$~50-52

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

% ***Judgment delivered on: 18.07.2024***

\+ W.P.(C) 3804/2023

ATS INFRASTRUCTURE LIMITED .....Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 1 (1) DELHI & ORS. .....Respondents

Through: Mr. Debesh Panda, SSC with Ms. Zehra Khan, Mr. Vikramaditya Singh, JSCs, Mr. Vineet Gupta, Mr. Ojaswa Pathak & Ms. Ananutta Shankar, Advs.
Mr. Raj Kumar Yadav, Adv. for Resp./ UOI.

51

\+ W.P.(C) 3807/2023

ATS INFRASTRUCTURE LIMITED .....Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 1(1),DELHI & ORS. .....Respondents

Through: Mr. Debesh Panda, SSC with Ms. Zehra Khan, Mr. Vikramaditya Singh, JSCs, Mr.

Vineet Gupta, Mr. Ojaswa Pathak & Ms. Ananutta Shankar, Advs.

52

\+ W.P.(C) 3808/2023
ATS INFRASTRUCTURE LIMITED .....Petitioner

Through: Mr. Ved Jain, Mr. Nischay Kantoor & Ms. Soniya Dodeja, Advs.

versus

ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 1(1), DELHI & ORS. .....Respondents

Through: Mr. Debesh Panda, SSC with Ms. Zehra Khan, Mr. Vikramaditya Singh, JSCs, Mr. Vineet Gupta, Mr. Ojaswa Pathak & Ms. Ananutta Shankar, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J. (Oral)

1. These three writ petitions pertain to **Assessment Years**[1] 2014-2015 [W.P.(C) 3807/2023], 2015-16 [W.P.(C) 3804/2023] and 2016-2017 [W.P.(C) 3808/2023] respectively and impugn the initiation of action under Section 148 of the **Income Tax Act, 1961**[2]. The principal challenge which stands raised was succinctly noticed by us in our order of 27 March 2023 and which reads thus:

[1] AY
[2] Act

"**WP(C) 3804/2023**

2. This writ petition concerns Assessment Year (AY) 2015-16.

3. Mr. Ved Jain, who appears on behalf of the petitioner, says that in the notice issued under Section 148A(b) of the Income Tax Act, 1961 [in short, "Act"], the allegation made against the petitioner was, that it had received loan from its 100% subsidiary i.e., Gul Properties Pvt. Ltd.

3.1 In response to this notice, Mr. Jain says, that a reply was filed, to demonstrate that the petitioner, in the period in issue, had not received loan from its subsidiary, but had, in fact, repaid the loan/advance.

4. It is pointed out by Mr. Jain, that although in the order dated 23.07.2022 passed under Section 148A(d) of the Act, this explanation was accepted, the Assessing Officer (AO) has now embarked on a different course altogether i.e., that the petitioner has not been able to completely explain the source of the money, which was used to repay a part of the loan.

5. It is in this context, that amount paid towards loan to the tune of Rs.25,53,42,435/- is sought to be treated as income chargeable to tax, which according to the AO, has escaped assessment.

6. Issue notice.

6.1 Mr. Kunal Sharma, learned senior standing counsel, accepts notice on behalf of the respondents/revenue.

7. Mr. Sharma says that he will return with instructions.

8. In case instructions are received to resist the writ petition, counter affidavit will be filed before the next date of hearing.

9. List the matter on 28.04.2023.

10. In the meanwhile, there shall be a stay on the operation of the order dated 23.07.2022 passed under Section 148A(d), and the consequential notice of even date i.e., 23.07.2022 issued under Section 148 of the Act till further directions of the Court."

W.P.(C) 3807/2023
W.P.(C) 3808/2023

"2. These writ petitions concern Assessment Year (AY) 2014-15 [W.P.(C)No.3807/2023] and AY 2016-17 [W.P.(C)No.3808/2023].

3. We are told by the learned counsel for the parties, that the issue which arises in the instant writ petition also obtains in W.P.(C)No.3804/2023, which was listed on our Board today.

4. Accordingly, issue notice.

> 4.1 Mr. Kunal Sharma, learned senior standing counsel, accepts notice on behalf of the respondents/revenue in the above-captioned matters.
>
> 5. Mr. Sharma will return with instructions.
>
> 6. In case instructions are received to resist the writ petitions, counter-affidavit(s) will be filed before the next date of hearing.
>
> 7. In the meanwhile, the impugned orders and notices shall remain stayed, till further directions of the Court.
>
> 8. Parties will act based on the digitally signed copy of the order.
>
> 9. List the matters on 28.04.2023."

2. It is the aforesaid contentions which are principally urged before us today also by Mr. Kantoor, who appeared for the writ petitioners. The argument essentially proceeds along the following lines.

