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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **W.P.(C) 1393/2002**

Reserved on: April 4, 2016
Date of decision: May 18, 2016

INDU LATA RANGWALA ..... Appellant
Through: Mr. Prem Nath Monga with
Mr. Manu Monga, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX ..... Respondent
Through: Mr. Dileep Shivpuri, Senior standing counsel with Mr. Sanjay Kumar with and Mr. Rahul Chaudhary, Advocates.

CORAM:
JUSTICE S. MURALIDHAR
JUSTICE VIBHU BAKHRU

J U D G M E N T

% 18.05.2016

Dr. S. Muralidhar, J.:

1. The challenge in this writ petition under Article 226 of the Constitution of India is to the impugned notice dated 25th June/6th July 2001 issued by the Deputy Commissioner of Income Tax Circle 16 (2), New Delhi (Respondent herein) under Section 148 of the Income Tax Act, 1961 ('Act') seeking to reopen the assessment of the Petitioner, Ms. Indu Lata Rangwala, for the Assessment Year ('AY') 1999-2000. A further challenge was also laid to the consequent notice dated 26th November 2001 issued by the Income Tax Officer, Ward – 36(2), New Delhi under Section 143(2)/142(1) of the Act requiring the Petitioner to furnish the requested details therein.

2. By an order dated 26th November 2002, the Court directed that the proceedings in terms of the abovesaid notice under Section 148 of the Act may continue before the Assessing Officer ('AO') but no final order shall be passed during the pendency of the writ petition.

3. The Petitioner was earlier a partner of M/s. Rangwala Enterprises. The other partner was Ms. Ritu Rangwala. The business of the firm was taken over by the Petitioner as a sole proprietor on 1st December 1998 as a going concern with all its assets and liabilities. It is stated that the Petitioner was also a deriving income from letting out of property, i.e., Flat at G-4, Arunachal, 19, Barakhamba Road, New Delhi in which the Petitioner has 47% share. Besides, the Petitioner has also income under head long term capital gains and other sources like interest from savings bank account and others.

4. On 1st December 1998 the Petitioner wrote to the AO regarding retirement of the other partner, Ms. Ritu Rangwala, from the partnership firm. It is stated that from that date the firm was converted into a proprietorship with the Petitioner as sole proprietor. A copy of the retirement deed dated 30th November 1998 evidencing the retirement of Ms. Ritu Rangwala from the partnership firm was enclosed with this letter.

5. For the AY 1999-2000 the Petitioner filed her return on 21st December 1999 indicating that there was a net loss of Rs. 2,17,100. The Petitioner claimed refund of Rs. 1,82,706. The audited accounts and statement of total income and tax audit report of the Chartered Accountant ('CA') under Rule 6G (1) (b) in Form 3CB was furnished with the return.

6. Simultaneously, a separate return was filed by the firm M/s. Rangwala Enterprises on 21st December 1999 for the period 1st April 1998 to 30th November 1998 relating to AY 1999-2000 showing a loss of Rs. 6,25,770. The said return was filed along with the statement of accounts, audit report etc.

7. The Petitioner's return was processed under Section 143 (1) of the Act by an order dated 29th May 2001 by the AO, Circle 16 (2), New Delhi. In the said order/intimation, the loss declared by the Petitioner in the return along with its statement of accounts, computation sheet, audit report etc. was accepted and the amount as claimed by the Petitioner was refunded to the Petitioner. A copy of the said order under Section 143 (1) of the Act issued by the AO on 29th May 2001 has been enclosed with the petition as Annexure P-7.

8. It must be noticed this was a time when the centralized computer system was not in vogue. The AO had the discretion whether to pick up a return for scrutiny. As far as the firm's return was concerned, it was processed by the Deputy Commissioner of Income Tax (DCIT), Circle 16 (2). An order/intimation dated 29th May 2001 was sent accepting the return. The Petitioner states that since she had a half share in the profits and losses of the said firm, the Petitioner's share of loss worked out to Rs. 3,12,885.

9. On 26th June 2001, the DCIT, Circle 16 (2) issued the impugned notice to the Petitioner under Section 148 of the Act stating that he had reasons to believe that the Petitioner's income chargeable to tax for the AY in question has escaped assessment and that he proposed to reassess the income. The Petitioner stated that she received the said notice on 10th July

2001 and filed a return on 31st July 2001 under protest. Along with the return, the Petitioner sent a letter dated 31st July 2001 to the AO, i.e., DCIT, Circle 16 (2) challenging the initiation of the proceeding under Section 147/148 of the Act as being without jurisdiction and bad in law. The AO was also requested to supply a copy of the reasons under Section 148 (2) of the Act for reopening the assessment.

10. The Petitioner states that her authorized representative ('AR'), i.e., Mr. Sanjeev Gupta, CA visited the office of the AO, i.e., DCIT on several dates beginning with 11th October 2001 up to 20th December 2001 for procuring copy of the reasons recorded by the AO for issuance of the notice under Section 148 of the Act. However, the request was not acceded to. The Petitioner states that she had also sent reminders on 19th November 2001 and 10th December 2001 for supply of reasons recorded but the reasons were not supplied.

