Recent Judicial Trends on Validity of Reassessment Proceedings

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The issue of validity of reassessment proceedings has been subject of repeated challenge in various High Courts & Supreme Court and it would be correct to state that the issue is now fairly settled as to when reassessment notices can be issued within or beyond four years.

Prior to 1989 Section 147 provided for two grounds to reopen concluded assessments :-

(1) On basis of information received by the Assessing Officer assessment could be reopened. This had to be within four years.

(2) Where facts material for assessment are not disclosed in the course of assessment, whether within or beyond four years..

Supervening this two requirements in the alternative, the initial condition is that the Assessing Officer has reason to believe that there is escapement of income.

The first requirement regarding information is now dropped by 1989 amendment and therefore for reopening of assessment within a period of 4 years from the end of the assessment year only requirement is reason to believe. For a period beyond 4 years further requirement was the non disclosure of material facts necessary for assessment by the assessee.

The right of the assessee to challenge the validity of reassessment proceedings by way of a writ petition without following the procedure of Departmental appeal was first emphatically laid down by the Supreme Court in the land mark case of Calcutta Discount Co. v/s. ITO (1961) 41 ITR 191(SC) which held that notices could be challenged when there is want to jurisdiction or non fulfillment of conditions precedent. The case is also important for laying the principles as to what disclosure of material facts would include, by holding that inferences are to be drawn only by Assessing Officer and it is not the duty of assessee. The Assessing Officer is required to record reasons for reopening of assessment and till the later decision in GKN Drive Shafts of the Supreme Court assessee would straight away challenge by a writ petition the reopening of assessment on the basis of reasons recorded. However, in the case of GKN Drive Shafts v/s. ITO (2003) 259 ITR 19 the Supreme Court

laid down that the assessee should first raise objections before Assessing Officer challenging the reasons for reopening and the Assessing Officer is required by a written order to deal with the objections and only thereafter the assessee could challenge the reassessment notice by writ petition. However, this has turned out to be practically an empty formality as in not a single case objections are allowed and notice dropped.

Great debate has been going on the issue of change of opinion, evidence of formation of opinion, subsequent decisions invalidating original opinion as well as whether the acceptance of the claim of the assessee should appear on the face of the assessment order and whether silence in the order amounts to acceptance of the assessee's claim.

The recent judgment of the supreme Court on the issue of change of opinion is **CIT v/s. Kelvinator of India Ltd.(2010) - 320 ITR 561** by which the cobwebs of confusion regarding change of opinion has been decisively cleared by the Supreme Court in the above case.

The most recent authoritative opinion on the validity of reassessment proceedings is Full Bench decision of the Delhi

High Court in the case of **CIT v/s. Usha International Ltd. (2012) 348 ITR 485 (Delhi)(FB).**

The Delhi judgment held as follows :-

(1) Reassessment proceedings can be validity initiated where return of income is processed u/s. 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion as no opinion is formed. Asst. CIT v/s. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500(SC).

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assesse. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the

issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

Thus, where scrutiny assessment has taken place u/s. 143(3) reassessment proceedings even within a period of 4 years will be invalid where assessment order itself record that the issue was raised and was decided in favour of the assessee. This is because it would be hit by the principle of change of opinion which cannot enable the Assessing Officer to issue reassessment notice. However, if new facts material or information comes the knowledge of the Assessing Officer which was not on record and available at the time of assessment the principle of change of opinion will not apply as the opinion is found on facts. However, such facts must be material facts meaning thereby that those facts which if taken in to account would have an adverse effect on the assessee by higher assessment. However, correct material facts can even be

ascertained from assessment records also and it is not necessary that the same came from a third person or outside source. The onus however, will be on the revenue to establish the above situation. A fine distinction can be drawn between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, and deduction. Where the Assessing Officer fails to examine a subject matter etc. It is a case of no opinion. It is not necessary for the assessee to establish that the Assessing Officer has examined the claim by raising a query. There can be cases where the question is to apparent or obvious to hold that the Assessing Officer did not examine a particular subject matter etc.

