THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 15.09.2015

+ ITA 174/2013

ORIENTAL INSURANCE COMPANY ..... Appellant

versus

COMMISSIONER OF INCOME TAX, DELHI ..... Respondent

Advocates who appeared in this case:

For the Appellant : Mr M.S. Syali, Senior Advocate with Mr Mayank Nagi and Mr Harkunal Singh.

For the Respondent : Mr Kamal Sawhney, Senior Standing Counsel with Mr Shikhar Garg.

CORAM:
HON'BLE DR. JUSTICE S. MURALIDHAR
HON'BLE MR. JUSTICE VIBHU BAKHRU

JUDGMENT

VIBHU BAKHRU, J

1. This appeal under Section 260A of the Income Tax Act, 1961 (hereafter the 'Act'), has been filed by the Oriental Insurance Company (hereafter the 'Assessee') impugning an order dated 22nd July, 2011 passed by the Income Tax Appellate Tribunal (hereafter the 'Tribunal') in ITA No. 3910/Del/2007. The said appeal was filed by the Assessee challenging an order dated 16th August, 2007 passed by the Commissioner of Income Tax (Appeals) [hereafter 'CIT(A)'] in Appeal no. 170/2006-07 whereby the appeal filed by the Assessee against the assessment order dated 25th

January, 2007 passed by the Assessing Officer (hereafter 'the AO') for the assessment year 2004-05, was dismissed.

2. By an order dated 10th July, 2013, this Court admitted this appeal and framed the following questions of law for consideration:-

> (1) Whether the Income Tax Appellate Tribunal was correct in law in upholding the addition on account of income arising on sale of investments in spite of the fact that no addition on account of grounds mentioned in the reasons to believe has been sustained?
>
> (2) Whether the Income Tax Appellate Tribunal was correct in law in holding that the income earned on sale/redemption of investment is chargeable to tax?"

At the outset, the learned Senior Counsel appearing for the Revenue submitted that the present appeal also raises the issue whether the AO's decision to tax income arising on sale of investments was the result of change in opinion and whether the same is permissible.

It is not disputed that the above issue arise from the impugned order passed by the Income Tax Appellate Tribunal and, accordingly, the following question of law is framed as the third question:-

> "(3) Whether the AO had assumed jurisdiction under Section 147 of the Act on account of change in opinion as to the taxability of the income arising on sale of investments

and whether the Income Tax Appellate Tribunal was correct in law in upholding the assumption of jurisdiction under Section 147 of the Act"

Background

3. The relevant facts necessary to address the aforesaid issues are briefly stated as under:-

3.1 The Appellant Company is a subsidiary of General Insurance Corporation of India and is engaged in the business of General Insurance comprising of Fire, Marine and Miscellaneous Insurance Business. According to the Assessee, it invests its policy holder's funds as per the statutory guidelines provided under The Insurance Act, 1938 and IRDA (Investment) Regulations, 2000.

3.2 The AO computed the assessable income at ₹35,87,12,674 but since the adjusted book profits were higher at ₹3,91,45,35,826, the AO passed an assessment order dated 30th January, 2006 for the Assessment year 2004-05 assessing the tax payable at ₹30,09,30,018 under section 115JB of the Act.

3.3 The Assessee claimed that the profits on sale/redemption of investments amounting to ₹505.33 crores for the year ending 31.03.2004, were exempt from tax in view of the omission of clause (b) of Rule 5 of the

First Schedule of Income Tax Act w.e.f. 01.04.1989 and in terms of the CBDT Circular No. 528 dated 1^{6th} December, 1988, providing explanatory notes to Finance Act, 1988. The Assessee also claimed deduction of ₹3,57,54,000/- on account of amount written off in respect of depreciated investments in support of which, it relied upon an order passed by the Tribunal in its own case for an earlier assessment year.

3.4 The AO, however, disallowed the claim for "Investments Written Off". He held that after the omission of clause (b) of Rule 5 of the First Schedule of the Act, neither the losses on depreciation of investments were allowable as a deduction nor were the profits on sale/redemption of investments taxable.