11. On 26th November 2001 the Respondent issued notice to the Petitioner under Section 142 (1)/143 (2) of the Act enquiring about the business and other matters relating to past several years of the Petitioner and her family members. This letter was stated to have been given by the AO to the Petitioner's AR on 3rd December 2001 requiring the compliance within a week.

Reasons for reopening assessment

12. On 20th December 2001 the Petitioner's AR was orally instructed by the AO to make an application to inspect the file. On inspecting the file, the AR noted the reasons for reopening the assessment which read as under:

> "The Assessee has filed return of income on 21st December 1999 declaring loss of Rs. 2,17,100 claiming refund Rs. 1,82,705.

This return was revised on 17th April 2000 declaring loss of Rs. 2,17,230 and claiming refund Rs. 1,80,066.

While going through the return, it was found that the Assessee has declared properly income of Rs. 9,62,957 as rental income from property situated at GF-4, Arunachal, 19, Barakhamba Road, New Delhi. This property is jointly owned by the Assessee with her husband.

She has also shown loss from firm Rangwala Enterprises (RF) at Rs. 3,12,885 and loss of Rs. 12,94,055 from the same concern converted into proprietary concern. While going through the profit and loss account of these concerns, it was found that up to 30th November 1998 it was a partnership concern and thereafter it was taken over by the Assessee as proprietor for the rest of the period.

While going through and comparing the profit and loss account of the two periods, the following situation emerges:-

Period	Sales (Rs.)	G.P. (Rs.)	G.P. Rate	Net Profit/ loss
1.4.97 to 31.3.98	1,34,43,289	18,75,770	13.95%	31.574 (Profit)
1.4.97 to 31.11.98	38,12,440	5,33,440	13.99%	5,42,970 (loss)
1.12.97 to 31.3.99	7,86,195	32,962	4.19%	12,94,055 (loss)

From the above data it would be seen that for the period 1st April 1998, the Assessee has wrongly claimed share of loss of Rs. 3,12,885 from the firm M/s. Rangwala Enterprises which cannot be claimed in view of the provisions of Section 10 (2A) of the Income Tax Act, 1961. The Assessee has thus artificially and with an ulterior motive reduced the income from the property by setting off loss accruing to the firm. Apart from this the P&L account of the Assessee reveals that she has claimed a loss of Rs. 12,94,055.85 from the income property includes a bad debt if Rs. 9,63,598.70 as against sales of Rs. 7,86,195. A scrutiny of the return shows that this bad debt belong to the registered firm and not to the Assessee and again the income from property has been reduced by the amount of loss with an ulterior motive and with the intention to defraud the revenue.

Further for the period of 4 months the expenses claimed are on the higher side and has to be examined. This case therefore, needs

> scrutiny and in the facts and circumstances, I have reason to believe that the Assessee has deliberately resorted to and adopted ways and means to avoid to declare the correct income thereby resulting in the escapement of taxable income.
>
> Issue notice under Section 148 of the Income Tax Act, 1961."

Reply to Petitioner's challenge

13. In response to the letter dated 10th December 2001 of the Petitioner challenging the re-opening of assessment under Section 148 of the Act, the Income Tax Officer ('ITO') Ward 36 (2) wrote a letter dated 21st December 2001 to the Petitioner setting out the reasons considered by the AO and thereby rejecting the challenge. The letter further stated that from the details furnished by the Assessee in the final account for the two periods, it was seen that for the period 1st April 1998 to 30th November 1998 there was a loss of Rs. 3,12,885 which was wrongly claimed as a deduction from the property income in view of Section 10 (2A) of the Act. The ITO therefore noted that the AO was accordingly of the view that

> "the Assessee has thus artificially and with an ulterior motive reduced the income from the property by setting off loss according to the firm. Apart from this the P&L account of the Assessee reveals that she has claimed a loss of Rs. 12,94,055 from the income property includes a bad debt if Rs. 9,63,598.70 as against sales of Rs. 7,86,195. A scrutiny of the return shows that this bad debt belong to the registered firm and not to the Assessee and again the income from property has been reduced by the amount of loss with an ulterior motive and with the intention to defraud the revenue."

14. It was further pointed out by the ITO that there were revenue receipts or sale of Rs. 7,86,195 in the relevant period. The bad debt of Rs. 9,63,598 was much more than the revenue receipts. It was accordingly concluded that the Petitioner had resorted to and adopted ways and means

to avoid declaring the correct income thereby resulting in the escapement of taxable income.

Submissions of counsel for the Petitioner

15. It is submitted by Mr. Prem Nath Monga, learned counsel appearing for the Petitioner that Section 148 was not a substitute for Section 143 (2) of the Act in terms of which a return had to be scrutinized and a decision given thereon by the AO within one year from the end of the month in which the return was filed under Section 139 or pursuant to the notice under Section 142 (1) of the Act. It is further submitted that no reasons were recorded before issue of notice on 26th June 2001. The reasons were recorded on 6th July 2001. According to the Petitioner, this is a mandatory requirement of Section 148 (2) of the Act and failure to do so rendered the entire proceedings invalid and void *ab initio.*

16. Mr. Monga submitted that the intimation under Section 143 (1) of the Act was as much an assessment as regular assessment of a return that has been picked up for scrutiny under Section 143 (3) of the Act. It is further submitted by Mr Monga that there was no tangible material that the AO came across to justify forming 'reasons to believe' that income had escaped assessment. The only material referred to were the statement of accounts, balance sheet, audited report etc. which in any way were available with the AO in respect of both the Petitioner and the firm for the AY in question at the time of issuance of the order/ intimation under Section 143 (1) of the Act. The reasons recorded were therefore at best a change of opinion based on suspicion and surmises.

