



K C Mehta & Co.

Chartered Accountants

- Landmar

April - 2020

Fundamental Proposition – Parsuram Pottery Works

- Taxes are the price that is paid for civilisation.
- Those who are entrusted with the task of calculating and realising that price should familiarise themselves with the relevant provisions and become well-versed with the law on the subject.
- Any remissness on their part can only be at the cost of the national exchequer and must necessarily result in loss of revenue.
- At the same time, it has to be borne in mind that the policy of law is that there must be a point of finality in all legal proceedings

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Refresher on Reopening of Assessment

- Section 147

- AO must have reason to believe that income has escaped assessment
- Income escaping assessment must be chargeable to tax
- Other income which is noticed by AO during reassessment proceedings can also be made subject to reassessment

- First Proviso to Section 147

- Where order u/s 143(3) has been passed, assessment can be reopened after expiry of 4 years from end of AY only in case of failure to file ROI or to disclose fully and truly all material facts necessary for the purpose of making the assessment

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Contd.-1

- Second Proviso to Section 147
 - First proviso (time limit of 4 years) to not apply in case of income escaping the assessment relates to foreign asset or financial interest outside India
- Third Proviso to Section 147
 - Matters which are subject matter of appeals, references and revisions are outside the scope fo section 147

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Contd.-2

- Explanation 1 to section 147
 - Production of books of accounts does not necessarily mean full and true disclosure
 - Exempts AO from exercising due diligence while framing original assessment
 - General Disclosure Vs. Specific Disclosure
- Explanation 2 to section 147
 - Escapement including Deemed escapement of income defined
 - Having asset (including financial interest) located outside India itself – deemed escapement
 - Use of the words “also” in definition
 - Only defines “escapement of income” and not right to re-open therefore, First Proviso

may still apply

Contd.-3

- Explanation 3 to section 147
 - Reiterates power of AO to assessee income which comes to the notice of AO after initiating proceedings u/s 147
 - Mentioning of the above income in the reasons recorded not required – power to go beyond reasons recorded
- Explanation 4 to section 147
 - Retrospective effect of amendments to section 147 by Finance Act, 2012
 - Foreign Asset cases – extension of time limit to 16 years from end of the relevant AY

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Contd.-4

- Section 148
 - **Service of notice** to the Assessee for filing return of income
 - Return filed would be treated as return filed u/s 139
 - AO must record reasons before issuing notice
- Section 149
 - Time limit **to issue notice** u/s 148
 - 4/6 years from end of AY for income escaping assessment < Rs. 1 Lac and => Rs. 1 Lac respectively [Attn: First Proviso to Section 147]
 - 16 years from end of AY in case of income relating to foreign asset or financial interest outside India
 - Retrospective effect of amendments made under Finance Act 2012 (Foreign Assets)

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Contd.-5

- Section 150
 - No Time Limit to issue notice in consequence of any appellate or revision order or order of a court under any other law
 - This shall not apply in case where the time to issue notice had expired on date on which the order which is subject matter of proceedings was passed
- Section 151
 - Approval of Pr. CCIT and Pr. CIT is to be taken before issuing notice if assessment u/s 143(3) completed
 - Approval of JCIT is to be taken before issuing notice in other case

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Index of Landmark Supreme Court Judgements

Sr. No.	Judgement	Citation	Slide Reference
1.	GKN Driveshafts (India) Ltd. vs. ITO	[2003] 259 ITR 19	
2.	ITO vs. Lakhmani Mewal Das	[1976] 103 ITR 437	
3.	CIT vs. Sun Engineering Works (P.) Ltd.	[1992] 198 ITR 297	
4.	ACIT vs. Rajesh Jhaveri Stock Brokers (P.) Ltd.	[2007] 161 ITR 500	
5.	CIT vs. Kelvinator of India Ltd.	[2010] 320 ITR 561	
6.	Calcutta Discount Co. Ltd. vs. ITO	[1961] 41 ITR 191	
7.	New Delhi Television Ltd. vs. DCIT	[2020] 116 taxmann.com 151	
8.	ACIT v. Hotel Blue Moon	[2010] 321 ITR 362	
9.	K.M. Sharma v. ITO	[2002] 254 ITR 772 (SC)	

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Understanding Landmark Judgements

- The analysis has been divided into 3 parts:

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GKN Driveshafts (India) Ltd.