3.5 Subsequently, the AO issued a notice dated 28th November, 2006 under Section 148 of the Act as the AO was of the view that income from sale/redemption of investments had escaped assessment and initiated proceedings under Section 147 of the Act. In response to the said notice, the Appellant stated that the return of income filed on 29th October, 2004 be treated as its return in compliance of the notice. Thereafter, notices under Sections 143(2) and 142(1) of the Act were issued by the AO. The Assessee

responded to the said notices by a letter dated 22nd January, 2007, *inter alia*, claiming that the profits on sale of investments were exempt in view of the omission of Rule 5(b) of the First Schedule of the Act. The AO, however, was not satisfied with the said response and, accordingly, passed an order dated 25th January, 2007 reassessing the income of the Assessee by including the sum of ₹505.33 crores in the total taxable income.

3.6 The Appellant filed an appeal, before the CIT (A), against the said order of reassessment, *inter-alia*, challenging both the assumption of jurisdiction to reopen the assessment as well as including of profit on sale/redemption of investment in the total income.

3.7 By an order dated 16th August, 2007, the CIT(A) upheld the reassessment order dated 25th January, 2007. In so far as the issue of assumption of jurisdiction is concerned, the CIT(A) held that the AO had recorded adequate reasons to believe and, therefore, the AO had the jurisdiction to issue a notice under Section 148 of the Act. Insofar as the merits of the addition were concerned, CIT(A) upheld the addition of ₹505.33 crores to the total income of the Assessee. The CIT(A) held that: (i) in absence of a specific statutory provision, the Assessee could not be

granted exemption merely on basis of the CBDT Circular No. 528 dated 16th December, 1988 explaining the provisions of the Finance Act 1988; (ii) CBDT Circular being contrary to the legal position is not binding; and (iii) once income is credited to the Profit and Loss Account no adjustment to the same was permitted as per Rule 5 of the First Schedule of the Income-Tax Act, and that the Tribunal had held so in the Assessee's own case for AY 1990-91 (in ITA No. 2998/Del/93).

3.8 The Assessee appealed against the aforesaid order of CIT(A), before the Tribunal, *inter alia,* contending that the AO had initiated the reassessment proceedings solely on the basis of a 'change of opinion', which was not permissible. The Assessee also urged that the reasons to believe recorded by the AO were based on erroneous factual assumptions that the assessee was carrying on business other than Non-Life Insurance business, and that the assessee had credited a sum of ₹505,33,63,209/- directly into the General Reserve Account in the Balance Sheet as "profit on sale of investment" without routing the same through the Profit and Loss Account for the Previous Year.

3.9 In respect of the addition of profit on sale of investment, the

Assessee reiterated that the provisions of clause (b) of Rule 5 were omitted by the Finance Act, 1988 and the legislative intention for such statutory amendment was explained vide CBDT Circular No. 528 dated 16th December, 1988. As per the said Circular, Rule 5 of the First Schedule of the Act was amended to provide tax exemption in respect of profits earned by General Insurance Companies on sale of investments. The provisions of clause (b) to Rule 5 were re-instated by virtue of the Finance (No.2) Act, 2009 w.e.f. 01-04-2011. It was further submitted by the Assessee that Circular No.5 of 2010, dated 3rd June, 2010 indicated the reasons for the statutory amendment. The said Circular indicated that post introduction of "Insurance Regulatory and Development Authority of India (hereafter 'IRDA') (Preparation of Financial Statements and Auditors Report of Insurance Companies) Regulations in 2002", Insurance Companies are required to include income from sale of investments directly in their Profit & Loss Account and, therefore, provisions of Rule 5 were amended so as to tax this income. The Assessee urged that this amendment was not retrospective and, therefore, the income from sale/redemption of investments during the Previous Year 2003-04 was not taxable.

3.10 The Tribunal did not accept the submissions made by the Assessee

and rejected the appeal.