17. It is further submitted by Mr Monga that the notice under Section 148 of the Act cannot be issued for the purpose of verification of the material

already available with the authorities. Mr. Monga placed reliance on the decision in ***Commissioner of Income Tax v. Kelvinator of India Limited (2010) 187 Taxman 312 (SC),*** and decisions of this Court in ***Commissioner of Income Tax v. Orient Craft Limited (2013)354 ITR 536 (Del), Mohan Gupta (HUF) v. Commissioner of Income Tax (2014) 366 ITR 115 (Del)*** , ***Pr. Commissioner of Income Tax v. Tupperware India (P) Ltd. (2016) 236 Taxman 494 (Del), Commissioner of Income Tax v. Batra Bhatta Company (2010) 321 ITR 526 (Del), Commissioner of Income Tax-V v. Times Business Solution Ltd. (2013) 354 ITR 25 (Del), Commissioner of Income Tax – Central v. Indo Arab Air Services (2016) 283 CTR 92 (Del)*** and ***Asia Satellite Telecommunications Co. Ltd. v. Assistant Director of Income-tax, International Taxation (2013) 29 taxmann.com 317 (Del).***

Submissions of counsel for the Revenue

18. Countering the above submissions it is pointed by Mr. Dileep Shivpuri, learned counsel for the Revenue that the recent decision of the Supreme Court in ***Deputy Commissioner of Income-tax v. Zuari Estate Development & Investment Co. Ltd. (2015) 373 ITR 661 (SC)*** settled the legal position that where the return had been processed under Section 143 (1) of the Act, there was no 'assessment' as such and therefore, the question of change of opinion did not arise. He referred to the order dated 10th February 2016 passed by the High Court of Judicature at Bombay in Writ Petition No. 3027 of 2015 ***(Khubchandani Healthparks Pvt. Ltd. v. Income Tax Officer 6 (3) (4) Mumbai)*** where the above legal position was further explicated.

19. Mr Shivpuri pointed out that in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*) the Supreme Court was only reiterating the

earlier decision in ***Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500 (SC).*** It is submitted that the conditionality attached to reopening of an assessment which was originally made under Section 143 (3) of the Act would not apply to reopening of the assessment where initially it was only an intimation under Section 143 (1) of the Act.

Legislative background of Section 143

20. At the outset it requires to be noticed that Section 143 of the Act has frequently undergone changes. Though the said provision has been amended several times, what is relevant as far as the present case is concerned, is Section 143 (1) (a) as it stood immediately prior to the amendment with effect from 1st June 1999 by the Finance Act, 1999. It read thus:

> "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, is *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* in admissible, 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 which the income was first assessable."

21. What is evident is the requirement of the AO having to send an intimation to the Assessee specifying if any tax or interest found is due on the basis of the return filed after adjustment of any tax deducted at source ('TDS'), any advance tax paid or any amount paid otherwise by way of tax or interest. Further, the first proviso to Section 143 (1) (a) permitted the Department to make adjustments on account of any arithmetical errors, any loss carried forward, deduction, etc. in the income or loss declared in the return. While the AO could pick up the return under this provision, he had no authority to make adjustments or adjudicate upon any issue arising from the return. The second point to be noted is that, notwithstanding the fact that an intimation to the Assessee which was deemed to be a notice of demand under Section 156 of the Act, the AO could proceed to issue notice under Section 143 of the Act. Thirdly, the sending of an intimation under Section 143 (1) (a) of the Act was

mandatory. The legislature was careful not to use the word ‘assessment' in the proviso to Section 143 (1) (a) of the Act. In other words, a distinction was made between making of an assessment by the AO after affording the Assessee an opportunity to explain the queries that arose from the returns whereas for the purpose of intimation under Section 143 (1) of the Act there was no question of any hearing to be given to the Assessee.

22. With effect from 1st June 1999 the changed Section 143 reads as under:

> “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 –
>
> (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, any tax paid on self-assessment 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 and an intimation to this effect shall be sent to the Assessee:
>
> Provided that except as otherwise provided in this sub-section, the acknowledgment of the return shall be deemed to be an intimation under this sub-section where either no sum if payable by the Assessee or no refund is due to him:
>
> Provided further that no intimation under this sub-section shall be sent after the expiry of two years from the end of the assessment year in which the income was first assessable.”

23. Here again the word used is ‘intimation’. The first proviso states that the acknowledgment of the return ‘shall be deemed to be an intimation’

where either no sum is payable by the Assessee or no refund is due to him. The provision underwent changes as far as the outer limit of two years from the end of the assessment year in which the intimation is to be sent.