[The Guide]

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Facts

- Facts
 - Assessment was reopened u/s 147
 - The Taxpayer challenged the validity of notice issued u/s 148 and 143(2) before HC by way of Writ
 - The HC dismissed the writ filed by Taxpayer considering it as pre-mature
- Short Judgement of the Supreme Court but changed the entire course of 147 proceedings
 - SC dismissed the appeal by the Assessee but gave far reaching directions

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Findings of SC

- Findings of SC
 - The SC laid down procedure to be followed on issue of notice u/s 148
 - Taxpayer has to file ROI and seek reasons for issuing notice
 - AO bound to furnish reasons within **reasonable time**
 - On receipt of reasons, Taxpayer has to file objections
 - AO bound to dispose objections by passing **speaking order**
 - The Taxpayer had not followed the above procedure and hence HC was correct in dismissing the writ.

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Judgement Utility

- A Safeguard to Reassessment Proceedings
 - CIT v. Multiplex Trading & Industrial Co. Ltd. [2015] 378 ITR 351 (Delhi)
- Non-compliance would result in invalidity of proceedings
 - Manjula Athur v. ITO [2018] 404 ITR 177 (Madras) / Goa State Co-operative Bank [2017] 395 ITR 642 (Bom)
 - Sesa Goa [2007] 294 ITR 101 (Bom) – Substantial delay in supplying the reasons
- Decision relevant where validity of reassessment order is challenged in appeal
- After the speaking order is passed by the AO upholding the re-assessment proceedings
 - Assessee can file a writ petition challenging the order of the AO dismissing the objections; or
 - File appeal against the final assessment order in which inter alia challenge the re-opening and

Contd.

- 30 days from filing ROI is “Reasonable Time” for supplying reasons as envisaged by SC
 - Sahkari Khand Udyog Mandal Ltd. v. ACIT [2015] 370 ITR 107 (Gujarat)
- Order would qualify as a “Speaking Order” if it addresses each objections raised by Assessee
 - Nallagonda Venkata Lakshmi Narasimha Prasaad v. ACIT [2019] 108 taxmann.com 547 (Madras)

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Lakhmani Mewal Das

[Reason to Believe]

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Facts

- Facts
 - Deduction of interest paid to creditors was allowed in original assessment
 - Assessment was reopened on following reasons
 - Certain creditors were known name lenders
 - One of the creditor had made a confession of doing name lending
 - The HC quashed the notice on the ground requirements of section 147 were not fulfilled

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Findings of SC

• Findings of SC

- No reason to believe that income had escaped assessment
- Reference to name of known name lenders would not mean income has escaped assessment
- Confession of creditor also did not point to the loan advanced to the Assessee
- Words used are “Reason to Believe” and not “Reason to Suspect”
- The reason must be in good faith and not merely a pretence
- The reasons were vague and tenuous to provide legally sound basis for reopening the assessment.
- Reasons for formation of the belief should have rational connection with the formation of belief and are not extraneous or irrelevant to formation of belief

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Judgement Utility

- Reopening of assessment cannot be made on the basis of suspicion
 - Anil Laul v. ITO [2018] 96 taxmann.com 306 (Delhi ITAT)
- Vague information cannot be made basis for reopening of concluded assessments
 - Signature Hotels (P.) Ltd. v. ITO [2011] 338 ITR 51 (Delhi)
- Revenue may contend that the decision pertains to pre-amended section 147
 - Decision focuses on presence of “information” as mentioned in erstwhile section 147(a)
 - Nonetheless it provides comprehensive meaning of “Reason to Believe” which is applicable to amended section 147 as well
- Reason to believe that “income has escaped” not reason to investigate

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Sun Engineering Works (P.) Ltd.

