceased assessee*** — Objection raised by legal heir of deceased assessee before completion of reassessment — Notice was held to be null and void**. Jaydeepkumar Dhirajlal Thakkar v. ITO (2018) 401 ITR 302 (Guj) (HC)**

21.2 The Assessing Officer issued notice u/s 148 on one Smt. Tara Bhardwaj on 29-3-2017. However, she had already expired on 11-10-2010 and this fact was also informed to the Department *vide* letter dt. 3-9-2013. The Legal Heir of Smt. Tara Bhardwaj challenged the reassessment notice u/s. 148 and subsequent notices issued on her as being null and void. The Hon'ble High Court while allowing the Writ Petition held that the the petitioner *vide* letter dated 3-9-2013 had informed the Income Tax Department of Ms. Tara Bhardwaj's death on 11-10-2010. That information was mechanically receipted and overlooked.. It is thus apparent that the notices impugned have been issued to a dead person and cannot sustain..
Bhaskar Sharma L/H Late Smt. Tara Bhardwaj vs. CIT [W.P. No.17529 of 2017, Rajasthan High Court]

21.3 Reassessment –Notice issued in name of deceased assessee —Department attempting to correct error by changing name of entity in reasons to believe" — Not curable defects notice is invalid –Failure to issue notice u/s 143(2) with in prescribed time – Reassessment is in valid
The notice was issued in the name of deceased assessee and an attempt was made by the revenue to correct error by changing name of entitity in reason to believe. On writ allowing the petition the Court held that in the absence of any provision in the Act, to fasten the liability upon a deceased individual assessee and in the absence of any pending or previously instituted proceedings, the Department could not impose the tax burden upon the legal representative. Court also held that the omission to issue the mandatory notice under section 143(2) rendered the reassessment void. The reassessment notice, the consequential proceedings and the reassessment order passed were to be quashed. (AY. 2010-11)
Rajender Kumar Sehgal. v. ITO (2019) 414 ITR 286 (Delhi)(HC)

21.4 Reassessment – Notice to dead person- Assessment order is held to be invalid .
Allowing the petition the Court held that as per settled law, notice for reopening of assessment against a dead person is invalid. ***The fact that the AO was not informed of the death before issue of notice is irrelevant***. Consequently, the S. 148 notice is set aside and order of assessment stands annulled . Followed Alamelu Veerappan v. ITO (2018) 257 Taxman 72 (Mad) (HC) followed)
Rupa Shyamsundar Dhumatkar v. ACIT (2020) 420 ITR 256 (Bom)(HC)

21.5 Reassessment – Notice in the name of deceased assessee- For acquiring jurisdiction to reopen an assessment, notice should be issued in name of living person, i.e., legal heir of deceased assessee-S.292B could not be invoked to

correct a fundamental/substantial error- Notice is held to be bad in law .[S.147, 292B, 292BB]
A notice which has been issued in the name of the dead person is also not protected either by provisions of section 292B or section 292BB. Therefore, both the impugned notice dated 29-3-2018 and the order dated 13-11-2018 was quashed and set aside.
Sumit Balkrishna Gupta. v. ACIT (2019) 414 ITR 292 (Bom)(HC)

21.6 Notice against dead person- Merely because in response to notice issued against Jayantilal Harilal Patel petitioner had informed Assessing Officer about death of assessee and asked him to drop proceedings- it could not, by any stretch of imagination, be construed as petitioner having participated in proceedings and, therefore, provisions of section 292B would not be attracted –Notice is held to be invalid **. [S. 2(7)/ 2(29), 159,147 292B]**
Chandreshbhai Jayantibhai Patel v. ITO (2019) 413 ITR 276 (Guj.)(HC)

21.7 Reassessment –Notice- Dead person- Notice issued on dead person is invalid. [S. 147 ,159(2b)) 292B, 292BB .]
Tribunal held that notice issued on dead person is invalid. Followed , Alamelu Veerappan v. ITO (2018)257 Taxman 72 (Mad) (HC), Sumit Balkrishna Gupta v. Asstt. CIT (2019) 262 Taxman 61 (Bom) (HC) (AY. 2007-08)
Aemala Venkateswara Rao. v. ITO (2019) 176 ITD 431 (Vishakha) (Trib.)

21.8 In **ITO v/s. Dharam Narain (2018) 253 CTR 479 (SC**) held that non availability of the assessee to receive the notice sent by registered post as many as on two occasions and service of notice on authorized representative of the assessee whom the assessee disowned, is sufficient to draw an inference of deemed service of notice on the respondent assessee and sufficient compliance of the requirement of sec 143(2).

XXII <u>SERVICE BY AFFIXTURE :</u>

22.1. Where notice was not sent by registered post nor served upon assessee in any other manner whatsoever, proceedings for assessment were void.
CIT vs. Harish J. Punjabi (2008) 297 ITR 424 (Del.)

22.2 Invalid Service of notice not a procedural defect. No material to prove efforts made by Depart to serve notice in normal course. ***Arunlal vs. ACIT (2010) 1 ITR 1 (Trib) (Agra) (TM)***

22.3 Notice affixed on the door of the place of business after the assessee refusing to accept the Notice is a valid service of Notice . As per Order V, Rule 17 & 18 of CPC, 1908 **Sheo Murti Singh (Dr.) v. CIT (2016) 383 ITR 174 (All.)(HC)**

22.4 Similarly in case of ***ITO V/s. Om Praksh Kukreja (2016) 134 DTR (Chd,. Tribl) 208*** it was held that where A.O having served the notice under S.148 by affixture at a wrong address where the assessee was not residing it cannot be said that the notice u/s 148 was served upon the assessee and therefore the resultant reassessment proceedings were invalid and bad in law.

22.5 A strict procedure has to be followed for service by affixture. If done improperly, the notice and the resultant assessment order are null and void
(i) As per sub-section (1) of section 282, the notice is to be served on the person named therein either by post or as if it was a summons issued by Court under the Code of Civil Procedure, 1908 (V of 1908). The relevant provision for effecting of service by different modes are contained in rules 17, 19 and 20 of Order V of CPC. Rules 17, 19 and 20 of Order V of CPC lay down the procedure for service of summons/notice and, therefore, the procedure laid down therein cannot be surpassed because the intention of the legislature behind these provisions is that strict compliance of the procedure laid down therein has to be made. The expression after using all due and reasonable diligence' appearing in rule 17 has been considered in many cases and it has been held that unless a real and substantial effort has been made to find the defendant after proper enquiries, the Serving Officer cannot be deemed to have exercised 'due and reasonable diligence'. Before taking advantage of rule 17, he must make diligent search for the person to be served. He therefore, must take pain to find him and also to make mention of his efforts in the report. Another requirement of rule 17 is that the Serving Officer should state that he has affixed the copy of summons as per this rule. The circumstances under which he did so and the name and address of the person by whom the house or premises were identified and in whose premises the copy of the summon was affixed. These facts should also be verified by an affidavit of the Serving Officer.
(ii) The reason for taking all these precautions is that service by affixture is substituted service and since it is not direct or personal service upon the defendant, to bind him by such mode of service the mere formality of affixture is not sufficient. Since the service has to be done after making the necessary efforts, in order to establish the genuineness of such service, the Serving Officer is required to state his full action in the report and reliance can be placed on such report only when it sets out all the circumstances which are also duly verified by the witnesses in whose presence the affixture was done and thus the affidavit of the Serving Officer deposing such procedure adopted by him would also be essential. In the instant case, the whole thing had been done in one stroke. It was not known as to why and under which circumstances another entry for service of notice by affixture was made on 27-7-2012 when sufficient time was available through normal service till 30-9-2012. Nor there is any entry in the note-sheet by the AO directing the Inspector for service by affixture and had only recorded the fact that the notice was served by the affixture. It appears that the report of the Inspector was obtained without issuing any prior direction for such process or mode. In view of the above, it is clear that there was no valid service of notice u/s.143(2) by way of affixation and the assessment made on the basis of such invalid notice could not be treated to be valid assessment and, hence, such

assessment order deserves to be treated as null and void and liable to be quashed and annulled.
Sanjay Badani vs. DCIT [2014] 35 ITR (T) 536 (ITAT Mumbai)

22.6 No valid notice served upon assessee either through registered post or through affixture, reassessment was held to be not valid. **Auram Jewellery Exports P. Ltd. v. ACIT (2017) 54 ITR 1 (Delhi) (Trib.)**

22.7 S. 148, 282, Rule 127: **Mere issue of a s. 148 notice is not sufficient. Service is essential**. If the postal authorities return the notice unserved, the Dept has to serve under Rule 127(2) using one of the four sources of address (such as PAN address, Bank address etc). The failure to do so renders the reassessment proceedings invalid

Harjeet Surajprakash Girotra vs. UOI (2019) 266 Taxman 29 / 311 CTR 260 (Bom HC

XXIII. NOTICE SENT TO OLD ADDRESS:

23.1 It is the duty of Assessing Officer to access changed Permanent Account Number database of assessee — Return filed showing new address- Reassessment is held to be bad in law . [S. 144,148, R. 127]
Allowing the petition, the Court held that , rule 127(2) states that the addresses to which a notice or summons or requisition or order or any other communication may be delivered or transmitted shall be either available in the permanent account number database of the assessee or the address available in the Income-tax return to which the communication relates or the address available in the last Income-tax return filed by the assessee : All these options have to be resorted to by the concerned authority, in this case the Assessing Officer. The Assessing Officer had mechanically proceeded on the information supplied to him by the bank without following the correct procedure in law and had failed to ensure that the reassessment notice was issued properly and served at the correct address in the manner known to law. The reassessment notice issued under section 148 , the subsequent order under section 144 read with section 147 and the consequential action of attachment of the assessee's bank accounts were quashed. (AY. 2010-11)
Veena Devi Karnani. v. ITO (2019) 410 ITR 23 (Delhi) (HC)

23.2 Notice - Mere mentioning of new address in the return of income is not enough-.If change of address is not specifically intimated to the AO, he is justified in sending the notice at the address mentioned in PAN database- If the notice is sent within the period prescribed in s. 143(2), actual service of the notice upon the assessee is immaterial-
PCIT v. Iven Interactive Ltd. (2019) 418 ITR 662/ 267 Taxman 471(SC),
Editorial: PCIT v. Iven Interactive Ltd (2019) 418 ITR 665 (Bom.)(HC) is set aside

XXIV. **Notice u/s. 143(2) is Mandatory:**

24.1 Issue of a notice u/s.143(2) is mandatory. The failure to do so renders the reassessment void (*CWT v. HUF ofH. H. Late Shri. J.M. Scindia (2008) 300 ITR 193 (Bom)*. S.292BB was inserted w.e.f. 1-4-2008 and came into operation prospectively for AY 2008-09 and onwards.

- **CIT v. Salman Khan Appeal No. 508 OF 2010 dt. 06/06/2011 (Bom.)(HC)** www.itatonline.org**.**
- **CIT vs. Mundra Nanvati [2009] 227 CTR 387 (Bom)(HC)**
- **CIT vs. Virendra Kumar Agarwal Appeal No. 2429 OF 2009 DT. 7/1/2010 (Bom.)**
- **Dy. CIT v. Dharampal Satyapal Ltd. (2016) 130 DTR 241 (Delhi)(Trib.)**

24.2 A notice u/s 143(2) issued by the AO before the assessee files a return of income has no meaning. If no fresh notice is issued after the assessee files a return, the AO has no jurisdiction to pass the reassessment order and the same has to be quashed

In view of consistent view of jurisdictional High Court and Delhi High Court, in the absence of pending return of income, the provisions of section 143(2) of the Act is clear that notice can be issued only when a valid return is pending for assessment. Accordingly, this notice has no meaning.

Sudhir Menon vs. ACIT, (2018) 67 ITR 86 (SN) (Mum.)(Trib.),

24.3 If the notice u/s 143(2) is issued prior to the furnishing of return by the assessee in response to notice u/s 148, the notice issued u/s 143(2) is not valid and the reassessment framed on the basis of said notice has to be quashed. S. 292BB does not save the assessment .

A reassessment order cannot be passed without compliance with the mandatory requirement of notice being issued by the Assessing Officer to the assessee under section 143(2). The requirement of issuance of such notice is a jurisdictional one. It does go to the root of the matter as far as the validity of the reassessment proceedings under section 147/148 of the Act is concerned

Halcrow Group Ltd vs. ADIT, (2018) 194 TTJ 704/167 DTR 103 (Delhi)(Trib.),

24.4 Reassessment without issuance of notice u/s. 143(2) is invalid and liable to be quashed.[S.148]

The Tribunal, following the judgement of the Hon'ble Delhi High Court in the case of Shri Jai Shiv Shankar traders Pvt. Ltd. (2016) 383 ITR 448 (Delhi) held that issuance of notice u/s. 143(2) was mandatory after receipt of return filed in response to the notice u/s. 148, without which the reassessment order passed u/s. 143(3) r.w.s. 147 of the Act was invalid, bad in law and void ab initio and thus liable to be quashed.

ACIT v. Sukhamani Cotton Industries (2019) 69 ITR 138 (Indore) (Trib)

24.5 One should note that a Jurisdictional error cannot be cured by section 292BB. A reference can be made to a recent decision of Delhi High Court in the case **PCIT v. Silver Line (2016) 383 ITR 455 (Delhi)(HC) . The ratio is followed in;**
Alok Mittal v. DCIT (2017) 167 ITD 325 (Kol) (Trib.)
Anil Kumar v. ITO (2017) 55 ITR 97 (Asr.) (Trib.)

24.6 **Whether for issuing notice under section 143(2) return should have been filed under section 139 or in response to a notice issued under section 142(1) :**
Where no return was filed in pursuance of notice issued under section 148, issue of notice under section 143(2) was not required for making assessment. [In favour of revenue]
Principal Commissioner of Income-tax *v.* Broadway Shoe Co [2018] 259 Taxman 223 (Jammu & Kashmir)

XXV. **NO REASSESSMENT JUST TO MAKE AN ENQUIRY OR VERIFICATION:**

25.1 No reopening to make fishing inquiries.

a) Bhor Industries Ltd. v/s. ACIT – [(2004) 267 ITR 161 (Bom)]
b) Hindutan Lever Ltd. v/s. R. B. Wadkar, ACIT – [(2004) 268 ITR 332 (Bom)]
c) Bhogwati Sahakari Sakhar Karkhana Ltd. v/s. Dy. CIT [(2004) 269 ITR 186 (Bom)]
d) Ajanta Pharma Ltd. v/s. ACIT – [(2004) 267 ITR 200 (Bom)]
e) Pr. CIT .v. G & G Pharma India Ltd.[2017] 383 ITR 147 (Delhi)(HC)
f) **Reassessment- Distinction between reason to believe and reason to suspect**.