3. It is the submission of the petitioner that a perusal and comparative reading of the Section 148A(b) notice and Section 148A(d) order would establish that the respondents have clearly changed their stance and now seek to base the proposed reassessment on reasoning which was neither constructed nor alluded to in the original notice. This would become evident from a reading of the original notice under Section 148A(b) of the Act which is extracted below:

> "**3. Analysis of information collected, inquiries made and findings of AO**:-
>
> 3.1 Detailed perusal of information shows that the M/s. Gul properties Pvt. Ltd. had given loans/advance amounting to Rs. 170 crore to a related party/company M/s. ATS Infrastructure Ltd. (PAN:AADCA0609B).
>
> 3.2 Further, as per the balance sheet dated 31.03.2015 and 31.03.2016 of M/s. Gul Properties Pvt. Ltd. the shareholding pattern was such that its 100% equity shares were held by M/s ATS Infrastructure Ltd. as on 31.03.2014, 31.03.2015 as well as 31.03.2016.
>
> 3.3 The above information has been examined with reference to

books of account for A.Y. 2015-16 available in this office. A perusal of available records reveals that this issue was not examined fully at the time of assessment proceedings u/s 143(3) of the Act. Assessee failed to make true disclosure in this regard during filing of ITR as well as assessment proceedings.

xxxx xxxx xxxx

4.2 In consideration of above, I have strong reason to believe that the income of assessee has been under-assessed to the tune of Rs. 170,00,00,000/-. In this case, a return of income was filed for the year under consideration and scrutiny assessment was also done. Accordingly, in view of the fresh information received in the case, the provisions of clause (c)(i) of Explanation 2 to section 147 are applicable to facts of this case and the assessment year under consideration is deemed to be a case where income chargeable to tax has been underassessed. I have, therefore, reasons to believe that in this case income of Rs. 170,00,00,000/- has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961"

4. Responding to the aforesaid notice the petitioner furnished a reply in which it was contended that the loans which had been alluded to had in fact been obtained in earlier years and were in the process of being repaid. Faced with the aforesaid response, and while framing the order under Section 148A(d) of the Act, the respondents have observed as under:

"**7.** In accordance with the aforesaid judgment, the assessee was provided with the information/material relied upon by letter dated 27.05.2022 to furnish reply (within two weeks by 10.06.2022) regarding why reassessment u/s 147 of the I.T. Act shall not be made in its case, on the basis of information which suggests that income chargeable to tax has escaped assessment in this case for the A.Y. 2015-16.

8. In response to the above, the assessee submitted vide its reply dated 06.06.2022 that the notice issued is time-barred and bad in law. It is further submitted that during the year, relevant to the assessment year the assessee company had received no loans rather repayment had been made. The assessee further stated that during the relevant assessment year loan of the assessee form Gul Properties Pvt Ltd has reduced from Rs.195,65,32,437 to Rs.170,11,90,002/- which proves that instead of taking fresh loans

> the assessee has repaid the loan amounting to Rs.25,53,42,435/-. Therefore, the same can in no way be deemed to be the dividend income in the hands of the assessee. Accordingly, provisions of section 2(22)(e) of the Act cannot be applied during the year under consideration.
>
> **9.** The reply of the assessee is considered and found tenable, but the assessee has not provided any evidences with regard to source of funds utilized for making the payment of Rs.25,53,42,435/-. So the loan repayment amounting to Rs. Rs.25,53,42,435/- has remained unexplained. Accordingly on the basis of information in possession it is inferred that income has escaped assessment to the tune of Rs.25,53,42,435/- as per the provisions of I.T. Act."

5. It is thus apparent that faced with the disclosures which were made by the petitioner, the respondents then sought to ascertain the source of funds on the basis of which repayments were made and those loans serviced. That was clearly not the edifice on which the Section 148A(b) notice was based.

6. Our Court in **Commissioner of Income Tax-II Vs. Living Media India Ltd.**[3] had pertinently observed that additional reasons cannot be provided or recorded by the **Assessing Officer**[4] subsequent to the issuance of a notice under Section 148 of the Act. We deem it apposite to quote the following passage from that decision:-

> "**13.** With regard to the additional reasons which were recorded subsequent to the issuance of notice under section 148 of the said Act, we have already observed that this could not have been done by the Assessing Officer. The validity of the proceedings initiated upon a notice under section 148 of the said Act would have to be judged from the stand point of the reasons which existed at the point of time when the section 148 notice was issued. The additional reasons cannot be provided or recorded subsequent to the issuance of notice under section 148. It is, of course, open to the Assessing Officer, if some other information comes within his knowledge to issue another notice under section 148 for different reasons. But that is not the case here. On the basis of the very same

[3] 2013 SCC OnLine Del 1627
[4] AO

> notice issued under section 148, the Assessing Officer has recorded additional reasons subsequent to the issuance of notice and this is impermissible in law."

7. It becomes pertinent to observe that the validity of the proceedings initiated upon a notice under Section 148 of the Act would have to be adjudged from the stand point of the reasons which formed the basis for the formation of opinion with respect to escapement of income. That opinion cannot be one of changing hues or sought to be shored upon fresh reasoning or a felt need to make further enquiries or undertake an exercise of verification. Ultimately, the Court would be primarily concerned with whether the reasons which formed the bedrock for formation of the requisite opinion are tenable and sufficient to warrant invocation of Section 148 of the Act.

