HIGH COURT OF JUDICATURE FOR RAJASTHAN BENCH AT JAIPUR

D.B. Income Tax Appeal No. 142 / 2006

Shri Loku Ram Malik

----Appellant

Versus

The Commissioner Of Income Tax

----Respondent

For Appellant(s) : Mr. Naresh Gupta

For Respondent(s) : Mrs. Parinitoo Jain

HON'BLE MR. JUSTICE K.S. JHAVERI

HON'BLE MR. JUSTICE VIJAY KUMAR VYAS

Judgment

03/05/2017

1. By way of this appeal, the appellant has assailed the judgment and order of the Tribunal whereby Tribunal has partly allowed the appeal of the department.

2. This court while admitting the appeal on 26.3.2007 framed following substantial question of law:-

> "1. Whether on the facts and circumstances of the case, the ITAT was justified in upholding the issuance of notice u/s 148 though the assessing officer could have notice u/s 143(2) to frame the regular assessment u/s 143(3)?
>
> 2. Whether the provisions of Section 145 of the Income Tax Act, 1961, in the facts and circumstances of the case could have been applied to reject the statement of affairs when there was no requirement to maintain the books of account u/s 44AA and 44AF of the Income Tax Act, 1961?"

3. Counsel for the appellant contended that he does not want to press issue no.2 and he has argued only issue no.1.

4. That facts of the case are that the assessee has filed the return on 6.12.1999 where an investment in plot no.31 R.K. Puram Kota was shown at Rs.1,31,000/-. The AO processed the return u/s 143(1)(a) of the Act on 11.8.2000. The assessee revised the balance sheet and profit and loss account showing the investment in the said property at Rs.5,22,936/- on 16.8.2000. The AO issued notice u/s 148 on 14.9.2000, on the basis of revised balance sheet filed by the assessee and then issued notice u/s 143(2) on 3.10.2000.

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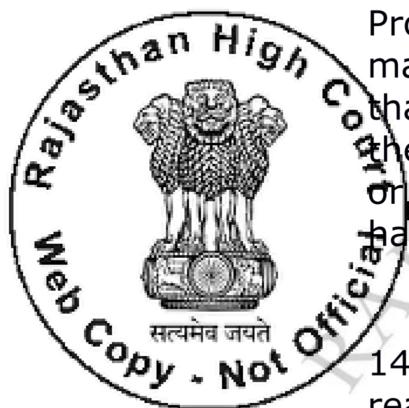
5. Counsel for the appellant stated that original return was filed on 6.12.1999 and was accepted on the same day. He has produced on record the income tax return which was accepted by the department being 7578 dt.11.8.2000.

6. He has pointed out the following provisions of law:-

> **147. Income escaping assessment.-** If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
>
> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this

section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:



Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

148 (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed[1] form and verified in the prescribed[1] manner and setting forth such other particulars as may be prescribed[1]; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139.

[Provided that in a case --

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to subsection (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment,

reassessment or re-computation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case--

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, re-assessment or re-computation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.]

[Explanation : For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.]

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.

143. Assessment.- (1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely—

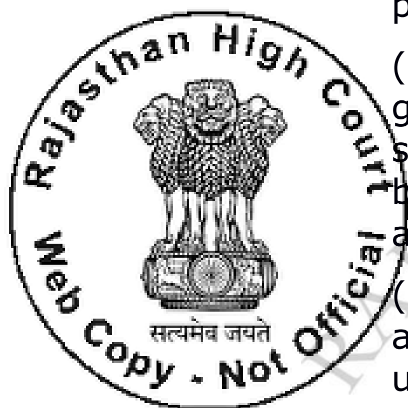
(a) the total income or loss shall be computed after making the following adjustments, namely:—

(i) any arithmetical error in the return; or

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);

(c) the sum payable by, or the amount of refund due to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self-assessment and any amount paid otherwise by way of tax or interest;



(d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and

(e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him:

Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made.

7. In support of his arguments, he has relied upon the following decisions:-

7.1 In Trustees of H.E.H. The Nizam's Supplemental Family Trust Vs. Commissioner of Income Tax (2000)242 ITR 381(SC) wherein Supreme Court held as under:-

"It is settled law that unless the return of income already filed is disposed of, notice for reassessments under Section 148 cannot be issued i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue it is immaterial whether the order is communicated or not and that the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated, in support of this contention reference was made to certain decisions of the High Courts and sonic

observations made by this Court in a case, which we note as under:

In M.Ct. Muthuraman v. Commissioner of Income-tax, Madras MANU/TN/0556/1961 : [1963]50ITR656(Mad) , the assessment proceedings which had commenced with the returns filed by the assessee were lawfully terminated when they were closed with the entry "N.A." (not assessed) . The orders terminating the assessment proceedings were riot communicated to the assessee. The Income-tax Officer issued notices under Section 34 of the Income-tax, Act, 1922 (corresponding to Section 147 of the Income-tax Act, 1961). The Court held that the assessment proceedings were lawfully terminated and that "the orders terminating the assessment proceedings were not apparently communicated to the assessee did not affect the legality of those orders OJ their finality."

9.2 In Commissioner of Income Tax vs. Ram Kishan Leela (2007) 295 ITR 525 (Raj.) wherein Rajasthan High Court held as under:-

7. Having given our careful consideration to the facts and circumstances of the case and the submissions made by learned Counsel for the appellant, we are of the opinion that issues raised in these appeals are of academic importance and from the narration of facts it is apparent that first reassessment proceedings initiated after the search was conducted at the premises of respondent-assessee on 15th March, 1990 had not attained finality and as a result of orders of the appellate forum the reassessment proceedings for the asst. yrs. 1985-86 and 1986-87 in pursuance of notice issued prior to one in question became pending and final assessment orders were passed on 28th March, 2003.

8. Apparently, two assessment proceedings could not have continued together and at parallel length. The original reassessment proceedings have already been restored to the file of AO, consequently, second reassessment proceedings became infructuous as the orders can be passed on the basis of available material including information received later on while finalising the proceedings under Section 143(3) r/w Section 147 in pursuance of the reassessment proceedings commenced earlier to one in question. While the first reassessment proceedings were pending, there cannot be second reassessment

proceedings. It is also settled that once the reassessment proceedings are pending, the entire assessment is open and is not confined to scope of reasons recorded by the AO before assuming jurisdiction. The setting aside of the reassessment proceedings commenced vide notice dt. 28th March, 1996 could not have been resurrected and all material must be taken into consideration in making final assessment in terms of the directions of the Tribunal while setting aside the order of CIT(A) and directing the AO to make fresh assessment vide its order dt. 8th Jan., 2002.