Universal Power Systems (P) Ltd. V/s Asst. CIT [2017][48 ITR (Tribunal) 191 (Chennai)]

The Assessment reopened merely to verify discrepancy- i.e. variation between Income declared by assessee and Income shown in TDS Certificate i.e. case reopened on reasons to suspect is not valid.

g) No Reason to believe that income has escaped assessment – Assessing Officer wanted to inquire about source of funds of an immovable property purchased by assessee – No reason to issue notice for reassessment.
CIT v. Maniben Velji Shah (2006) 283 ITR 453 (Bom.)(HC)

h) The AO has mechanically issued notice u/s. 148 of the Act, on the basis of information allegedly received by him from the Directorate of Income Tax (Investigation), New Delhi. AO has not applied his mind so as to come to an independent conclusion that he has reason to believe that income has escaped during the year. **Banke Bihar Properties Pvt. Ltd. v. ITO ITA NO. 5128/M/2015 dt. 22/04/2016 (A.Y. 2006-07) (Delhi)(Trib) I**

i) **Merely because the assessee's income is "shockingly low" and others in the same line of business are returning a higher income. The invocation of the jurisdiction on the basis of suspicions and presumptions cannot be sustained .**
Though Explanation 2 of s. 147 authorizes the AO to reopen an assessment wherever there is an "understatement of income", the AO is not entitled to assume that there is "understatement of income" merely because the assessee's income is "shockingly low" and others in the same line of business are returning a higher income. ***The invocation of the jurisdiction u/s 147 on the basis of suspicions and presumptions cannot be sustained***.(WP. No. 36483/2016, dt. 13.02.2017) (AY. 2012-13)
Rajendra Goud Chepur v. ITO (AP&T)(HC);www.itatonline.org

j) Reassessment –Witin four years - General allegation- No violation of provisions of S.11(3)(d)-Reassessment is bad in law :
Areez Khambatta Benevolent Trust. v. DCIT (2019) 415 ITR 70 (Guj) (HC)

K) Fishing enquiry-Information from intelligence wing : Giriraj Enterprises v. ACIT (2019) 174 DTR 409 /102 taxmann.com 188 (Bom.)(HC)

XXVI. <u>EXPL 3 TO SEC 147: ANY OTHER INCOME :</u> Inserted by the F Y 2009 w.r.e.f 1.4.1989

26.1 ***If Assessing officer does not assess income for which reasons were recorded u/s. 147 he cannot assess other income u/s. 147.***
CIT vs. Jet Airways (I) Ltd. (2011) 331 ITR 236 (Bom)(HC)

- **<u>Once Asst is open – any other income can be considered. Expl 3 to sec 147:</u>**
CIT v/s. Best Wood [2011] 331 ITR 63 Ker FB.

26.2 Though Explanation 3 to s. 147 inserted by the F Y 2009 w.r. e.f 1.4.1989 permits the AO to assess or reassess income which has escaped assessment even if the recorded reasons have not been recorded with regard to such items, **it is essential that the items in respect of which the reasons had been recorded are assessed**. **If the AO accepts that the items for which reasons are recorded have not escaped assessment, it means he had no "*reasons to believe that income has escaped assessment*" and the issue of the notice becomes invalid**. If so, he has no jurisdiction to assess any other income.
Ranbaxy Laboratories Ltd vs. CIT (2011) 60 DTR 77(Delhi) (High Court)
(Jet Airways Supra followed).

26.3 Similar view was taken in ***Hotel Regal International & Anr. Vs. ITO (2010) 320 ITR 573 (CAL)*** *wherein the* Petitioner were called upon to file objection to the notice u/s. 148 proposing to reopen the assessment on ground that Rs. 73,219 had escaped asst. Now the authorities could not shift their stand and pass on order on other ground that valuation report received subsequent to passing of the order disposing the

objection the Assessing officer must consider the material and pass speaking order. Assessment quashed.

A Reference can also be made to following decisions :

- **ITO v Bidbhanjan Investment & Trading CO (P) Ltd (2011) 59 DTR 345 (Mum) (Trib)**
- **Dy. CIT v. Takshila Educational Society (2016) 131 DTR 332/ 284 CTR 306 (Pat.) (HC)**
- **Anugrah Varhney v. ITO ITA NO. 134/Agra/2014 dt. 05/04/2016 [A.Y. 2003-04] (Agra)(Trib.) www.itatonline.org**
- **Ratnagiri District Central Co-Operative Bank Ltd. v DCIT (2019) 197 TTJ /175 DTR 327 (Pune) (Trib)**

- **S. 147 : Reassessment-No addition was made on basis of reasons recorded-No other addition could be made in course of reassessment proceedings.**
  Followed CIT v Jet Airways (I) Ltd (2011) 331 ITR 236 (Bom) (HC). (AY. 1999-2000)
  DIT (IT) v. Black & Veatch Prichard, Inc. (2019) 107 taxmann.com 289 / 265 Taxman 93 (Bom.)(HC)
  Editorial : SLP is granted to the revenue, DIT (IT) v. Black & Veatch Prichard, Inc. (2019) 265 Taxman 92 (SC)

XXVII. NO REASSESSMENT U/S. 148, IF ASSESSMENT OR REASSESSMENT IS PENDING:

27.1 So long the asst proceedings are pending the AO cannot have any reason to believe that income for that year has escaped asst (period for issue of notice u/s. 143(2) had not expired)
CIT v/s. Qatalys Software Technology [2009] 308 ITR 249 (Mad)

27.2 When time limit for issue of notice under section 143(2) has not expired, Assessing Officer cannot initiate proceedings under section 147.
Super Spinning Mills Ltd. vs. Addl. CIT (2010) 38 SOT 14 (Chennai)(TM)(Trib.)

27.3 Notice under section 148 cannot be issued for making reassessment, when time limit is available for issue of notice under section 143(2) for making an assessment u/s. 143(3). A reference can be made to following decisions in favour as well as against the assessee on the issue :
CIT vs. TCP Ltd. (2010) 323 ITR 346 (Mad.)
Trustees of H.E.H. The Nizam's Supplemental Family Trust v/s. CIT – [(2000) 242 ITR 381 (SC)]
Ghanshyamdas v/s. Regional Assistant Commissioner of Sales Tax – [(1964) 51 ITR 557 (SC)]
CIT v/s. S. Raman Chettiar – [(1965) 55 ITR 630 (SC)]
Commercial Art Press v/s. CIT – [(1978) 115 ITR 876 (All)]
A.S.S.P & Co. v/s. C.I.T – [(1988) 172 ITR 274 (Mad)]

CIT v/s. P. Krishnakutty Menon – [(1990) 181 ITR 237 (Ker)]
Indian Tube Co. Ltd. v/s. ITO – [(2005) 272 ITR 439 (Cal)]
CIT vs Rejendra G. Shah (247 ITR 372) (Bom) [in favour of assessee]

Jimmy F. Bilimoria [ITA No.6063/Mum/2012] (Against the assessee)

XL India Business Services (P.) Ltd.v ACIT (2014) 67 SOT 117/167 TTJ 467 (Delhi)(Trib.)(In context to reference to TPO . In favour of assessee)

CIT.v. Shamlal Bajaj (2014)222 Taxman 173 (Mag.) (Mad.)(HC)
S.147 : Reassessment – Non-initiation of action u/s 143(2) though time is available Reassessment is held to be valid . ***(Against the assessee)***
CIT v. Jora Singh (2013) 215 Taxman 424 / 262 CTR 630 (All.)(HC)
Vardhman Holdings Ltd. v. ACIT (2016) 158 ITD 843 (Chd.)(Trib.)

XXVIII. RE-OPENING BEYOND 4 YEARS :

CONDITION – SANCTION – FRESH MATERIAL - FAILURE ON PART OF ASSESSEE TO DISCLOSE MATERIAL FACT :

28.1 Having concluded that all the material facts were fully and truly disclosed by the assessee at the time of original assessment, invoking the of provisions of S. 147 after the expiry of four years from the end of the relevant asst. year was not valid.
German Remdeis Ltd vs. DCIT (2006) 287 ITR 494 (Bom)
CIT vs. Former Finance (2003) 264 ITR 566 (SC)
Tata Business Support Services Ltd. vs. Dy. CIT (2015) 232 Taxman 702 (Bom.)(HC)
Tirupati Foam Ltd. v. Dy. CIT (2016) 380 ITR 493 (Guj.)(HC)
Gujarat Eco Textile Park Ltd. v.ACIT (2015) 372 ITR 584 (Guj.)(HC)
Nirmal Bang Securities (P) Ltd. v. ACIT. (2016) 382 ITR 93 (Bom.)(HC)
Pandesara Infrastructure Ltd v. Dy.CIT (2019) 263 Taxman 367 (Guj.)(HC)
Editorial: SLP of revenue is dismissed, Dy. CIT v. Pandesara Infrastructure Ltd. (2019) 263 Taxman 366 (SC)

Reassessment has to be based on "fresh material". A reopening based on reappraisal of existing material is invalid :

28.2 There was no tangible material before the Assessing Officer to form the belief that the income had escaped assessment and therefore, reopening of assessment under section 147 was not valid.
Balakrishna Hiralal Wani vs. ITO (2010) 321 ITR 519 (Bom.)(HC)
Dempo Brothers Pvt Ltd. v. ACIT (2018) 403 ITR 196 (Bom) (HC)
Golden Tobacco Limited v. DCI [2017] 48 ITR (T) 132(Mum.)(Trib.)
DIT v. Rolls Royal Industries Power India Ltd. [2017] 394 ITR 547 (Delhi)(HC)
ACIT v. Tata Chemicals Ltd. (2017) 185 TTJ 123 (Mum.) (Trib.)
Deloitte Haskins & Sells v. DCIT (2018) 253 Taxman 490 (Guj)(HC)
Runwal Realty (P.) Ltd. v. Dy.CIT (2019) 107 taxmann.com 284/ 266 Taxman 6 (Mag.) (Bom.)(HC)

28.3 Where the deduction under section 80IB of the Act was allowed to the assessee by the assessing officer in the original assessment order under section 143(3) of the Act after

considering the audit report in Form 10CCB and the other details filed by the assessee, it cannot be said that there was a failure on the part of the assessee to disclose fully and truly all the facts for the assessment so as to invoke the provisions of section 147 for re-examining the deduction under section 80 IB of the Act, after expiry of four years from the end of the assessment year.
Purity Techtextile (P) Ltd. vs. ACIT & Anr. (2010) 325 ITR 459 (Bom.) (HC)

28.4 *SECOND REASSESSMENT*

- Issue raised in second reassessment was part of original assessment hence second reassessment was held to be not valid**.**
  CIT v. Central Warehousing Corporation (2015) 371 ITR 81 (Delhi) (HC).

- During assessment proceedings and first reassessment proceedings questions regarding dealer's commission as well as TDS on those amounts were replied to AO. Revenue considering same, disallowed certain portion. Notice was issued once again on the same issue . Allowing the petition the Court held that an attempt of AO to revisit same issue for third time without any tangible or fresh material could not be held as valid reassessment. Action of AO was nothing but the tax authorities effort to overreach the law and resultantly a sheer harassment of the petitioner
  Vodafone South Ltd. .v. Union of India (2014) 363 ITR 388 (Delhi)(HC)

- **Second reassessment -High Court set aside the reassessment on one issue – Second reassessment on another ground is held to be not valid .[S. 32,148]**
  Assessee-company was engaged in business of manufacturing, trading and marketing of pesticides . Assessment was completed u/s. 143(3) making certain additions .Subsequently, AO reopened assessment and made additions on account of provision for diminution in value of assets and provision for doubtful debts . Tribunal set aside reassessment proceedings and High Court upheld order of Tribunal. AO again initiated reassessment proceedings on ground that set off of unabsorbed depreciation against book profit was not in order. On writ the Court held that when High Court had already set aside reassessment proceedings for relevant assessment year, there was no warrant for issue of further notice u/s. 148 of the Act . (AY. 2005 -06)
  Rallies India Ltd (2018) 411 ITR 452 (Bom) (HC) Editorial: SLP of revenue is dismissed ,DCIT v. Rallis India Ltd. (2019) 264 Taxman 25 (SC)

- *As obiter the Hon court also stated that they have not expressed any opinion on whether on facts of this case the revenue could take benefit of the second proviso to S 147 read with S 149(1)(c).or not. Therefore, the revenue may issue fresh notice taking benefit of the second proviso if otherwise permissible under law .*
  New Delhi Television Ltd v/s. DCIT ; CIVIL APPEAL NO. 1008 OF 2020 ; dated : 3rd April , 2020 Supreme court (AY: 2008-09) www.itatonline.org

FAILURE TO DISCLOSE ALL MATERIAL FACTS WAS NOT MENTIONED IN THE RECORDED REASONS-REASSESSMENT WAS HELD TO BE NOT VALID.

28.5 **Notice after expiry of four years As there is no allegation in the reasons for failure to disclose material facts necessary for assessment reopening beyond four years was held to be not valid.**

The assessment was completed u/s. 143(3) accepting the melting loss at 7.75 percent. The notice for reopening was issued on the ground that in the similar line of business other assessee have claimed the melting loss at 5.5 percent. The objection of assessee was rejected by the Assessing Officer. The assessee challenged the reopening by writ petition. The court allowed the writ petition and held that there is no allegation in the reasons which have been disclosed to the assessee that there was any failure on his part to fully and truly disclose material facts necessary for assessment and therefore reopening beyond four years was not valid. (A.Y. 2005 06)

Sound Casting(P) Ltd v. Dy.CIT (2012) 250 CTR 119 (Bom.)(HC)
Tao Publishing (P) Ltd..v. Dy.CIT (2015) 370 ITR 135 (Bom.) (HC)
Tata Business support Services Ltd. v. DCIT(2015) 121 DTR 222/ 232 Taxman 702 (Bom)(HC)
Micro Inks P. Ltd. v. ACIT (2017) 393 ITR 366/ 246 Taxman 143 (Guj.)(HC)
Navkar Share and Stock Brokers P. Ltd v. ACIT (2017) 393 ITR 362 (Guj.)(HC)

28.6 **Beyond four years-Reassessment held to be not valid in the absence of any new or additional information.**

Where the assessee had made full and true disclosure and also there was a note by the auditor in his audit report, reopening of assessment beyond the period of four years was held to be not valid notwithstanding the fact that for subsequent assessment year a similar addition had be made by the assessing officer. Assessment cannot be reopened on the basis of a mere change of opinion. There should be some tangible material with the assessing officer to come to the conclusion that there is an escapement of income. A mere change of opinion on the part of the assessing officer in the course of assessment for a subsequent year cannot justify the reopening of an assessment.(A.Y.2006-07)

NYK Line (India) Ltd. v. Dy. CIT (2012) 68 DTR 90 (Bom)(HC)

28.7 ***Reassessment – Despite "Wrong Claim", reopening invalid if failure to disclose not alleged:***

It is necessary for the AO to first state that there is a failure to disclose fully and truly all material facts. If he does not record such a failure he would not be entitled to proceed u/s 147.There is a well known difference between a wrong claim made by an assessee after disclosing all the true and material facts and a wrong claim made by the assessee by withholding the material facts.