[Additional Claim]

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Facts

- Facts
 - The Taxpayer filed loss returns after the due date
 - The AO disallowed the carry forward of loss on the ground of late filing
 - The CIT(A)/AAC confirmed the action of the AO and the Taxpayer did not further challenge the order
 - The case of Taxpayer was reopened and the Taxpayer claimed set off of loss as per original return

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Findings of SC

- Findings of SC

- Order passed in original assessment by AO had become final and issues therein could not be reargued
- The original order retains its character and identity in respect of items which have attained finality
- Section 147 only set-asides the underassessed income and not the entire original assessment
- Taxpayer cannot be permitted to claim relief which was rejected in original assessment or not claimed in original assessment
- 147 proceedings cannot be allowed to be converted as 'revisional' or 'review' proceedings at the instance of the assessee as they are for the benefit of the Revenue

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Judgement Utility

- Fresh claim cannot be made in the return filed in pursuance to notice u/s 148
 - Can such fresh claim be made in appellate proceedings- CIT v. Pruthvi Brokers & Shareholders [2012] 349 ITR 336 (Bombay)
 - Scope of appeal in furtherance of Re-assessment
- Decision also restricts powers of AO to reassess income other than escaped income
- Amendment of Direct Tax Laws (Amendment) Act, 1987, w.e.f. **1-4-1989**
 - Powers given to AO to reassess any other income which comes to his notice subsequent to reopening
 - Explanation 3 inserted by Finance (No. 2) Act, 2009 w.r.e.f. 1-4-1989-Issue need not be included in reasons

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Contd.

- Power to reassess other income subject to assessment of escaped income
 - Words used are “and also any other income” in section 147
 - Mewalal Dwarka Prasad [1989] 176 ITR 529 (SC) – If Original Reasons fail, the re-assessment cannot be sustained on any other findings
 - Dr. Anil Kumar Jain v. DCIT [2014] 35 ITR(T) 123 (Lucknow ITAT)
 - Assessment Re-opened for making addition of Commission,
 - No addition for commission made
 - The AO cannot make any other addition

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Rajesh Jhaveri Stock Brokers (P) Ltd.

[Assessment]

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Facts

- Facts

- Return filed by Taxpayer declaring loss
- ROI processed u/s 143(1)
- Assessment reopened u/s 147 on the basis of audit query
- During the reassessment proceedings, the AO filed an objection against audit query
- HC quashed the reassessment on the basis of Guj HC decision in the case of Adani Exports 240 ITR 224

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Findings of SC

- Findings of SC – Upholding the Re-opening of the Assessment
 - Conceptual difference between 143(1) and 143(3)
 - No assessment is made under 143(1) and it is merely an intimation and scope of adjustment very limited
 - Failure to take steps u/s 143(3) would not take away AO's power to reopen the assessment
 - Decision of Adani Exports (*supra*) not applicable as it relates to assessment u/s 143(3) not u/s 143(1)
 - if the Assessing Officer, for whatever reason, has reason to believe that income has escaped assessment, it confers jurisdiction to reopen the assessment

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Judgement Utility

- First Proviso to section 147 cannot be applied if only intimation u/s 143(1) is received
 - Does above still apply if processing is through Artificial Intelligence?
 - Implication of extensive information sought in the return itself.
- Where time limit to issue 143(2) notice has expired, can it be said assessment has been completed?
 - Smt. Yamini Agarwal v. DCIT [2017] 83 taxmann.com 209 (Kolkata ITAT)
 - 153 A proceedings - original proceedings, time limit for notice U/s. 143 (2) expired
 - In absence of incriminating material, the AO cannot re-examine any matter
 - Can it altogether substitute “reason to believe” with reason to suspect?
 - Case not selected for scrutiny U/s. 143 (2) could be a ground itself for re-opening ? like pointing out – say vast deposits or significant increase in the capital.

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Contd.

- Decision of Adani Exports is not reversed and still holds valid
 - SC has not applied the above decision on the ground that there was no assessment u/s 143(3)
 - The SC in the present decision has not considered that AO objected to Audit Query
 - Therefore debatable issue
 - There was no “Reason to Believe” in the present case in terms of decision of Adani Exports

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of India

Ltd.

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Findings of SC

- Issue under Consideration

- After amendment by Direct Tax Laws (Amendment) Act, 1987, can AO reopen the assessment on the basis of “Change of Opinion”.