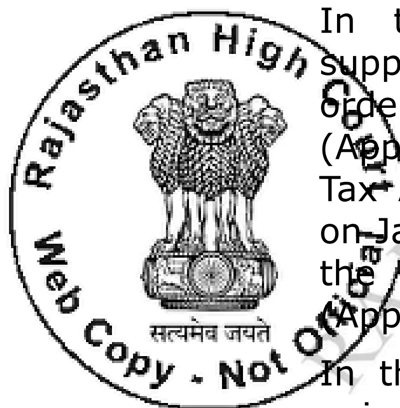
9. The Tribunal has categorically reached a finding in these appeals that M/s Jagdamba Griha Nirman Sahakari Samiti Ltd., Jodhpur, is a separate entity with the respondent-assessee. On the basis of this finding also, the reassessment order framed in favour of respondent-assessee could not have been sustained. The finding that M/s Jagdamba Griha Nirman Sahakari Samiti Ltd. and respondent-assessee are two separate entities and independent of each other is a finding of fact and that finding has not been challenged before us. For that reason also assessment order dt. 30th March, 1998 cannot be sustained. Viewed from any angle, the questions raised in these appeals are of academic importance and cannot be considered as questions of law requiring consideration in these appeals.

7.3 In Jhunjhunwala Vanaspati Ltd. vs. Assistant Commissioner of Income Tax (No.2) (2004) 266 ITR 664 (All) wherein Allahabad High Court holding as under:-

"Be that as it may, there is no dispute that once the Commissioner of Income Tax (Appeals) passed an order of remand on March 15, 1994, the assessment proceedings became pending before the Assessing Officer.

It is well settled that the notice under Section 148 cannot be issued when assessment proceedings are pending vide CIT v. Ranchhoddas Karsondas MANU/SC/0097/1959 : [1959]36ITR569(SC) ; CIT v. S. Raman Chettiar MANU/SC/0146/1964 : [1965]55ITR630(SC) ; N. Naganatha Iyer v. CIT MANU/TN/0436/1965 : [1966]60ITR647(Mad) ; Ram Bilas Kedar Nath

v. ITO MANU/UP/0128/1963 : [1963]47ITR586(All) ; Dr. Onkar Dutt Sharma v. CIT MANU/UP/0247/1966 : [1967]65ITR359(All) ; Sool Chand Ram Sewak v. CIT MANU/UP/0127/1968 : [1969]73ITR466(All) ; S.P. Kochhar v. ITO MANU/UP/0347/1982 : [1984]145ITR255(All) ; Trustees of H. E. H. The Nizam's Supplemental Family Trust v. CIT MANU/SC/0106/2000 : [2000] 242 ITR 381 and CIT v. M. K.K. R. Muthu-kamppan Chettiar MANU/SC/0195/1969 : [1970]78ITR69(SC) , etc.



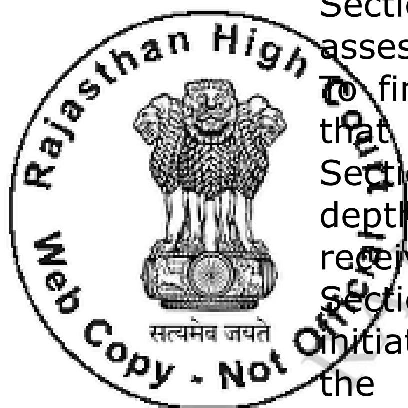
In the present case, the petitioner filed a supplementary affidavit stating that against the order of the Commissioner of Income Tax (Appeals) an appeal was filed before the Income Tax Appellate Tribunal which has been dismissed on January 28, 1997 (vide annexure SA 1). Hence, the order of the Commissioner of Income Tax (Appeals) stands confirmed.

In the circumstances it is not necessary for us going into the other points urged by the petitioner.

In view of the above, we are of the opinion that the impugned notice dated March 18, 1994, under Section 148 is invalid and it is hereby quashed. The petition is allowed. No order as to costs.

7.4 In KLM Royal Dutch Airlines vs. Assistant Director of Income Tax (2007) 292 ITR 49 (Del) wherein Delhi High Court held as under:-

11. In our opinion Sections 147/148 cannot be interpreted in isolation of the other provisions of Chapter-XIV of the IT Act which is the fasciculus dealing with the procedure for Assessment. Section 139 makes it mandatory for every person whose total income exceeds the maximum amount which is not chargeable to Income Tax, to furnish a Return of Income by the due date. Section 142 deals with the inquiry before Assessment. The first sub-section thereof empowers the AO to issue a notice to any person to file a Return or to produce its Accounts or any documents or to provide any information as the AO may require. Sub-section (2) empowers the AO to make any inquiry he considers necessary. Sub-section (3) incorporates the audi alteram partem rule of natural justice viz. providing to the affected party an opportunity of being heard.



Section 143 deals with the dispatch of intimations specifying the sum payable as tax or interest that has been found by the AO to be due on the basis of the Return; it deals with refunds payable to the assessed. The neat question which arises before us is whether on the commencement of assessment proceedings must they first be brought to their logical conclusion by framing an assessment before embarking on the proceedings as envisaged in Sections 147/148 of the IT Act; or more precisely stated, can resort to Section 147 be made even whilst the normal assessment proceedings are pending conclusion. To find the answer we must keep in perspective that every Return of Income filed under Section 139 may not result in its active and in-depth perusal or consideration by the AO as it may receive an automatic onward passage under Section 143(1). However, once an inquiry has been initiated by the AO, it cannot but result in either the Return being accepted as having been correctly computed by the concerned assessed, or for an Assessment being conducted and concluded thereon by the AO. The provisions of Section 147would have no role to play at this stage of the proceedings. Once a Return of Income attracts the attention and scrutiny of the AO, it is his bounden duty to delve into every aspect thereof. The AO is sufficiently empowered to ask for all information necessary for framing the Assessment. The only fetter on the amplitude of his discretion is that the Assessment must be framed within the time limit set-down by Section 153 which, in substance, is two years from the end of the Assessment Year in which the income was first assessable or one year from the end of the Financial Year. A perusal of its second sub-section makes it clear that proceedings under Section 147are altogether different to those under Section 143. This distinction appears to have escaped the attention of the Revenue. Sub-section (2) stipulates that no order under Section 147 shall be made after the expiry of one year from the end of the Financial Year in which notice under Section 148 was served.