The Rajesh Jhaveri decision

24.1 The entire legislative history of Section 143 (1) of the Act was discussed by the Supreme Court in ***Assistant Commissioner v. Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*). The facts of that case were that the Assessee filed its return of income for the AY 2001-02 on 30th October 2001, declaring total loss of Rs. 2,70,85,105. The said return was processed under Section 143 (1) of the Act accepting the loss returned by the Assessee. After the revenue audit raised an objection relating to showing of a debt of Rs. 1,285.72 lakhs as bad debts, the AO reopened the assessment on the ground that he had reason to believe that income assessable to tax had escaped assessment within the meaning of Section 147 of the Act.

24.2 In response to the notice, the Assessee filed its return of income on 31st May 2004 declaring the loss in the original income. The Assessee raised a protest on various grounds relating to jurisdiction and the merits of reopening the assessment. When the reopening was challenged by the Assessee by way of writ petition, the High Court of Gujarat relied on its decision in ***Adani Export v. ACIT (1999) 240 ITR 224 (Guj)*** and allowed the writ petition.

24.3 An appeal was filed before the Supreme Court in which the Revenue pointed out that the decision in ***Adani Export*** (*supra*) had no application since the return in that case had been final after an adjustment under

Section 143 (3) of the Act whereas in the case before the Supreme Court the return had been accepted by processing it under Section 143 (1) of the Act. It is above in the background that the Supreme Court discussed the entire legislative history of Section 143 (1) of the Act. The Supreme Court explained the difference in the two expressions 'intimation' and 'assessment order' as under:

> "It is to be noted that the expressions 'intimation' and 'assessment order' have been used at different places. The contextual difference between the two expressions has to be understood in the context the expressions are used. Assessment is used as meaning sometimes 'the computation of income', sometimes 'the determination of the amount of tax payable' and sometimes 'the whole procedure laid down in the Act for imposing liability upon the tax payer'. In the scheme of things, as noted above, the intimation under Section 143 (1) (a) cannot be treated to be an order of assessment. The distinction is also well brought out by the statutory provisions as they stood at different points of time. Under Section 143 (1) (a) as it stood prior to 1st April 1989, the Assessing Officer had to pass an assessment order if he decided to accept the return, but under the amended provision, the requirement of passing of an assessment order has been dispensed with the instead an intimation is required to be sent. Various circulars sent by the Central Board of Direct Taxes spell out the intent of the Legislature, i.e., to minimize the Departmental work to scrutinize each and every return and to concentrate on selective scrutiny of returns. These aspects were highlighted by one of us (D.K. Jain, J.) in ***Apogee International Limited v. Union of India (1996) 220 ITR 248 (Del).*** It may be noted above that under the first proviso to the newly substituted section 143 (1), with effect from 1st June 1999, except as provided in the provision itself, the acknowledgment of the return shall be deemed to be an intimation under Section 143 (1) where (a) either no sum is payable by the Assessee, or (b) no refund is due to him. It is significant that the acknowledgement is not done by any Assessing Officer, but mostly by ministerial staff. Can it be said that any 'assessment' is done by them? The reply is an emphatic 'no'. The intimation under Section 143 (1) (a) was deemed to be a notice of demand under Section 156, for the apparent purpose of making machinery provisions relating to recovery of tax applicable by such

application only recovery indicated to be payable in the intimation became permissible. And nothing more can be inferred from the deeming provision. Therefore, there being no assessment under Section 143 (1) (a), the question of change of opinion, as contended, does not arise."

24.4 The Supreme Court in ***Assistant Commissioner v. Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) then discussed Sections 147 and 148 of the Act. It observed that Section 147 of the Act substituted with effect from 1st April 1989 empowered the AO to assess or reassess income chargeable to tax if the AO has reason to believe that income for any AY has escaped assessment. To confer the jurisdiction under Section 147 (a), the two conditions have to be fully satisfied: (i) the AO must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment and (ii) if the reopening of assessment was after four years from the end of the relevant assessment year, the AO must also have reason to believe that such escapement had occurred by reason of either omission or failure on the part of the Assessee to disclose fully or truly all material facts necessary for his assessment of that year.

24.5 It was concluded by the Supreme Court in ***Assistant Commissioner v. Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) that even where no steps were taken under Section 143 (3) of the Act in relation to the assessment, the AO was not powerless to initiate reassessment proceedings even when an intimation under Section 143 (1) of the Act had been issued. The Supreme Court concluded that the High Court had wrongly applied ***Adani's*** case (*supra*) which had no application in view of the conceptual difference between Section 143 (1) and Section 143 (3) of the Act.

24.6 The ratio of the decision in ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) is that the sending of an intimation by the AO to an Assessee in

terms of Section 143 (1) of the Act is not treated to be an 'assessment' made by the AO. After 1st April 1989 there was no need for AO to pass an assessment order if he had decided to accept the return and this was in line with the legislative intent of minimizing the departmental work of scrutinizing each and every return and instead concentrate on selective scrutiny of returns. Importantly it was pointed out that "there being no assessment under Section 143 (1) (a), the question of change of opinion, as contended, does not arise."