Titanor Components Limited vs ACIT (2011) 60 DTR 273 (Bom)(HC)

28.8 **Reassessment - Transfer pricing - Permanent establishment - Income had already been disclosed by the Indian subsidiary and found by the Transfer Pricing Officer (TPO) to be at arm's length. Reassessment was held to be bad in law .** The AO is not entitled to issue a reopening notice only on the basis that the foreign company has a permanent establishment (PE) in India if the transactions in respect of which it is alleged that there has been an escapement of income had already been disclosed by the Indian subsidiary and found by the Transfer Pricing Officer (TPO) to be at arm's length. (CA. No. 2833 of 2018, dt. 14. 03. 2018)(AY. 2004 - 05)
Honda Motor Co. Ltd. v. ADCIT (2018) 301 CTR 601 /255 Taxman 72 (SC)

28.9 Reassessment - After the expiry of four years- Capital gains- Cost of acquisition -***In absence of fresh tangible material and in the absence of failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment***- Reassessment is held to be invalid . [ITA NO 583 /Mum/2016 dt 18-1-2019, ITA NO 584/Mum/2016 dt. 18-1-2019 (AY. 2006-07)]
ACIT v. Dhruv Khaitan (Mum) (Trib)(UR)
ACIT v. Archana Kahitan (Mrs) (Mum) (Trib)(UR)

28.10 Reassessment-After the expiry of four years- Two house properties – Annual value - Deemed let out- **All relevant facts were brought on record at time of assessment** – Reassessment is bad in law .
Pankaj Wadhwa. v. ITO (2019) 174 ITD 479 (Mum) (Trib.)

28.11 **New Delhi Television Ltd. v/s. DCIT [CIVIL APPEAL NO. 1008 OF 2020 ; dated : 3rd April , 2020 Supreme Court] (AY: 2008-09) www.itatonline.org**
The court held that the assessee had disclosed all primary facts before the AO and it was not required to give any further assistance to the AO by disclosure of other facts. It was for the AO at this stage to decide what inference should be drawn from the facts of the case.
The Hon. court relied on the decision in case of **Calcutta Discount Co. Ltd. vs. Income-tax Officer, Companies District I, Calcutta and Anr [(1961) 41 ITR 191 (SC)]** , wherein it was held that non disclosure of other facts which may be termed as secondary facts is not necessary.

28.12 **Reassessment-After the expiry of four years-Capital gains-Year of taxability-No new material-Reassessment is held to be not valid.**
Nilamben Sandipbhai Parikh v. ACIT (2019) 266 Taxman 191 (Guj.)(HC)

XXIX. **APPROVAL AND SANCTION :**

29.1 CIT having mechanically granted approval for reopening of assessment without application of mind, the same is invalid and not sustainable.
German Remedies Ltd vs. Dy. CIT (2006) 287 ITR 494 (Bom) (AY: 1997-1999)
CIT vs. Suman Waman Chaduahry (2010) 321 ITR 495 (Bom)

SLP dismissed on 12/2/2008 (2009) 312 ITR 339 (St.)
CIT v. S. Goyanka Lines & Chemical Ltd. (2016) 237 Taxman 378 (SC)
My Car (Pune) (P.) Ltd. v. ITO (2019) 263 Taxman 626/ 179 DTR 236 (Bom.)(HC)
United Electrical Company (P) Ltd vs. CIT & Ors (2002) 258 ITR 317 (Del)(HC)
Asiatic Oxygen Ltd.v. Dy. CIT (2015) 372 ITR 421 (Cal.) (HC)
Maruti Clean Coal And Power Ltd. v. ACIT *(*2018) 400 ITR 397 (Chhattisgarh) (HC)
ITO v. Virat Credit & Holdings Pvt. Ltd. ITA NO. 89/DEL/2012 dt. 09/02/2018 (Delhi)(Trib), www.itatonline.org
Sunil Agarwal v. ITO [2002] 83 ITD 1 (TM) (Delhi)(Trib),
Banke Bihar Properties Pvt. Ltd. v. ITO (Delhi)(Trib) www.itatonline.org

29.2 Merely affixing a **'yes'** stamp and signing underneath suggested that the decision was taken by the Board in a mechanical manner as such, the same was not a sufficient compliance under section 151 of the Act. **The approval is a safeguard and has to be meaningful and not merely ritualistic or formal.** ***Central India Electric Supply Co. Ltd. vs. ITO (2011) 51 DTR 51 (Del)(HC)***
Dy. CIT v. Dharampal Satyapal Ltd. (2016) 130 DTR 241/ 175 TTJ 217 (Delhi)(Trib.)
PCIT v. N. C. Cables Ltd. (2017) 391 ITR 11/ 149 DTR 90 (Delhi)(HC)

29.3 (i) Sanction granted by writing "Yes, I am satisfied" is not sufficient to comply with the requirement of s. 151 because it means that the approving authority has recorded satisfaction in a mechanical manner and without application of mind, (ii) If information is received from investigation wing that assessee was beneficiary of accommodation entries but no further inquiry was undertaken by AO, said information cannot be said to be tangible material per se and, thus, reassessment on said basis is not justified (All imp judgments referred)

Pioneer Town Planners Pvt. Ltd vs. DCIT, (2018) 195 TTJ 388 (SN)(Delhi)(Trib.),

Ghanshyam vs. ITO, dtd: 19/06/2018 (ITAT Agra) (2018) 194 TTJ (Agra)(UO) 25
Blue Chip Developers (P) Ltd vs. ITO [dt 02.12.2019 ITA no. 1061 / DEL / 2019]

29.4 **Failure on part of Assessing Officer to take sanction of appropriate authority would go to very root of validity of assumption of jurisdiction by Assessing Officer hence the order is bad in law.** ***Anil Jaggi. v. CIT (2018) 168 ITD 599 (Mum) (Trib.)***

29.5 If the AO issues the notice for reopening the assessment before obtaining the sanction of the CIT, the reopening is void ab initio. The fact that the sanction was given just one day after the issue of notice makes no difference

AO can issue notice only after getting approval. Thus, the ld.CIT(A) has rightly quashed the assessment because the very foundation for issuance of notice under section 148 is the approval from the competent authority, i.e. Commissioner of Income Tax, and in the absence of such, such notice is void ab initio

ITO vs. Ashok Jain, [ITA.No.1505/Ahd/2017, dtd:14/11/2018 (ITAT Surat)]

29.6 **Sanction of commissioner instead of JCIT renders reopening is void :**

There is no statutory provision under which a power to be exercised by an officer can be exercised by a superior officer. When the statute mandates the satisfaction of a particular functionary for the exercise of a power, the satisfaction must be of that authority. Where a statute requires something to be done in a particular manner, it has to be done in that manner .

Ghanshyam K. Khabrani v. ACIT (2012) 346 ITR 443 (Bom)(HC)
DSJ Communication Ltd. .v. DCIT (2014) 222 Taxman 129 (Bom.)(HC)
Purse Holdings India P. Ltd. v. ADDIT(IT)(2016) 143 DTR 1(Mum.)(Trib.)
Yum ! Restaurants Asia Pte Ltd v. Dy. DIT (No.1) (2017) 397 ITR 639 (Delhi) (HC)

CIT vs. Aquatic Remedies Pvt. Ltd [2018] 406 ITR 545 (Bom)(HC)

Sanction by CIT instead JCIT .The fact that the sanction is granted by a superior officer is not relevant **-PCIT vs. Khushbu Industries (Bom)(HC) www.itatonline.org**

29.7 In case of CIT v. Gee Kay Finance And Leasing Co. Ltd. (2018) 401 ITR 472 (Delhi) (HC) it was observed that the satisfaction and approval of the Chief Commissioner or the Commissioner under section 151(1) was a sine qua non before issuance of a notice under section148 by the Assessing Officer, who might be of the rank of an Income-tax Officer or Assistant Commissioner or Deputy Commissioner, but when such notice was to be issued after the expiry of four years period of limitation, the sanction of the Chief Commissioner was a precondition. The proviso to section 151(1), when it referred to an Assessing Officer, could also mean not merely an Assessing Officer below the rank of an Assistant Commissioner and a Deputy Commissioner but also all Assessing Officers

29.8 S. 147 vs. S. 263: If the AO has incorrectly or erroneously applied law and income chargeable to tax has escaped assessment, the Revenue should resort to s. 263 and revise the assessment and not reopen u/s 147. When matter was referred to the CIT for seeking approval, instead of holding that the matter falls u/s 263 and not u/s 148, has given approval u/s 151 which shows non-application of mind and mechanical

grant of approval. Therefore, the assumption of jurisdiction u/s 147 cannot be sustained and is held as invalid in eyes of law

Krish Homes Private Limited vs. ITO, ITA No. 237/JP/2019, CO: 16/JP/ 2019 23/12/2019 (ITAT Jaipur)

29.9 Where Assessing Officer issued notice under section 148 after four years from end of relevant assessment year without obtaining sanction under section 151, then impugned notice under section 148 was unjustified and, consequently, entire reassessment proceedings stood vitiated - **Even if assessment was reopened in consequence of or to give effect to any finding or direction of Appellate Authority, requirement of sanction u/s. 151 is mandatory for issuing notice u/s. 148** .

Sonu Khandelwal vs. ITO [2018] 173 ITD 67 (ITAT Jaipur)

29.10 Two set of reasons – Gist of reasons same –Sanction was obtained – Mere fact that tax authorities conveyed reason twice would not be fatal -Reassessment is held to be valid [S.143(1) 148]

The Court held that gist of reasons recorded in both sets of communications sent to assessee were same and Joint Commissioner perused such reasons and forwarded same to Principal Commissioner with his own remarks and thereupon Principal Commissioner also put his endorsement that it was a fit case for re-opening of assessment. Mere fact that tax authorities conveyed reason twice would not be fatal and, thus, validity of reassessment proceedings deserved to be upheld .

Himmatbhai M. Viradiya vs. ITO (2019) 261 Taxman 132 / 174 DTR 251 (Bom.)(HC)

29.11 Sanction of Additional commissioner instead of Joint Commissioner-Joint Commissioner includes an Additional Commissioner-Notice is held to be valid.

Assessee filed writ petition contending that notice under S. 148 was not issued with prior sanction of Joint Commissioner, but sanction was accorded by Additional Commissioner and, therefore, said notice was without jurisdiction. High Court held that in terms of S. 2(28C), Joint Commissioner includes an Additional Commissioner as well.

Vikram Singh v. CIT (2019) 267 Taxman 381 (All)(HC)

Editorial : SLP of assessee is dismissed ; Vikram Singh v. CIT (2019) 267 Taxman 380 (SC)

XXX. **DISCLOSURE OF PRIMARY FACTS : NO POWER TO REVIEW**

30.1 The Court held that AO has **no power to review** assessment order under shelter of re-opening of assessment under sections 147/148, therefore, **it was not open for AO to re-look at same material only because he was subsequently of view that conclusion arrived at earlier was erroneous**.

Housing Development Finance Corporation Ltd. vs. J. P. Janjid (2014) 225 Taxman 81(Mag.) / (Bom.)(HC); CIT vs. Amitabh Bachchan [2012] 349 ITR 76 (Bom.)(HC),

30.2 Allowance of bad debt was specifically raised in the original assessment proceedings and on receiving explanation from assessee the claim of assessee was allowed, reassessment held to be invalid.(A. Y. 2004□05)
Yash Raj Films P. Ltd. vs. ACIT (2011) 332 ITR 428 (Bom.)(HC)

30.3 Assessment order is not a scrap of paper & AO is expected to have applied his mind. ***Reopening on ground of "oversight, inadvertence or mistake" is not permissible.***
CIT vs. Jet speed Audio Pvt. Ltd. (2015) 372 ITR 762 (Bom.)(HC)

30.4 Order of Assessing officer u/s. 143(3) reflects that the primary facts relating to case was before the Assessing officer therefore there was disclosure of all primary facts relating to claim of deduction u/s. 80IB(10).
Mistry Lalji Narsi Development Corp. vs. ACIT (2010) 229 CTR 359 (Bom)(HC)

30.5. All facts were before AO at the time of original assessment as well as reopened asst. **Even assuming that he failed to apply his mind, assessment cannot be reopened u/s 147**.
Asian Paints Ltd. vs. CIT [2009] 308 ITR 195 (Bom.)(HC)

30.6. In the absence of any fresh material – Reopening would amount to change of opinion. ***The CIT- 8. Vs. M/s. Advance Construction Co. Pvt. Ltd. [INCOME TAX APPEAL NO.77 OF 2014; dt 28/6/2016 (Bom)(HC)]***

30.7 Full particulars were furnished in the course of original assessment proceedings Crescent Construction Co. vs. ACIT (2017) 188 TTJ 497 (**Mum.) (Trib.)**

30.8 There was no failure on part of assessee to submit related documents **Muniwar Abad Charitable Trust vs. ACIT (E) (2017) 59 ITR 204 Mum) (Trib)**

30.9 Reassessment - After the expiry of four years - **Deemed dividend** - No failure to disclose material facts hence reassessment was held to be not valid
Gujarat Mall Management Company Private Limited vs. ITO (2018) 400 ITR 329 (Guj) (HC)

30.10 Reassessment - After the expiry of four years - There was no failure to disclose all material facts – Reassessment was held to be not valid – Alternative remedy is no bar to file writ petition if the action of the authority is beyond their jurisdiction.
Cedric De Souza Faria. vs. DCIT (2018) 400 ITR 30 (Bom)(HC)

30.11 The fact that the assessee did not disclose the material is not relevant if the AO was otherwise aware of it. ***If the AO had the information during the assessment proceeding, irrespective of the source, but chooses not to utilize it, he cannot allege that the assessee failed to disclose truly and fully all material facts*** & reopen the assessment (Scope of Explanation 1 to S. 147 explained)

Rajbhushan Omprakash Dixit vs. DCIT, (2019) 264 Taxman 222 (Bom) (HC)

30.12. The ***computation of income is the basic document*** for making the s. 143(3) assessment. If there is a ***disclosure in the computation, it leads to the prima facie*** necessary inference that there is application of mind by the AO. The fact that the AO did not raise specific queries & is silent in the assessment order does not mean there is no application of mind (Techspan 404 ITR 10(SC) followed, other contra judgements distinguished)

State Bank Of India vs. ACIT, (2019) 411 ITR 664 (Bom)

30.13 Business expenditure – Capital or revenue - Advertisement and sales promotion-Complete disclosure of all primary material facts on part of assessee in course of assessment-, Reassessment proceedings merely on basis of change of opinion was not justified.
Asian Paints Ltd. v. Dy. CIT (2019) 261 Taxman 380 (Bom.)(HC)

30.14 Since assessee failed to disclose ***primary fact of taxing event*** i.e. allotment of shares in their returns, initiation of reassessment proceedings was justified - [Para 70] [In favour of revenue]

Sonia Gandhi vs. ACIT [2018] 257 Taxman 515 (Delhi High Court)

30.15 The reasons in support of the s. 148 notice is the very issue in respect of which the ***AO had raised a query during the assessment proceedings and the Petitioner had responded justifying its stand***. The non-rejection of the explanation in the Assessment Order amounts to the AO accepting the view of the assessee, thus taking a view/forming an opinion. In these circumstances, the reasons in support of the notice proceed on a mere change of opinion and would be completely without jurisdiction

ACIT vs. Marico Ltd (Supreme Court) www.itatonline.org

[Approved Bombay High Court decision Writ petition 1917 of 2019 dt 21/08/2019]

30.16 **Reassessment-After the expiry of four years-Furnishing all details in response to notices-Non-application of mind by assessing officer to materials produced at the time of original assessment-Reassessment is invalid.**

Allowing the petition the Court held that there was no application of mind by the AO to the jurisdictional requirements to issue notice u/s. 148. Firstly, the assessment was sought to be reopened after four years and it was not mentioned that the assessee had

failed to disclose all material facts in the reasons supporting the notice for reassessment. Secondly, on the facts, there had been no failure by the assessee to fully and truly disclose all the material facts.