The Delhi judgment also deals with presumptions u/s. 114(e) of the Evidence Act. It holds that the said section is a permissive provision to enable Judge to support his judgment but there is no scope of presumption when facts are known. Further, presumption of facts u/s. 114 is rebuttable. Further, in a separate judgment delivered by Hon'ble Mr. Justice R.V Easwar. It is held that Section 114(e) can be applied to the

assessment order framed u/s. 143(3) provided that there is full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter covered by the disclosure it would amount to change of opinion. So long as the assessee has furnished full and true particulars at the time of original assessment and so long as the assessment order is framed u/s. 143(3) of the Act it matters little that the Assessing Officer did not ask any question or query with respect to one entry or note but he raised queries and question on other aspects.

The judgment of the Delhi High Court extensively relies on the judgment of the Supreme Court in the case of **CIT v/s. Kelvinator of India Ltd. – (2010) 320 ITR 561(SC)**.

Reference may now be made to the leading judgment of the Supreme Court in the case of **CIT v/s. Kelvinator of India Ltd. – (2010) 320 ITR 561(SC)** on the issue of change of opinion negativing Department's contention that after omission of Section 147 clause (b) requiring "information" even the change of opinion is permissible ground for reopening of assessment, the Supreme Court laid down that even after the amendment of

1989 the Assessing Officer has to have reason to believe that income has escaped assessment but this does not imply that on mere change of opinion assessment can be reopened on change of pinion.. The concept of "change of opinion" must be treated as an in-built test to check abuse of power. Hence, after 1st April 1989 the Assessing Officer has power to reopen an assessment provided there is tangible material to come to the conclusion that there was escapement of income from assessment. The reasons must have a link that the formation of belief.

Recently in 2011 & 2012 about 60 (reported and unreported) judgments have been delivered by Gujarat High Court on the issue of validity of reassessment notices and it would not be wrong to state that Gujarat High Court leads in deciding largest number of writ petitions challenging reassessment notices.

At the outset reference may be made to a leading decision of the Gujarat High Court in the case of **Dishman Pharmaceuticals and Chemicals Ltd. v/s. Dy. CIT -(2012) 346 ITR 228** which has laid down exhaustively the principles governing validity of reassessment notices. The said principles are as follows :-

"[i] To confer jurisdiction to the Assessing Officer to reopen the assessment under Section 147 of the Income-tax Act, beyond four years from the end of assessment year, following two conditions must be satisfied [a] that the Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment; and (b) that the same was occasioned, on account of either failure on the part of the assessee to make a return of his income for that assessment year, or to disclose fully and truly all material facts necessary for assessment of that year. (ii) Both conditions are conditions precedent and must be satisfied simultaneously before the Income-tax Officer can assume jurisdiction to reopen an assessment beyond four years of the end of assessment year. (iii) Such reasons must be recorded and if the reasons recorded by the Assessing Officer do not disclose satisfaction of these two conditions, the re-opening notice must fail. (iv) There is no set format in which such reasons must be recorded. It is not the language but the contents of such recorded reasons which assumes importance. In other words, a mere statement that the Assessing Officer had reason to believe that certain income has escaped assessment and such escapement of income was on account of non-filing of the return by the assessee or failure on his part to disclose fully and truly all material facts

necessary for assessment would not be conclusive. Nor, would the absence of any such statement be fatal, if on the basis of reasons recorded, it can be culled out that there were sufficient grounds for the Assessing Officer to hold such beliefs. (v) Such reasons must emerge from the reasons recorded by the Assessing Officer and cannot be supplied through an affidavit filed before the Court. However, Gujarat High Court in the case of **Aayojan Developers v. Income Tax Officer (2011) 335 ITR 234(Guj)** has accepted the view that to elaborate such reasons already recorded, reference would be permissible to the affidavit filed by the Department before the Court. (vi) What would amount to true and full disclosure of all material facts must depend on each case and no strait-jacket formula of universal application can be provided. It can however safely be stated that the duty of the assessee is to disclose primary facts and it is not his duty to lead the Assessing Officer to any particular inference of fact or of law on the basis of such primary disclosures. In other words, once the assessee discharges his duty of stating all the primary facts, what inferences and conclusions should be drawn is the duty of the Assessing Officer. (vii) At the time of ascertaining whether the notice was validly issued, what could be the probable conclusion of fresh assessment if re-opening is permitted, is not the inquiry of the Court. In

other words, the merits of the proposed action, through opening of the assessment, cannot be gone into by the court beyond prima facie stage."