8. We in this regard find the following pertinent observations which appear in a decision of the Bombay High Court in **Indivest Pe. Ltd. vs. Additional Director of Income-tax and Ors.**[5]

> "**11.** Reading the reasons of the Assessing Officer, it is evident that there is absolutely no tangible material on the basis of which the assessment for the assessment year 2006-07 could have been reopened. Upon the return of income being filed by the assessee both in the electronic form and subsequently in the conventional mode, the assessee received an intimation under section 143(1). The Assessing Officer would have been legitimately entitled to issue a notice under section 143(2) within the statutory period. That period has expired. We must clarify that the non-issuance of a notice under section 143(2) does not preclude the Assessing Officer from reopening the assessment under section 147. For that matter, as has been held by the Supreme Court in Asst. CIT v. Rajesh Jhaveri Stock Brokers P. Ltd. (2007) 291 ITR 500 (SC), the failure of the Assessing Officer to take steps under section 143(3) will not render the Assessing Officer powerless to initiate reassessment proceedings even when an intimation under section 143 (1) has been issued. But it is also a settled principle of law that when the Assessing Officer issues a notice under section 148, at that stage

[5] 2012 SCC OnLine Bom 387

the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief (Rajesh Jhaveri (supra). At that stage, an established fact of the escapement of income does not have to be proved, since it is not necessary that the Assessing Officer should have finally ascertained that income has escaped assessment. The nature of the jurisdiction of the Assessing Officer which was dealt with by the judgment of the two learned judges of the Supreme Court in Rajesh Jhaveri's case was revisited in a decision of three learned judges in CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC). The Supreme Court has held that though after April 1, 1989, a wider power has been conferred upon the Assessing Officer to reopen an assessment, the power cannot be exercised on the basis of a mere change of opinion nor is it in the nature of a review. The Supreme Court has laid down the test of whether there is tangible material on the basis of which the Assessing Officer has come to the conclusion that there is an escapement of income. The Supreme Court held thus (page 564):

> "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 precondition 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 April 1, 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."

12. If the test of whether there exists any tangible material were to be applied in the present case, it would be evident that the Assessing Officer has not acted within his jurisdiction in purporting to reopen the assessment in exercising the powers conferred by section 148. There was a disclosure clearly by the assessee that it is a body corporate incorporated in Singapore, the principal business of which is to invest in Indian securities; that the assessee is a tax resident of Singapore and that the profits which the assessee realised from its transactions in securities constituted its profits from business. The assessee stated that it had no permanent establishment in India as defined in article 5 of the DTAA and that based on the provisions of article 7 the profits of Rs. 131.70 crores from transactions in Indian securities were not liable to tax in India. The only basis on which the assessment is sought to be reopened is on the assumption that the provisions of section 115AD would stand attracted. That is on the assumption that the assessee is an FIL Though the attention of the Assessing Officer was drawn to the fact that the assessee is not an FII and that the provisions of section 115AD would not be attracted, the Assessing Officer persisted in rejecting the objections to the reopening of the assessment. In the order disposing of the objections which were raised by the assessee, the succeeding Assessing Officer has clearly attempted to improve upon the reasons which were originally communicated to the assessee. The validity of the notice reopening the assessment under section 148 has to be determined on the basis of the reasons which are disclosed to the assessee. Those reasons constitute the foundation of the action initiated by the Assessing Officer of reopening the assessment. Those reasons cannot be supplemented or improved upon subsequently. While disposing of the objections of the assessee, the Assessing Officer has purported to state that the assessee had filed only sketchy details in its return filed in the electronic form. As we have noted earlier, the relevant provisions expressly make it clear that no document or report can be filed with the return of income in the electronic form. The assessee has an opportunity to do so during the course of the assessment proceedings if a notice is issued under section 143(2). The Assessing Officer was, in our view, not entitled, when he disposed of the objections to travel beyond the ambit of the reasons which were disclosed to the assessee. For all these reasons, we are of the view that the exercise of the jurisdiction under section 147 and section 148 in the present case is without any tangible material. The notice of reopening does not meet the requirements as elucidated in the judgment of the Supreme Court in Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) For these reasons, we make the rule absolute by quashing and setting aside the notice dated March 16, 2011, and the order passed by the Assessing Officer on December 20, 2011."

9. Reiterating the aforesaid position this Court in **Northern Exim Pvt. Ltd. Vs. Deputy Commissioner of Income-tax**[6], held that the validity of assumption of jurisdiction under Section 147 of the Act can be tested only with reference to the reasons as recorded in the Section 148(2) notice and the AO has no authority to refer to any other reasons, even if they be otherwise deducible from the records. The Court pertinently observed that the AO must record all reasons in support of assumption of jurisdiction and cannot be permitted to record additional reasons in support of that action subsequently. We extract the following paragraphs from that decision:-

> "**14.** The learned standing counsel for the Income-tax Department drew our attention to the entry made on January 22, 2001, in the proceedings sheet recorded in the course of the reassessment proceedings. We have already seen that the said entry records that the authorised representative of the petitioner was asked to show cause why the difference in the amount of profit before tax and the amount declared under the VDIS cannot be treated as its income for the assessment year 1997-98 as no return of income had been filed. The entry made in the proceeding sheet is perhaps more elaborate and informative than the reasons recorded under section 148(2) in the sense that it also states one more reason for initiating re-assessment proceedings, namely, that there is a difference between the profit before tax (Rs. 42,79,340) and the amount declared in the VDIS (Rs. 7,23,490). The reasons recorded, however, are not so explicit and do not refer to this fact. We are to be guided only by the reasons recorded for reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. This legal position is well settled and if any authority is needed, reference may be made to the following judgments:
>
> (i) Jamna Lal Kabra v. ITO (1968) 69 ITR 461 (All) ;
> (ii) CIT v. Agarwalla Brothers (1991) 189 ITR 786 (Patna) ;
> (iii) C. M. Rajgharia v. ITO (1975) 98 ITR 486 (Patna);
> (iv) Asa John Devinathan v. Addi. CIT (1980) 126 ITR 270 (Mad) ;
> (v) East Coast Commercial Co. Ltd. v. ITO (1981) 128 ITR 326 (Cal) ; (vi) Equitable Investment Co. P. Ltd. v. ITO

[6] 2012 SCC OnLine Del 1432

(1988) 174 ITR 714 (Cal) ; and
(vii) S. Sreeramachandra Murthy v. Deputy CIT (2000) 243 ITR 427 (AP).

