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HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 25-4-2019

Judgment delivered on 25-6-2019

WA No. 293 of 2017

1. Income Tax Officer -1 Mahanadi Complex, Niharika Road, Korba Chhattisgarh.

2. Income Tax Officer, Ward 3, Mahanadi Complex, Niharika Road, Korba, Chhattisgarh

3. Deputy Commissioner Of Income Tax, Korba, Mahanadi Complex, Niharika Road, Korba, Chhattisgarh

4. Assistant Valuation Officer Il, Income Tax Department, 2nd Floor, Piramal Chamber, Parel, Mumbai 12 Maharashtra

5. Union Of India, Through Its Secretary, Ministry Of Finance Department Of Revenue, North Block New Delhi

---- Appellants

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Versus

1. Smt. Kamala Ojha W/o Shri Pankaj Ojha, Aged About 71 Years R/o Qr.No. MIG-II-06, M P Nagar, Korba Chhattisgarh.

---- Respondent

For Appellants	Shri Amit Choudhary, Adv. with Ms. Naushina Ali with Shri Ajay Kumrani, Advocate
For Respondent	Shri Siddharth Dubey, Advocate

Hon'ble Shri Prashant Kumar Mishra, J

Hon'ble Shri Parth Prateem Sahu, J

C A V Judgment

The following judgment of the Court was passed by

Prashant Kumar Mishra, J.

1. Revenue has preferred the instant appeal challenging the order passed by the Single Judge, thereby quashing the reassessment proceedings under Section 147 of the Income Tax Act, 1961 (for short 'the Act') by issuing notice under Section 148 of the Act; also quashing the order rejecting the preliminary objection preferred by the assessee and imposing cost of Rs.15,000/- on the revenue.

2. When the writ petition was filed on 16-12-2016 the challenge was only to the notice issued on 21-9-2015 (Annexure – P/6 to WP) under Section 147 of the Act; order dated 13-12-2016 (Annexure – P/9 to WP); order dated 12-6-2015 (Annexure – P/5 to WP) under Section 55 A of the Act read with Section 16A(5) of the Wealth Tax Act, 1957 (for short 'the Act, 1957'); and the notice under Section 55 A of the Act read with Section 16A(4) of the Act, 1957, however, during pendency of the petition the final assessment order was passed on 20-12-2016, therefore, the writ petitioner amended the writ petition to challenge the said assessment order also. The learned Single Judge has allowed the main prayers made in the writ petition.

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3. Relevant facts giving rise to the present appeal are that the case of the assessee for assessment year 2011-12 was

reopened after having information that the assessee Smt. Kamala Ojha, had got an amount of Rs.2,00,02,500/-, as her share of sale consideration of the house property situated at plot No.13, Vile Parle (East), Mumbai corresponding to CTS No. 917/1 to 917/6. The sale transaction took place on 16-12-2010 i.e. during the financial year 2010-11, assessment year 2011-12, however, the capital gain on the sale of the said property on her share of capital gain was not correctly disclosed in the Return of income(for short 'ROI') for the relevant A.Y. 2011-12, filed belatedly in the year ending on 31-3-2013. During an inquiry by the then Assessment Officer, the assessee had submitted two valuation reports on two different occasions, one dated 28-6-2013 prepared by the registered valuer Mr. Anmol Sekhri valuing the subject property for Rs.11,13,000/- as on 1-4-1981 and the second report dated 24-10-2013 prepared by a registered valuer Shri Kiran Sowani valuing the subject property for Rs.30,00,000/- as on 1-4-1981. On applying the index cost, the value of the property during financial year 2010-11 comes to Rs.79,13,430/-. For half share of the assessee the cost at her hands came to be Rs.39,56,715/-. Thus, the capital gain on the sale of the said property in the hands of the assessee came to be assessed at Rs.1,60,45,785/-, but this income on

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account of capital gain was not correctly disclosed by the assessee in the ROI filed on 31-3-2013, therein showing return income of Rs.69,983/- only.