Broadly the following issues have arisen before the Courts :-

(1) When reassessment notice is issued after passing order Section 143(1) .

Ans : It is clear that while passing order u/s. 143(1) no opinion is formed by the Assessing Officer. Hence, ground of change of opinion would not be available to challenge notice u/s. 148 within 4 years and notice, cannot be challenged except on the ground that there is no "reason to believe". Asst. CIT v/s. Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500(SC).

If the notice is issued beyond 4 years., The Officer has to show that there was non disclosure of material facts necessary for assessment.

(2) When such notice is issued within a period of 4 years after assessment U/s. 143(3)?

Ans : Mere change of opinion is not a valid ground an but the requirement of non disclosure of material facts necessary for assessment need not be there..

H.K Buildcon v/s. ITO – (2011) 339 ITR 535

The Court held that a mere change of opinion by succeeding Officer would not be a ground for reassessment notice.

Rubamin Ltd. v/s Love Kumar -

Spl. C.A. No.16901/2011 dt 30/4/2012 (unreported)

That TDS exemption letters were filed at original assessment . Notice to disallow expenditure as TDS not deducted was quashed as there was no non disclosure and assessee was not liable to deduct TDS & therefore the notice had no basis

Ashokyot Oxygen Pvt. Ltd. v/s. H.N Patel ITO

(2012) 346 ITR 399

In this case notice was issued after 4 years and reasons did not show failure to disclose material facts.

Reopening was on the ground that preoperative expenses were capital in nature, but wrongly allowed as revenue expenditure. The Court struck down the notice as there was no case of non disclosure of material facts.

Balar Exports v/s. Dy. CIT – (2011) 202 Taxman 293

The scrutiny assessment was made by a detailed order regarding export of diamonds in course of business. Notice was issued on the ground that closing stock was under valued. The Court held that when full details were furnished in course of assessment proceedings and the ITO was satisfied and no addition were made the Court held that the reopening was without jurisdiction.

Arvind Polycot Ltd. v/s. Chandra Ram

Spl. C.A No. 2385/2001 dt. 27-8-12 (unreported)

For assessment year 1997-98 scrutiny assessment was made on 28-3-2000. Reopening notice was issued on the ground that Rs. 187 lacs claimed being Voluntary Retired Scheme was allowed as revenue expenditure

relying on subsequent CBDT circular dt. 23-1-01 (not u/s. 119). The circulars stated that such payments was for enduring benefit and therefore capital expenditure. The notice was quashed on the ground that it was change of opinion. Full facts were disclosed during the course of assessment.

(3) Whether reassessment notice would be justified after 4 years because of subsequent judgment of the jurisdictional High Court or Supreme Court or retrospective amendment of law?

Ans : Notice after 4 years relying on subsequent judgment of jurisdictional High Court or Supreme Court is not valid. Assessing Officer has to establish non disclosure of material facts.

Doshin Ltd, v/s. ITO - (2012) 342 ITR 6

Here notice was issued after 4 years because of subsequent amendment of the law with retrospective effect. There was no failure on the part of the assessee to disclose material facts. The Court quashed the notice.

Trivenu Ship Breakers v/s. Harsh Prakash – (2011) 335 ITR 284

Notice was issued on the ground that payment of usance interest on purchase of ship was made without deducting TDS. However, Section 10(15) was amended with retrospective date from 1-4-1962 exempting usance interest from TDS requirement. Subsequent retrospective amendment may also knock out the notice as there would be no escapement. Notice was therefore quashed.

Conversely even if because of subsequent retrospective amendment income can be said to have escaped assessment no notice can be issued after 4years as there is no non disclosure of material facts.

Sadbhav Engineering Ltd. v/s. Dy. CIT –

(2011) 333 ITR 483

In this case notice was issued after 4 years based on subsequent amendment of law with retrospective

effect. The Court held that there were no failure to disclose and the notice was invalid.

Surat Peoples Co-op. Bank v/s. ITO –

(2011) 336 ITR 218

Here notice was issued after 4 years based on Supreme Court judgment delivered by 2 Judges. However, the same was reversed by larger Bench of 3 Judges. Notice was therefore held bad. However, even otherwise merely because of High Court or Supreme Court judgment notice cannot be issued after 4 years as there would be no failure to disclose material facts.

