A Comprehensive Guide To The law Of Reopening Of Assessments Under Sections 147 To 153 Of The Income-tax Act, 1961 (Updated: Sept 2018)

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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)

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).***
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)**

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)**
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.) 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.)

- 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)

V. DISPOSE OFF THE ASSESSEE OBJECTION AND SERVE THE ORDER ON ASSESSEE

5.1 Assessing officer should 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] 308 ITR 195 (Bom)(HC) ;**

Order was passed before expiry of four weeks of passing the orders of objection was held to be void . **Meta Plast Engineering P. Ltd. v. ITO, ITA NO. 5780/Del/2014, dtd: 06/04/2018 (Delhi)(Trib), www.itatonline.org**

5.2 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)** the Hon. Bombay High Court set-aside the assessment for fresh hearing in case

5.3 Similar view was taken in the case of ***Allana cold storage vs. ITO (2006) 287 ITR 1 (Bom.)*** 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

5.4 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)**

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.

5.5 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)**

5.6 However now 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.

In my view remitting the matter for compliance with procedure will lead only to harassment and delay.

VI <u>Disposal of objections – To be linked with recorded reasons.</u>

6.1 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.

<u>Rejection of objection without assigning reasons:</u>

6.2 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.

6.3 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.

6.4 In the case of **Venkatesan Raghuram Prasad v ITO (2018) 94 taxmann.com 249(Madras),** 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.

VII NEW REASONS CANNOT BE ALLOWED TO BE INTRODUCED OR SUPPLIED:

7.1 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.

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

Mohinder Singh Gill vs. Chief Election AIR 1978 SC 851

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

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

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

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

7.2 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.)***

7.3 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)

7.4 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)

7.5 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)

7.6 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- 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-Reassessment was quashed

GKN Sinter Metals Ltd. v. Ramapriya Raghavan (Ms.), ACIT (2015) 371 ITR 225 (Bom.)(HC)

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

7.7 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.

7.8 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

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

8.1 In the case of ***Indivest PTE Ltd v. ADDIT (2012) 250 CTR 15 / 206 Taxman 351 (Bom.)*** The 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.

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

9.1. 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:

9.2 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.)

9.3 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.)

9.4 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.

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

10.1 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 (Delhi)(High Court)

CIT v. Multiplex Trading & Industrial Co Ltd (2015) 128 DTR 217 (Delhi)(HC)

Pr. CIT v G. Pharma India Ltd.[2017] 384 ITR 147 (Delhi) (H C)

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

10.2 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

10.3 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.

10.4 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)

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

10.5 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)

10.6 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.

10.7 In case of Deepraj Hospital (P) Ltd. v. ITO, 41/AGRA/2017, AY: 2010-11 Dtd: 01/06/2018 (Agra)(Trib), www.itatonline.org 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.

10.8 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.)**

10.9 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)

10.10 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.**

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)**

Also refer other cases where reopening has been held to be justified :

PCIT v. Paramount Communication P. Ltd. (2017) 392 ITR 444 (Delhi)(HC)

Aravali Infrapower Ltd. v. DCIT (2017) 390 ITR 456 (Delhi)(HC)

Aradhna Estate Pvt. Ltd. v. DCIT (2018) 404 ITR 105 (Guj) (HC)

Rajnish Jain. v. CIT (2018) 402 ITR 12 (All) (HC)

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

10.11 REOPENING - CLIENT CODE MODIFICATION

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

Statement of third / unconnected person :

10.12 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)
(Asst year 1991-1992)

JCIT & Ors vs. George Williamson (Aassam) Ltd (2002) 258 ITR 126 (Guj)

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)

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)

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.

In the case of AMSA India P. Ltd. v. CIT (2017) 393 ITR 157/ 82 taxmann.com 29 (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.

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 .

XI NCRIMINATING MATERIAL FOUND IN SEARCH OF THIRD PARTY : 153C vis a vis 148

11.1 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.

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

11.3 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.)**

XII INFORMATION FROM U. K. TAX AUTHORITY

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.

XIII. REASON TO BELIEVE OF THE AO:

13.1 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.

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..

13.2 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.)]**

13.3 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:

13.4 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**]

13.5 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)

REASONS TO BELIEVE – SURVEY :

13.6 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

13.6 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)

13.7 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.)

13.8 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)

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

Balakrishna H. Wani vs. ITO 321 ITR 519 (Bom)

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

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

15.1 ***Sagar Enterprises vs. ACIT (2002) 257 ITR 335 (Guj)*** - 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:

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 .

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

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 re.opened merely to verify discrepancy- i.e. variation between Income declared by assessee and Income shown in TDS Certificate i.e. case re.opened 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.)(High Court)

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

XVII. EXPL 3 TO SEC 147: ANY OTHER INCOME :

17.1 ***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)

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

17.2 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).

17.3 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**

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

18.1 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)

18.2 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.)

18.3 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)

18.4 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)

18.5 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.)

18.6 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).

18.7 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)

However the recent 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

18.8 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,.

18.9 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)**

18.10 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)**

18.11 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).

XIX SERVICE BY AFFIXTURE :

19.1. 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.)