12. Section 147 of the IT Act deals with the powers of the AO to 'assess' or reassess the income chargeable to tax which has escaped assessment. Section 148 contemplates making the 'assessment', reassessment or recomputation under Section 147. Keeping the factual matrix before us in perspective, it becomes critical to define the word assess since the AO is avowedly not reassessing or recomputing the income

presented by the assessed for taxation in the form of its Return. It is trite that the words assess, reassess or recompute are not synonymous of each other. It seems to us that an assessment must entail a conscious and concerted calculation carried out by the concerned officer with a view to determine the amount of tax payable by any person. The exercise commencing with Section 139 and ending at Section 145A cannot be interpreted as identical to or overlapping Sections 147/148/149. They are predicated on different circumstances and operate in disparate dimensions. The IT Act makes it incumbent upon every person whose total income exceeds the maximum amount which is not chargeable to Income Tax to file a Return of Income in order to kick-start the normal assessment procedure. However, it may happen that a person fails to file a Return of Income, say for the AY 2000-2001, even though he is liable to pay tax. It could also happen that a person may file a Return of Income incorrectly offering for purposes of taxation a sum lower than the correctly calculated income. Both these situations have been obviously kept in view in 2nd Explanation to Section 147 and in its Clauses (a) and (b). In either event the AO would invoke the powers conferred upon him by Section 147 of the IT Act culminating with the completion of the assessment. It is also conceivable that the incorrectness of the Return may not be detected or noticed within the time period set-down in Section 153. In these circumstances if the AO has reason to believe, predicated on information received by him, that income chargeable to tax has escaped assessment, he would invoke the powers under Section 147. On the other hand, where a Return of Income has been filed but has been taken at its face value, without any proceedings under Section 143(2) and 143(3) having been conducted, no assessment exercise would obviously have been undertaken. After the expiry of the time period set-down in Section 153, this situation can be remedied by the AO by invoking Section 147. The word 'assessment' has been defined in the Act in a most unsatisfactory manner, merely by stating that it includes reassessment. A more comprehensive definition is readily available in the Australian decision titled Batagol -vs- Federal Commissioner of Taxation (1963) 109 CLR 243 in these words:

> assessment means the completion of the process by which the provisions of the Act relating to

liability to tax are given concrete application in a particular case with the consequence that a specified amount of money will become due and payable as the proper tax in that case.

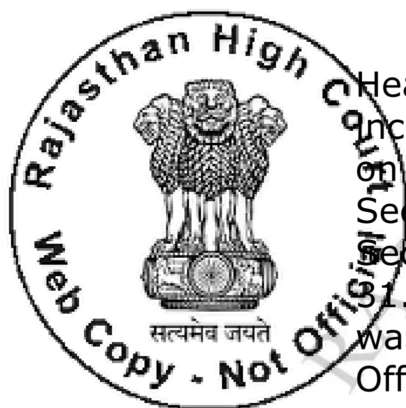
19. Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

7.5 In CESC Ltd. and another vs. Deputy Commissioner of Income Tax and others (No.2) (2003) 263 ITR 402 (Cal) wherein Calcutta High Court held as under:-

It is an admitted proposition that the jurisdiction for assessment of nonresidents have been conferred only upon the authorities at Mumbai. All nonresidents are assessed at Mumbai, The jurisdiction relating to such assessment by the Dy. CIT, Mumbai, cannot be questioned. The said proceeding cannot be taken up anywhere else in India. In connection with such proceedings, the Dy. CIT, Mumbai, had authority to summon or ask for information from any person through out India in connection with such proceedings. Now it is to be considered whether issue of a notice in connection with a proceeding pending before the Dy. CIT, Mumbai, would give rise to a cause of action to such an extent enabling the High Court having territorial jurisdiction where such notices

were served to exercise its discretion to assume jurisdiction even if such service of notice is an integral part of the cause of action or even if it prima facie appears to be without jurisdiction.

7.6 In Commissioner of Income Tax vs. K.M. Pachayappan (2008) 304 ITR 264 (Mad) wherein Madras High Court holding as under:-

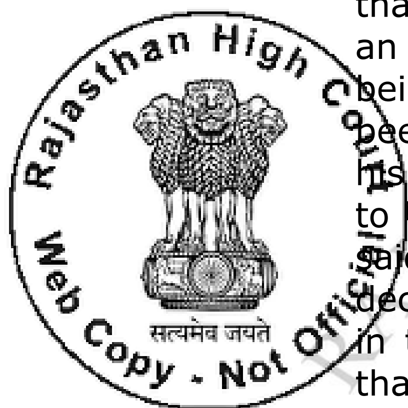


Heard the counsel. In this case, Return of Income was filed under Section 139(4) of the Act on 15.03.2000 and notice under Section 143(2) for framing assessment under Section 143(3) could have been issued upto 31.03.2000. Therefore, a valid Return of income was pending as on 15.03.2000. The Assessing Officer issued notice under Section 148 on 15.03.2000 when a valid Return under Section 139(4) was pending. In this case the Return was filed and the same is pending, which means that the proceeding is still pending. In such a situation, the Revenue could not have issued notice for the purpose of reopening under Section 147 of the Act. In the case of Trustees Of H.E.H. The Nizam's Supplemental Family Trust v. Commissioner of Income Tax MANU/SC/0106/2000 : [2000] 242 ITR 381 (SC), the Supreme Court considered the scope of reopening the assessment and held as follows:

It is settled law that unless the return of income already filed is disposed of, notice for reassessment under Section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue it is immaterial whether the order is communicated or not and the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated.