4. Before the Tribunal, it was conceded by the Revenue that the reasons recorded by the AO for issuing notice under Section 148 of the Act were erroneous. Concededly, the profit and loss on sale of investments had been credited to the Profit & Loss Account and not entered directly to the General Reserve Account as assumed by the AO. The second reason provided by the AO for reopening the assessment was that the Assessee was carrying on two streams of business; (1) non-life insurance business and (2) business in shares and securities as a public financial institution. Concededly, this assumption was also erroneous. However, the Tribunal upheld the reassessment on the ground that the Assessee had not brought the decision of the Tribunal in respect of Assessment Year 1991, which was against the Assessee, to the knowledge of the AO. The Tribunal held *"that such an issue should have been brought to the notice of the Assessing Officer specially, failing which it can be held that special circumstances exist by way of facts on record so as to lead to the conclusion that the Assessing Officer had reason to believe that income had escaped assessment"*. The Tribunal was of the view that since relevant information had been withheld from the AO, it was within the powers of the AO to

reopen the assessment.

Submissions

5. Mr Syali, learned counsel appearing on behalf of the Assessee contended that the validity of reopening of assessment must be tested on the reasons provided by the AO and the reopening of assessments cannot be sustained on additional grounds provided subsequently. He argued that once it was clear that the reasons as indicated by the AO for issuing notice under Section 148 of the Act were found to be palpably erroneous; the reopening of the assessment could not be sustained. He submitted that it was not open for the Income-tax Authorities to sustain re-opening of assessment under Section 147 of the Act on grounds other than those indicated as reasons for forming the belief that income had escaped assessment and for issuance of notice under Section 148 of the Act. He relied upon the decision of this Court in ***Ranbaxy Laboratories Ltd. v. CIT***: **336 ITR 136** and ***CIT v. Software Consultants***: **341 ITR 240** in support of his contentions.

6. Mr Syali further argued that the AO had no jurisdiction to reopen the assessment for taxing the profits and gains from sale of investments as the

issue with regard to taxability of that income had been considered by the AO in the initial assessment order in the context of the Assessee's claim for deduction on account of diminution in the value of investments. He submitted that in the first round of assessment the AO had considered the effect of omission of clause (b) of Rule 5 of the First Schedule by virtue of the Finance Act, 1988 and held that with the omission of the said clause, profit and gains on sale/redemption of investments were not chargeable to tax. He submitted that the notice under Section 148 of the Act was occasioned by a change of opinion on the issue of taxability of profits from sale/redemption of investments and the same was not permissible.

7. Mr Sawhney, learned counsel for the Revenue countered the arguments made on behalf of the Assessee and submitted that the decisions of this Court in ***Ranbaxy Laboratories*** *(supra)* and ***Software Consultants*** *(supra)* were wholly inapplicable in the facts of the present case. He submitted that the said decisions related to the question whether other incomes could be taxed where the income that was alleged to have escaped assessment and which had occasioned a notice under Section 148 of the Act had not been assessed or the assessment, if made, had not been sustained.

Reasoning and Conclusion

8. It is now well established that the powers under Section 147 of the Act of an AO can be invoked only in cases where the AO has reason to believe that the income chargeable to tax has escaped assessment. It has been held in several decisions that reason to believe must be based on tangible material and cogent facts; the powers under Section 147 of the Act cannot be exercised merely on suspicion or on an apprehension that the income of an Assessee has escaped assessment.

9. A *bona fide* reason to believe that income has escaped assessment is a necessary pre-condition that clothes the AO with the power to reopen the assessment, which has otherwise attained finality. The reasons to believe must have a 'direct nexus' and a 'live link' with the formation of an opinion by the AO that taxable income of an Assessee has escaped assessment. In ***Commissioner of Income-Tax v. Chintoo Tomar*: (2015) 54 Taxmann.com 160 (Delhi)**, a Division Bench of this Court had observed as under:

> "reason to believe predicates a belief which is founded and induced by existence of palpable or cogent material or information. Reason to suspect cannot amount to reason to

believe. As it is the beginning of the inquiry, having a *prima facie* opinion is sufficient; and irrebuttable conclusive evidence or finding is not required. But the *prima facie* formation of belief should be rational, coherent and not *ex facie* incorrect and contrary to what is on record."