Supra Estates India Pvt. Ltd. v. ITO (2019) 418 ITR 130 / (2020) 268 Taxman 88 (Bom.)(HC)

XXXI. **DISCLOSURE IN BALANCE SHEET ALSO AMOUNTS TO DISCLOSURE** :

31.1 **Decisions in favour** :

CIT vs. Corporation Bank Ltd (2002) 254 ITR 791 (SC)
Arthus Anerson & Co. vs. ACIT (2010) 324 ITR 240 (Bom)(HC)
Considering the decision against of Dr. Amin's Pathology Lab vs. P.N. Prasad (2001) 252 ITR 673 (Bom)(HC)
CIT .v. Lincoln Pharmaceuticals Ltd. (2015) 375 ITR 561 (Guj.)(HC)

- **Sutra Ventures Pvt Ltd v UOI (2019) 111 Taxmann.com 442 (Bom.)(HC)**
  Court held that, the assessee had produced all material such as acknowledgement of return, balance sheet, profit and loss account, tax audit report, return of income of directors, shareholding pattern, bank account details etc. during original assessment. Therefore, ***profit and loss account was thoroughly scrutinized*** during original assessment and, thereafter, an assessment order was passed. Accordingly, there was no failure on part of assessee to produce all material particulars during original assessment. Allowing the petition the Court held that it cannot be said that there was any failure on part of the assessee to produce any material particulars, accordingly the notice issued by the AO is quashed.

31.2 ***Against :***

ACIT v. M.P. Laghu Udyog Nigam Ltd. (2017) 165 ITD 446 (Indore) (Trib.)

- Mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Hence reopening of assessments is perfectly in accordance with law hence same is upheld.

  CIT v. Tata Ceramics Ltd. (2018) 403 ITR 389 (Ker) (HC)

XXXII. **FULL AND TRUE DISCLOSURES OF ALL MATERIAL FACTS *:***

32.1 **No failure to disclose all material facts fully and truly**

ICICI Securities Ltd. .v. ACIT (2015) 231 Taxman 460 (Bom.)(HC)
Business India .v. DCIT(2015) 370 ITR 154/299 Taxman 289 (Bom.) (HC)
Prashant Project Ltd. vs. Asst. CIT (2011) 333 ITR 368 (Bom)
Hindustan Petroleum Corporation Ltd. vs. Dy. CIT (2010) 328 ITR 534 (Bom)
Betts India (P.) Ltd. v. Dy. CIT (2015) 235 Taxman 77 (Bom.)(HC)
Kimplas Trenton Fittings Ltd. v.ACIT (2012) 340 ITR 299 (Bom.)
Hamdard Laboratories (India) & Anr. v. ADIT(E) (2015) 379 ITR 393 (Delhi)(HC)
Dempo Brothers Pvt Ltd. v. ACIT (2018) 403 ITR 196 (Bom) (HC)

ACIT v. Kalyani Hayes Lemmerz Ltd (Bom) (HC)
Kotarki Constructions (P) Ltd. v. ACIT (2018) 162 DTR 49 (Karn) (HC)
PCIT v. State Bank of Saurashtra (2019) 260 Taxman 194 (Bom) (HC)
CMI FPE Ltd. v. UOI (2019) 263 Taxman 433 (Bom.)(HC)
CIT. v. M/s National Stock Exchange of India Ltd,[INCOME TAX APPEAL NO.1164 OF 2016, DATE : FEBRUARY 18, 2019. (Bom)(HC)]
State Bank of India v. ACIT (2019) 175 DTR 335 (Bom.)(HC) (Referred Dr.Amin's Pathology Laboratory (2001) 252 ITR 673 (Bom) (HC) Raymond Woollen Mills Ltd v ITO (1999) 236 ITR 34 (SC)
Best Cybercity (India) Pvt. Ltd. v. ITO (2019) 414 ITR 385 (Delhi)(HC)

The CIT (E) v Mumbai Metropolitan Region Development Authority (MMRDA), [INCOME TAX APPEAL NO. 1315 OF 2016, DATED : 4th FEBRUARY, 2019 (Bom)(HC)]
CIT(E) v. Marhatta Chamber of Commerce Industries & Agriculture (2019) 175 DTR 137 (Bom.)(HC)

32.2 All material facts disclosed in the original assessment proceedings – Reassessment to verify cash intensive transactions is held to be not valid .[S.148]
The Court held that where the assessee had disclosed all the material facts. Reassessment to verify cash intensive transactions is held to be not valid .
Revolution Forever Marketing Pvt. Ltd. v. ITO (2019) 413 ITR 400 (Delhi) (HC)

32.3 No failure to disclose material facts - Finding in case of another assessee - Reassessment was held to be not valid. [S. 80IB(10) ,148]
Pr.CIT v Vaman Estate PCIT v. Vaman Estate (2020) 113 taxmann.com 405 (Bom.)(HC)
Editorial : SLP of revenue is dismissed ; PCIT v. Vaman Estate (2020) 269 Taxman 196 (SC)

32.4 Reassessment – After the expiry of four years - Change of opinion-the Court held that notice was issued beyond period of four years from end of assessment year 2011-12 and **there had been a complete disclosure of all material facts on part of assessee during regular assessment proceedings u/s.143(3)**, impugned notice was clearly hit by first proviso to section 147 and deserved to be set aside.
DCIT v. MSEB Holding Co. Ltd. (2019) 102 taxmann.com 288 (Bom) (HC)
Editorial: SLP of revenue is dismissed, since tax effect is less than Rs.2Crore. DCIT v. MSEB Holding Co. Ltd. (2020) 269 Taxman 22 (SC)

32.5 After the expiry of four years-No failure to disclose all material facts – Reassessment is bad in law .[S.80IB(10), 148]
The Court held that there was no failure to disclose material facts , reassessment is held to be bad in law. (AY. 2011-12)

Akshar Anshul Construction LLP v. ACIT (2019) 264 Taxman 65 (Bom)(HC)

32.6 Reassessment-After the expiry of four years-Interest on ECB-No failure to disclose material facts

AO passed order u/s 143(3) by rejecting assessee's claim of such income on securities not being taxable in India, However, he allowed assessee's claim of interest income on ECB. AO issued notice proposing to reopening of assessment for failure on assessee's part that it did not made true and full disclosure regarding its beneficial ownership status accordingly claim of exemption on interest on ECB was chargeable to tax under Act. The Court held that AO not only considered assessee's claim during scrutiny assessment, not being satisfied, raised multiple queries during such assessment. Reopening is based on mere change of opinion and would be impressible. Accordingly notice was set aside. (AY. 2011-12)

HSBC Bank (Mauritius) Ltd. v. DCIT(IT) (2019) 307 CTR 456 / 175 DTR 153 (Bom.)(HC)

32.7 After the expiry of four years- Interest paid on purchase of securities - expenditure for increase in capital – loss on securities - Excess claim of depreciation - There was no failure on part of assessee to disclose fully and truly all relevant material- Reassessment is bad in law .[S. 32 , 36(1), 148]

All the deductions/allowance/disallowance of expenses were dealt with by Assessing Authority at time of original scrutiny assessment made under section 143(3) and there was nothing on record to show that there was non-application of mind on part of Assessing Authority on these aspects of matter at time of original scrutiny assessment. Accordingly the reassessment notice was unjustified and, thus, same was rightly quashed by Tribunal.

CIT v. City Union Bank Ltd. (2019) 264 Taxman 204 (Mad)(HC)

32.8 Tangible material is required-Live link with such material for formation of the belief. Merely using the expression "failure on the part of the assessee to disclose fully and truly all material facts" is not enough. The reasons must specify as to what is the nature of default or failure on the part of the assessee**.**

BPTP Limited vs. PCIT (2020) 185 DTR 372 (Delhi)(HC),

32.9 In absence of any failure on part of assessee to disclose fully and truly all material facts at time of assessment- Reassessment proceedings is held to be bad in law

PCIT v. L&T Ltd. (2020) 113 taxmann.47 /268 Taxman 391 (Bom)(HC)

Editorial: SLP of revenue is dismissed. PCIT v. L&T Ltd. (2020) 268 Taxman 390 (SC)

XXXIII. **REASSESSMENT WITHIN FOUR YEARS :ASST COMPLETED U/S. 143(3):**

33.1 An asst. order passed after detailed discussion cannot be reopened within a period of 4 years unless the AO has reason to believe that there is to some inherent defect in the assessment.

German Remedies Ltd vs. DCIT & Ors (2006) 285 ITR 26 (Bom)
Siemens Information System Ltd. vs. ACIT (2007) 295 ITR 333 (Bom)
Godrej Agrovet Ltd. V. Dy. CIT [2011] 323 ITR 97 (Bom)
Capgemini India (P.) Ltd. v. ACIT (2015) 232 Taxman 149 (Bom.)(HC)
Friends of WWB India v. DIT (2018) 402 ITR 350 (Guj) (HC)
CIT v. Aroni Commercial Ltd. (2017) 393 ITR 673 (Bom)
United States Pharmacopiea India Pvt.Ltd. v. DCIT (2017) 57 ITR 312 (Hyd. Trib.)
Vijay Harishchandra Patel. v. ITO (2018) 400 ITR 167 (Guj) (HC)
Jalaram Enterprises (P.) Ltd. v. ITO (2019) 262 Taxman 404 (Bom) (HC)
Pr. CIT v. Century Textiles and Industries Ltd(2018) 167 DTR 105 /(2019) 412 ITR 228 (Bom.) (HC)
Editorial : SLP of revenue is dismissed, PCIT v. Century Textiles & Industries Ltd (2018) 408 ITR 59 (St)/ 259 Taxman 360 (SC)
M IHHR Hospitality Pvt. Ltd. v. ACIT (2019) 415 ITR 459 (Delhi)(HC)

- **Rubix Trading (P) Ltd. v. ITO (2019) 174 DTR 1 (Bom.)(HC)-** Where the AO had questioned the assessee with respect to a particular income but not dealt with it in the order, reopening on the ground of taxability of the same income would amount to a change of opinion.
  Editorial: SLP of revenue is dismissed, CIT v. Rubix Trading (P.) Ltd. (2019) 265 Taxman 423 (SC)/ 416 ITR 136(St.) (SC)

- Reassessment- Within four years- In the absence of assessee's failure to disclose facts, reassessment was to be quashed.
  Samson Maritime Ltd. v. Dy. CIT (2019) 175 DTR 25 (Bom.)(HC)

33.2 **Change of opinion Within period of Four year:**

Once an assessment has been completed under section 143 (3) after raising a query on a particular issue and accepting assessee's reply to the query. Assessing Officer has no jurisdiction to reopen the assessment merely because the issue in question is not specifically adverted in the assessment order ,unless there tangible material before the Assessing Officer to come to the conclusion that there is escapement of income.(Asst Year 1998 99).

Asst CIT v Rolta India Ltd (2011)132 ITD 98 (Mumbai) (TM) (Trib)

33.3 Change of opinion - reopening not permissible

CIT - 3 vs. SICOM LTD. [Income tax Appeal no 137 of 2014 dt : 08/08/2016 (Bombay High Court)].
CIT v. Balaji Neemuch Infrastructure Pvt. Ltd. (2019) 414 ITR 707 (MP)(HC)
CIT v. Atul Ltd. (2019) 415 ITR 1 (Guj) (HC)

Pawan Sood. v. CIT (2019) 415 ITR 350 (All) (HC)

33.4 During original assessment, assessee's claim was processed at length and after calling for detailed explanation from him, same was accepted. *Merely because a certain element or angle was not in mind of Assessing Officer while accepting such a claim, could not be a ground for issuing notice* under section 148 for reassessment. Mere failure of AO to raise such a question would not authorise him to reopen assessment even within period of 4 years from end of relevant assessment year, any such attempt on his part would be based on mere change of opinion, therefore, notice issued under section 148 was liable to be quashed.

Cliantha Research Ltd. .v. Dy. CIT (2014) 225 Taxman 102 (Mag.) (Guj.)(HC)

- The assessment cannot be reopened (within 4 years) on the ground that the AO lost sight of a statutory provision like 50C. This amounts to a review. Here it is not the case of the Revenue that the AO was not aware of s. 50C at the time of passing the S. 143(3) assessment order.

PCIT vs. Inarco Limited, INCOME TAX APPEAL NO.102 OF 2016, dtd: 23/07/2018 (Bom)(HC)

XXXIV. RE-ASSESSMENT – CHANGE OF OPINION- FACTS DISCLOSED IN ORIGINAL ASSESSMENT PROCEEDING:

34.1. **CHANGE OF OPINION**

Amendment as per Direct tax laws (Amendment) Act, 1989 w.e.f. April 1, 1989 as also of sec. 148 to 152 have been elaborated in circular No. 549, dated October 31, 1989. A perusal of clause 7.2 of the said circular makes it clear that the amendments had been carried out only with a view to allay fears t hat the omission of the expression reason to believe" from sec. 147 would give arbitrary power to AO to reopen past assessments on a mere change of opinion i.e. a more change of opinion cannot form basis for reopening a completed assessment.