25. It appears that the above distinction drawn between the object of provision of Section 143 (1) and Section 143 (3) of the Act was overlooked in some of the decisions of the High Courts, including this Court.

Decision in Orient Craft Ltd.

26.1 In ***Commissioner of Income Tax v. Orient Craft Limited*** (*supra*), the question that arose for consideration was whether the reopening of the assessment made by the AO under Section 147 of the Act of an assessment for the AY 2002-03 was valid and whether the intimation under Section 143 (1) sent to the Assessee by the AO in respect of such return was an 'assessment'?

26.2 It was urged on behalf of the Assessee that the requirement of the AO having to form 'reasons to believe' that income chargeable to tax has escaped assessment for the AY in question, was a *sine qua non* even where the return was merely processed under Section 143 (1) of the Act. The Court noted that

> "it is true that no assessment order is passed when the return is merely processed under Section 143 (1) and an intimation to that effect is sent to the Assessee. However, it has been recognized by

the Supreme Court itself in ***Assistant CIT v. Rajesh Jhaveri Stock Brokers (P) Limited*** (*supra*), a decision that was relied upon by the Revenue, that even where proceedings under Section 147 are sought to be taken with reference to an intimation framed under Section 143 (1), the ingredients of Section 147 have to be fulfilled, the ingredient is that there should exist 'reason to believe' that income chargeable to tax has escaped assessment. This judgment, contrary to what the Revenue would have us believe, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under Section 143 (1) at his *whims and caprice*; he must have reason to believe within the meaning of the Section."

26.3 The Court in ***Orient Craft Ltd.*** (*supra*) then discussed extensively the meaning and content of the expression 'reasons to believe' under Section 147 of the Act. The Court relied upon the earlier decisions of the Supreme Court in ***A.N. Lakshman Shenoy v. ITO (1958) 34 ITR 275 (SC), S. Narayanappa v. CIT (1967) 63 ITR 219 (SC), Sheo Nath Singh v. Appellate Assistant CIT (1971) 82 ITR 147 (SC), ITO v. Lakhmani Mewal Das (1976) 103 ITR 437 (SC).*** The Court has also discussed the decision of the Supreme Court in ***CIT v. Kelvinator of India Limited*** *(supra*). It must be noted at this stage that the ***Kelvinator of India Limited*** *(supra*) was a case one where the initial return was picked up for scrutiny and an assessment order passed under Section 143 (3) of the Act.

26.4 The conclusion in ***Orient Craft Ltd.*** (*supra*) was that the requirement of the AO having 'reasons to believe' that income has escaped assessment equally applied to an intimation under Section 143 (1) of the Act. In that context, the Court proceeded to hold that:

"Section 147 makes no distinction between an order passed under Section 143 (3) and the intimation issued under Section 143 (1). Therefore, it is not permissible to adopt different standards while interpreting the word 'reason to believe' vis-a-vis Section 143 (1) and Section 143 (3)."

26.5 The Court in ***Orient Craft Ltd.*** (*supra*) proceeded to hold as under:

> "We are unable to appreciate what permits the Revenue to assume that somehow the same rigorous standards which are applicable in the interpretation of the expression when it is applied to the reopening of an assessment earlier made under Section 143 (3) cannot apply where only an intimation was issued earlier under Section 143 (1). It would in effect place an Assessee in whose case the return was processed under Section 143 (1) in a more vulnerable position than an Assessee in whose case there was a full-fledged scrutiny assessment made under Section 143 (3). Whether the return is put to scrutiny or is accepted without demur is not a matter which is within the control of Assessee; he has no choice in the matter. The other consequence, which is somewhat graver, would be that the entire rigorous procedure involved in reopening an assessment and the burden of providing valid reasons to believe could be circumvented by first accepted the return under Section 143 (1) and thereafter issue notices to reopen the assessment. An interpretation which makes a distinction between the meaning and content of the expression 'reason to believe' in cases where assessments were framed earlier under Section 143 (3) and cases where mere intimations were issued earlier under Section 143 (1) may well lead to such an unintended mischief. It would be discriminatory too. An interpretation that leads to absurd results or mischief is to be eschewed."

26.6. The Court in ***Orient Craft Ltd.*** (*supra*) then proceeded to also explain ***Rajesh Jhaveri Stock Brokers (P) Ltd.*** (*supra*) and point out that the difference between an 'assessment' and an 'intimation' did not mean that the strict requirements of Section 147 could be compromised. It was pointed out in ***Orient Craft Ltd.*** (*supra*) that in ***Rajesh Jhaveri Stock Brokers (P) Ltd.*** (*supra*) the Court reiterated that "so long as the ingredients of Section 147 are fulfilled an intimation issued under Section 143 (1) can be subjected to proceedings for reopening." The Court in ***Orient Craft Ltd.*** (*supra*) then reiterated that

> "It is nobody's case that an 'intimation' cannot be subjected to Section 147 proceedings; all that is contended by the Assessee, and

> quite rightly, is that if the Revenue ants to invoke Section 147 it should play by the rules of that Section and cannot bog down. In other words, the expression 'reason to believe' cannot have two different standards or sets of meaning, one applicable where the assessment was earlier made under Section 143 (3) and another applicable where an intimation was earlier issued under Section 143 (1). It follows that it is open to the Assessee to contend that notwithstanding that the argument of 'change of opinion" is not available to him, it would still be open to him to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not relevant for the formation of the belief that income chargeable to tax has escaped assessment. In doing so, it is further open to the Assessee to challenge the reasons recorded under Section 148 (2) on the ground that they do not meet the standards set in the various judicial pronouncements."