4. Since two valuation reports were filed by the assessee herself within a span four months the first showing value of Rs.11,13,000/- and the second showing value of Rs.30,00,000/- the AO felt it necessary to enquire and examine the genuineness of the valuation reports. During assessment proceedings the property was referred to the Approved Valuer of the Department to know the fair market value as on 1-4-1981 by invoking Section 55A of the Act for which the notice along with report Annexure – P/3 was served on the writ petitioner. In the report the fair market value of the property as on 1-4-1981 was valued at Rs.8,34,300/-. Initially the assessee did not reply to the notice, but eventually she filed objections two days prior to 31-3-2015, therefore, the DVO (Departmental Valuation Officer) expressed his inability to send the final report on or before 31-3-2015 and requested the AO to pass protective assessment order subject to rectification on receipt of final valuation report as it was a time barring case.

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5. In the above circumstances, the AO passed the protective order of assessment on 31-3-2015 subject to receiving the final valuation report. The AO received the final valuation report dated 12-6-2015, on 18-6-2015 and thereafter the Department proceeded against the assessee for taxing the capital gain amount which has escaped the assessment, as the AO reached to the conclusion that the income on account of capital gain was not correctly disclosed by the assessee and hence there was reason to believe that the said income under the head "Capital gain" has escaped assessment within the meaning of section 147 of the Act.

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6. The assessee was issued notice under Section 148 on 21-9-2015 after obtaining necessary approval of the JCIT. In response the assessee requested for the reasons for reopening of assessment. The reasons recorded were eventually supplied to the assessee after which she filed objections requesting the AO to drop the proceedings. The objection was dismissed by the AO vide order dated 13-12-2016.

7. At this stage the writ petition was filed on 16-12-2016, which was first listed on 21-12-2016. On the said date, learned counsel for the Revenue informed the Court that the assessment order has already been passed. The writ

petitioner was thereafter allowed to examine the matter and the petition was posted for hearing on 4-1-2017, 5-1-2017 and 6-1-2017 when the writ Court heard on maintainability of the writ petition.

8. Challenge to the notice under Section 147/148 of the Act has been made on the ground that condition precedent for invoking Section 147 did not exist; the order disposing of objections is not a speaking order; only on the basis of report of DVO proceeding cannot be reopened and lastly the revenue should have taken recourse to Section 263 of the Act and not for reassessment. The learned Single Judge has allowed the writ petition; accepting the grounds raised in the writ petition.

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9. Assailing the order impugned, Ms Naushina Ali, learned counsel for the Revenue would submit that once the assessment order has been passed during pendency of the writ petition the appropriate remedy for the petitioner was to prefer an appeal and the writ petition was not maintainable. She would submit that the condition precedent for invoking S.147 existed in the matter as there was information for the purpose of invoking the said provision providing necessary foundation and formation of belief. It is putforth that the

report of DVO being not available at the time of original assessment it is not a case of change of opinion.

10. Learned counsel for the Revenue would refer to the decisions rendered in the matter of ***Kalyanji Mavji & Co. v Commissioner of Income Tax***[1]***, Assistant Commissioner of Income Tax v Rajesh Jhaveri Stock Brokers Private Limited***[2], ***Commissioner of Income Tax and Others v Chhabil Dass Agarwal***[3] and ***Lalita Ashwin Jain v Income Tax Officer***[4]**.** Learned counsel has also placed reliance on the orders passed by this Court in ***Arun Kumar Agrawal v The Principal Commissioner of Income Tax & Others***[5]***, Hariom Rice Mill Private Limited & Another v Assistant Commissioner of Income Tax & Others***[6]***, M/s Precision Engineering & Another v Assistant Commissioner of Income Tax & Others***[7]. Reliance is also made to the decision rendered by the Delhi High Court in ***R. Dalmia v Union of India (UOI) and Others***[8], ***The Commissioner of Income Tax & Another v Sri N. Nagaraja***[9] and ***S. Narayanappa and Others v Commissioner of Income Tax, Bangalore***[10]**.**