CIT vs. Kelvinator of India Ltd (2002) 256 ITR 1 (Del) (FB) (AY 1997-1998)

Approved by Supreme Court in (2010) 320 ITR 561 (SC)

ITO v. Techspan India (P) Ltd (2018) 404 ITR 10/ 302 CTR 74 (SC)

34.2. In determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage.

Raymond Woollen Mills Ltd. Vs. ITO And Others (1999) 236 ITR 34 (S.C.)

34.3. Points not decided while passing assessment order under section 143(3) not a case of change of opinion. Assessment reopened validly.

Yuvraj vs. Union Of India (2009) 315 ITR 84. (Bom.)

DURING THE ORIGINAL SCRUTINY ASSESSMENT ASSESSING OFFICER HAD EXAMINED THE ASSESSEE'S CLAIM.

34.4 During the original scrutiny assessment, the assessee's claim of deduction u/s. 10B of the Act was scrutinized, any attempt on part of Assessing Officer to reexamine the said claim, without any material would be based on change of opinion. Reopening of assessment was therefore clearly impermissible.
Pr.CIT-7 v Hanil Era Textiles Ltd, INCOME TAX APPEAL NO.203 OF 2017, dated: 15/04/2019 (Bom)(HC)

34.5 During the original scrutiny assessment, the Assessing Officer had examined the Assessee's claim of computer software expenses. Through the reopening process, AO desired to re-examine the same. Without there being new tangible material available with him, the Tribunal correctly held that the same was impermissible.
Pr. CIT-7 v. Mahindra & Mahindra Financial Services Ltd, INCOME TAX APPEAL NO.288 OF 2017, DATE :02/4/2019 (Bom)(HC)

34.6 Deduction u/s 80(P)(2) of the Act was examined by the AO during original scrutiny Assessment .When the claim was examined during the original scrutiny assessment, the assessment could not have been reopened, on the basis of an amendment which was already in existence when the assessment was framed. Income Tax Appeal is dismissed.
Yashomandir Sahakari Patpedhi Ltd . [INCOME TAX APPEAL NO.112 OF 2017, DATE : 12th MARCH, 2019 (Bom)(HC)]

34.7 No reopening of assessment to examine another facet of a claim : High Court by impugned order held that since Assessing Officer, in original assessment had thoroughly scrutinized claim of deduction under section 10B and allowed same, he could not reopen assessment to examine another facet of said claim - Whether Special leave petition filed against impugned order was to be dismissed - Held, yes [Para 10] [In favour of assessee]
DCIT *vs.* Qx Kpo Services (P.) Ltd. [2018] 259 Taxman 317 (SC)

34.8 During the original assessment, the Assessing Officer had examined the claim of the assessee of the expenditure in question being revenue in nature. Without any additional material, the Assessing Officer exercised power of reassessment and held that the expenditure was capital in nature which was fully impermissible.
Pr. CIT - Central 4 vs. M/s. Shreya Life Sciences Pvt Ltd, INCOME TAX APPEAL NO. 1854 OF 2016, DATE : MARCH 6, 2019 (Bom)(HC)

34.9 Reassessment-After the expiry of four years- Bogus sales and purchases – Dealer in iron and steel- If the AO disallowed 2.5% of alleged bogus purchases during the regular assessment-Reassessment to disallow entire amount is said to be bad in law- There is difference between revisional powers and reassessment . [S. 68, 69 148, 263]

Assessment which was accepted u/s 143(1) which was reopened on the ground that the purchase from hawala dealers on the basis of information received from Sales tax department . The AO after detailed verification made an addition of 2.5% of alleged bogus purchases. AO once again issued notice u/s 147 on the ground that as per N. K. Proteins Ltd 2017-TIOL-23-SC-IT the entire amount should have been disallowed. On writ allowing the petition the court held that as per settled law, if a claim or an issue had been examined by the Assessing Officer during the previous assessment proceedings, in absence of any material available to the Assessing Officer later on to reassess such income would based on mere change of opinion and, therefore, impermissible. Court also observed ,the Act recognizes the revisional powers of the Commissioner to be exercised in case where the assessment order is erroneous and prejudicial to the interest of the Revenue. However, the reopening of assessment is an entirely independent and vastly different jurisdiction and cannot be confused with the revisional powers of the higher authority. WP No. 3495 of 2018, dt. 17.01.2019) (AY.2011-12)

Saurabh Suryakant Mehta v. ITO (Bom)(HC), www.itatonline.org

34.10 **Reassessment-After the expiry of four years- Transfer of asset to subsidiary - Subsequent transfer by subsidiary to third party -Transaction was disclosed in the original assessment proceedings- Re assessment is held to be not valid**

Allowing the petition the Court held that , Explanation 1 to section 147 would not apply as all the primary facts were disclosed, stated and were known and in the knowledge of the Assessing Officer. This would be a case of "change of opinion" as the assessee had disclosed and had brought on record all facts relating to transfer of the passive infrastructure assets, their book value and fair market value were mentioned in the scheme of arrangement as also that the transferred passive assets became property of I including the dates of transfer and the factum that one-step subsidiary BIV was created for the purpose. These facts were within the knowledge of the Assessing Officer when he passed the original assessment order for the AY 2008-09. The notice of reassessment was not valid.

Bharti Infratel Ltd. v. DCIT (2019) 411 ITR 403/ 174 DTR 169 (Delhi)(HC)

34.11 Reassessment- After the expiry of four years- Acceptance of loans and deposits - Otherwise than by account payee cheque or account payee bank draft – reassessment proceedings was merely based on change of opinion of Assessing Officer, impugned order passed by Tribunal up held .[S.148 , 269SS]

Assessment was completed assessment u/s. 143(3) making certain additions to income declared . After expiry of four years from end of relevant year, Assessing Officer initiated reassessment proceedings on ground that assessee had accepted loan, deposits etc. of Rs. 20,000/-or more in cash in violation of provisions of section 269SS . Tribunal finding that there was no omission or failure on part of assessee to disclose fully and truly all material facts at time of original assessment and allegation that deposits were unexplained, were not based on any cogent material evidence on record. Dismissing the appeal of the revenue the Court held that since initiation of

reassessment proceedings was merely based on change of opinion of AO, impugned order passed by Tribunal did not require any interference. (AY. 1992 – 93)
CIT v. Sahara India Mutual Benefit Co. Ltd. (2019) 261 Taxman 83 (Cal.)(HC)

34.12 Change of opinion- Loans or advances to share holders – Disclosed material facts- Reassessment is held to be not valid .[S.2(22)(e), 148]
The Court held that , since assessee had made full disclosure of all material facts at time of assessment, initiation of reassessment proceedings merely on basis of change of opinion was not justified.
ITO v. Sanjeev Ghei. (2019) 262 Taxman 265 (Delhi) (HC)
Editorial: SLP of revenue dismissed **ITO v. Sanjeev Ghei. (2019) 262 Taxman 264 (SC)**

34.13 **Change of Opinion : Case Laws:**
No new material brought on records – Reassessment on change of opinion of officer not valid.

a. Asteroids Trading & Investment P. Ltd. vs DCIT (2009) 308 ITR 190 (Bom) (HC)
b. Asian Paints Ltd. vs. DCIT (2008) 308 ITR 195 (Bom)(HC) (198)
c. ICICI Prudential Life Insurance Co. Ltd. (2010) 325 ITR 471 (Bom)(HC)
d. Aventis Pharma Ltd. vs. Astt. CIT (2010) 323 ITR 570 (Bom)(HC)(577)
e. Nirmal Bang Securities (P) Ltd. v. ACIT. (2016) 382 ITR 93 (Bom.)(HC)
f. Aryan Arcade Ltd v. DCIT (2017) 390 ITR 67 (Guj)(HC)
g. Valsad District Central Co-Operative Bank Ltd. v. ACIT (2019) 414 ITR 616 (Guj)(HC)

i. Reassessment on same issue is change of opinion hence not valid. - Assessment completed after enquiry and replies furnished by assesse could not be reopened. [S.148]
Capri Global Advisory Services Pvt. Ltd. v DCIT-1(1)(1), ITA No. 170/Mum/ 2017 , DOH: 10/04/2019 (Mum)(Trib)

34.14 Reassessment has to be based on "fresh material". A reopening based on reappraisal of existing material is invalid.
DIT v. Rolls Royal Industries Power India Ltd. (Delhi)(HC),www.itatonline.org
Golden Tobacco Limited v. DCI ITA NO. 5858 & 5859 /M/2012 Dt. 28/10/2015 (A. Y. 2005-06 & 2006-07)(Mum.)(Trib.) www.itatonline.org
Uttaranchal Jal Vidyut Nigam Ltd v. ACIT (2016) 47 ITR 198 (Delhi) (Trib)
PCIT v. Anil Nagpal (2017) 291 CTR 272/ 145 DTR 209 (P&H)(HC)
Lambda Therapeutic Research Ltd. v. ACIT (2018) 402 ITR 177 (Guj) (HC)
Giriraj Steel v. DCIT (2018) 402 ITR 204 (Guj) (HC)
Pawan Sood v. ITO (2019) 175 DTR 217 /307 CTR 452 (All.)(HC)

34.15 <u>Facts which come to the knowledge of the assessing officer in subsequent assessment years proceedings- form tangible material</u> :

The Hon. court relied on the decisions in case of **Claggett Brachi Co. Ltd., London vs. CIT , Andhra Pradesh [(1989) 177 ITR 409 (SC)] [1989 Supp(2) SCC 182]; M/s Phool Chand Bajrang Lal and Another vs. ITO and Another [(1993) 203 ITR 456 (SC)] [(1993) 4 SCC 77] and Ess Kay Engineering Co.(P) Ltd. vs. CIT , Amritsar [(2001) 247 ITR 818 (SC)] [(2001) 10 SCC 189]**, for the proposition that subsequent facts which come to the knowledge of the assessing officer can be taken into account to decide whether the assessment proceedings should be re-opened or not. Information which comes to the notice of the assessing officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer u/s. 147 of the Act.

New Delhi Television Ltd. v/s. DCIT [CIVIL APPEAL NO. 1008 OF 2020 ; dated : 3rd April , 2020 Supreme court (AY: 2008-09)] www.itatonline.org

XXXV. **<u>RE-ASSESSMENT – AUDIT OBJECTION</u>**

35.1 If the AO disagrees with the information/ objection of the audit party and is not personally satisfied that income has escaped assessment but still reopens the assessment on the direction issued by the audit party, the reassessment proceedings are without jurisdiction**. Larsen & Toubro Ltd. v. State of Jharkhand [2017] 79 Taxmann.com 267 (SC)** www.itatonline.org

35.2 AO having communicated to the auditor that a certain decision of a HC did not apply to the facts of the petitioners case but later rejected the objections raised by the petitioner to the notice u/s. 148 taking a contrary view without giving any reason as to why he has departed from the earlier view that the decision was not applicable, there was total non application of mind on the part of AO; matter remanded back to AO for de-novo consideration.

Asian Cerc Information Services (P) Ltd vs. ITO (2007) 293 ITR 271 (Bom)(HC)

35.3 AO having allowed assessee's claim for depreciation in the regular assessment and reopened the assessment pursuant to audit objection, it cannot be said that he had formed his own opinion that the income had escaped assessment, and the reopening being based on mere change of opinion, same was not valid.

IL & FS Investment Managers Ltd. vs. ITO & Ors(2008) 298 ITR 32 (Bom)(HC)

CIT vs. Rajan N. Aswani (2018) 403 ITR 30 (Bom)(HC),

Vijaykumar M. Hirakhanwala (HUF) vs. ITO & Ors (2006) 287 ITR 443 (Bom)(HC)

CIT vs. Lucuns TVS Ltd. [2001] 249 ITR 306 (SC)

Prothious Engineering Services Pvt. Ltd. vs. ITO (2016) 46 ITR 438 (Mum.)(Trib)

Purity Tech Textiles Pvt. Ltd. vs. ACIT (2010) 325 ITR 459 (Bom)(HC)

CIT .vs. DRM Enterprises(2015)230 Taxman 61/ 120 DTR 401(Bom.)(HC)
Reckit Benckiser Healthcare India P. Ltd vs. Dy. CIT (2017) 392 ITR 336 (Guj.)(HC)
Torrent Power S.E.C. Ltd v. ACIT (2017) 392 ITR 330 (Guj.)(HC)
Mehsana District Central Co-op Bank Ltd. vs. ACIT [2018] 93 TAXMANN.COM 219 (Guj.)(HC),

35.4 Audit Objection cannot be the basis for reopening of assessment to income tax by the revenue.
Indian & Eastern Newspaper Society Vs. CIT (1979) 119 ITR 996 (SC).

35.5 If the reassessment notice is solely based on an audit opinion, it means it is issued on change of opinion which is not permissible :
Since it is settled law that mere change of opinion cannot form the basis for issuing of a notice under section 147/148 of the Act . It is not new or fresh or tangible material.
FIS Global Business Solutions India Pvt. Ltd vs. PCIT, (2019)102 taxmann.com 471 (Delhi) (HC)
Editorial: SLP of revenue is dismissed , ACIT v. FIS Global Business Solutions India (P.) Ltd. (2019) 262 Taxman 369 (SC)

35.6 Loan transaction was duly scrutinized by Assessing Officer in original assessment. Notice issued on insistence of audit party , hence reassessment is held to be bad in law .
Hamilton Housewares (P.) Ltd. v. DCIT (2019) 262 Taxman 410 (Bom)(HC)
Hamilton Housewares (P.) Ltd. v. DCIT (2019) 262 Taxman 418 (Bom)(HC)

35.7 Reassessment proceedings quashed on ground that said proceedings were based on mere audit objection that there was undervaluation of closing stock.
PCIT v. S. Chand & Co. Ltd (2019) 260 Taxman 108 (Delhi) (HC)
Editorial: SLP of revenue is dismissed ; PCIT v. S. Chand & Co. Ltd. (2019) 260 Taxman 107 (SC)

35.8 Reassessment was not valid as the AO held no belief on his own at any point of time that income of assessee had escaped asst. on account of erroneous computation of benefit u/s 80HHC and was constrained to issue notice only on the basis of audit object.
Adani Exports vs. DCIT (1999) 240 ITR 224 (Guj)(HC) (AY: 1993-94)

35.9 S. 147: If AO contests the audit objection but still reopens to comply with the audit objection, it means he has not applied his mind independently and the reopening is void**:**
Raajratna Metal Industries Ltd vs. ACIT [2014] 227 TAXMAN 133 (Guj)(HC).
National Construction Co. v. Jt. CIT (2015) 234 Taxman 332 (Guj.)(HC)

- Assessing Officer tried to justify his order and requested to drop the proceedings. Notice based solely on opinion of audit party-Not valid
  Shree Ram Builders v. ACIT (OSD) (2015) 377 ITR 631 (Guj.)(HC)

35.10 **Audit objection vis-à-vis debatable issue:-**

Letter written by AO to CIT showing that AO himself found that the issue on which reassessment was sought was debatable, reasons recorded by A.O did not meet the requirements of law.
Sunil Gavaskar V/s ITO (2016) 134 DTR (Mumbai ITAT) 113.