10. In the present case, the reasons recorded by the AO for issuance of notice under Section 148 of the Act are quoted as under:-

> "Under the prescribed statutory provisions only the profits and gains of insurance (other than life insurance) shall be taken to be the balance as disclosed in the annual' accounts by the assessee, the copies of which were required under the Insurance Act, 1938(4 of 1938) to be submitted to the prescribed Controller of Insurance (referred to in Schedule 1 of the I.Tax Act, 1961). It is, therefore, clear that the income earned by the assessee form the noninsurance activities are taxable like profit and gains of business and profession. After the omission of Rule 5(b) of first schedule of the I.Tax Act, 1961, with effect from A.V. 1989-90, the assessee has been crediting directly the profits on the realization of investments/sale of shares of companies and redemption of such investment into the balance sheet
>
> Under the head general reserve account without subjecting it to the profit and loss account of the corresponding year. Since this part of the profit and gains is not attributable to the insurance business, the same does not constitute a valid cause for claiming it exempted. Further, taking profit and gains attributable to such activities directly to the balance sheet without subjecting it to the profit and loss account of the corresponding year constitute furnishing of inaccurate particulars of income on the part of the assessee. Besides the profit arising out of sale of investments being non-obligatory under the

> Insurance Act, 1938, constitute the business income of the assessee not incidental to. the Insurance business. During the previous year under consideration the assessee has inter-alia credited a sum of Rs. 5,05,33,63,209/- directly into the General Reserve Accounts in the· Balance Sheet as "profit on sale of investment" without routing it through the profit and loss account of the corresponding year. Thus the income of Rs. 5,05,33,63,209'- has escaped assessment within the meaning of section 147 of the I.Tax Act, 1961 during the previous year relevant to the assessment year under consideration ."

11. As indicated hereinbefore, it is not disputed that the reasons that led the AO to reopen the assessment were factually incorrect. It is not disputed that the Assessee was carrying on only one business - General Insurance Business, which is regulated under The Insurance Act, 1938. Indisputably, the insurers cannot carry on any business other than the insurance business or any prescribed business. The business of General Insurance is regulated and there is no allegation that the regulatory authority has found the Assessee to be in default of any provisions of The Insurance Act, 1938. The learned counsel for the Revenue also did not dispute that the AO's assumption that the Assessee was carrying on two streams of business was incorrect. Thus, this reason to believe that the Assessee's income had escaped assessment is clearly without any factual basis.

12. The assumption that the Assessee had not credited the profits in question to the Profit and Loss Account is also, admittedly, factually incorrect. Thus, the reasons which led the AO to form a belief that income of the Assessee had escaped assessment are admittedly based on palpably incorrect assumptions. It is well established that reasons to believe that income had escaped assessment is a necessary precondition for the AO to assume jurisdiction. Clearly, it would be difficult to sustain that this pre-condition is met if such reasons to believe that income of an Assessee has escaped assessment are based on palpably erroneous assumptions. The reason to believe must be predicated on tangible material or information. A reason to suspect cannot be a reason to believe; the belief must be rational and bear a direct nexus to the material on which such a belief is based. In the present case, the very assumption on the basis of which the AO is stated to have formed his belief that the Assessee's income had escaped assessment has been found to be erroneous. There was no basis for the AO to assume that the Assessee had not credited the profits from the sale of investments, which are alleged to have escaped assessment in its Profit and Loss account.