26.7 The above lengthy discussion of the decision in ***Orient Craft Limited*** (*supra*) becomes necessary since it was a case where reopening of the assessment was stated to be done pursuant to the initial return being processed under Section 143 (1) of the Act and an intimation sent to the Assessee in acceptance of such return. Secondly, this was a decision where the earlier decision in ***Rajesh Jhaveri Stock Brokers (P) Ltd.*** (*supra*) was discussed at length and it was concluded that even for the purpose of reopening the assessment where the initial return had been accepted by sending an intimation to the Assessee under Section 143 (1) of the Act, the AO would, for the purposes of reopening the assessment under Section 147/148 of the Act still have to record reasons to believe that the income chargeable to tax has escaped assessment. Thirdly, the Court in ***Orient Craft Ltd.*** (*supra*) also discussed the entire case law as per the reason to believe including the decision in ***Kelvinator of India Limited*** (*supra*).

Other decisions of this Court

27. In ***Mohan Gupta (HUF) v. Commissioner of Income Tax-XI*** (*supra*) the return for the AY 2005-06 filed by the Assessee was processed under Section 143 (1) of the Act. On 26th March 2012 the Revenue issued a notice under Section 148 of the Act for reopening the assessment. The reason to believe as recorded by the AO was that the income on purchase and sale of shares ought to have been treated as business income rather than Short Term Capital Gain ('STCG') as claimed by the Assessee in the return filed by it. The AO was of the view that the earlier intimation under Section 143 (1) did not involve the application of mind by the AO and the new information had resulted from the scrutiny assessment for AY 2007-08. The Court relied on its decision in ***Orient Craft Limited*** (*supra*) and held that the record does not show "any tangible material that created the reason to believe that income had escaped assessment. Rather, the reassessment proceedings amount to a review or change of opinion carried out in the earlier AY 2005-06, which amounts to an abuse of power and is impermissible." It was further noted that even the order of the AO for the AY 2007-08, converting the STCG into business income, has been reversed by the CIT (A) and that order had been affirmed by the ITAT.

28. In ***Commissioner of Income Tax-Central I v. Indo Arab Air Services*** (*supra*), the return filed was processed under Section 143(1) of the Act. Subsequently, on the basis of the information received from the Enforcement Directorate that in the books of the Assessee there were huge cash deposits, notice was issued by the AO to the Assessee under Section 148 of the Act. The Court relied on the decision in ***Orient Craft Limited*** (*supra*) and held that while the AO had in the reasons for

reopening the assessment set out the information received from the ED, he had failed to examine if that information provided the vital link to form the 'reason to believe' that income of the Assessee had escaped assessment for the AY in question. The AO had not stated that "he examined the returns filed by the Assessee for the said AY and detected that the said cash deposits were not reflected in the returns." Again the Court proceeded on the basis that there had to be some tangible material on the basis of which the AO could form a *prima facie* reason to believe that the income had escaped assessment.

29. The same approach was adopted in the decision in ***Commissioner of Income Tax v. Atul Kumar Swami (2014) 52 taxmann.com 47 (Del)*** where again the initial return was accepted by sending to the Assessee an intimation under Section 143 (1) of the Act. This was for the AY 1999-2000. On 9th January 2002 the return was sought to be reopened under Section 147 of the Act but the reasons for so doing did not refer to any tangible material which the AO had come across subsequent to the filing of the return. The Court this time relied on the decision in ***Commissioner of Income Tax v. Kelvinator of India*** (*supra*) and held that a valid reopening of the assessment has to be based only on tangible material to justify the conclusion that there was escapement of income. There was no discussion of the decision in ***Orient Craft Limited*** (*supra*) which in turn discussed the decision in ***RajeshJhaveri Stock Brokers (P) Ltd.*** (*supra*).

30. In ***Pr. Commissioner of Income Tax v. Tupperware India (P) Limited*** (*supra*) the return of income was processed under Section 143 (1) of the Act at the returned amount. The return was for the AY 2003-04. It was sought to be urged that the AO had reasons to believe that the amount had escaped assessment after having examined the audit report

and consequently notice was issued on 21st October 2005. The Court came to the conclusion that since the report of the statutory Auditor had already been enclosed with the return filed, "there was no material that the AO came across so as to have 'reasons to believe that the income had escaped assessment." The Court relied on the decision in ***Orient Craft Limited*** (*supra*) and answered the question on the validity of the reopening of the assessment in favour of the Assessee.