15. The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under section 147 can be tested only by reference to the reasons recorded under section 148(2) of the Act and the Assessing Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the court if his action is ever challenged in a court of law.

xxxx xxxx xxxx

18. From the record made available to us by the learned standing counsel for the Income-tax Department in the course of the hearing we found that the petitioner, in the return of income filed for the assessment year 1998-99 had stated that the return of income for the assessment year 1997-98 was filed under the VDIS. For this reason also, the Assessing Officer could not have had reason to believe that income chargeable to tax had escaped assessment for the assessment year 1997-98, because of any failure to file the return.

19. For the above reasons, we hold that no income chargeable to tax had escaped assessment for the assessment year 1997-98. The reasons recorded for issue of notice under section 148 are factually incorrect. They cannot, therefore, form the basis for the belief that there was escapement of income. The notice is accordingly quashed as also the proceedings taken consequent thereto. The writ petition is allowed with no order as to costs.

10. Our attention was lastly drawn to the recent judgment passed by this Court in **Catchy Prop-Build Pvt. Ltd. Vs. Assistant Commissioner of Income-tax and Ors.**[7]. We deem it apposite to extract the following passage from the decision:

> "**8.** This court is further of the opinion that if the foundational allegation is missing in the notice issued under section 148A(b) of the Act, the same cannot be incorporated by issuing a supplementary notice"

[7] 2022 SCC OnLine Del 3457

11. We also find merit in the submission of Mr. Kantoor who drew our attention to the First Proviso to Section 148 and which reads as under:-

> "**148. Issue of notice where income has escaped assessment** - Before making the assessment, reassessment or recomputation under Section 147, and subject to the provisions of Section 148A, -
>
> xxxx xxxx xxxx
>
> Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice."

12. As is manifest from the above, the Proviso again ties the initiation of action to the existence of information which already exists or is in the possession of the AO and on the basis of which we come to form the opinion that income liable to tax has escaped assessment. The provision thus fortifies our view that the foundational material alone would be relevant for the purposes of evaluating whether reassessment powers were justifiably invoked. Accordingly, and for all the aforesaid reasons we find ourselves unable to sustain the impugned reassessment action.

13. Before parting, we deem it apposite to deal with one other issue which in our opinion merits consideration, notwithstanding learned counsels for respective sides having not alluded to the same. It becomes relevant to note that by virtue of Finance Act, 2009, the following provision came to be inserted in Section 147 of the Act:-

> "**Amendment of Section 147**—In Section 147 of the Income Tax Act, after Explanation 2, the following Explanation shall be inserted and shall be deemed to have been inserted with effect from the 1st day of April, 1989, namely: —

> Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148."

14. The said Explanation stands mirrored in the Explanation which forms part of Section 147 of the Act as it came to exist in the statute book post the promulgation of Finance Act, 2021. That Explanation, as it presently exists, reads as under:-

> "For section 147 of the Income-tax Act, the following section shall be substituted, namely: —
>
> "147. *Income escaping assessment.*—If any income chargeable to tax, in the case of an assessee, has escaped assessment for any assessment year, the Assessing Officer may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance or any other allowance or deduction for such assessment year (hereafter in this section and in sections 148 to153 referred to as the relevant assessment year).
>
> *Explanation.*—For the purposes of assessment or reassessment or recomputation under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, irrespective of the fact that the provisions of section 148A have not been complied with."

15. As would become manifest from the discussion which follows, a question appears to have been raised as to whether once an assessment had come to be reopened, the AO would still be bound to restrict the scrutiny only to those heads or items in respect of which the notice had been originally issued under Section 148 of the Act. It appears to have been urged from the side of the assessees at that time that notwithstanding a reopening under Section 147 of the Act, the AO would be bound to examine only such items of income which had

constituted the basis for formation of opinion that income had escaped assessment.

16. From the side of the Revenue, it appears to have been urged that the decision of the Supreme Court in **Commissioner of Income Tax vs. Sun Engineering Works (P.) Ltd.**[8] would not stand in the way in light of Explanation 3 which had come to exist. It would be pertinent to recall that *Sun Engineering Works* was a case which dealt with the argument of the assessee who had sought a review/revision of certain issues which had come to be settled against it in the original assessment proceedings.

17. In *Sun Engineering Works*, the Supreme Court in the aforesaid context, observed that the power of reassessment inures to the benefit of the Revenue and is consequently not liable to be construed as an embodiment of a power to review the original assessment at the behest of the assessee.