13. Before the Tribunal, the Revenue had contended that the errors in the

reasons recorded were minor errors, which did not detract from the fact that income had escaped assessment. In our view, this contention is without merit as reasons to believe that income had escaped assessment is a necessary pre-condition which enables the AO to assume jurisdiction to proceed further. In the event such reasons are found to be erroneous, the AO would not have the jurisdiction to make an assessment and any proceedings initiated on the basis of palpably erroneous reasons would be without authority of law. Therefore, even if it is assumed that, infact, the Assessee's income has escaped assessment, the AO would have no jurisdiction to assess the same if his reasons to believe were not based on any cogent material. In absence of the jurisdictional pre-condition being met to reopen the assessment, the question of assessing or reassessing income under Section 147 of the Act would not arise.

14. Thus, in our view, the proceedings under Section 147 of the Act are liable to be quashed as being without jurisdiction.

15. The decisions of this Court in ***Ranbaxy Laboratories Ltd.*** *(supra)* and ***Software Consultants*** *(supra)* are, in our view, inapplicable to the facts pertaining to the issues involved in the present case. As rightly pointed out

by Mr Sawhney, the said decisions relate to the jurisdiction of the AO to tax other income – being income other than the income which the AO has reason to believe has escaped assessment and has occasioned issuance of notice under Section 148 of the Act – that has escaped assessment and comes to the notice of the AO during the course of the proceedings initiated under Section 147 of the Act. This Court had held that other income chargeable to tax could be assessed only once the income which the AO had reason to believe had escaped assessment and which occasioned the AO to reopen the assessment under Section 147 of the Act is sustained. In the present case, the AO has not sought to tax any other income but the income, which the AO believed had escaped assessment, that is, profits from sale of investments. The point in issue involved in the present case is whether the reopening could be sustained on grounds other than those which led the AO to believe that income has escaped assessment. This Court was not convinced with this issue in the decisions referred above.

16. The next issue to be addressed is whether the AO would have jurisdiction to examine the question as to the taxability of the profits and gains from sale of securities as it is contended that the AO had already expressed his opinion in that regard in the initial assessment. According to

the Assessee, the decision of the AO to tax profits and gains from sale of investments, amounts to a change of opinion, which is impermissible under Section 147 of the Act.

17. By virtue of Section 44 of the Act, the income of an insurance company is to be computed in accordance with the Rules contained in the First Schedule of the Act. Rule 5 of the First Schedule provides for computation of profits and gains of insurance business other than life insurance business. The said Rule as in force prior to 1st April, 1989 reads as under:-

> **"Computation of profits and gains of other insurance business.**
>
> **5.** The profits and gains of any business of insurance other than life insurance shall be taken to be the profit before tax and appropriations as disclosed in the profit and loss account prepared in accordance with the provisions of the Insurance Act, 1938 (4 of 1938) or the rules made thereunder or the provisions of the Insurance Regulatory and Development Authority Act, 1999 (4 of 1999) or the regulations made thereunder, subject to the following adjustments:-
>
> (*a*) subject to the other provisions of this rule, any expenditure or allowance including any amount debited to the profit and loss account either by way of a provision for any tax, dividend, reserve or any other provision as may be prescribed which is not admissible

under the provisions of sections 30 to 43B in computing the profits and gains of a business shall be added back;

(*b*) Any amount either written off or reserved in the accounts to meet depreciation of or loss on the realization of investments shall be allowed as a deduction and any sum taken credit for in the accounts on account of appreciation of or gain on the realization of investment shall be treated as part of the profits and gains.

(*c*) such amount carried over to a reserve for unexpired risks as may be prescribed in this behalf shall be allowed as a deduction."