19.2 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)***

19.3 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)**

19.4 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.

19.5 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)

19.6 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.)**

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

20.1 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.)**

20.2 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.)

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

21.1 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)

21.2 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.)

21.3 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 under section 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.)

XXII. RE-OPENING BEYOND 4 YEARS :

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

22.1 Tribunal 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. v. 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)

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

22.2 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.)
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)

22.3 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)

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 noting 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)

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

22.4 **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 under section 143 (3) on 14th December, 2007 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.)
Tao Publishing (P) Ltd..v. Dy.CIT (2015) 370 ITR 135 (Bom.)
Tata Business support Services Ltd. v. DCIT(2015) 121 DTR 222/ 232 Taxman 702 (Bom)
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)

22.5 **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)(High Court)

22.6 **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 (Bombay)

22.7 **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)

XXIII. **APPROVAL AND SANCTION :**

23.1 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) (Asst yr 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)
United Electrical Company (P) Ltd vs. CIT & Ors (2002) 258 ITR 317 (Del)
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 (A.Y. 2005-06)(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) [Supra];

23.2 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.)(H C)***
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)

23.3 **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.)***

12.4 **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 (SPL's Siddhartha Ltd followed)(A.Y. 2004-05)
Ghanshyam K. Khabrani v. ACIT (2012) 346 ITR 443 (Bom)(HC)
DSJ Communication Ltd. .v. Dy.CIT (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)

23.5 **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

XXIV. DISCLOSURE OF PRIMARY FACTS : NO POWER TO REVIEW

24.1 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)

24.2 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.)

24.3 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 .v. Jet speed Audio Pvt. Ltd. (2015) 372 ITR 762 (Bom.)

24.4 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. .v. J. P. Janjid (2014) 225 Taxman 81(Mag.) / (Bom.)(HC); CIT v. Amitabh Bachchan [2012] 349 ITR 76 (Bom.) (HC),

24.5. 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. v. CIT [2009] 308 ITR 195 (Bom.) (HC)

24.6. 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 (Bombay High Court)]***

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

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

24.9 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 v. ITO (2018) 400 ITR 329 (Guj) (HC)

24.10 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. v. DCIT (2018) 400 ITR 30 (Bom) (HC)

XXV Disclosure in balance sheet also amounts to disclosure

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

XXVI FULL AND TRUE DISCLOSURES OF ALL MATERIAL FACTS *:*

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)

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

27.1 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)
Pr. CIT v. Century Textiles and Industries Ltd[Income tax Appeal no 1367 of 2015 dt : 03/04/2018 (Bombay High Court)].

27.2 **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)

27.3 Change of opinion - reopening not permissible

Commissioner of Income tax- 3 vs. SICOM LTD. [Income tax Appeal no 137 of 2014 dt : 08/08/2016 (Bombay High Court)].

27.4 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)

XXVIII. RE-ASSESSMENT – CHANGE OF OPINION

28.1. **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) (Asst yr 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)

28.2. 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.)

28.3. 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.)

28.4 **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)
b. Asian Paints Ltd. vs. DCIT (2008) 308 ITR 195 (Bom) (198)
c. ICICI Prudential Life Insurance Co. Ltd. (2010) ***325 ITR 471*** (Bom)
d. Aventis Pharma Ltd. vs. Astt. CIT (2010) 323 ITR 570 (Bom) (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. Change of opinion- Labour charges - **Subsequent assessment year- Reassessment was held to be bad in law:** CIT v. Srusti Diam (2015) 232 Taxman 127 (Bom.)(HC) ; PCIT v. Jai Prakash Associates Ltd. (2018) 403 ITR 41 (All) (HC)
h. Reopening on mere change of opinion by **subsequent Assessing Officer is not permissible.** Orient News Prints Ltd. v. Dy. CIT (2017) 393 ITR 527 (Guj.)(HC) ; Ajanta Pvt. Ltd. v. DCIT (2018) 402 ITR 72 (Guj) (HC)

28.5 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.[Supra] (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)

XXIX. RE-ASSESSMENT – AUDIT OBJECTION

29.1 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 CIVIL APPEAL NO. 5390 OF 2007 DT. 21/03/2017 (SC)** www.itatonline.org
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)

29.2 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) (Asst year 2003-2004)
CIT v. Rajan N. Aswani (2018) 403 ITR 30 (Bom)(HC),
Vijaykumar M. Hirakhanwala (HUF) vs. ITO & Ors (2006) 287 ITR 443 (Bom) (Asst year 1997-1998 to 1999-2001 to 2002-2003)
CIT vs. Lucuns TVS Ltd. [2001] 249 ITR 306 (SC)
Prothious Engineering Services Pvt. Ltd. v. ITO (2016) 46 ITR 438 (Mum.)(Trib)
Purity Tech Textiles Pvt. Ltd. vs. ACIT (2010) 325 ITR 459 (Bom)
CIT .v. DRM Enterprises(2015)230 Taxman 61/ 120 DTR 401(Bom.)(HC)
Reckit Benckiser Healthcare India P. Ltd v. 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. v. ACIT [2018] 93 TAXMANN.COM 219 (Guj.)(HC),

29.3 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).