- Prior to amendment there were “failure” or “information” cases. Substituted by purely “reason to believe”

- Findings

- AO does not have power to review but has power to reassess and no arbitrary powers

- There has to be “Tangible Material” with AO to hold escapement of income

- Reopening of assessment cannot be done on the basis of “Change of Opinion”

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Judgement Utility

- Tangible Material must for reopening the assessment and not merely re-appraisal of existing material
 - Pertinent for survey cases where no material is found
 - DCIT v. MJ Naidu [2017] 85 taxmann.com 206 (Vishkhapatnam)
- Reference to Tangible Material has to be in the reasons recorded
 - Woodward Governor (India) Ltd. v. ACIT [2016] 389 ITR 50 (Delhi)
- Tangible Material must be absent in original proceedings for valid reopening
 - Franchise India Holdings Ltd. v. ACIT [2016] 388 ITR 563 (P&H)

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Contd.

- Reopening cannot be done for issue which has been verified in original proceedings
 - Applicable even where First proviso to section 147 is not applicable i.e. reopening is within 4 years
 - Opinion formed in original assessment cannot be reviewed (even if erroneous)
 - Shanti Enterprise v. ITO [2016] 76 taxmann.com 184 (Gujarat)
- No Reopening for “verification”
 - “Verifying” or for “verification” in reasons would tantamount to change of opinion
 - J.V. Agrawal v. ITO [2013] 257 CTR 112 (Gujarat)

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Calcutta Discount Co. Ltd.

[Full and True Disclosure]

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Findings of SC

- Findings of SC
 - Once primary facts are disclosed, no further liability on part of Taxpayer to disclose other facts
 - Omission to disclose an inferential fact cannot lead to any failure on part of the Taxpayer
 - AO is required to draw inferences from the document filed during original assessment
 - Where more than 1 inference can be drawn, Taxpayer is not required to draw them and intimate to AO
 - Explanation 1 to section 147 is restricted to primary facts and cannot be extended to inferences

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- Full and true disclosure under first proviso to section 147 if all the primary facts disclosed
 - CIT v. Multiplex Trading & Industrial Co. Ltd. [2015] 378 ITR 351 (Delhi)
- Analysis has to be carried by AO on the basis of primary facts disclosed
 - Rate of tax applied, withholding tax deducted etc. has to be observed by AO
 - Failure to analyse above cannot lead to failure on the part of Taxpayer to disclose material facts
 - Vodafone West Ltd. v. ACIT [2013] 354 ITR 520 (Gujarat)

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Contd.

- AO is required to mention the manner in which Taxpayer has failed to disclose primary facts
 - Gujarat Lease Financing Ltd. v. DCIT [2014] 360 ITR 496 (Gujarat)
- Improper investigation of primary facts does not entitle AO to reopen assessment
 - IHHR Hospitality (P.) Ltd. v. ACIT [2019] 415 ITR 459 (Delhi)

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New Delhi Television Ltd.

[Disclosure on Notice]

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Facts

- Taxpayer's UK subsidiary (UKCO) issued step-up coupon bonds
- Taxpayer had agreed to furnish corporate guarantee for the same.
- Addition of guarantee fee was made in hands of Taxpayer
- Assessment was reopened u/s 147 on following grounds
 - DRP for subsequent year held that there was round tripping of funds through UKCO
 - Complaint from minority shareholders were received towards transfer of funds to Taxpayer through UKCO
 - UKCO was placed under liquidation after redemption of bonds

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Contd.

- Taxpayer filed objections against reopening of assessment
- The AO disposed off the objections on following grounds
 - Non-disclosure of material facts by Taxpayer
 - Applicability of second proviso to section 147 considering involvement of foreign asset

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Findings of SC

- Findings of DRP, Compliant of minority shareholders were Tangible Material
 - Hence, there was reason to believe that income had escaped assessment
- First Proviso was to be invoked since original assessment had been completed
- No failure on the part of Taxpayer to disclose full and true material facts
 - All primary facts were disclosed by Taxpayer
 - Taxpayer was not required to give further assistance to AO

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Contd.