31. In each of the above decisions, the Court proceeded on the basis that there had to be some new tangible material to justify forming 'reasons to believe' that the income had escaped assessment. During the course of the arguments in ***Tupperware India (P) Limited*** (*supra*) [decision dated 10th August 2015] the Court's attention was not drawn to the decision rendered by the Supreme Court four months earlier on 17th April 2015 in ***Deputy Commissioner of Income tax v. Zuari Estate Development & Investment Co. Ltd.*** (*supra*).

The decision in Zuari Estate Development

32.1 The Supreme Court in ***Zuari Estate Development & Investment Co. Ltd.*** (*supra*) was dealing with an appeal by the Revenue against the decision of the Bombay High Court in ***Zuari Estate Development & Investment Co. (P) Limited v. J.R. Kankar, Dy. CIT (2004) 139 Taxman 209 (Bom)***.

32.2 The facts in brief were that the Assessee filed its return for the AY 1991-92 which was accepted under Section 143 (1) of the Act. Subsequently, the AO came to learn that there was a sale agreement dated 19th June 1984 entered into between the Assessee and Bank of Maharashtra to sell a building on the condition that the sale would be

completed only after the five years but before expiration of sixth year at the option of the purchaser, the purchaser could rescind the sale for a certain consideration.

32.3 The transaction could not be completed even after 30th September 1993. The Assessee's accounts for the AY 1991 had disclosed the amount of Rs. 84,47,112 received from the Bank by the Assessee way back on 20th June 1984 as a 'current liability' under the heading 'Advance against deferred sale of building'. During the course of the assessment for AY 1994-95, the AO posed a query as to why the capital gains arising out of the sale of the premises should not be taxed in the AY 1991-92. On this basis notice was issued on 4th December 1996 under Section 143 read with Section 147 of the Act seeking to reopen the assessment for AY 1991-92.

32.4 The Bombay High Court allowed the writ petition challenging the reopening of the assessment and held that there was no transfer of any property in terms of Section 2 (47) of the Act. It was further held that "there was no material for the Assessing Officer to have reason to believe that the agreement to sell had been entered into in the assessment year 1990-91".

32.5 In the appeal by the Revenue, the Supreme Court reversed the decision of the Bombay High Court by relying on the decision in ***ACIT v. Rajesh Jhaveri Stock Brokers (P) Limited*** (*supra*). The Supreme Court found that the contention of the Revenue to the effect that there was no question of 'change of opinion' since the original return was accepted under Section 143 (1) of the Act, was not even addressed by the High Court.

32.6 To be fair to the Bombay High Court, the decision in ***Rajesh Jhaveri Stock Brokers (P) Limited*** (*supra*) was delivered more than four years after its decision and therefore, there was no occasion for the Bombay High Court to have followed that ruling. However, the Supreme Court while setting aside the judgment of the Bombay High Court took note of the fact that in the meanwhile the AO had completed the assessment holding that the transaction amounted to a sale. This was affirmed by the CIT (A) but reversed by the ITAT relying on the decision of the High Court. Since the said decision of the High Court was being set aside, the Supreme Court also set aside the subsequent order dated 29th January 2004 of the ITAT and remitted the matter to the ITAT to decide the appeal on merits.

Decisions post Zuari Estate Development

33. The true purport of the decision in Supreme Court in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*) came for consideration before the Bombay High Court in Writ Petition No. 3027 of 2015 ***(Khubchandani Healthparks Pvt. Ltd. v. Income tax office 6(3)(4), Mumbai***). By an interim order dated 10th February 2016, the Bombay High Court noted that the Supreme Court in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*) had not dealt with the issue of "reason to believe that income chargeable to tax has escaped assessment on the part of the Assessing Officer in cases where regular assessment was completed by Intimation under Section 143 (1) of the Act". Therefore the court observed as under:

> "it would not be wise for us to infer that the Supreme Court in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*) has held that the condition precedent for the issue of reopening notice namely, reason to believe that income chargeable to tax has

escaped assessment, has no application where the assessment has been completed by intimation under Section 143 (1) of the Act. The law on this point has been expressly laid down by the Apex Court in the case of ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) and the same would continue to apply and be binding upon us. Thus, even in cases where no assessment order is passed and assessment is completed by Intimation under Section 143 (1) of the Act, the *sine qua non* to issue a reopening notice is reason to believe that income chargeable to tax has escaped assessment. In the above view, it is open for the Petitioner to challenge a notice issued under Section 148 of the Act as being without jurisdiction for absence of reason to believe even in case where the assessment has been completed earlier by intimation under Section 143 (1) of the Act."

34. Recently in ***Olwin Tiles (India) (P.) Ltd. v. Deputy Commissioner of Income Tax (2016) 66 taxman.com 8 (Guj)***, the Gujarat High Court dealt with the case where the initial return was processed under Section 143 (1) of the Act, and later notice was issued under Section 148 of the Act seeking to reopen the assessment of the Assessee for the said AY 2011-12. The Court took note of the decision ***Rajesh Jhaveri Stock Brokers (P) Ltd.*** (*supra*) and negatived the plea of the Assessee that "the Assessing Officer, when recording his reason to believe that income chargeable to tax has escaped assessment, could not have relied on the original assessment records and he must have some material outside or extraneous to the records to enable him to form such a belief. Being a case which was originally accepted under Section 143 (1) of the Act without scrutiny, the only requirement to be fulfilled for issuing notice for reopening was that the Assessing Officer must have reason to believe that income chargeable to tax had escaped assessment." The Court however did not refer to the decision of the Supreme Court in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*).