18. Essentially, Explanation 3 was a manifestation of the legislative intent to enable the AO to undertake a wholesome assessment and not be tied down only to those aspects which formed the basis for commencement of reassessment. These aspects and the legislative amendments which came to be introduced by virtue of Finance Act, 2009, were lucidly considered by a Division Bench of our Court in **Ranbaxy Laboratories Ltd. vs. Commissioner of Income-tax**[9]. The Court firstly traced the legislative intent underlying the introduction of Explanation 3 and made the following pertinent observations:-

[8] (1992) 4 SCC 363
[9] 2011 SCC OnLine Del 2612

"**8.** The crux of section 147 of the Act is the escapement of income which may be assessed or reassessed as well as any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings under this section. Explanation 3 makes it clear that the Assessing Officer may assess or reassess the income in respect of issue which has escaped assessment, if such issue comes to his notice in the course of proceedings under this section even though the said issue did not find mention in the reasons recorded and the notice issued under section 148. Since there was a confusion prevailing with regard to the powers of the Assessing Officer to assess or reassess on the issues for which no reasons were recorded, this Explanation came to be inserted as clarificatory. The reasons for insertion of this clarificatory Explanation in clause (57) of the Memorandum Explaining the Provisions of the Finance (No. 2) Bill, 2009, of 2009 are the following (see (2009) 314 ITR (St.) 57, 206):

> "Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.
>
> With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub- section (2) of section 148.
>
> This amendment will take effect retrospectively from April 1, 1989, and will accordingly apply in relation to the assessment year 1989-90 and subsequent years."

9. By virtue of Explanation 3 to section 147 interpretive confusion came to be clarified and thus the decisions rendered by the Punjab and Haryana High Court in the case of Vipan Khanna v. CIT (2002) 255 ITR 220 (P&H) and the Kerala High Court in the case of Travancore Cements Limited v. Asst. CIT (2008) 305 ITR 170 (Ker), no longer hold the field on the subject.

10. The ratio of both the aforecited cases was that upon the issuance of notice under section 148(2), when proceedings were

initiated by the Assessing Officer on issues in respect of which he had formed a reason to believe that income had escaped assessment, it was not open to the Assessing Officer to carry out an assessment or reassessment in respect of other issues which were totally unconnected with the proceedings that were already initiated. To put it differently, once the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment and proceeds to issue a notice under section 148, it is not open to him to assess or reassess the income under an independent or unconnected issue, which was not the basis of the notice for reopening the assessment.

11. Now, after the insertion of Explanation 3, as noted above, the position is that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under section 147 though the reasons for such issue were not included in the reasons recorded in the notice under section 148(2) on the basis of which he had initiated proceedings under section 147. Similar question came for consideration before the Division Bench of the Bombay High Court in CIT v. Jet Airways (1) Limited (2011) 331 ITR 236 (Bom). The court held as under (page 242):

> "The effect of section 147 as it now stands after the amendment of 2009 can, therefore, be summarised as follows: (i) the Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year; (ii) upon the formation of that belief and before he proceeds to make an assessment, reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148; (iii) the Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped assessment 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 the section; and (iv) though the notice under section 148(2) does not include a particular, issue with respect to which income has escaped assessment, he may none the less, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section."

19. Noticing the contentions which were addressed on behalf of parties in the context of *Sun Engineering Works*, the Court observed:-

> "**12**. The submission of learned counsel for the Revenue was that when reassessment is reopened by issuance of notice under section 148, the previous assessment is set aside and the whole assessment proceedings start afresh and the Assessing Officer has power to levy taxes on the entire income which has escaped assessment. The learned counsel relied upon the cases of the Supreme Court in CIT v. Sun Engineering Works P. Limited (1992) 198 ITR 297 (SC) and V. Jaganmohan Rao v. CIT and EPT [1970] 75 ITR 373 (SC). On the other hand learned counsel for the assessee submitted that the words, "and also" in section 147 signify that unless the Assessing Officer assesses the income with respect to which he has formed reason to believe within the meaning of section 147, it would not be open for him to assess or reassess any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of proceedings. Learned counsel relied upon the case of Jet Airways (2011) 331 ITR 236 (Bom) and also CIT v. Shri Ram Singh (2008) 306 ITR 343 (Raj) and CIT v. Dr. Devendra Gupta (2008) 174 Taxman 438 (Raj); (2011) 336 ITR 59 (Raj). Reliance was also placed in the case of C. J. International Hotels Ltd. v. ITO being I. T. A. No. 2736/Del./2006 dated October 24, 2008."

20. It then proceeded to review various precedents relevant to the question which stood posited as would be evident from a reading of the following passages of that decision:-

> "**13.** Similar contention was raised before the Division Bench of the Bombay High Court in the case of Jet Airways (2011) 331 ITR 236 (Bom). The court referred to the interpretation by the Rajasthan High Court in Ram Singh (2008) 306 ITR 343 (Raj) wherein it was observed as under (page 246):
>
> > "It is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax which has escaped assessment for any assessment year, with respect to which he had 'reason to believe' to be so, then only, in addition, he can also put to tax, the other income, chargeable to tax, which has escaped assessment, and which has come to his notice subsequently, in the course of proceedings under section 147."
> >
> > To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his 'reason to believe', had escaped

assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

14. The Bombay High Court also discussed the case of V. Jaganmohan Rao (1970) 75 ITR 373 (SC) and Sun Engineering (1992) 198 ITR 297 (SC) of the apex court. In the case of Sun Engineering (1992) 198 ITR 297 (SC), the issue before the Supreme Court was whether in the course of reassessment on an escaped item of income an assessee could seek a review in respect of an item which stood concluded in the original order of assessment. The Supreme Court dealt with the provisions of section 147, as they stood prior to the amendment on April 1, 1989. In this context, the Supreme Court held that the expression "escaped assessment" includes both "non- assessment" as well as "underassessment". The expression "assess" was defined as referring to a situation where the assessment is made for the first time under section 147, whereas "reassess" as referring to a situation where the assessment has already been made, but the Assessing Officer has reason to believe that there is underassessment on account of the existence of any of the grounds stipulated in section 147. The Supreme Court referred to the judgment in the case of V. Jaganmohan Rao (1970) 75 ITR 373 (SC) wherein it was held that the object of section 147 enures to the benefit of the Revenue and it is not open to the assessee to convert the reassessment proceedings as an appeal or revision and thereby seek relief in respect of items which were rejected earlier or in respect of items not claimed during the course of the original assessment proceedings.

15. In Dr. Devendra Gupta's case (supra), the learned Tribunal has relied upon the judgment of the Punjab and Haryana High Court in Atlas Cycle Industries case (1989) 180 ITR 319 (P&H), and concluded that the basic condition is that the Assessing Officer has reason to believe, that any income chargeable to tax has escaped assessment, for any assessment year, and it was found that the section puts no bar on the powers of the Assessing Officer to put to tax any other income chargeable to tax, which has escaped assessment, and which subsequently comes to his notice in the course of the proceedings, but then the prefixing words "and also" which succeeded "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".

This expression was found to be making clear that existence of the income for which the Assessing Officer formed belief to have escaped assessment, is a precondition for including any other income chargeable to tax, escaping assessment, and coming to the notice of the Assessing Officer subsequently, in the course of the proceedings. Thus, unless and until such income, as giving rise to form belief, for escaping assessment, continues to exist, and constitutes a subject-matter of assessment, under section 147 "no other income" coming to the notice of the Assessing Officer, during the course of the proceedings, can be roped in.

16. In the case of C. J. International Hotels Ltd. (supra) before the Tribunal, the facts were almost similar as in the present case. The Tribunal relied upon the case of CIT v. Shri Ram Singh (2008) 306 ITR 343 (Raj) while holding that the Assessing Officer was justified in initiating the proceedings under section 147/148, but then, once he came to the conclusion that the income with respect to which he had entertained, his jurisdiction came to a stop at that, and did not continue to possess jurisdiction to put to tax any other income which subsequently came to his notice in the course of the proceedings, which were found by him, to have escaped assessment.

17. Now, coming back to the interpretation which was given by the Bombay High Court to sections 147 and 148 in view of the precedent on the subject, the court held as under (pages 243 and 247 of 331 ITR):

> "Interpreting the provision as it stands and without adding or deducting from the words used by Parliament, it is clear that upon the formation of a reason to believe under section 147 and following the issuance of a notice under section 148, the Assessing Officer has the power to assess or reassess the income which he has reason to believe had escaped assessment, and also any other income chargeable to tax. The words 'and also cannot be ignored. The Interpretation which the court places on the provision should not result in diluting the effect of these words or rendering any part of the language used by Parliament otiose. Parliament having used the words 'assess or reassess such income and also any other income chargeable to tax which has escaped assessment', the words 'and also cannot be read as being in the alternative. On the contrary, the correct interpretation would be to regard those words as being conjunctive and cumulative. It is of some significance that Parliament has not used the word 'or'. The Legislature did not rest content by merely using the word 'and'. The words 'and' as well as 'also have been used together and in

conjunction....

Evidently, therefore, what Parliament intends by use of the words. 'and also is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice. under section 148(2) must assess or reassess: (1). 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from April 1, 1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment the former, he cannot independently assess the latter.

Section 147 has this effect that the Assessing Officer has to assess or reassess the income ('such income') which escaped assessment and which was the basis of the formation of belief and if he does so, he can also assess or reassess any other income which has escaped assessment and which comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of

> the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee."

21. The Division Bench ultimately concluded that the view expressed by the Bombay High Court in **Commissioner of Income-tax Vs. Jet Airways (I) Ltd.**[10] clearly merited affirmation as would be evident from a reading of Para 18 of the report:-

> "**18**. We are in complete agreement with the reasoning of the Division Bench of the Bombay High Court in the case of CIT v. Jet Airways (1) Limited (2011) 331 ITR 236 (Bom). We may also note that the heading of section 147 is "income escaping assessment and that of section 148 "Issue of notice where income escaped assessment". Sections 148 is supplementary and complimentary to section 147. Sub-section (2) of section 148 mandates reasons for issuance of notice by the Assessing Officer and sub-section (1) thereof mandates service of notice to the assessee before the Assessing Officer proceeds to assess, reassess or recompute the escaped income. Section 147 mandates recording of reasons to believe by the Assessing Officer that the income chargeable to tax has escaped assessment. All these conditions are required to be fulfilled to assess or reassess the escaped income chargeable to tax. As per Explanation 3 if during the course of these proceedings the Assessing Officer comes to conclusion that some items have escaped assessment, then notwithstanding that those items were not included in the reasons to believe as recorded for initiation of the proceedings and the notice, he would be competent to make assessment of those items. However, the Legislature could not be presumed to have intended to give blanket powers to the Assessing Officer that on assuming jurisdiction under section 147 regarding assessment or reassessment of the escaped income, he would keep on making roving inquiry and thereby including different items of income not connected or related with the reasons to believe, on the basis of which he assumed jurisdiction. For every new issue coming before the Assessing Officer during the course of proceedings of assessment or reassessment of escaped income, and which he intends to take into account, he would be required to issue

[10] 2010 SCC OnLine Bom 2065

a fresh notice under section 148."