Gujarat State Co-operative Agri. & Rural Development Bank v/s. Dy. CIT - (2011) 227 ITR 447

In this case notice was issued after 4 years. There was no failure to disclose material facts necessary for assessment, but the notice was based on subsequent decision of the High Court. It was held that such a notice is not valid.

(4) Whether when facts are disclosed and claims are made but the assessment order is silent and not expressly dealing with the said issue, can it be deemed to have been accepted the claim after examining the same preventing reopening of assessment?

Ans : In this case if the assessment order does not deal with the issue on which claims are made and facts disclosed it is deemed to have been accepted by the Assessing Officer as when claims are accepted it is not necessary to so mention in the assessment order.

FAG Bearings India Ltd v/s. Dy.CIT -

Spl. C.A. No. 16204/03 dt.15/9/2012 (unreported)

At original stage all facts were fully disclosed on four points on which reassessment notice was issued beyond four years and assessment order was passed wherein nothing was mentioned in the order. . Court struck down the notice as full facts were fully disclosed and deemed to be accepted.

Shirish C. Parikh v/s. ITO - (2011) 55 DTR 386

The notice was issued after 4 years Court found that full details of purchase of property, payment of price etc. were given to claim relief u/s. 54. The notice was therefore struck down.

Manukant C. Shah, HUF v/s. Dy. CIT

(2011) 61 DTR 235=245 CTR 224

The assessee had given full details of unsecured loans given and explained also one inadvertent omission to charge interest from one debtor. Assessing Officer had at the original stage examined these issues. Therefore, there was no failure to disclose and the notice after 4 years and therefore held invalid.

Ashank D. Desai v/s. Asst. CIT - (2012) 346 ITR 326

It was held that reassessment notice was issued after 4 years to disallow interest on borrowings for purchase of shares. During assessment proceedings full details were disclosed and there was no failure to disclose. Accordingly the notice was quashed.

Parle Sales and Services Pvt. Ltd. v/s. ITO -

(2011) 337 ITR 203

In this case notice was issued after 4 years and material facts were disclosed and deduction was allowed after considering all facts. Notice issued to disallow the deduction on the ground that it was capital expenditure. The Court held the notice invalid.

Priya Blue Industries Pvt. Ltd. v/s. ITO –

(2012) 346 ITR 204

Notice was issued after 4 years to disallow deduction of usance interest paid to non residents without deducting TDS. However there was no indication of any default by the assessee to disclose material facts. The notice was therefore quashed.

Sayajee Industries Ltd. v/s. Jt. CIT –

(2012) 336 ITR 360

In this case notice was issued after 4 years, but reasons did not disclose any failure on the part of the

assessee to disclose material facts necessary for assessment.

I.P Patel and Company v/s. Dy. CIT –

(2012) 346 ITR 207

In this case notice was issued after 4 years. The Court held that notice did not specify instances of failure to disclose. However, it is sufficient if the failure to disclose can be inferred. Further, sufficiency of material cannot be gone into for holding the notice invalid. This is instance of an adverse decision

Ketan B. Mehta v/s. ACIT - (2012) 346 ITR 254

Here notice was issued after 4 years. During assessment proceedings the fact of borrowing to purchase shares and the details of investment were disclosed. The reasons for issue of notice was that interest was not paid to earn dividend or for acquiring controlling interest in the company. It was held that there was no failure to disclose material facts and notice was bad.

Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 12468/2004 dt. 31-7-2012 (unreported)

In this case for assessment year 1997-98 scrutiny assessment was made and it was sought to be reopened by notice dt. 25-2-04 in connection with income u/s. 115JA. The petitioner had made full disclosure with the return and during the course of scrutiny of various claims and adjustments were made. The notice was set aside as full facts were disclosed (case law fully disclosed).

Also see Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 652/05 dt. 6-8-12 (Unreported)

and

Sun Pharmaceutical Industries Ltd. v/s. Dy. CIT

Spl. C.A No. 12468/2004 dt. 31-7-2012.