18. By virtue of Finance Act, 1988, clause (b) of Rule 5 of the First Schedule of the Act was deleted. In the initial assessment proceedings relevant to the Assessment Year 2004-05, the Assessee claimed a deduction in respect of a sum of ₹3,57,54,000/- on account of amount written off in respect of depreciated investments. The Assessee contended that the deletion clause (b) of Rule 5 did not affect the deduction claimed as the same had been debited to the Profit & Loss Account and was not representing any loss on realization of investments. In support of its contention, the Assessee relied on paragraph seventeen of the Memorandum explaining the provisions of the Finance Act, 1988 which reads as under:-

> "17) Under the existing provisions of section 44 of the Income Tax Act, the profits and gains of any insurance business is computed in accordance with the rules contained in the first Schedule to the Act. In Rule 5 of this Schedule, profits and gains of any business of insurance, other than life insurance, are taken to be balance of profits disclosed in the annual accounts furnished to the Controller of Insurance subject to certain adjustments. One of the adjustments provided therein is in respect of an amount either written off or reserved in the account to meet depreciation or loss on the realization of investment, which is allowed as deduction. Similarly, any sum taken credit for in the accounts of appreciation of or gain on the realisation of investments is taken as part of the profits and gains of the business.
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> With a view to enable the General Insurance Corporation and its subsidiaries to play a more active role in capital markets for the benefit of policy holders, it is proposed to provide for exemption of the profits earned by them on the sale of investments. As a corollary, it is proposed to provide that the losses incurred by the General Insurance Corporation on the realization of investment shall not be allowed as deduction in computing the profits chargeable to tax. To achieve this objective, clause (b) of Rule 5 of the First schedule of the Act will take effect from 1st April, 1989, and will, accordingly, apply in relation to the assessment year 1989-90 and subsequent years."

19. The AO rejected the above contention of the Assessee and held that the intention of the Legislature in deleting clause (b) of Rule 5 of the First Schedule of the Act was to exempt all types of gains on investments whether by way of appreciation or by way of realization and simultaneously to disallow all types of losses on investments whether by

way of depreciation or by way of realization. The relevant extract of the assessment order dated 30th January, 2006 is quoted below:-

> "The above contention of the assessee is taken into consideration by me and I think that the assessee has not understood the provision of clause 5(b) in totality. When clause 5(b) stood in the Income Tax statute, it talked about for not allowing deduction for all type of losses from investments either it is due to writing off or reserved in the account to meet depreciation of investment or it is due to loss in the realisation of investments and simultaneously it talked about taking the amount as part of profits and gains, which is taken credit for in the accounts on account of appreciation of the investments earned as gain on the realization of investments. Therefore, when it is deleted, the intention of the legislature is very clear that it has exempted all types of gains on investments whether by way of appreciation or by way of realization and simultaneously all type of losses on investments whether by way of depreciation or by way of realisation are to be disallowed. As far as para 17 of the Memorandum quoted by the assessee is concerned, firstly the Memorandum is not law and secondly this explains the basic idea behind an amendment and does not give the exact effect of an amendment. Therefore, in general term it has been explained that when profit on sale of investment is not being taxed, loss on the realisation of investment will not be deducted. However, while applying provision of a particular clause or section we have to see its effect in totality. Had the intention of legislature been that only loss on the realisation of investments is to be disallowed, there was no need of deleting the whole clause 5(b) and only the phrase "or loss on the realization of investments" and "or gains on the realization of investments" could have been deleted from clause 5(b). Since, the whole clause 5(b) is deleted, all the profit on investments whether by way of appreciation or gains on the realization of investments

> shall be exempted from taxation and at the same time all type of losses on investments whether by way of depreciation or loss on the realization of investments are to be disallowed. Once depreciated value of investment is written off, no loss would be incurred by the assessee on realization of these investments. Therefore, it is quite logical and also in consonance with the deletion of clause 5(b) that any loss booked by the assessee company on depreciation in value of investment should not be allowed."
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> (emphasis added)

20. It is at once clear from the above that the AO had expressed its firm opinion that profits and gains on realization of investments were exempt from taxation. Admittedly, such profits had been included by the Assessee in its Profit & Loss Account, which was subjected to scrutiny in the assessment proceedings.