35.11 CBDT instruction directing remedial action in case of audit objections. Notice based solely on such instruction (CBDT Instruction No. 9 of 2006). No failure to disclose fact. No allegation that material facts had not been disclosed . Notice was held not valid.
Sun Pharmaceutical Industries Ltd. vs. Dy.CIT (2016) 381 ITR 387/ 237 Taxman 709(Delhi)(HC)

35.12 Assessing Officer disagreeing with audit objection yet issuing notice –Reassessment was held to be not valid
AVTEC Ltd. vs. DCIT(2015) 370 ITR 611 (Delhi)(HC)

XXXVI. **REASSESSMENT – INTERPRETATION OF HIGH COURT DECISION:**

36.1 Reopening of assessment on the basis of wrong interpretation of high court decision was invalid.
Assam Co. Ltd vs. UOI & Ors (2005) 275 ITR 609 (Gau)

XXXVII. **DIRECTION OF THE HIGHER AUTHORITIES:**

37.1 Revisional authority having directed the AO to adjudicate specific issues which were addressed and examined by him, asst made by the AO on a higher total income by assuming more powers than that of the revisional authority is patently illegal and without jurisdiction.
N. Seetharaman vs. CIT (2008) 298 ITR 210 (Mad)

37.2. The assessing officer for the AY: 2000-01 recorded a specific note in the assessment order which indicated that the assessment order was passed under the dictates of the commissioner. The Supreme court in the challenge to the reopening for the same AY held that the assessment order passed on the dictates of the higher authority being wholly without jurisdiction, was a nullity. Therefore with a view to complete the justice to the parties. The Supreme Court directed that the assessment proceedings should be gone through again.
CIT vs. Greenworld Corporation (2009) 314 ITR 81 (SC).

37.3 No new material-Notice under direction of Commissioner-Reassessment is held to be not valid.

Distinguished IPCA Laboratories Ltd v Dy.CIT (2001) 251 ITR 420 (Bom) (HC)

CIT v. Narcissus Investments P. Ltd. (2019) 417 ITR 512 / 182 DTR 73 (Bom.)(HC)

XXXVIII. ***SUPREME COURT DECISION CANNOT BE THE BASIS FOR REOPENING:***

38.1 The ITO cannot seek to reopen an assessment u/s. 147 on the basis of the Supreme Court decision in a case where assessee had disclosed all material facts.

Indra Co. Ltd. vs. ITO (1971) 80 ITR 559 (Cal.)(HC)

***SESA Goa ltd vs.* Jt CIT [2007] 294 ITR 101 (Bom)(HC)**

CIT vs. ITW India Ltd. (2015) 377 ITR 195 (P & H)(HC)

Subsequent High court decision - beyond 4 year Discloure of complete facts. Reopening bad in law.

38.2 Contrary Decision:

Kartikeya International vs. CIT (2010) 329 ITR 539 (All.)(HC)

Asst. CIT v. Central Warehousing Corp.(2012) 67 DTR 356 (Delhi)(HC)

XXXIX. **REASSESSMENT BASED ON RETROSPECTIVE AMENDMENT. NOT JUSTIFIED:**

- Denish Industries Ltd. Vs. ITO[2004] 271 ITR 340 (Guj.)(HC) (346)
  SLP dismissed(2005)275 ITR 1 (St.)
- Rallies India Ltd. vs. ACIT (2010) 323 ITR 54 (Bom)(HC)
- SGS India Pvt. Ltd. vs. ACIT (2007) 292 ITR 93 (Bom)(HC)
  Law in subsequent A.Y. is different, reopening not proper.
- Siemens Information Ltd. v. ACIT (2007) 293 ITR 548 (Bom)(HC)
  Notice u/s. 148 based on amended law not applicable to relevant A.Y.
- Sadbhav Engineering Ltd. vs. Dy. CIT [2012] 333 ITR 483 (Guj.)(HC)
- Kalpataru Sthapatya (P) Ltd. (2012) 68 DTR 221 (Guj)(HC).
- **Reopening, even within 4 years, on basis of retrospective amendment to section 80IB(10) is held to be invalid.:**
  Ganesh Housing Corporation Ltd. v. Dy. CIT [2013] 350 ITR 131(Guj)(HC)
- **Reassessment held to be invalid only on the basis of retrospective amendment as there is no failure to disclose fully and truly all material facts. [S. 80IB(10)]**
  Assessee claimed the deduction under section 80(IB)(10) after enquiry the deduction was allowed. The amendment was introduced by Finance Act, 2009, inserting Explanation with retrospective effect from 1st April, 2001 which denied benefit of deduction under section 80IB(10) to works contractors execution housing project. The only reason for issuing the notice, was amendment brought in the statute book with retrospective effect. The said notice was challenged before the High Court. High Court quashed the notice and held that reopening only on the basis of retrospective amendment of law is not justified. (A. Y. 2004-05).
  Pravin Kumar Bhogilal Shah v. ITO (2012) 66 DTR 236 (Guj.)(HC)

Vinayak Construction v. ITO (2012) 66 DTR 233 (Guj.)(HC)

- **S.147: Reassessment-After the expiry of four years - Benefit of Double taxation benefit – Tax residency certificate-Introduced subsequently- Reassessment is bad in law - DTAA-India –UAE [S.148, Art.4(b)]**
  In the original assessment the assessee had disclosed that he was governed by the Double Taxation Avoidance Agreement between India and the United Arab Emirates. The details called for had been furnished and placed on record. The passport also was produced to establish the number of days the assessee was abroad to qualify to be a non-resident. A perusal of the reasons for notice of reassessment clearly showed that the only reason was that the tax residency certificate or any other details were not supplied by the assessee. **The requirement to produce the tax residency certificate was introduced by the Finance Act, 2012 with effect from April 1, 2013**. The present proceedings were in connection with the assessment year 2005-06 and there was no need of producing such certificate as on that date. Besides that, the requirement of stay in the United Arab Emirates for a period of six months had been introduced in article 4(b) of the amended Double Taxation Avoidance Agreement between India and the United Arab Emirates which came into effect only from November 28, 2007. Accordingly reassessment is held to be not valid . (AY.2005 - 06)
  Prashant M. Timblo v. CCIT (2019) 414 ITR 507 (Bom)(HC)
  Editorial: SLP of revenue is dismissed CCIT v. Prashant M. Timblo (2018) 408 ITR 72 (St) (SC)

- ***Ignorance of board circular is not sufficient to Reopen:***
  The mere fact that the ITO was not aware of the circular of the board is not sufficient to reopen the assessment.
  Dr. H. Habicht V. Makhija (1985) 154 ITR 552 (Bom.)**(HC)**

XL. <u>Appeal pending from original assessment order. Reassessment cannot be done as the order merged with order of Higher authorities</u>.

40.1 Proviso to section 147 has been inserted by Finance Act, 2008, w.e.f. 2008.
(2008) 298 ITR 163 (st), - Notes on clauses.
(2008) 298 ITR St. 222 to 224 Memorandum explaining the provision.
Metro Auto Corporation vs. ITO (2006) 286 ITR 618 (Bom) (HC)
Vodafone Essar Gujarat Ltd. Vs. ACIT (2010) 37 DTR 259 (Guj.) (HC)

40.2 Appeal was pending before ITAT and the matter was subject matter of appeal before CIT(A). No Reassessment. Once an issue is subject matter of appeal before Tribunal , issuance of notice of reassessment on said ground has to be considered bad in law. (A.Y. 2000□01).
Chika Overseas (P) Ltd v ITO (2011) 131 ITD 471 (Mum) (Trib).

ICICI Bank Ltd. v. Dy. CIT (2012) 246 CTR 292/ 204 Taxman 65 (Mag.)(Bom.)(HC)
CIT vs. Flothern Engineers (P.) Ltd. (2014) 225 Taxman 223 (Mag.)(Mad.)(HC)

40.3 There is no escapement of income as the assessing officer had disallowed the assessee's claim of exemption and the same was subject matter of appeal before CIT(A).Principal condition that income chargeable to tax has escaped assessment was not satisfied **Nivi Trading Limited v. UOI [2015] 375 ITR 308 (Bom)(HC);**

40.4 Reassessment – Change of opinion – Beyond four years – Third proviso – Merger – There was no failure on part of assessee to disclose full and true particulars, and order of original assessment was merged with order of the appellate Authority, hence the reassessment held to be invalid

- **CIT vs. Reliance Energy Ltd. (2013) 81 DTR 130 / 255 CTR 357 (Bom.)(HC)**
- **Allanasons Ltd. vs. ACIT (2015) 230 Taxman 436 (Bom.)(HC)**
- **GTL Ltd . vs. Asst CIT (2015) 37 ITR 376 (Mum.)(Trib.).**
- **Radhaswami Salt Works vs. ACIT (Guj.)(HC), dtd. 06/07/2017, SPECIAL CIVIL APPLICATION NO. 16644 of 2012 www.itatonline.org**

XLI. JURISDICTION ISSUE CAN ALWAYS BE RAISED AT ANY STAGE :

41.1 Jurisdiction can be challenged in second appeal
Investment Corpn Ltd vs. CIT (1992) 194 ITR 548 (Bom)* (HC) *(556)
N. Nagaganath Iyer vs. CIT (1996) 60 ITR 647 (Bom)* (HC) *(655)
Hemal Knitting Industries vs. ACIT (2010) 127 ITD 160 (Chennai)(TM)
Rule 27 of ITAT Rules: Reassessment ground can be raised.

41.2 If assessee does not ask for the reasons recorded and object to reopening, ITAT cannot remand to Assessing officer and give assessee another opportunity. **CIT vs. Safetag Int. India Pvt. Ltd. [2012] 332 ITR 622 (Del.) (HC)**

41.3 **A question relating to jurisdiction which goes to the root of the matter can always be raised at any stage-** Issue of notice or service of notice in the setaside appeal can be raised- Matter was set aside to Tribunal to decide the jurisdictional issue of reassessment. (ITA No. 87 of 2009, dt. 30.03.2017)(AY. 1997-98). **Teena Gupta v. CIT (All.)(HC); www.itatonline.org [** referred Sun Engineering Works P. Ltd.]

41.4 Jurisdiction to issue notice was challenged after limitation period prescribed under S.124 (3) – Reassessment was held to be valid .
Assessee having not challenged territorial jurisdiction of AO issuing notice under section 148 within 30 days as required under section 124 (3) of the Act, belated challenge cannot be accepted. The court further held that the contention of the assessee that objection is raised when it came to know about the CBDT notification regarding jurisdiction is not tenable as absence of knowledge of notification will not

suspend running of limitation. (AY. 2012-13 to 2014-15) **Elite Pharmaceuticals v. ITO (2017) 152 DTR 226/297 CTR 428 (Cal) (HC)**

41.5 In this context reference is made to the decision of **Bombay High Court in case of CIT v/s. LalitKumar Bardia (2018) 404 ITR 63 (Bom)(HC)** wherein the court held that **t**hough the assessee has taken part in the assessment proceedings, waiver will not confer jurisdiction on Assessing Officer. Irregular exercise of jurisdiction and absence of jurisdiction is explained .

41.6 Similarly in **Tata Sons Ltd. v. ACIT (2017) 162 ITD 450 (Mum.)(Trib.)**

Additional ground on jurisdiction was admitted- Assessment order passed without authority of law was held to be bad in law. [In favour of assessee]

41.7 Also in **PCIT v. Tata Sons Ltd. (2019) 267 Taxman 13 (Bom.)(HC)** the Court held that issue of notice U/s. 148 without recording reasons for same was not a mere case of clerical error, but substantial condition for valid issue of reopening notice had not been fulfilled and, such a defect could not be cured by invoking provisions of S. 292B of the Act. (AY. 2004-05)

41.8 Section 292B would not empower the A.O. to treat a proceeding taken u/s 147(b) as a proceeding u/s 147(a) of the Act . This is not a mere technicality but a question of jurisdiction.
Sunrolling Mills (P) Ltd. vs. ITO (1986) 160 ITR 412 (Cal)(HC)
P.N. Sasikumar & Ors. vs. CIT (1988) 170 ITR 80 (Ker)(HC)

XLII. **RECTIFICATION PROCEEDINGS INITIATED AND DROPPED.**

42.1 Dept. having taken one of the two possible views in the matter of calculation of deduction u/s. 10B and 80HHE asst. cannot be reopened by taking the other view more so when the CIT(A) has already quashed the rectification us. 154 which was made on the very same ground.
Westun Outdoor Interactive (P) Ltd vs. A.K. Phute, ITO & Ors
(2006) 286 ITR 620 (Bom) (HC)

42.2 Allowance u/s. 80HHC having been granted by the ITO in rectification proceedings. The remedy the against lay with the dept. either u/s. 154 or S. 263 and not S. 147 further reassessment having been made on a date earlier than fixed same was bad.
Smt. Jamila Ansari vs. ITO & Anr (1997) 225 ITR 490 (Addl)

42.3 **S. 147 vs. S. 263:** If the AO has incorrectly or erroneously applied law and income chargeable to tax has escaped assessment, the Revenue should resort to s. 263 and revise the assessment and not reopen u/s 147. When matter was referred to the CIT for seeking approval, instead of holding that the matter falls u/s 263 and not u/s 148,

has given approval u/s 151 which shows non-application of mind and mechanical grant of approval. Therefore, the assumption of jurisdiction u/s 147 cannot be sustained and is held as invalid in eyes of law

Krish Homes Private Limited vs. ITO, ITA No. 237/JP/2019, 23/12/2019 (ITAT Jaipur)

42.4 **SEC. 147 VIZ – A – VIZ SEC.154**

Section 147 reopening for rectifying sections 154 mistakes are invalid.

- ***Hindustan Unilever Ltd. vs. Dy. CIT (2011) 325 ITR 102 (Bom.)(HC)***
- **CIT v/s. EID Parry Ltd. [(1995) 216 ITR 489 (Mad)(HC)]**

The jurisdiction under sections 147(b) and 154 are different but in cases where they seem to overlap, the ITO may choose one in preference to the other and once he has done so, he should not give it up at a later stage and have recourse to the other.

- **Reassessment Rectification pending – (S.154)**

When proceedings under section 154 were pending on the same issue and not concluded , parallel proceedings under section 147 initiated by the Assessing Officer are invalid ab inito , especially when except the return and its enclosures , no other material or information was in the possession of the assessing Officer.(Asst year 2004 05).