Bipin Kumar P. Khandheria Advocate v/s. Dy. CIT

Spl. C.A No. 6557/2001 dt. 13-8-12 (unreported)

Return filed before the ward where he was assessed but correct jurisdiction was another officer as it was

search case. However it was accepted & assessed. Reassessment notice issued on ground that return filed before wrong ward amounted to return not filed. Held it was invalid notice (case law discussed).

Gujarat Fluorochemicals Ltd. v/s. Asst. CIT

Spl. C.A No. 1/2005 dt. 27.08.12 (unreported)

Notice issued because of audit objection, though A.O believed there was no escapement . Held notice bad as reopened on opinion of audit & against his own non belief of escapement.

Garden Finance Ltd. v/s. ACIT

Spl. C.A No. 12251/2002 & 489/2005

Claim for higher depreciation examined and allowed.

No failure to disclose material facts notice set aside.

(5) Where a mere claim for deduction or disallowance made but there is no non disclosure can notice be issued?

Ans : Making a claim does not amount to non disclosure.

Cadila Healthcare Ltd. v/s. Dy. CIT –

(2011) 334 ITR 420

Notice was issued after 4 years it was held that mere claim by the assessee for deduction would not amount to failure to disclose and the notice was held bad.

(6) To what extent change of opinion would be permissible for reopening of the assessment. Whether "change of opinion" would amount to "review" which is not permissible?.

Ans : Change of opinion would be no ground to reopen assessment within or beyond 4 years. Change of opinion would amount to "review" of points decided which is not permissible.

(7) Whether duty to disclose primary and material facts necessary for assessment would include drawing of inferences of facts or law or whether that is the duty of the ITO to draw such inferences?.

Ans : Duty disclosure is only of primary and material facts and not inferences of fact or law which are to be

drawn by the Assessing Officer. Hence wrong inference of fact or law is not a valid ground if primary and material facts are disclosed. Calcutta Discount v/s. ITO (1961) 41 ITR 191(SC).

(8) Whether omitting to apply the law inadvertently or by ignorance would enable the ITO to reopen assessment though primary facts are fully disclosed?

Ans : Omitting to apply the law or ignorance of law or obvious misinterpretation of law would not unable ITO to reopen the assessment within or beyond 4 years - in the later case when primary facts are fully disclosed. Further there has to be escapement.

Devesh Metcast Ltd. v/s. Jt. CIT – (2011) 338 ITR 139

In this case notices for reassessment was issued within 4 years for disallowing set off unabsorbed depreciation on erroneous interpretation of statutory provisions. Hence on correct and obvious interpretation income would not be said to have escaped assessment. Notice was struck down.

(9) Whether the reasons recorded is the only material to be looked at by the Court or subsequent affidavits can be looked at for fresh reasons in support of the notice, which may contain new reasons?

Ans : The Court is only required to examine the reasons recorded for re opening assessment and not subsequent reasons brought out in affidavit filed in reply to the challenge to reassessment notice. However affidavit may explain the reasons.

Dishman Pharmaceuticals and Chemicals Ltd. v/s.

Dy. CIT (2012) 346 ITR 245

The notice was issued after 4 years. The Court struck down the notice on the ground that there were no existing grounds in the notice and the same cannot be subsequently sustain on another ground not mentioned in the reasons.

Aayojan Developers v/s. ITO – (2012) 335 ITR 234

In this case notice was issued after 4 years reasons were recorded. The Court held that affidavit can

explain the reasons but cannot validate the notice in the assessment proceedings. Assessee was allowed deduction for housing project after examining facts. The notice was issued alleging that assessee was a works contractor and not a developer. There was no failure to disclose material facts. The notice was therefore quashed.

(10) Whether the period of limitation for the issue of notice would start after signing the notice or later when it is to put in the course of transmission to the assessee?

Ans : Section 149 of I.T Act prescribes period of limitation within which notice for reassessment can be issued u/s. 148. The word "issue" does not mean merely signing notice but the date of issue would be the date on which the signed notice is put in the course of transmission to the assessee by delivering the same to the Post Office or in other agent to deliver the notice.