29.4 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) (Asst yr 1993-94)

29.5 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 (Gujarat High Court).

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)

29.6 **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.

29.7 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. v. Dy.CIT (2016) 381 ITR 387/ 237 Taxman 709(Delhi)(HC)

29.7 Assessing Officer disagreeing with audit objection yet issuing notice –Reassessment was held to be not valid

AVTEC Ltd. .v. DCIT(2015) 370 ITR 611 (Delhi)(HC)

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

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)

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

31.1 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)
(Asst yr 1989-1990 to 1999-2000)

31.2. The assessing officer for the assessment year 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 assessment year 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).

XXXII. ***Supreme court decision cannot be the basis for Reopening:***

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

Indra Co. Ltd. V. ITO (1971) 80 ITR 559 (Cal.)(Asst yr 1959-1960)
***SESA Goa ltd v/s* Jt CIT [2007] 294 ITR 101 (BOM)**
CIT v. 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.

Contrary Decision:

Kartikeya International vs. CIT (2010) 329 ITR 539 (All.)
Asst. CIT v. Central Warehousing Corp.(2012) 67 DTR 356 (Delhi)

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

- Denish Industries Ltd. Vs. ITO[2004] 271 ITR 340 (Guj.) (346)
  SLP dismissed(2005)275 ITR 1 (St.)
- Rallies India Ltd. vs. ACIT (2010) 323 ITR 54 (Bom)
- SGS India Pvt. Ltd. vs. ACIT (2007) 292 ITR 93 (Bom)
  Law in subsequent A.Y. is different, reopening not proper.
- Siemens Information Ltd. v. ACIT (2007) 293 ITR 548 (Bom)
  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.)
- Kalpataru Sthapatya (P) Ltd. (2012) 68 DTR 221 (Guj)(High Court).
- **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)(High Court)
- **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.)(High Court)
  Vinayak Construction v. ITO (2012) 66 DTR 233 (Guj.)(High Court)

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

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)
Vodafone Essar Gujarat Ltd. Vs. ACIT (2010) 37 DTR 259 (Guj.)

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 hasto 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.)(High)
CIT .v. Flothern Engineers (P.) Ltd. (2014) 225 Taxman 223 (Mag.)(Mad.)(HC)

- 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);**

- 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 v. Reliance Energy Ltd. (2013) 81 DTR 130 / 255 CTR 357 (Bom.)(HC)**
- **Allanasons Ltd. v. ACIT (2015) 230 Taxman 436 (Bom.)(HC)**
- **GTL Ltd . v. Asst CIT (2015) 37 ITR 376 (Mum.)(Trib.).**
- **Radhaswami Salt Works v. ACIT (Guj.)(HC), www.itatonline.org**

XXXV. <u>JURISDICTION ISSUE CAN ALWAYS BE RAISED AT ANY STAGE :</u>

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

35.2 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.) (H.C.)**

35.3 **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.]

35.4 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)**

35.5 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** 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 .

35.6 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]

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

XXXVI. <u>RECTIFICATION PROCEEDINGS INITIATED AND DROPPED.</u>

36.1 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) (Asst yr 2000-2001)

36.2 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)

36.3 <u>SEC. 147 VIZ – A – VIZ SEC.154</u>

Section 147 reopening for rectifying sections 154 mistakes are invalid.

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

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)]**
- **Jethalal K. Morbia v/s. ACIT [(2007) 109 TTJ (Mum) 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 (Chand) (Trib)**

36.4 **Against:**

- CIT v/s. India Sea Foods [(2011) 54 DTR (Ker) 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 Taxman415 (Delhi). Assessee's SLP dismissed **Honda Siel Power Products Ltd vs DCIT [2016] 240 Taxman 576 (SC) .**

XXXVII. REOPENING BASED ON VALUATION REPORT

37.1 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)

37.2 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)

37.3 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

37.4. ***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.)(Asst yr 1973-1974)
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)

37.5 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 Consturction Co. (2010) 328 ITR 515.

XXXVII. REASSESSMENT JURISDICTION IS AVAILABLE FOR BENEFIT OF REVENUE ONLY.

38.1. 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).

38.2. 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.

38.3 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).

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.)

38.4. ***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.) (Asst yr 1975-1977)

XXXVIII. When intimation under section 143 (1) is issued

39.1 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) (Asst yr 2001-2002)

39.2 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).

39.3 **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)

39.4 **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)]**

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)]**

4. **Aipta Marketing P. Ltd. v/s. ITO - [(2008) 21 SOT 302 (Mum.)]**
5. **Pirojsha Godrej Foundation v/s. A.D.I.T. (E) – [(2010) 133 TTJ (Mum) 194]**
6. **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.
7. **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

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

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

XXXIX. Section 150 : LIMITATION PRESCRIBED

40.1 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 recomputation 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.

40.2. ***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.

40.3 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)

40.4 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**.

40.5 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.

40.6 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).**

40.7 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.

40.8 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 challenging 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).

40.9 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).

40.10 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).

40.11. 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)

40.12. 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)

40.13 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.)

40.14 **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).

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

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

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