22. Speaking on the scope and extent of the power of the AO in light of the principles which had come to be elucidated and have been noticed hereinabove, the Division Bench pertinently observed:-

> "**19.** In the present case, as is noted above, the Assessing Officer was satisfied with the justifications given by the assessee regarding the items, viz., club fees, gifts and presents and provision for leave encashment, but, however, during the assessment proceedings, he found the deduction under sections 80HH and 80-1 as claimed by the assessee to be not admissible. He consequently while not making additions on those items of club fees, gifts and presents, etc., proceeded to make deductions under sections 80HH and 80-1 and accordingly reduced the claim on these accounts.
>
> **20.** The very basis of initiation of proceedings for which reasons to believe were recorded were income escaping assessment in respect of items of club fees, gifts and presents, etc., but the same having not been done, the Assessing Officer proceeded to reduce the claim of deduction under sections 80HH and 80-1 which as per our discussion was not permissible. Had the Assessing Officer proceeded to make disallowance in respect of the items of club fees, gifts and presents, etc., then in view of our discussion as above, he would have been justified as per Explanation 3 to reduce the claim of deduction under sections 80HH and 80-1 as well.
>
> **21**. In view of our above discussions, the Tribunal was right in holding that the Assessing Officer had the jurisdiction to reassess issues other than the issues in respect of which proceedings are initiated but he was not so justified when the reasons for the initiation of those proceedings ceased to survive. Consequently, we answer the first part of question in the affirmative in favour of the Revenue and the second part of the question against the Revenue."

23. It becomes evident that the Court in *Ranbaxy Laboratories Ltd.*, firstly took into consideration Section 147 of the Act, embodying the phrase "*and also*" prefixed to the expression "*any other income chargeable to tax which has escaped assessment*". It thus came to the conclusion that, while an assessment may be reopened based on certain grounds which may have led the AO to be of the opinion that income chargeable to tax had escaped assessment, once it is found that

the reassessment power had been validly invoked, the power of the AO would not stand confined only to those aspects which may have been noticed in the original notice issued under Section 148 of the Act but would also extend to any other income which may be found to be exigible to tax.

24. This clearly appeals to reason, since Section 147 of the Act embodies a power to assess, reassess as well also to recompute. Consequently, and once that power is validly invoked, the original assessment would cease to exist in the eyes of law. Undoubtedly, once an assessment already made comes to be reopened, the AO stands empowered statutorily to undertake an assessment afresh in respect of the entire income which may have escaped assessment. However, the only additional caveat which *Ranbaxy Laboratories Ltd.* enters is with respect to a situation where, in the course of reassessment, the AO ultimately comes to the conclusion that no additions or variations were warranted in respect of the heads or items of income which had formed the basis for initiation of action under Section 148 of the Act. It is in the aforesaid backdrop that the Court in *Ranbaxy Laboratories Ltd.* proceeded on facts to hold that since no additions had ultimately been made in respect of items such as club fees, gifts and presents, and which constituted the basis for initiation of reassessment, it would not be open to the AO to revise or modulate findings on any other head or items that may have been dealt with in the original assessment.

25. The position in law which emerges from the aforesaid discussion is that while it is true that the AO would have to establish that reassessment is warranted on account of information in its possession which appears to indicate that income chargeable to tax

had escaped assessment, once the assessment itself is reopened it would not be confined to those subjects only. This would, however, be subject only to one additional rider and that being if, in the course of reassessment, the AO ultimately comes to conclude that no additions or modifications are warranted under those heads, it would not be entitled to make any additions in respect of other items forming part of the original return.

26. This position in law also finds resonance in the judgment of the Punjab and Haryana High Court in **Majinder Singh Kang Versus Commissioner of Income-tax and Another**[11] and where it was observed:-

> "**8.** Learned counsel for the assessee submitted that the Assessing Officer had reopened the assessment by issuing notice under section 148 of the Act on the ground that the income from salary, perquisites and unexplained cash deposits in various accounts along with interest thereon had escaped assessment. The counsel urged that the Assessing Officer, however, while passing the reassessment order had sought to make addition of another amount without any addition having been made on the ground on the basis of which reassessment had been initiated. According to the learned counsel, no reassessment order could be passed by the Assessing Officer. Learned counsel for the assessee relied upon the following observations made by this court in CIT v. Atlas Cycle Industries [1989] 180 ITR 319 (page 322):
>
> > " ...we are of the view that the Tribunal was right in cancelling the reassessment as both the grounds on which reassessment notice was issued were not found to exist, and the moment such is the position, the Income-tax Officer does not get the jurisdiction to make a reassessment."
>
> **9.** Support was also drawn from the decision of the Rajasthan High Court in CIT v. Shri Ram Singh (2008) 306 ITR 343 (Raj) wherein judgment of this court in Atlas Cycle Industries' case (1989) 180 ITR 319 (P&H) was followed."
>
> XXXX XXXX XXXX

[11] 2010 SCC OnLine P&H 13401

> **12.** A plain reading of Explanation 3 to section 147 clearly depicts that the Assessing Officer has power to make additions even on the ground on which reassessment notice might not have been issued in case during the reassessment proceedings, he arrives at a conclusion that some other income has escaped assessment which comes to his notice during the course of proceedings for reassessment under section 148 of the Act. The provision nowhere postulates or contemplates that it is only when there is some addition on the ground on which reassessment had been initiated, that the Assessing Officer can make additions on any other ground on the basis of which income may have escaped assessment. The reassessment proceedings, thus, in the present case cannot be held to be vitiated.