Mahinder Freight Carriers v Dy CIT (2011) 56 DTR 247 (Mum) (Trib).

- **Berger Paint India Ltd. v/s. ACIT & Ors. [(2010) 322 ITR 369 (Cal)(HC)]**
- **Jethalal K. Morbia v/s. ACIT [(2007) 109 TTJ (Mum)(Trib) 1]**

Followed in:

- **S.M. Overseas P. Ltd. v/s. ACIT [(2009) 23 DTR (Del) (Trib) 29]**
- **CIT v. Jandu Construction Co. (2018) 61 ITR 235 (Chad) (Trib)**

42.5 **Against:**

- CIT v/s. India Sea Foods [(2011) 54 DTR (Ker) (HC) 223]
- Accordingly, the fact that there were section 154 proceedings is not a bar to the section 147 proceedings. It was further held that the scope of section 154 & 147 / 148 are different and it cannot be said as a general principle that if notice under section 154 is issued, then notice under section 147 / 148 is barred or prohibited (Hindustan Unilever Ltd**.** 325 ITR 102 (Bom.) distinguished).(A. Y. 2000-2001)

Honda Siel Power Products Ltd. vs. Dy. CIT(2011) 197 Taxman 415 (Delhi)(HC). Assessee's SLP dismissed **Honda Siel Power Products Ltd vs. DCIT [2016] 240 Taxman 576 (SC) .**

XLIII. **REOPENING BASED ON VALUATION REPORT**

43.1 AO had no jurisdiction to reopen the concluded assessments on the strength of valuation report of valuation officer obtained officer obtained subsequently and that too not in exercise of powers u/s. 55A impugned notices under S. 148 quashed.

Prakash Chand vs. Dy. CIT & ors(2004) 269 ITR 260 (MP) (Asst yr 1997-2001)

43.2 Assessing Authority having made a detailed enquiry before making the assessment of the petitioner u/s. 143(3) the impugned notice u/s. 148 was issued only on the basis of change of opinion and was therefore, invalid, notice was also illegal on the ground that it was based on the valuation report of cost of construction.
Girdhar Gopal Gulati vs. UOI(2004) 269 ITR 45 (All)(HC)

43.3 Mere DVO's report cannot constitute reason to believes that income has escaped assessment for the purpose of initiating reassessment and therefore tribunal was justified on holding that the reassessment proceedings initiated on the basis of DVO's report were invalid abinitio, more so when it has found that the DVO's report sufers from various defects and mistakes.
CIT vs. Smt. Meena Devi Mansighka (2008) 303 ITR 351

43.4. ***Valuation report cannot by itself form the basis***
Where apart from the valuation report which was relied upon by the ITO there was no material before him to come to the prima facie conclusion that the assessee had received the higher consideration than what had been stated in the sale deed, reassessment would not be justified.
ITO V. Santosh Kumar Dalmia (1994) 208 ITR 337 (Cal.)(HC)
ITO v Shiv Shakti Build Home (P) Ltd (2011) 141 TTJ 123 (Jodhpur) (Trib).
Akshar Infrastructure P. Ltd. v. ITO (2017) 393 ITR 658 (Guj.)(HC)
CIT v. P. Nithilan. (2018) 403 ITR 154 (Mad) (HC)

43.5 ***Reopening of the assessment – based on the opinion given by the District Valuation Officer***
Reopening of the assessment – based on the opinion given by the District Valuation Officer – opinion of the DVO per se is not an information for the purposes of reopening assessment under section 147 of the Income-tax Act,1961 – Held that: –. The Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon- Department was not entitled to reopen the assessment.
Assistant CIT vs. Dhariya Construction Co. (2010) 328 ITR 515.

XLIV. REASSESSMENT JURISDICTION IS AVAILABLE FOR BENEFIT OF REVENUE ONLY :

Assessee cannot raise fresh independent claims on Reopening :

44.1. Since the proceedings under section 147 are for the benefit of the revenue and in the assessee, and are aimed at gathering the escaped income of the revenue and an assessee and are aimed at gathering the escaped income of an assessee the same cannot be allowed to be converted as revisional or review proceedings at the instance of the assessee, thereby making the machinery workable.
CIT vs. Sun Engineering Works (p.) Ltd. (1992) 198 ITR 297 (SC).

44.2. Proceeding under section 147 are for the benefit of the revenue and not the assessee and hence the assessee cannot form the be permitted to convert the reassessment proceedings as his appeal or revision in disguise and seek relief in respect of items earlier rejected, or claim relief inrespect of items not claimed in the original assessment proceedings unless relatable to the escaped income and reagitate concluded matters. Allowance of such a claim in respect of escaped assessment in the case of reassessment has to be limited to the extent to which they reduce the income to that originally assessed. Income for the purpose of reassessment cannot be reduced beyond the income originally assessed.
K. Sudhakar S. Shanbhag V. ITO (2000) 241 ITR 865 (Bom.)
CIT v/s. CAIXA ECONOMICA DE GOA (1994) 210 ITR 719 BOM.

44.3 Assessee having not claimed deduction under section 80HHC, in its return because it had only income from other sources and no business income, claim made in the revised return by filing audit report under section 147 due to disallowances under section 43B is upheld.
ITO vs. Tamil Nadu Minerals Ltd. (2010) 124 ITD 156 (Chennai)(TM).

44.4 Issue concluded in original assessment proceedings cannot be re-agitated during course of reassessment proceedings.
Karnataka State Co-operative Apex Bank Ltd.v. Dy. CIT (2016) 46 ITR 728 (Bang.)(Trib.)

44.5 Reassessment – Notice – Return filed in response offering lesser income- Assessee cannot raise fresh independent claims having effect of reducing income already declared .
Authorities below were justified in not accepting the return filed in response to notice under section 148 declaring income lower than shown in the original return. Assessee cannot raise fresh independent claims having effect of reducing income already declared . Followed CIT v. Sun Engineering Works Pvt Ltd (1992) 198 ITR 297 (SC) (AY 2010-11)

Ratnagiri District Central Co-Operative Bank Ltd. v DCIT (2019) 197 TTJ 649/175 DTR 327 (Pune) (Trib)

44.6 Reassessment - Claim for deduction cannot be made in Reassessment — Limitation - Not barred by limitation. [S.149]
Reassessment is to benefit the revenue .Claim for deduction cannot be made in reassessment proceedings.
CIT v. Punalur Paper Mills Ltd. (2019) 411 ITR 563 (Ker)(HC)

XLV. ***<u>When intimation under section 143 (1) is issued</u>***

45.1 So long as the ingredients of section 147 are fulfilled, Assessing Officer is free to initiate proceeding under section 147 even where intimation under section 143(1) has

been issued; as intimation under section 143 (1) (a) is not assessment there is no question of treating re assessment in such a case as based on change of opinion.
Asstt. CIT V. Rajesh Jhaveri Stock Brokers (P) Ltd.
(2007) 291 ITR 500 (SC)

45.2 Original assessment completed under section 143(1)- Intimation is not an assessment- No question of change of opinion
CIT v. Zuari Estate Development and Investment Co. Ltd. (2015) 373 ITR 661(SC).

45.3 **It is open to the assessee to challenge a notice issued u/s.148 as being without jurisdiction for absence of reason to believe even in case where the assessment has been completed earlier by Intimation u/s 143(1) of the Act.**
The law on this point has been expressly laid down by the Apex Court in the case of Rajesh Jhaveri Stock Brokers P. Ltd. (Supra) and the same would continue to apply and be binding upon us. Thus, even in cases where no assessment order is passed and assessment is completed by Intimation under Section 143(1) of the Act, the sine qua non to issue a reopening notice is reason to believe that income chargeable to tax has escaped assessment. In the above view, it is open for the petitioner to challenge a notice issued under Section 148 of the Act as being without jurisdiction for absence of reason to believe even in case where the Assessment has been completed earlier by Intimation under Section 143(1) of the Act
Khubchandani Healthparks Pvt. Ltd. v. ITO [2016] 384 ITR 322 (Bom.)(HC)

45.4 143(1)- Law on whether reopening to assess alleged Bogus Capital gains from penny stocks is permissible explained in the context of Rajesh Jhaveri 291 ITR 500 (SC) & Zuari Estate 373 ITR 661 (SC)

Purviben Snehalbhai Panchhigar vs. ACIT, (2018) 409 ITR 124 (Guj) (HC)

45.5 **NO REASSESSMENT IF NO 'REASON TO BELIEVE' EVEN IN CASES OF SECTION 143 (1):**

A. *[Even in case of assessment under section 143 (1)]*:

1. **Prashant Joshi v/s. ITO [(2010) 324 ITR 154 (Bom)(HC)]**
   Even if there is no assessment u/s 143 (3), reopening u/s 147 is bad if there are no proper "reasons to believe" recorded by the AO.
2. **Bapalal & Co. v/s. Jt. CIT – [(2007) 289 ITR 37 (Mad)(HC)]**
3. **Aipta Marketing P. Ltd. v/s. ITO - [(2008) 21 SOT 302 (Mum.)(Trib)]**
4. **Pirojsha Godrej Foundation v/s. A.D.I.T. (E) – [(2010) 133 TTJ (Mum) 194]**
5. **Rajgarh Liquors v/s. CIT - [(2004) 89 ITD 84 (Ind.)]**
   Where only intimation was issued u/s. 143 (1) and no notice was issued u/s. 143(2) within the prescribed time limit, a substantive right is created of not being put to scrutiny could be said to have accrued and could not be snatched away by resorting to other provisions of the Act.

6. **Assessment u/s 143(1) - Reopening on mechanical basis void even where section 143(3) assessment not made.**
For purpose of reopening of assessment under section 147, Assessing Officer must form and record reason before issuance of notice under section 148. The reasons so recorded should be clear and unambiguous and must not be vague. There can not be any reopening of assessment merely on the basis of information received without application of mind to the information and forming opinion thereof.
Sarthak Securities Co. (P.) Ltd. vs. ITO (2010) 329 ITR 110 (Del)(HC)

7. **Akshar Builders and Development v. ACIT(2019) 411 ITR 602 (Bom)(HC),**

8. **The Swastic Safe Deposit and Investment Ltd. v. ACIT (2019) 265 Taxman 164/(2020) 312 CTR 389 / 185 DTR 156 (Bom.)(HC),**

9. The mere fact that the return is processed u/s 143(1) does not give the AO a carte blanche to issue a reopening notice. The basic condition precedent of 'reason to believe' applies even to s. 143(1) intimations. If the assessee claims the facts recorded in the reasons are not correct, the order on objection must deal with them. Otherwise an adverse inference can be drawn against the Revenue
Ankita A. Choksey v. ITO (2019) 411 ITR 207(Bom)(HC),

10. The submission of the Dept that in view of Rajesh Jhaveri 291 ITR 500 (SC), the AO can reopen the assessment for "whatever reason" is preposterous. The AO cannot reopen on the basis of info received from DIT (Investigation) that a particular entity has entered into suspicious transactions without linking it to the assessee having indulged in activity which could give rise to reason to believe that income has escaped assessment. Such reopening amounts to a fishing inquiry. The AO has to apply his mind to the information received by him from the DDIT (Inv.) and cannot act on borrowed satisfaction

PCIT vs. Shodiman Investments Pvt. Ltd, (2018) 93 taxmann.com 153/ 167 DTR 290 (Bom.)(HC)

B. ***[Within four year]***

1. **Asian Paints v/s. Dy. CIT & Anr. – [(2009) 308 ITR 195 (Bom)(HC)]**
2. **Audco India Ltd. v/s. ITO – [(2010) 39 SOT 481 (Mum)(Trib)]**
3. **Dy. CIT v/s. Pasupati Spinning & Weaving Mills Ltd. – [(2010) 6 ITR (Trib) 689 (Del)]**
4. **KEY Components P. Ltd. v. ITO (2019) 70 ITR 211 (Delhi) (Trib)**

XLVI. **<u>Section 150 : LIMITATION PRESCRIBED</u>**

46.1 The Section 150 of the Act provides that notwithstanding the limitation prescribed under section 149, notice under section 148 may be issued at any time for the purpose

of making an assessment or reassessment or re-computation in consequence of or to give effect to any finding or direction contained in an order passed by any authority in any proceedings under the Act by way of appeal, reference or revision or by a court in any proceeding under any other law.

46.2. ***ITO v. Murlidhar Bhagwan Das [1964] 52 ITR 335 (SC)*** held that the word "finding" can be only that which is necessary for the disposal of an appeal in respect of an assessment of a particular year. The apex court further held that the appellate authority may incidentally find that the income belongs to another year, but that is not a finding necessary for the disposal of an appeal in respect of the assessment year in question. Similarly, the expression "direction" has been construed by the apex court to mean a direction which the appellate or revisional authority as the case may be, is empowered to give under the sections mentioned therein.

46.3 Apart from the above, section 150(1) of the Act provides that the power to issue notice under section 148 of the Act in consequence of or giving effect to any finding or direction of the appellate/revisional authority or the court is subject to the provision contained in section 150(2) of the Act. Section 150(2) provides that directions under section 150(1) of the Act cannot be given by the appellate/revisional authority or the court if on the date on which the order impugned in the appeal was passed, the reassessment proceedings had become time-barred.
K. M. Sharma vs. Ito [2002] 254 ITR 772 (SC)

46.4 According to s. 150(2), the provisions of s. 150(1) shall not apply where, by virtue of any other provision limiting the time within which action for assessment, reassessment or recomputation may be taken, such assessment, reassessment or recomputation is barred on the date of the order which is the subject-matter of the appeal, reference or revision in which the finding or direction is contained. **Thus, s. 150(2) enacts a well-settled principle of law that an appellate or revisional authority cannot give a direction which goes to the extent of conferring upon the AO if he is not lawfully seized of jurisdiction**.

46.5 Similarly Bombay High court in the case of **Rakesh N Dutt v/s. Asst CIT (2009) 311 ITR 247** wherein it was held, that the Tribunal had held that the addition of Rs. 90 lakhs, if at all permissible legally, it could be considered in the hands of the two companies and not in the hands of the assessee. There was no finding that the amount of Rs. 90 lakhs was liable to be taxed in the hands of the assessee. Consequently, reopening of the assessments by invoking the provisions of section 150 of the Act could not be sustained. Once it was held that section 150 of the Act was not applicable, then the reopening of the assessment beyond the period of six years from the end of the relevant assessment year would be time barred.