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1 (1976) 102 ITR 287 (SC)
2 (2008) 14 SCC 2018
3 (2014) 1 SCC 603
4 (2014) 363 ITR 343 (Guj)
5 WPT No.163 of 2016 (decided on 1-12-2016) and other connected matters
6 WPT No.69 of 2018 (decided on 5-4-2019) and other connected matter
7 WPT No.234 of 2018 (decided on 5-4-2019) and other connected matter
8 Civil Writ Petition No.316-D of 1965 (decided 27-7-1971)
9 ITA No.1302/2006 & ITA No.1304/2006 (decided on 13-8-2012)
10 (1967) AIR (SC) 523

11. Referring to the compilation submitted by the appellant, learned counsel has distinguished the judgments relied by the writ Court while allowing the writ petition. It is further submitted that the orders passed by this Court in ***Arun Kumar Agrawal*** (supra)***, Hariom Rice Mill Private Limited*** (supra) and ***M/s Precision Engineering*** (supra) were relied before the writ Court.

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12. Shri Siddharth Dubey, learned counsel appearing for the respondent/writ petitioner, *per contra*, would argue that the condition precedent for invoking Section 147 does not exist inasmuch as there is no foundation or material for forming reason to belief, therefore, the order passed by the learned Single Judge does not call for any interference. Learned counsel would further argue that reassessment is based on DVO's report, which is not permissible. Learned counsel would next argue that in the facts and circumstances of the case bar of alternative remedy is not attracted and the writ petition is maintainable and the learned Single Judge has rightly passed the order impugned.

13. What constitutes an 'information' for the purpose of Section 147 of the Act which is the edifice for formation of belief has

been considered by the Supreme Court in ***Kalyanji Mavji & Co.*** (supra) wherein the following has been observed :

> Another pertinent fact which may be mentioned here is that although Section 34 was the subject of several amendments, yet the word 'information' which was introduced in 1939 has not been defined at all. Since the word 'information' has not been defined, it is difficult to lay down any rule of universal application. At the same time it cannot be disputed that the object of the Act was to see that the tax collecting machinery is made as perfect and effective as possible so that the tax-payer is not allowed to set away with escaped income-tax. The fact, that the adjective 'definite' qualified the word 'information' and the word 'discovers' which were introduced in the Income-tax (Amendment) Act, 1939 were deleted by the Amendment Act of 1948 would lead to the irresistible inference that the word 'information' is of the widest amplitude and comprehends a variety of factors. Nevertheless the power Under Section 34(1)(b), however wide it may be, is not plenary, because the discretion of the Income-tax Officer is controlled by the words "reason to believe". It was so held by this Court in Bhimraj Pannalal v. Commissioner of Income-tax (1961) 41 ITR 221 (SC) : TC 51 R. 300, while affirming the decision of the Patna High Court in Bhimraj Panna Lal v. Commissioner of Income-tax, (1957) 32 ITR 289 (Pat) : TC51R.301. This legal proposition, however, is not disputed. It, therefore, follows that information may come from external sources or even from materials already on the record or may be derived from the discovery of new and important matter or fresh facts. The word 'information' will also include true and correct state of the law derived from relevant judicial decisions either of the Income-tax authorities or other Courts of law which decide Income-tax matters. Whether the ground on which the original assessment is based is held

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to be erroneous by a Supreme Court in some other case, that will also amount to a fresh information which comes into existence subsequent to the original assessment. A subsequent Privy Council decision is also included in the word 'information'. Thus it is very difficult to lay down any hard and fast rule. But this Court has in two leading cases laid down some objective tests and principles to determine the applicability of Section 34(1)(b) of the Act which we shall now discuss.