Kanubhai M. Patel , HUF v/s. Hiren Bhatt –

(2011) 334 ITR 25

The Court considered the question of limitation as regards issue of reassessment notice and examined the meaning of "issue". It was held that mere signing of notice on a particular date is not sufficient, the date of issue of notice would be the date on which notice was handed over for service to the proper Officer (Post Office). Hence, in case of notice for assessment year 2003-04, it was signed on 31-3-2010 but sent to Speed Post Central on 7-4-2010. It was considered as barred by limitation.

(11) Whether notice issued within period laid down in s. 149 also has to comply with requirement that there should be failure to disclose material facts?

Ans : The impact of two sections, s.149 & s. 147 is different. Even if notice beyond 4 years can be issued in case of non disclosure, it has still to be issued within limitation provided by s. 149.

Sayaji Hotels v/s. ITO - (2011) 339 ITR 498

Here notice was issued after 4 years. It was held that though u/s. 149 maximum limitation was prescribed for issue of Section 147 notice based upon the amount involved. It was held that Section 149 did not override provisions of Section 147. Hence were notice was issued after 4 years the requirement that there should be failure to disclose material facts still exists and hence notice was bad.

(12) Can notice within 4 years be issued on change of opinion?

Ans : Such notice would be invalid.

Tulsi Developers v/s. Dy. CIT – (2011) 59 DTR 351

The Court found that the notice was issued merely on change of opinion and was therefore held invalid.

(13) Once Tribunal has decided there are no bogus purchases. Can notice for reassessment be still issued for taxing such purchases?

Ans : Notice would be invalid.

Connection v/s. ITO – (2011) 335 ITR 465

Vallabh Yarns P. Ltd v/s. CIT – (2011) 335 ITR 465

The Tribunal had in appeal from block assessment deleted addition on account of bogus purchases holding that purchases were not bogus. The Court held that reassessment notice cannot be issued on the ground that purchases were bogus.

(14) If issue is in appeal before Tribunal can notice still be issued for reassessment ?

Ans : Such notice cannot be issued.

National Diary Develipment Board v/s. Dy. CIT

(2011) 54 DTR 217

The notice was issued after 4 years on two grounds, but in the reasons recorded nothing was mentioned to indicate that there was any failure to disclose all material facts. The notice was quashed . It was further held that when the subject matter is in appeal no reassessment notice can be issued on such ground, which is pending in appeal.

(15) Can notice be issued for fishing inquiry without any basis for escapement?

Ans. : No

Bakulbhai Ramanlal Patel v/s. ITO –

(2011) 56 DTR 212

In this case notice was issued beyond 4 years but the reasons did not reflect that the income escaped was over one lac. The notice was therefore struck down. Further, the reasons could not be held to be valid as it was a fishing inquiry stating that matter requires detailed investigation and further clarification. Notice was therefore struck down.

Hotel Oasis (Surat)Pvt. Ltd. v/s. Dy. CIT

(2011)57 DTR 378

In this case notice was issued after 4 years there was nothing in the reasons to indicate whether any income has actually escaped assessment, but notice for reopening was issued to make inquiries. The notice was held bad.

(16) If assessment order has merged with order of CIT(A). Can notice be issued on change of opinion?

Ans : No

United Phosphorus v/s. Addl. CIT – (2011) 56 DTR 193

It was held that notice was merely on change of opinion though the decision was after applying mind to the facts further assessment order had merged with the order of CIT(A) hence also notice was bad.

(17) If claim for 100% depreciation is accepted under s. 143(i)(a) & in subsequent notice u/s. 143(2). Can reassessment notice be issued?

Ans : No

Gujarat Power Corporation v/s. Jt. CIT-

(2011) 238 CTR 91 = 202 Taxman 303

Claim for 100% depreciation on boiler purchased from GEB – return accepted under S. 143(i)(a) accepting the claim. Subsequently notice u/s. 143(2) issued & full details furnished & assessment under s. 143(i)(a) not disturbed. Later notice for reassessment

issued on ground of excessive depreciation. Held it was mere change of opinion & notice bad.

Agricultural Produce Market Committee v/s. ITO

(2011) 63 DTR 7

In this case reopening notice was issued on the opinion of the audit party. The ITO had granted exemption u/s. 11, I.T Act and the CIT had granted Registration u/s. 12AA of I.T Act. The reopening on the basis of audit objection was mere change of opinion & notice was invalid.