46.6 The Tribunal do not have power to give any finding or direction in respect of another year / period which is not before the authority as held by **Supreme Court in CI T vs. Green World Corporation [2009] 314 ITR 81 (SC).**

46.7 The decision of the apex court in the case of ***CIT v/s. Green World Corporation 314 ITR 81 (106) SC*** wherein it was observed that the provision of s. 150 although appears to be of a very wide amplitude, but would not mean that recourse to reopening of the proceeding sin terms of ss. 147 and 148 can be initiated at any point of time whatsoever. Such a proceedings can be initiated only within the period of limitation prescribed therefore as contained in s. 149. Sec. 150(1) is an exception to the aforementioned provision. It brings within its ambit only such cases where reopening of the proceedings may be necessary to comply with an order of the higher authority. For the said purpose, the records of the proceedings must be before the appropriate authority. It must examine the records of the proceedings. If there is no proceeding before it or if the assessment year in question is also not a matter which would fall for consideration before the higher authority, s. 150 will have no application.

46.8 Finding or Direction. (S.149.).

Sec 148 r.w.s 150: Reopening of assessment – Based on Tribunal "finding or direction " in respect of any other year or period - Beyond six years – Not valid.

During the year ending 31/3/2000, (A.Y. 2000-01) the assessee had entered into an Development Agreement. The building was to be completed within 21 months(AY 2002-2003). However the Original Agreement was not materialised and was supplemented by Second agreement prepared on 8/4/ 2002 (i.e A.Y 2003-04).. The Assessing Officer had assessed the capital gain in A.Y. 2002-03. On appeal to Hon'ble ITAT the assessee appeal was allowed and held that the amount assessed as capital gains was not liable to be taxed in A.Y.2002-03. In order to disposed of the appeal the Hon'ble ITAT incidentally observed that the capital gain should have been assessed in A.Y. 2000-01. The Assessing officer issued notice under Section 148 dated 24/8/2007 on basis of the observation of ITAT order . On appeal challengening the reopening of assessment the Tribunal Held:

The observation of the Tribunal for the purpose of deleting the addition in respect of the AY: 2002-03 cannot be treated to be a 'finding' for reopening the AY 2001-02 as the appeal for said assessment year has not been before the Tribunal for adjudication. The observation of the Tribunal that 'the case of the assessee is to be brought to tax for assessment year 2000-01 and not assessment 2002-03 as done by the assessing officer' is incidental for holding the addition made in the year 2002-03 is not justifiable and the same cannot be the basis for having recourse to section 150 of the Act by holding it as 'finding or direction'. Section 150(1) is an exception which brings within its ambit only such cases where reopening of the proceedings may be necessary to comply with an order of the higher authority. Since the observation of the Tribunal that 'the case of the assessee is to be brought to tax for assessment year 2000-01', does not require compliance by the authorities below so far as the

assessment year 2000-01 is concerned, taking recourse to section 150 of the Act by holding the same as 'finding' of the Tribunal is not legally tenable.
Shri Anil Suri v/s. ITO 11(1)(3) ; [2014] 66 SOT (Mum ITAT).

46.9 Assessment having not been reopened to give effect to the order of the CIT (A). According to the Assessing Officer because of giving effect to the order made by the CIT (A) , will result in to escapement of income . The court held that section 150 did not apply. As there was no failure on the part of assessee to disclose fully and truly all material facts , reassessment is clearly time barred.(A.Y. 1988□89).
Harsiddh Specific Family Trust v JCIT (2011) 58 DTR 149 (Guj) (High Court).

46.10 Since no findings or directions had been given in assessment year 1992□93 to tax the receipt in question in assessment year 1994□95 under appeal which is also inherently impossible in view of the findings that it is capital receipt ,provisions of section 150 would apply in the case of the assessee and reopening of the assessment made after a period of six years from the end of the assessment year was clearly time barred.(A.Y. 1994□95).
Vadilal Dairy International Ltd v Asst CIT (2011) 140 TTJ 371 (Ahd) (Trib).

46.11. Observation of Tribunal in AY. 1990-91 is not a finding or direction u/s. 150 and thus re-assessment proceedings are not sustainable.[S. 45 (4),147, 148, Art. 226]
In appeal for the assessment year 1991-92 held that if at all the issue of capital gains arises, it shall arise in A.Y.1990-91 and not under A.Y.1991-92 which was the year under consideration before the Tribunal. Based on the observation AO issued notice u/s. 148 for re-opening of assessment of A.Y.1990-91. On writ allowing the petition the Court held that, the observation of Tribunal is not a finding or direction u/s. 150 and thus re-assessment proceedings are not sustainable. (AY. 1990-91)
Kala Niketan v. UOI (2016) 293 CTR 178/148 DTR 121 (Bom.) (HC)

46.12. Finding given by Tribunal could not enable Assessing Officer to extend period of limitation-Order barred by limitation :
EskayK'n' IT (India) Ltd. v. Dy. CIT (2015) 229 Taxman 204 (Bom.)(HC)

46.13 In respect of any assessment year wherein further proceedings are barred by limitation, assessment cannot be reopened merely by virtue of an opinion expressed by any higher forum at a later date, i.e., subsequent to date of limitation period.
Emgeeyar Pictures (P.) Ltd. v. DCIT (2016) 159 ITD 1/ 138 DTR 20/ 179 TTJ 383 (TM) (Chennai)(Trib.)

46.14 An assessment order was passed against assessee - Subsequently, Assessing Officer received information in form of observation of Tribunal in assessment proceedings of son of assessee, SG, that certain investments in mutual funds made jointly by assessee and her son should be taxed in hands of assessee as she was first holder in investments - On basis of said observations of Tribunal, Assessing Officer re-opened

assessment in case of assessee on ground that income chargeable to tax had escaped assessment by way of said unexplained investments - It was not in dispute that investments in question stood in name of assessee as first holder - Further, when assessee filed her return under section 139(1) she had not explained source of said investments - In fact her exempt income from dividends did not form part of her return filed under section 139(1) - Further, assessee in her son's case accepted that these investments should not be brought to tax in his hands as he was second holder and they were to be brought to tax in hands of assessee being first holder - Whether, on facts, impugned reopening of assessment was justified - Held, yes [Paras 12 and 13] [In favour of revenue]

S. Rajalakshmi vs. ITO, [2018] 409 ITR 157, (Bom)(HC)

46.15 **Power of Appellate authority.**

Section 150 does not enable or require an appellate authority to give any directions for reopening of assessment, but it deals with a situation in which a reassessment is to be initiated to give effect to finding or direction of appellate authority or Court.(A.Y. 2002□03).

Sujeer Properties (AOP) v ITO (2011) 131 ITD 377 (Mum) (Trib).

46.16. Reassessment-Notice issued beyond six years from the end of relevant AY.2009-10-Limitation-Reopened based on the subsequent decision of the Appellate Tribunal-The limitation of six years under S. 149, must be alive on the date of passing of the order of CIT (A). In the present case since, as on 05.10.2011, the time limit for reopening of assessment for A.Y. 2009-10 had not lapsed, the order of the ITAT was well within the limitation-Notice of reassessment is valid-Petition is dismissed.

Intec Corporation v. ACIT (2019) 184 DTR 425 / (2020) 312 CTR 3 (Delhi)(HC)

XLVII Applicability of second proviso to sec 147 of the Act i.e asset or financial interest in foreign country - Amendment to S. 149, by Finance Act, 2012

Reassessment – Non - resident – Limitation - Offshore trust –Amendment to S. 149, by Finance Act, 2012, which extended limitation for initiation of reassessment proceedings to sixteen years, could not be resorted for reopening concluded proceedings in respect of which limitation had already expired before amendment became effective – Notice issued in 2015 for the assessment year 1998-99 was quashed .[S.148 , 149]

The revenue relying upon his statement, issued impugned notice dated 24-3-2015 under section 148 seeking to initiate reassessment proceedings for assessment year 1998-99, on the suspicion that the, income of the assessee had escaped assessment. The assessee contended that the limitation for re-assessment for assessment year 1998-99 had expired on 31-3-2005 and therefore, re-assessment was barred by limitation. The Assessing Officer contended that the proceedings were initiated within the extended period of 16 years from the end of the relevant assessment year by relying on section 149(1)(c), introduced by the Finance Act, 2012, with effect

from 1-7-2012. On writ allowing the petition the Court held that ; reassessment for 1998-99 could not be reopened beyond 31-3-2005 in terms of provisions of section 149 as applicable at the relevant time. The assessee return for assessment year 1998-99 became barred by limitation on 31-3-2005. The question of revival of the period of limitation for reopening assessment for assessment year 1998-99 by taking recourse to the subsequent amendment made in section 149 in the year 2012, i.e., more than 8 years after expiration of limitation on 31-3-2005, has been dealt with in K.M. Sharma v. ITO (2002) 254 ITR 772(SC), accordingly the reassessment notice was quashed. (AY. 1998-99)

Brahm Datt v. ACIT (2019) 260 Taxman 380/ 173 DTR 1 / 306 CTR 114(Delhi)(HC)

XLVIII. Section 153 – Time Limits for Reassessment

- The order u/s. 147 has to be passed within one year from the end of the financial year in which the notice u/s. 148 has been **served.** – section 153(2)
- If during the reassessment a reference is made to TPO then time limit will be two years from the end of the F.Y. in which the notice u/s. 148 has been served.

  Finance Act 2016 – Limits in both the above cases has been reduced by 3 months – Reduced to 9 months and 21 months respectively.

XLIX. Summary of Key legal principles culled out from various decisions :

1. ***Recording of reasons*** before issue of notice is ***mandatory.***
2. The requirement of law is "***reason to believe" and not reason to "suspect".*** Notice based on suspicion and surmise is not valid
3. In ***absence of recorded reasons*** for reopening the assessment, the notice issued u/s. 148(2) of the Act would be bad-in-law
4. Even the assessment which is completed u/s 143(1) cannot be reopened without **proper 'reason to believe'**
5. At the stage of issuance of notice, the ***AO is to only form a prima facie view*** .
6. Mere ***change of opinion*** of the AO is not a sufficient to meet the standard of 'reason to believe'.
7. Reassessment notice issued by AO solely on ***basis of audit objection*** without application of mind independently is not valid.
8. ***Successor AO cannot issue*** notice u/s. 148 on the basis of reasons recorded by predecessor AO.
9. As per settled law, notice for reopening of assessment against a ***dead person*** is invalid.
10. ***Approval for reopening*** of assessment granted mechanically without application of mind, the same is invalid and not sustainable.
11. So long the ***asst proceedings are pending*** the AO cannot have any reason to believe that income for that year has escaped asst (period for issue of notice u/s. 143(2) had not expired). No Reassessment. Once an issue is ***subject matter of appeal***

12. Issue of a notice ***u/s.143(2) is mandatory***. The failure to do so renders the reassessment void. One should note that a ***Jurisdictional error*** cannot be cured by ***section 292BB***

13. The ***assessee must be put to notice of all the provisions*** on which the revenue relies upon. The assessee could not be taken by surprise at the stage of rejection of its objections or at the stage of proceedings before the Court that the notice is to be treated as a notice invoking a particular provision of the Act.

14. The notice and reasons given should confirm to the ***principles of natural justice*** and the assessee must get a proper and adequate opportunity to reply to the allegations which was being relied upon by the revenue. The noticee or the assessee should not be prejudiced or be taken by surprise**.**

15. If ***assessee does not ask for s. 147 reasons & object*** to reopening, ITAT cannot remand to AO & give assessee another opportunity.

16. The Assessing officer must deal with the assessee objection and ***pass speaking order***.

17. Assessing officer must ***serve the order*** of rejection of assessee's objection.

18. In a challenge to reopening proceeding the court should not go in to the merits of the allegations made by the dept against the assessee. At this stage court will only decide whether the revenue has ***sufficient reasons to believe*** that undisclosed income of the assessee has escaped assessment and whether there are grounds to issue notice.

19. ***Information*** which comes to the notice of the AO during ***proceedings for subsequent assessment years*** can definitely form tangible material to invoke powers vested with the AO u/s. 147 of the Act.

20. Revenue can take the **benefit of the extended period of limitation** of 6 years for initiating proceedings under the first proviso section 147 of the Act only if the revenue can show that the assessee had failed to disclose fully and truly all material facts necessary for its assessment .

21. **Assessment order is not a scrap of paper** & AO is expected to have applied his mind. Reopening on ground of "oversight, inadvertence or mistake" is not permissible.

22. The AO has ***no power to review*** assessment order under shelter of re-opening of assessment u/s. 147/148, therefore, ***it was not open for AO to re-look at same material*** only because he was subsequently of view that conclusion arrived at earlier was erroneous.

23. The requirement of law is that the assessee ***must disclosed all primary facts*** before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts.

24. It was for the assessing officer to decide what inference should be drawn from the primary facts disclosed . Non disclosure of other facts which may be termed as ***secondary facts is not necessary***.

25. The revenue cannot be permitted to take a contrary stand and therefore could not be permitted to orally urge the same before the court . ***Court cannot allow the AO to improve upon the reasons*** in order to support the notice of reassessment .

26. Reassessment only on the ***basis of retrospective amendment*** held to be invalid , as there is no failure to disclose fully and truly all material facts.

27. There is no bar in issuing ***second reopening*** notice if notice satisfy the other condition .

28. ***Amendment to S. 149, by Finance Act, 2012***, which extended limitation for initiation of reassessment proceedings to sixteen years, could not be resorted for reopening concluded proceedings in respect of which limitation had already expired before amendment became effective.

29. The jurisdiction ***u/s 147(b) and 154*** are different but in cases where they seem to overlap, the ITO may choose one in preference to the other and once he has done so, he should not give it up at a later stage and have recourse to the other.

30. Proceeding u/s. 147 are for the ***benefit of the revenue and not the assessee*** and hence the assessee cannot form the be permitted to convert the reassessment proceedings as his appeal or revision in disguise and seek relief in respect of items earlier rejected, or claim relief in respect of items not claimed in the original assessment proceedings unless relatable to the escaped income and reagitate concluded matters

CONCLUSION :

By virtue of Article 141 of the Constitution of India, the judgments pronounced by the Supreme Court have the force of law and are binding on all the Courts in India.

Thus in the ongoing reassessment proceedings and upcoming one's, the keg legal principles list above should be kept in mind . However the ratio of the above decisions has to be read in context of the fact before it as held in ***CIT vs. Sun Engineering Works (p.) Ltd. (1992) 198 ITR 297 (SC).*** One needs to note the above key legal principles while dealing with reassessment proceedings and raise appropriate contentions while filing reply/objections to the reasons recorded for reopening of assessment **.** It is settled position in law now that department cannot improve the reasons recorded and the courts shall not rely on any new explanation from department either in form of affidavit or orally submitted in court nor from the order rejecting the assessee's objection . Further one should note that there is no bar in law in issuance of second notice u/s. 147 /148 of the Act subject to other conditions are satisfied .

Thank You . I acknowledge support of Mr. Ravindra Poojari Adv and my office staff.

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