27. For the sake of completeness, we may note that a Division Bench of this Court had expressed certain doubts with respect to the view taken by the Court in *Ranbaxy Laboratories Ltd*. This becomes evident upon a consideration of the opinion expressed by the Court in **Principal Commissioner of Income Tax vs. Jakhotia Plastics Pvt. Ltd.**[12] The Court in *Jakhotia Plastics* had expressed certain reservations with respect to what it viewed as undue importance having been placed by the Bombay High Court on the words "and also" in *Jet Airways (I) Ltd.*

28. In light of the above, the Court in *Jakhotia Plastics* had observed that since there was some doubt as to the accuracy of the interpretation accorded in *Ranbaxy Laboratories Ltd*., it would be appropriate for the matter being placed for the consideration of a larger Bench. This becomes evident from a reading of paragraphs 13, 14 and 15 of the report and which are extracted hereinbelow:-

> "**13.** This Court specifically is of the opinion that the Karnataka High Court's view in the case of *N. Govindaraju* (*supra*) is a more accurate one. In this Court's view the emphasis placed in *Jet Airways's* case (*supra*) on "and also" undermines the essential

[12] **Order dated 22.01.2018 in ITA 727/2017**

> objective of Section 147 of the Act and unduly restricts and narrows it. The circumstance clarifies existence of an additional power to bring to tax other sums. This *per se* would not mean that the sums or amounts sought to be brought to tax in a reassessment notice (which are ultimately not the subject of the final reassessment orders), act as a limitation.
>
> **14.** Having regard to the facts, this Court is of the opinion that since there is some doubt as to the accuracy of the interpretation in the case of *Ranbaxy Laboratories Limited* (*supra*) and which was subsequently followed in the case of *Monarch Educational Society* (*supra*), the appropriate course would be to refer the issue to a larger Bench.
>
> **15.** The following issue is accordingly framed for reference to the Full Bench i.e. whether the view expressed in the case of *Ranbaxy Laboratories Limited* (*supra*) [following *Jet Airways's* case (*supra*) of the Bombay High Court and followed later in *Monarch Educational Society*'s case (*supra*)] with respect to the interpretation of Section 147 read with Explanation (3) of the Act, is restrictive, so as to sustain only additions made in the course of reassessment proceedings subject to the additions of amounts adverted to in the reassessment notice in the "reasons to believe" under Sections 147/148 of the Act and notice pursuant thereof?"

However, the aforesaid reference ultimately came to be closed on 07 February 2020 on account of low tax effect.

29. In our considered opinion, and bearing in mind the import of Explanation 3 as well as the language in which Section 147 of the Act stands couched, we find no justification to differ from the legal position which had been enunciated in *Ranbaxy Laboratories Ltd*. We also bear in consideration the said decision having been affirmed and approved subsequently in **Commissioner of Income-tax (Exemption) vs. Monarch Educational Society**[13] and **Commissioner of Income-tax vs. Software Consultants**[14]**.**

30. We thus, come to the conclusion that the enunciation with respect to the indelible connection between Section 148A(b) and

[13] 2016 SCC OnLine Del 6636
[14] 2012 SCC OnLine Del 316

Section 148 A(d) of the Act are clearly not impacted by Explanation 3. As we read Sections 147 and 148 of the Act, we come to the firm conclusion that the subject of validity of initiation of reassessment would have to be independently evaluated and cannot be confused with the power that could ultimately be available in the hands of the AO and which could be invoked once an assessment has been validly reopened.

31. Explanation 3, or for that matter, the Explanation which presently forms part of Section 147, would come into play only once it is found that the power to reassess had been validly invoked and the formation of opinion entitled to be upheld in light of principles which are well settled. The Explanations would be applicable to issues which may come to the notice of the AO in the course of proceedings of reassessment subject to the supervening requirement of the reassessment action itself having been validly initiated.

32. Explanation 3, cannot consequently be read as enabling the AO to attempt to either deviate from the reasons originally recorded for initiating action under Section 147/148 of the Act nor can those Explanations be read as empowering the AO to improve upon, supplement or supplant the reasons which formed the bedrock for initiation of action under the aforenoted provisions.

33. The writ petitions are accordingly allowed and the impugned notices and orders in each of the above-captioned writ petitions are quashed. The impugned orders under Section 148A(d) dated 31.07.2022 [W.P.(C) 3807/2023], 23.07.2022 [W.P.(C) 3804/2023], and 29.07.2022 [W.P. (C) 3808/2023], respectively as well as the

notices under Section 148 dated 31.07.2022 [W.P.(C) 3807/2023], 23.07.2022 [W.P.(C) 3804/2023], and 29.07.2022 [W.P.(C) 3808/2023], respectively are hereby quashed.

34. We, however, leave it open to the respondent to take such steps as may otherwise be permissible in law.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

JULY 18, 2024/kk