... A mere glance at this note would show that it could not be said that the Income Tax Officer gave finality to the refund since no refund is granted either in the hands of the trust or in the hands of the beneficiaries. It is an inconclusive note where the Income Tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not

communicated to the trustees. When we examine the note dated November 10, 1965, on the file of 1963-64 nothing flows from that as well. In any case if it is an order, it would be appealable under Section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it is imperative that such an order be communicated to the assessee. Had the Income Tax Officer passed any final order, it would have been communicated to the assessee within a reasonable period. In any case, what we find is that the note dated November 10, 1965, is merely an internal endorsement on the file without there being an indication if the refund application has been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source is to be allowed, the Income Tax Officer cannot be said to have closed the proceedings finally. The decisions referred to by the Revenue are of no help in the present case. We are, thus, of the opinion that during the pendency of the return filed under Section 139 of the Act along with the refund application under Section 237of the Act, action could not have been taken under Section 147/148 of the Act. Our answer to the question, therefore, is in the negative, i.e., against the Revenue.



In the case of KLM Royal Dutch Airlines v. Assistant Director of Income Tax MANU/DE/7547/2007 : [2007]292ITR0(Delhi) , the Delhi High Court, following the above Supreme Court judgment, considered the scope of provision of Sections 139 and 147 of the Act and held as follows:

Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no "fresh evidence or material" could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the Assessing Officer for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year, it would have to be assumed that since proceedings had not been opened under Section 143(2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the Assessing Officer after the expiry of limitation fixed for

framing the original assessment. So far as the present case is concerned, we are of the view that it is evident that, faced with severe paucity of time, the Assessing Officer had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

Applying the principles enunciated in the judgments of the Supreme Court as well as the Delhi High Court, cited supra, the Tribunal is right in coming to a conclusion that no action could be initiated under Section 147 of the Act, when there is a pendency of the Return before the Assessing Officer. The reasons given by the Tribunal are based on valid materials and evidence and we do not find any error or illegality in the order of the Tribunal so as to warrant interference.

5. In view of the foregoing reasons, no substantial questions of law arise for consideration of this Court and accordingly the tax case is dismissed. No costs.

7.7 In Commissioner of Income Tax vs. TCP Ltd. (2010) 323 ITR 346 (Mad) wherein Madras High Court held as under:-

We heard learned counsel for the Revenue, who fairly submitted that the issue is covered by the decision in the case of Trustees of H.E.H. The Nizam's Supplemental Family Trust v. CIT MANU/SC/0106/2000 : [2000] 242 ITR 381 in which case, the Supreme Court considered the scope of reopening of the assessment and held as follows :

It is settled law that unless the return of income already filed is disposed of, notice for reassessment under section 148 cannot be issued, i.e., no reassessment proceedings can be initiated so long as assessment proceedings pending on the basis of the return already filed are not terminated. According to the Revenue, it is immaterial whether the order is communicated or not and the only bar to the reassessment proceedings is that proceedings on the return already filed should have been terminated...

A mere glance at the note of the Income-tax Officer would show that it could not be said that

the Income-tax Officer gave finality to the refund since no refund was granted either in the hands of the trust or in the hands of the beneficiaries. It was an inconclusive note where the Income-tax Officer left the matter at the stage of consideration even with regard to refund in the hands of the beneficiaries. This note was also not communicated to the trustees. Nothing flowed from the note dated November 10, 1965, on the file of 1963-64 as well. In any case if it was an order, it would be appealable under section 249 of the Act. Since the period of limitation starts from the date of intimation of such an order, it was imperative that such an order be communicated to the assessee. Had the Income-tax Officer passed any final order, it would have been communicated to the assessee within a reasonable period. In any case, the note dated November 10, 1965, was merely an internal endorsement on the file without there being an indication if the refund application had been finally rejected. By merely recording that in his opinion, no credit for tax deducted at source was to be allowed, the Income-tax Officer could not be said to have closed the proceedings finally. During the pendency of the return filed under section 139 of the Act along with the refund application under section 237 of the Act, action could not have been taken under section 147 /148 of the Act (headnote).

3. Following the abovesaid judgment, a Division Bench of this court in the case of CIT v. K.M. Pachayappan MANU/TN/8644/2007 : [2008] 304 ITR 264 and the subsequent Division Bench of this court, in which one of us is a party (Raviraja Pandian J.) in the case of CIT v. Qatalys Software Technologies Ltd. MANU/TN/1630/2008 : [2009] 308 ITR 249, has held the issue against the Revenue, by also relying upon the decision in the case of KLM Royal Dutch Airlines v. Asst. DIT MANU/DE/0589/2007 : [2007] 292 ITR 49, in which the Delhi High Court, following the Supreme Court judgments cited supra, considered the scope of the provision of sections 139 and 147 of the Act and held as follows (page 63):

Applying this line of decisions to the facts of the present case, the inescapable conclusion that

would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the Assessing Officer for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular assessment year, it would have to be assumed that since proceedings had not been opened under section 143(2), the return had been accepted as correct. It may be argued that thereafter recourse could be taken to section 147, provided fresh material had been received by the Assessing Officer after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned, we are of the view that it is evident that, faced with severe paucity of time, the Assessing Officer had attempted to travel the path of section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

In the light of the decisions cited supra and on the facts of this case, we are of the view that the order of Tribunal is not against any statutory provision or the law declared by the Supreme Court. The tax case appeal stands dismissed. No costs.

7.8 In Assistant Commissioner of Income Tax vs. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500 (SC) wherein Supreme Court held as under:-

10. Section 143(1) as it stood at the point of time when the intimation was given under the said provision, so far as relevant, read as follows:

143. (1)(a) Where a return has been made under Section 139, or in response to a notice under Sub-section (1) of Section 142,

(i) if any tax or interest is found due on the basis of such return, after adjustment of any tax deducted at source, any advance tax paid and any amount paid otherwise by way of tax or interest, then, without prejudice to the provisions of sub-section (2), an intimation shall be sent to

the assessee specifying the sum so payable, and such intimation shall be deemed to be a notice of demand issued under Section 156 and all the provisions of this Act shall apply accordingly; and

(ii) if any refund is due on the basis of such return, it shall be granted to the assessee:

Provided that in computing the tax or interest payable by, or refundable to, the assessee, the following adjustments shall be made in the income or loss declared in the return, namely:

(i) any arithmetical errors in the return, accounts or documents accompanying it shall be rectified;
(ii) any loss carried forward, deduction, allowance or relief, which, on the basis of the information available in such return, accounts or documents, if prima facie admissible but which is not claimed in the return, shall be allowed;

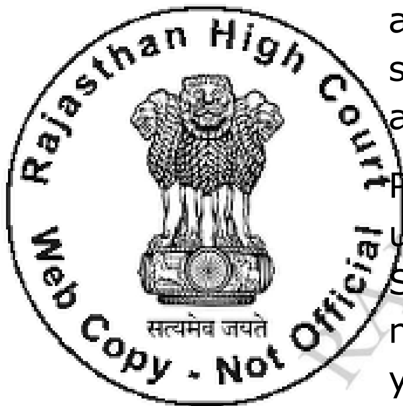
(iii) any loss carried forward, deduction, allowance or relief claimed in the return, which, on the basis of the information available in such return, accounts or documents, is prima facie inadmissible, shall be disallowed :

Provided further that an intimation shall be sent to the assessee whether or not any adjustment has been made under the first proviso and notwithstanding that no tax or interest is due from him:

Provided also that an intimation under this clause shall not be sent after the expiry of two years from the end of the assessment year in h the income was first assessable.

147. **Income escaping assessment.--**If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped

assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice
subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153referred to as the relevant assessment year):



Provided that where an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

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

Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:

(a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been under-assessed ; or

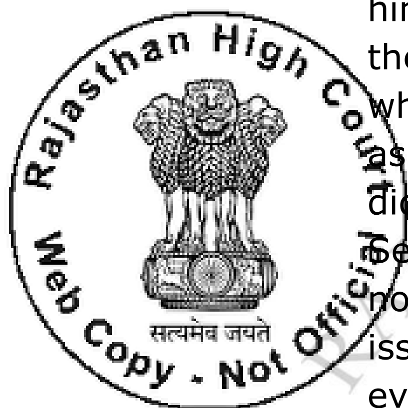
(ii) such income has been assessed at too low rate ; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

148. **Issue of notice where income has escaped assessment.--**(1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice containing all or any of the requirements which may be included in a notice under Sub-section (2) of Section 139; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub section.

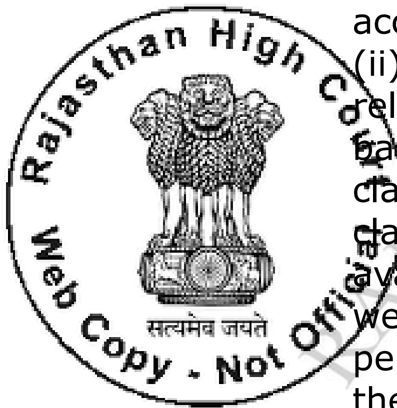
(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so.



11. It is to be noted that substantial changes have been made to Section 143(1) with effect from June 1, 1999. Up to March 31, 1989, after a return of income was filed the Assessing Officer could make an assessment under Section 143(1) without requiring the presence of the assessee or the production by him of any evidence in support of the return. Where the assessee objected to such an assessment or where the officer was of the opinion that the assessment was incorrect or incomplete or the officer did not complete the assessment under Section 143(1), but wanted to make an inquiry, a notice under Section 143(2) was required to be issued to the assessee requiring him to produce evidence in support of his return. After considering the material and evidence produced and after making necessary inquiries, the officer had power to make assessment under Section 143(3). With effect from April 1, 1989, the provisions underwent substantial and material changes. A new scheme was introduced and the new substituted Section 143(1)prior to the subsequent substitution with effect from June 1, 1999, in Clause (a), a provision was made that where a return was filed under Section 139 or in response to a notice under Section 142(1), and any tax or refund was found due on the basis of such return after adjustment of tax deducted at source, any advance tax or any amount paid otherwise by way of tax or interest, an intimation was to be sent without prejudice to the provisions of Section 143(2) to the assessee specifying the sum so payable and such intimation was deemed to be a notice of demand issued under Section 156. The first proviso to Section 143(1)(a) allowed the Department to make certain adjustments in the income or loss declared in the return. They were as follows:

(a) an arithmetical error in the return, accounts and documents accompanying it were to be rectified;

(b) any loss carried forward, deduction, allowance or relief which on the basis of the information available in such return, accounts or documents,



was prima facie admissible, but which was not claimed in the return was to be allowed;

(c) any loss carried forward, relief claimed in the return which on the basis of the information as available in such returns accounts or documents were prima facie inadmissible was to be disallowed.

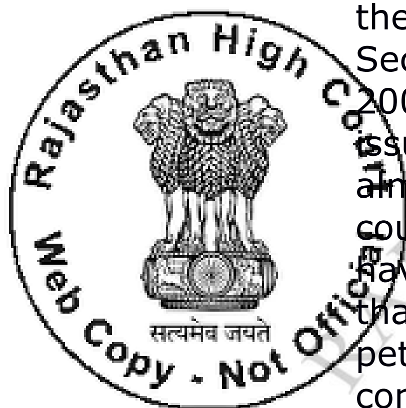
12. What were permissible under the first proviso to Section 143(1)(a) to be adjusted were, (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return and similarly (iii) those claims which were on the basis of the information available in the return, prima facie inadmissible, were to be rectified/allowed/disallowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. The Assessing Officer had no authority to make adjustments or adjudicate upon any debatable issues. In other words, the Assessing Officer had no power to go behind the return, accounts or documents, either in allowing or in disallowing deductions, allowance or relief.

7.9 In Commissioner of Income Tax vs. Abdul Gani Mohd. Ismail (1993) 203 ITR 627 (Raj.) wherein Rajasthan High Court holding as under:-

The return was submitted under s. 139 and, therefore, the ITO had jurisdiction to issue the notice under s. 143(2). The notice which has been issued under s. 143(2) has resulted in the final assessment and simply because a notice was issued earlier under s. 148 for which the conditions precedent were not in existence, it cannot be deemed that the assessment has been framed under s. 148. Though the provisions of s. 292B cannot be invoked in the present case because it was not a case of mistake, defect or omission in a notice issued, it is a case where a notice was wrongly issued and subsequently the correct notice was issued. On issuing the correct notice subsequently, the effect of issue of the earlier notice is obliterated. It was on account of the issue of notice under s. 143(2) that information/statement which was not submitted along with the return were

subsequently submitted and, therefore, the assessment was framed under s. 143(3). Mere writing of s. 148 "will not escape the assessee of the liability" to pay tax in accordance with the return which was submitted by him.