21. It is also not disputed that the Assessee had appended a note expressly explaining that a sum of ₹5,05,33,63,209/- had been deducted from the taxable income. The relevant note being Note No. 2 appended along with the return of income reads as under:-

> "Profit/loss on sale/redemption of investment amounting to Rs.5,05,33,63,209/- during the year ended on 31.03.2004 has been credited to revenue and profit and loss account as per IRDA requirement made applicable from the F.Y. ending 31.03.2002. Till 31.03.2001, this amount was being credited directly to General Reserve as per our consistent accounting policy and was treated as exempt by us and also

> accepted by the Assessing Officer. We, therefore, deducted Rs.5,05,33,63,209/- out of taxable income."

22. In the above circumstances, it cannot be disputed that the exemption claimed by the AO in respect of the profit on sale/redemption of investments was duly disclosed and the AO had also opined on the merits of the taxability of profits on sale/redemption of investments. The income from profit on sale/redemption of investments is now sought to be taxed as income which had escaped assessment. This, in our view, clearly represents a change in the opinion with regard to the taxability of the income in question. It is well settled that the power under Section 147 of the Act is not a power of review but a power to reassess. Permitting reopening of assessment on a change of opinion as to the taxability of the income of the Assessee is, thus, outside the scope of Section 147 of the Act. The Supreme Court in the case of ***Commissioner of Income-Tax v. Kelvinator of India Ltd.*: 320 ITR 561 (SC)** had held as under:-

> "6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the

Act (with effect from 1st April, 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words " reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of " mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of " change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of " change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words " reason to believe" but also inserted the word " opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words " reason to believe", Parliament reintroduced the said expression and deleted the word " opinion" on the ground that it would vest

arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression ' reason to believe' in section 147.—A number of representations were received against the omission of the words ' reason to believe' from section 147 and their substitution by the ' opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, ' reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression ' has reason to believe' in place of the words ' for reasons to be recorded by him in writing, is of the opinion' . Other provisions of the new section 147, however, remain the same."

(emphasis added)

23. This Court in the case of ***Prabhu Dayal Rangwala v. Commissioner of Income-Tax*****: 373 ITR 596 (Delhi)** referred to the decision of the Supreme Court in ***Kelvinator of India*** *(supra)* and earlier decisions of this Court and held as under:-

"18. In view of the dictum of the Supreme Court in the case of Kelvinator of India Ltd. (supra), the Full Bench of this court in Kelvinator of India Ltd. (supra) and Usha International (supra), the present case would fall in the category of "change of opinion" as the "reasons to believe" proceed on the premise that the opinion formed in the original assessment orders was wrong

> or erroneous. A wrong or erroneous opinion is not a good ground for reopening. This would be contrary to the jurisdictional requirements and the mandatory pre-conditions which should be satisfied. The said aspect has been highlighted in the aforesaid ratio by the Supreme Court and this court. Erroneous decisions can be corrected by resort to exercise of power under section 263 of the Act, which is the appropriate remedy. The said power can be exercised if the order passed by the Assessing Officer was erroneous and prejudicial to the interests of the Revenue. The error and mistake made by the Assessing Officer/Revenue in the present case is that it did not resort to and exercise the power under section 263 of the Act but erringly selected to exercise the power of reopening under section 147 of the Act. Exercise of the said power under section 147 of the Act is faulty and flawed, as jurisdictional pre-conditions are not satisfied."

24. In view of the aforesaid, we find considerable merit in the contention of the Assessee that the AO did not have the jurisdiction to tax the profits and gains from sale/realization of investments under Section 147 of the Act. The first and the third questions of law are, therefore, answered in favour of the Assessee and against the Revenue. In view of our decision that the AO could not assume jurisdiction to reopen the assessment under Section 147 of the Act, it is not necessary to address the second question of law, which relates to the taxability of profits on sale of investments on merits.

25. The appeal is allowed. The reassessment order dated 21st January, 2007; the order dated 16th August, 2007 passed by the CIT(A) and the order

dated 22nd July, 2011 passed by the Tribunal are set aside.

26. The parties are left to bear their own costs.

VIBHU BAKHRU, J

S. MURALIDHAR, J

SEPTEMBER 15, 2015
RK