(18) When revised statement filed & accepted can reassessment notice be issued on ground that revised statement was after statutory period?

Ans : No

Rotary Club of Ahmedabad v/s. ACIT

(2011) 336 ITR 58

The Court held that it cannot find there is any material to believe that income has escaped

assessment. The assessee had supplied revised computation which was accepted. The reopening notice was on the ground that the revised statement was given after the statutory period and was therefore invalid. The Court held that this was no ground to commence reassessment proceedings.

(19) Can notice for reassessment be issued while giving effect to CIT(A) order on the ground that it will lead to escapement?

Ans : No

Harsiddh Specific Family Trust v/s. Jt. CIT

(2011) 58 DTR 149

Notice was issued after 4 years, the assessment was opened to give effect to order of CIT(A) but according to ITO giving effect to the order of CIT(A) would result in escapement of income. Court held that there was no failure to disclose material facts the notice was therefore bad.

(20) Can notice be issued when there is no escapement & tax would be less than original assessment?

Ans : No

P.K.M Advisory Services Pvt. Ltd. v/s. ITO

(2011) 339 ITR 585

The Court found that the tax payable on proposed reassessment would be less than tax paid under regular assessment. Therefore there was no escapement and the reassessment proceedings were invalid.

All these questions have been recently decided by about 60.

Recent unreported decisions of Gujarat High Court are listed below :-

(1) **Chimanlal and Sons v/s. Dy. CIT- Spl. C.A No. 16846/11**

Dt. 8-10-2012.

Reassessment notice issued on 28-3-11 for A.Y 2004-05 on ground that subsidy of Rs. 17,33,554/- received from Govt. in 1995 was subsequently distributed

amongst partners in 2004-05 instead of any utilization for business. Notice was beyond 4 years. However, Court quashed the notice on the limited ground that no income escaped in A.Y 2004-05 by mere transfer to partners' A/cs in that year. No taxable event occurred in A.Y 2004-05. It did not go into further question whether there was failure to disclose material facts in course of assessment proceedings in A.Y 2004-05.

(2) **Vishwanath Engineers v/s. Asst. CIT - Spl C.A No. 204/12 Dt. 8-10-2012**

Notice dt. 19-4-10 for reopening A.Y 2006-07 reasons were supplied, assessment proceedings & objection were raised but were not disposed off separately but only while passing assessment order. Scrutiny assessment had taken place examining the issue whether certain expenditure was allowable under section 37. Revenue raised objection that appeal lay. Court had that Assessing Officer has violated Supreme Court decision in GKN Driveshafts case by not rejecting objections separately before passing

assessment order. Court rejected revenue's contention as directing assessee to appeal remedy would enable Assessing Officer to take an advantage of his own wrong. Issue was gone into in assessment. Hence it was mere change of opinion. Facts were gone into during assessment proceedings and assessment order passed notice was quashed.

General Motors India (P) Ltd. v/s. Dy. CIT

Spl. C.A No. 1773/2012 - dt. 23-8-2012

In A.Y 2006-07 unaborbed depreciation of A.Y. 1997-98 was allowed to be carried forward & set off after 8 years without any time limit in accordance with S.32(2) as amended by Finance Act, 2001 in scrutiny assessment. Later, reassessment notice was issued on ground that carry forward was wrongly allowed as it was in violation of amended section 32(2). Notices were quashed as there was no non disclosure of facts & only a change of opinion. Further, Assessing Officer had not decided objections of the assessee to

reassessment notices but passed assessment order & rejected objections in the assessment order itself which was contrary to Supreme Court in GKN Driveshafts (India) Ltd.

Eagle Fashion Pvt. Ltd. v/s. Dy. CIT

(2012) 347 ITR 401

Assessee claiming special deduction u/s. 80-IB filed audit report in course of assessment instead of filing along with the return. Assessment made granting deduction reopening notice after 4 years on ground that audit report not filed with return. Notice quashed as no non disclosure of material facts.

Mihir Textiles - (2012) 347 ITR 546

Reassessment notice after 4 years no failure to disclose material facts & assessment made holding sale of ongoing concern not taxable. Indexed cost less than sale price. Notice quashed – writ lies & alternative remedy no bar

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