7.10 In Punjab Tractors Ltd. vs. Joint Commissioner of Income Tax (2002) 254 ITR 242 (P & H) wherein it has been held as under:-



We are unable to accept this contention. Firstly, it is the petitioner's own case that the assessment under Section 143(3) could be made up to March 19, 2002. In the present case, the impugned notice was issued to the petitioner on March 29, 2001. It was almost a year before the date on which an order could be passed under Section 143(3). The notice having been given well in advance, it cannot be said that any prejudice had been caused to the petitioner. Secondly, we find that the reasons were conveyed. It has not been suggested by counsel that these were not relevant. There is no injustice. We find no ground to interfere under article 226.

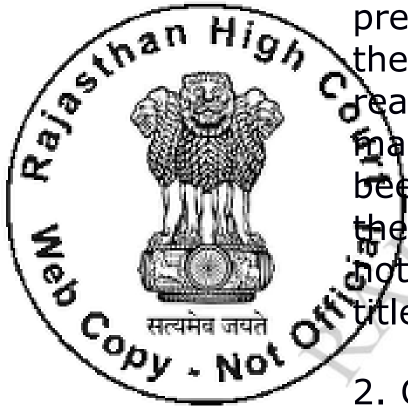
In view of the above, we answer the question posed at the outset against the petitioner. It is held that the notice under Section 147/148 issued to the petitioner is not vitiated merely for the reason that notice under Section 143(2) had not been issued to it.

7.11 In Mahanagar Telephone Nigam Ltd. vs. Chairman, Central Board of Direct Taxes and anr. (2000) 246 ITR 173 (Del) wherein it has been held as under:-

So long as the ingredients of Section 147 are fulfilled ,the Assessing Officer is free to initiate to proceed under Section 147 and failure to take steps under Section 143(3) will not render the Assessing Officer powerless to initiate re-assessment proceedings even when intimation under Section 143(1) had been issued. Similar view has been taken in A. Pusa Lal Vs. Commissioner of Income (1988) 1691 ITR 215 and Jorawar Singh Baid Vs. Asstt Commissioner of Income Tax MANU/WB/0140/1992 : [1992]198ITR47(Cal) and Pradeep Kumar Har Saran Lal Vs . Assessing Officer MANU/UP/0552/1997 : [1998]229ITR46(All) . In the instant case, though statutorily reasons were not required to be communicated to the assessed prior to the submission of return in response to notice under Section 148, pursuant to the directions

of this Court, reasons for proceeding under Section 147 have been indicated. They are as follows:-

"M/s. Mahanagar Telephone Ltd. with its office at Jeevan Bharati Tower-1, 12th Floor, Connaught Circus, New Delhi filed its return of income for the A.Y. 1994-95 on a total income of Rs. 778,01,90,342/-. The return so filed on 30.11.1994 was processed u/s 143(1)(a) on 28.03.1995. Examination of the return of income reveals that a sum of Rs.124,85,60,000/- has been claimed as license fee as against nil in the immediately preceding year. While finalizing the assessment for the A.Y. 1996-97 u/s 143(3) on 23.03.1999 for reasons discussed therein it is found that the claim made by the assessed is erroneous and should have been disallowed. It is so on account of the fact that the expenditure is application of income and does not tantamount to diversion of income by overriding title.



2. On the facts of the case I have reasons to believe that income chargeable to tax of Rs. 124,85,60,000/- has escaped assessment for the A.Y. 1994-95. Accordingly, notice u/s 148 r.w. Section 147 is issued to bring to tax the aforesaid amount. Notice signed may issue.

16. This cannot be said to be a case where initiation of proceedings in terms of notice under Section 148 can be said to be without jurisdiction or foundation. The reasons indicated cannot be said to be non-relevant. While deciding the validity of a notice under Section 148, the permissible limit of consideration is the existence of reasons and, as indicated above not sufficiency thereof.

7.12 In Pradeep Kumar Har Saran Lal vs. Assessing Officer (1998) 229 ITR 46 (All) wherein it has been held as under:-

In the case at hand, the Assessing Officer proceeded on a wrong footing by making the adjustment not permissible by the proviso to Section 143(1)(a). He might have proceeded under Section 143(2) as well to bring the profits of the petitioner to tax by making a regular assessment under Section 143(3), but failure on his part in doing so before the processing of the return was completed under Section 143(1)(a) will not take away the jurisdiction of the Assessing Officer to proceed under Section 147, if the Assessing Officer is able to establish the requisite conditions of Section 147. For these reasons, the second submission is rejected.

> 28. Lastly, Sri Gulati submits that after the appeal order, the intimationsent by the Assessing Officer to the petitioner, had merged in the appealorder and the only remedy open to the Assessing Officer was to appealagainst the order of the Commissioner of Income Tax (Appeals) and thatafter the merger of the intimation in the appeal order, it was not opento the Assessing Officer to take recourse to the reassessment proceedings.It is to be borne in mind that there was no appeal against the intimationsent to the petitioner by the Assessing Officer. After the intimation havingbeen sent, the petitioner made an application for rectification under Section 154, which was rejected on February 16, 1990, and it is that order againstwhich the appeal was filed by the petitioner before the Commissioner ofIncome-tax (Appeals). It is, therefore, incorrect to say that the intimationstood merged in the appeal order. Even if the submission of counsel forthe petitioner that after the appeal order, the order appealed againstmerged, is taken to be correct, still however, not the intimation but theorder dated February 16, 1990, rejecting the application made under Section 154 could, at the most, be said to have merged in the order of the appellate authority. So the merger if at all it is there, is limited to the proposition that the scope of the proviso to Section 143(1)(a) and of Section 154 telescoping into each other, no debatable addition by way of adjustment is permissible under Section 143(1)(a). It does not create estoppel against the department to make reassessment. This submission too of counsel for the petitioner is rejected.