- Fresh Tangible Material cannot lead to non-disclosure of facts by Taxpayer
 - Since there is no withholding of information during original assessment
- Benefit of Second Proviso cannot be taken by AO
 - Second proviso was not mentioned in notice issued u/s 148 or the reasons recorded
 - Taxpayer should not be taken by surprise
 - Taxpayer should know all the provisions on which Revenue relies
- SC permitted AO to issue fresh notice by invoking second proviso to section 147

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Judgement Utility

- Decision of SC in case of Phool Chand Bajrang Lal (203 ITR 456) is distinguished
 - SC in Phool Chand's case has put emphasis on withholding of information by Taxpayer
 - If there is no withholding by Taxpayer, there is no non-disclosure of material facts
 - Factual inaccuracy Vs. drawing of inferences – What must be disclosed is not disclosed or is falsely submitted Vs. not submitting something which was not essential
- Fresh Tangible Material cannot necessarily lead to valid reopening
 - Tangible Material sufficient for having “Reason to Believe”
 - Conditions of first proviso to be fulfilled along with reason to believe

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Contd.

- Provisions relied upon by AO have to be mentioned on the face of notice
 - Invalidate proceeding where time has expired to issue fresh notice u/s 148
 - Implications on penalty cases

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Hotel Blue Moon

[Notice u/s 143(2)]

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Facts

- Assessment was for block period under section 158BC
- Notice u/s 143(2) was not issued within the specified time
- The validity of assessment made u/s 158BC was challenged
- HC held that application of section 143(2) and 143(3) is mandatory in proceedings u/s 158BC

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Findings of SC

- Notice u/s 143(2) to be issued within time specified for proceedings u/s 158BC
 - Erstwhile provisions provided issue of notice within 1 year from date of filing ROI
- AO is required to complete assessment u/s 143(3) after following procedures
 - Issue notices u/s 143(2)/142
- Section 158BC does not provide for accepting ROI as provided under 143(1)
 - Assessment has to be completed u/s 143(3)
- Omission to issue notice u/s 143(2) cannot be a procedural irregularity and is not curable
- Further, provisions of section 158BC have specific requirement of issuing notice u/s 143(2)

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Judgement Utility

- The SC decision can be applied to proceedings u/s 147
 - Non-issue of notice u/s 143(2) can invalidate reassessment proceedings
 - ITO v. D.D. Ahuja & Brothers [2014] 45 taxmann.com 336 (Lucknow ITAT)
- Can it be said that SC decision is limited to proceedings u/s 158BC
 - The SC has observed that section 158BC has specific requirement of issue of notice u/s 143(2)
 - Whether issuance of notice must for completing the assessment U/s. 143 (3)
 - Relevance of the words “provisions of the Act shall apply as if it is a return filed U/s. 139”
 - Such mandatory requirement not present in other provisions
 - Tarsem Singla v. DCIT [2016] 385 ITR 138 (P&H)

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Contd.

- Notice u/s 143(2) to be issued after filing ROI
 - PCIT v. Marck Biosciences Ltd. [2019] 106 taxmann.com 399 (Gujarat)
- Invalid notice if served after limitation period
 - CIT v. V.V. Devassy [2018] 403 ITR 25 (Kerala)

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K.M. Sharma

[Reopening of Time Barred Assessment]

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Findings of SC

- Issue under consideration
 - Whether amended section 150 could be invoked to reopen assessment which were time barred before the amendment of section 150
- Findings of SC
 - As per section 150(2), only those assessment can be reopened which have not attained finality
 - Proceedings which have attained finality cannot be revived on the basis of any prospective amendment
 - This is a general finding of SC and not limited to section 150
 - Any provision cannot be presumed to have retrospective effect so as to affect finality of assessment.

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Judgement Utility

- Application of SC decision to the extended time period of 16 years u/s 149(1)(c)
 - Assessment time barred before insertion of section 149(1)(c) are to be excluded from scope of section 147
 - Brahm Datt v. ACIT [2019] 260 Taxman 380 (Delhi)

» Is section 149(1)(c) retrospective in nature?

» Explanation to section 149-Language or effective date? – Applies A.Y. beginning on or before 1.4.2012

- Effective date of amendment is to be considered
 - Assessment has to get time barred before the effective date of amendment
 - Udhna Udyog Nagar Sahkari Sangh Ltd. v. Shailendra Lodha [2016] 75 taxmann.com 185

Questions???

Thank You

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