Summary of the legal position

35.1 The upshot of the above discussion is that where the return initially filed is processed under Section 143 (1) of the Act, and an intimation is sent to an Assessee, it is not an 'assessment' in the strict sense of the term for the purposes of Section 147 of the Act. In other words, in such event, there is no occasion for the AO to form an opinion after examining the documents enclosed with the return whether in the form of balance sheet, audited accounts, tax audit report etc.

35.2 The first proviso to Section 147 of the Act applies only (i) where the initial assessment is under Section 143 (3) of the Act and (ii) where such reopening is sought to be done after the expiry of four years from the end of the relevant assessment year. In other words, the requirement in the first proviso to Section 147 of there having to be a failure on the part of the Assessee "to disclose fully and truly all material facts" does not at all apply where the initial return has been processed under Section 143 (1) of the Act.

35.3 As explained in ***Rajesh Jhaveri Stock Brokers (P) Ltd.*** (*supra*) "an intimation issued under Section 143 (1) can be subjected to proceedings for reopening", “so long as the ingredients of Section 147 are fulfilled".

35.4 Explanation 2 (b) below Section 147 states that for the purposes of Section 147, where a return of income has been furnished by the Assessee but no assessment has been made and it is noticed by the AO that the Assessee has understated the income and claimed excessive loss, deduction, allowance and relief in the return then that "shall also be deemed to be a case where the income chargeable to tax has escaped assessment".

35.5 As explained by the Supreme Court in ***Rajesh Jhaveri Stock Brokers P. Ltd.*** (*supra*) and reiterated by it in ***Zuari Estate Development and Investment Co. Ltd.*** (*supra*) an intimation under Section 143 (1) (a) cannot be treated to be an order of assessment. There being no assessment under Section 143 (1) (a), the question of change of opinion does not arise.

35.6 Whereas in a case where the initial assessment order is under Section 143 (3), and it is sought to be reopened within four years from the expiry of the relevant assessment year, the AO has to base his 'reasons to believe' that income has escaped assessment on some fresh tangible material that provides the nexus or link to the formation of such belief. In a case where the initial return is processed under Section 143 (1) of the Act and an intimation is sent to the Assessee, the reopening of such assessment no doubt requires the AO to form reasons to believe that income has escaped assessment, but such reasons do not require any fresh tangible material.

35.7 In other words, where reopening is sought of an assessment in a situation where the initial return is processed under Section 143 (1) of the Act, the AO can form reasons to believe that income has escaped assessment by examining the very return and/or the documents accompanying the return. It is not necessary in such a case for the AO to come across some fresh tangible material to form 'reasons to believe' that income has escaped assessment.

35.8 In the assessment proceedings pursuant to such reopening, it will be open to the Assessee to contest the reopening on the ground that there was either no reason to believe or that the alleged reason to believe is not

relevant for the formation of the belief that income chargeable to tax has escaped assessment.

35.9 The decisions of this Court and other Courts to the extent inconsistent with the above decisions of the Supreme Court cannot be said to reflect the correct legal position.

Analysis of the case at hand

36. In light of the above legal position, when the case at hand is examined, it is seen that the return filed having been processed under Section 143 (1) of the Act, there was no occasion for the AO to form an opinion on whether that was any escapement of income to begin with. A perusal of reasons to believe reveals that the AO on going through the return subsequently found that the Assessee had showed a loss of the firm, M/s. Rangwala Enterprises at Rs. 3,12,885. A loss of Rs. 12,94,055 of the firm was converted into a loss of the proprietary concern. Thus it was after comparing the profit and loss account for the two periods, i.e., prior to the Assessee taking over the partnership firm and thereafter it was noticed that the Assessee had wrongly claimed share of loss from the firm which was impermissible in terms of Section 10 (2A) of the Act. The AO was of the view that the Assessee had 'artificially and with an ulterior motive' reduced the income from the property by setting off loss accruing to the firm. Apart from this the P&L account of the Assessee showed that she has claimed a loss on account of the bad debt of the firm.

37. The central submission of Mr. Monga, learned counsel for the Assessee that the above reason to believe had to be based on some new tangible material cannot be accepted in light of the legal position explained hereinbefore. At the same time, the Court does not consider to

express any opinion at this stage on the AO's reason to believe except to hold that it cannot be said to have been based on a mere 'change of opinion'. The other objections of the Assessee to the reopening are left open to be urged before the AO in the assessment proceedings in accordance with law.

Conclusion

38. By the order dated 26th November 2002 the Court had directed that the assessment proceedings would go on before the AO but no final order would be passed. The Court now vacates the said interim order and directs that the AO will now pass a final order within eight weeks from today, after affording the Petitioner one opportunity of being heard.

39. The writ petition is accordingly dismissed but in the facts and circumstances of the case, no orders as to costs.

S. MURALIDHAR, J

VIBHU BAKHRU, J

MAY 18, 2016
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