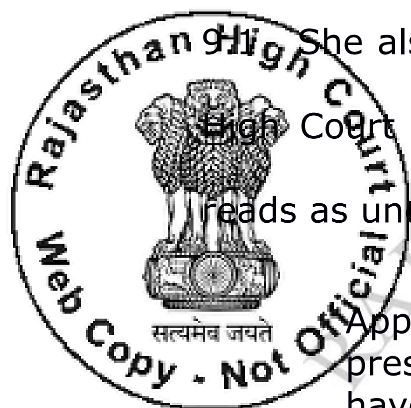
8. He has also pointed out the statutory provisions which was made applicable u/s 143 at the relevant time which is produced on record and subsequent amendment. He contended that the judgment in Rajesh Jhaveri (supra) (2007) 291 ITR 500 para 10, 11 ,12 is required to be considered.

9. Counsel for the respondent has opposed and relied on the view taken in Rajesh Jhaveri (supra) in para no.18 & 19 which reads as under:-

> 18. So long as the ingredients of Section 147 are fulfilled, the Assessing Officer is free to initiate

proceeding under Section 147 and failure to take steps under Section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when intimation under Section 143(1) had been issued.

19. Inevitable conclusion is that High Court has wrongly applied Adani's case (supra) which has no application to the case on the facts in view of the conceptual difference between Section 143(1) and Section 143(3) of the Act.



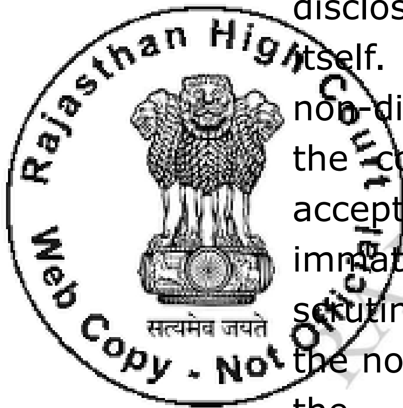
9.1 She also relied on the observations made in Para 19 of Delhi High Court judgment in KLM Royal Dutch Airlines (supra) which reads as under:-

Applying this line of decisions to the facts of the present case, the inescapable conclusion that would have to be reached is that while assessment proceedings remain inchoate, no 'fresh evidence or material' could possibly be unearthed. If any such material or evidence is available, there would be no restrictions or constraints on its being taken into consideration by the AO for framing the then current assessment. If the assessment is not framed before the expiry of the period of limitation for a particular AY, it would have to be assumed that since proceedings had not been opened under Section 143(2), the Return had been accepted as correct. It may be argued that thereafter recourse could be taken to Section 147, provided fresh material had been received by the AO after the expiry of limitation fixed for framing the original assessment. So far as the present case is concerned we are of the view that it is evident that, faced with severe paucity of time, the AO had attempted to travel the path of Section 147 in the vain attempt to enlarge the time available for framing the assessment. This is not permissible in law.

9.2 She has also relied upon the following decisions:-

9.3 In Jorawar Singh Baid vs. Asst. Commissioner of Income Tax & ors. reported in (1992) 198 ITR 47 (Cal) wherein it has been held as under:-

6. We have not been able to persuade ourselves to accept any such plea, howsoever novel. In our view, a return after its acceptance, whether in a summary manner or after scrutiny, may itself lead to reassessment proceedings provided the conditions for reassessment under Section 147 exist.



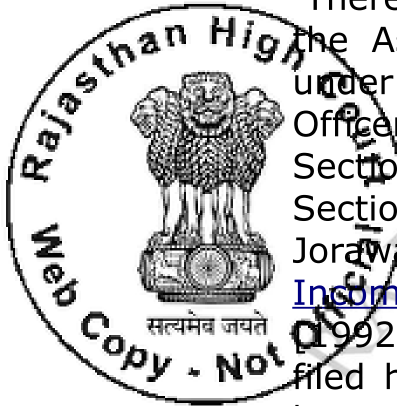
7. The major consideration in reassessment is whether the assessee has disclosed truly and fully all materials necessary for assessment. Such disclosure is primarily to be made in the return itself. Therefore, any enquiry as to the question of non-disclosure necessarily directs one's attention to the contents of the return. The return may be accepted with or without scrutiny, that is immaterial. The only difference that may arise in a scrutiny assessment under Section 143(2) is that the non-disclosure in the return may be removed by the assessee in the proceeding under Section 143(3). But, in all cases, the very starting point of suppression of material is the filing of the return that contains incomplete materials or concealment of materials without which no proper assessment of income is possible. It is not the summary acceptance of the return under Section 143(1)(a) that can operate as a bar against reassessment. It is, rather, the further disclosure made by the assessee in the course of proceedings under Section 143(3)whereby the assessee may take out his case from the mischief of Section 147. Therefore, the scope for initiating reassessment proceedings in an assessment made under Section 143(1)(a) is far wider than in an assessment under Section 143(2) read with Section 143(3).

8. In our view, the power that can be exercised under Section 143(2) to correct the assessment made under Section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under Section 147 if the ingredients of Section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under Section 147, notwithstanding the fact that there are other remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under

Section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under Section 143(1) by issuing a notice under Section 143(2) of the Act.

9.4 In Pradeep Kumar Har Saran Lal vs. Assessing Officer

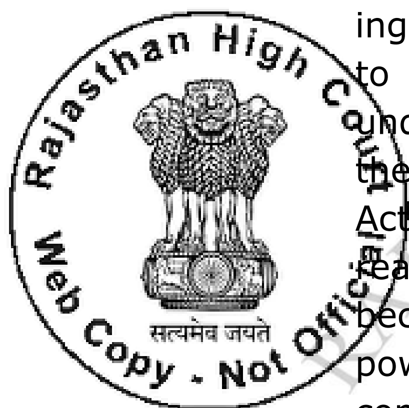
(1998) 229 ITR 46 (ALL) holding as under:-



Therefore, the question is whether the failure of the Assessing Officer in having issued the notice under Section 143(2) precluded the Assessing Officer from issuing the impugned notice under Section 148 after the proceedings under Section 143(1)(a) having been completed. In Jorawar Singh Baid v. Assistant Commissioner of Income Tax MANU/WB/0140/1992 : [1992]198ITR47(Cal) , the processing of the return filed had been completed under Section 143(1)(a), but such completion was not followedby initiation of proceedings under Section 143(2). Counsel for the assessee then contended before the Calcutta High Court that completion of the assessment under Section 143(1)(a) coupled with the expiration of the period of limitation for invoking the proviso to Section 143(2) precluded the Assessing Officer from issuing a notice under Section 148. The Calcutta High Court rejected such submission of counsel for the assessee for the following reasons (page 51) :

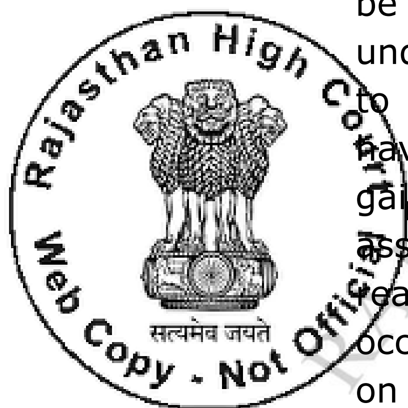
> " Simply because the return of the assessee has been accepted without scrutiny and in good faith the Assessing Officer is not precluded from initiating a proceeding satisfying the conditions therefore where the income has escaped assessment. There is nothing either in Section 143 or in Section 147 that can support such a view. The provisions of a tax statute should be interpreted in a manner leading to the result that everybody pays his due tax. ... In our view, a return after its acceptance, whether in a summary manner or after scrutiny, may itself lead to reassessment proceedings provided the conditions for reassessment under Section 147 exist. , . . It is not the summary acceptance of the return under Section 143(1)(a) that can operate as a bar against reassessment. It is, rather, the further disclosure made by the assessee in the course of proceedings under Section 143(3) whereby the

assessee may take out his case from the mischief of Section 147. Therefore, the scope for initiating reassessment proceedings in an assessment made under section 143(1)(a) is far wider than in an assessment under Section 143(2) read with Section 143(3). In our view, the power that can be exercised under Section 143(2) to correct the assessment made under Section 143(1) does not exclude the power of the Assessing Officer to reopen the assessment under Section 147 if the ingredients of Section 147 are satisfied. It is open to the Assessing Officer to invoke the jurisdiction under Section 147, notwithstanding the fact that there are other remedies open to him under the Act. It cannot, therefore, be accepted that the reassessment under Section 147 is vitiated because the Assessing Officer failed to invoke his power to correct the assessment already completed under Section 143(1) by issuing a notice under Section 143(2) of the Act."



9.5 In MTNL vs. The Chairman, Central Board of Direct Taxes & Anr. (2002) 246 ITR 173 (Delhi) wherein it has been held as under:-

8. What were permissible under the first proviso to Section 143(1)(a) to be adjusted were: (i) only apparent arithmetical errors in the return, accounts or documents accompanying the return, (ii) loss carried forward, deduction, allowance or relief, which was prima facie admissible on the basis of information available in the return but not claimed in the return, and similarly, (iii) those claims which were on the basis of the information available in the return, prima facie inadmissible, were to be rectified/allowed/disallowed. What was permissible was correction of errors apparent on the basis of the documents accompanying the return. Assessing Officer had no authority to make adjustments or adjudicate upon any debatable ble issue. In other words, the assessing officer had no power to go behind the return, accounts or documents, either in allowing or in disallowing deductions, allowance or relief.



13. The scope and effect of Section 147 as substituted with effect from 1-4-1999 as also Sections 148 to 152 are substantially different from the provisions as stood prior to such substitution. Under old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or re-assessed. To confer jurisdiction under Section 147(a) two conditions were required to be satisfied, firstly, the Assessing Officer must have reason to believe that income, profits or gains chargeable to income-tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on part of assessed to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions are condition precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under Section 148 read with Section 147(a). But under substituted Section 147, existence of only the first condition suffices. In other words if the Assessing Officer for what ever reason has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment. It is however, to be noted that both the conditions must be fulfilled ,if the case falls within the ambit of proviso to Section 147. Case at hand is covered by the main provision and not the proviso.

14. Another plea taken by the petitioner was that within that prescribed time limit action for assessment under Section 143(3) was not taken. We find no substance in this plea.

9.6 In CIT vs. ABAD Fisheries (2002) 258 ITR 641 (Ker.) wherein it has been held as under:-

5. The first question for consideration is whether the assessment was valid. The contention taken by

> the assessee is as follows : Section 143(1)(a) of the Act provides the procedure regarding assessment. Under Section 143(1)(a) of the Act, the officer can, after being satisfied about the return, send an intimation. This intimation shall be deemed to be a notice of demand issued under Section 156. The intimation may be either that the amount is due as per the return filed by the assessee or that refund is due to the assessee. In this case there was no proceeding under Section 143(2) or (3). The return was processed under Section 143(1)(a) of the Act. Then notice was issued under Section 148 and finally, the order was passed under Section 143(3) of the Act. The contention of the assessee is that since no order was passed under Section 143(3) of the Act before the notice was issued under Section 148, the procedure under Section 148 of the Act is invalid. We are not able to appreciate the contention of learned counsel for the assessee."

9.7 Counsel for the respondent Ms. Jain contended that the order is appealable and also revisable u/s 264. In our considered opinion the against the appealable order or revision, it will not confer jurisdiction to the assessing officer to issue notice u/s148.

10. We have heard counsel for the parties.

10.1 Before proceeding with the matter, it will not be out of place to mention that order u/s 143 was confirmed on 11.8.2000 when the return was filed and the notice which is impugned u/s 148 came to be issued before the assessment could have been done.

10.2 The contention of the assesee that in the notice which has been issued u/s 148, ingredients u/s 148 are not fulfilled, in our considered opinion, when order u/s 143 is passed, the observations which are made in the case of Rajesh Jhaveri (supra) in para no.11, 12 & 13 as reproduced hereinabove would apply.

10.3 The contention raised by the counsel for the appellant is required to be accepted in view of the observations made by the Delhi High Court in KLM Royal Dutch Airlines (supra).

10.4 In that view of the matter, we are of the opinion that the Tribunal has seriously committed an error in upholding the notice u/s 148 when the officer has regularly framed assessment. The view taken by the CIT(A) is required to be accepted.

11. Therefore, the issue is answered in favour of the assesee and against the department.

12. The appeal stands allowed.

(VIJAY KUMAR VYAS),J. (K.S. JHAVERI),J.

Bm Gandhi 209.

RAJASTHAN HIGH COURT