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An analysis of this case would clearly show that the information as contained in Section 34(1)(b) must fulfill the following conditions: (1) the information may be derived from an external source concerning facts or particulars as to law relating to a matter bearing on the assessment: (2) that the information must come after the previous or the original assessment was made. In fact the words "in consequence of information as used in Section 34 (1) (b) clearly postulate that the information must be subsequent to the original assessment sought to be reopened; and (3) that the information may be obtained even on the basis of the record of the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law. These categories are in addition to the categories laid down by this Court in Maharaj Kumar Kamal Singh's case (supra), which has been consistently followed in several decisions of this Court as shown above.

On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of Section 34(1)(b) to the following categories of cases: (1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions: (2) Where in the original

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> assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. This is obviously based on the principle that the tax-payer would not be allowed to take advantage of an oversight or mistake committed by the Taxing Authority: (3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment: (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.
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> If these conditions are satisfied then the Income-tax Officer would have complete jurisdiction to re-open the original assessment. It is obvious that where the Income-tax Officer gets no subsequent information, but merely proceeds to re-open the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, Section 34(1)(b) would have no application.
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> (Emphasis supplied)

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14. It is, thus, clearly held by the Supreme Court that any material surfacing after the previous or the original assessment which were not present at the time of original assessment would constitute 'information' and the ITO would have jurisdiction to reopen the original assessment after forming reason to belief on the basis of such information, which was not available at the time of original assessment.

15. In ***Assistant Commissioner of Income-Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.***[11] the Supreme Court spelt out the twin requirements which had to be satisfied as a sine qua non for a valid reassessment notice:

> "firstly the AO must have reason to believe that income profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either (i) omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the AO could have jurisdiction to issue notice under Section 148 read with Section 147(a). But under the substituted Section 147 existence of only the first condition suffices. In other words, 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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16. The Supreme Court in ***Phool Chand Bajrang Lal and Another v Income Tax Officer and Another***[12] emphasised on the veracity of information supplied previously by the assessee during the course of the regular assessment, while considering the validity of a reassessment notice; it stated as follows:

> "From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment

11 [2007] 291 ITR 500 (SC)
12 AIR 1993 SC 2390

> under Section 147(a) read with Section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non- specific information. To that limited extent, the court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief."

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17. In ***Phool Chand Bajrang Lal*** (supra) the Supreme Court has held that the Assessment Officer may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information

with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. It is held therein that since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming this belief is not for the court to judge.

18. In ***Income Tax Officer, Calcutta v Selected Dalubrand Coal Co. Pvt. Ltd.***[13], the Supreme Court held as follows:

> "At the stage of the issuance of the notice, the only question is whether there was relevant material, as stated above, on which a reasonable person could have formed the requisite belief. Since we are unable to say that the said letter could not have constituted the basis for forming such a belief, it cannot be said that the issuance of notice was a invalid. Inasmuch as, as a result of our order, the reassessment proceedings have now to go on, we do not and we ought not to express any opinion on merits."

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19. In ***Commissioner of Income Tax and Others v Chhabil Dass Agarwal***[14], the Supreme Court was dealing with a case of re-assessment wherein the assessee was issued notice under Section 148 of the Act, 1961. After the assessment was completed, the assessee, instead of preferring an appeal,

13 (1997) 10 SCC 68
14 (2014) 1 SCC 603

preferred writ petition before the High Court and the assessment order was quashed occasioning filing of special leave petition before the Supreme Court by the revenue. Allowing the appeal, the Supreme Court held thus in paragraphs 15 & 16:-

> 15. Thus, while it can be said that this Court has recognised some exceptions to the rule of alternative remedy i.e. where the statutory authority has not acted in accordance with the provisions of the enactment in question, or in defiance of the fundamental principles of judicial procedure, or has resorted to invoke the provisions which are repealed, or when an order has been passed in total violation of the principles of natural justice, the proposition laid down in Thansingh Nathmal case {AIR 1964 SC 1419}, Titaghur Paper Mills case {(1983) 2 SCC 433} and other similar judgments that the High Court will not entertain a petition under Article 226 of the Constitution if an effective alternative remedy is available to the aggrieved person or the statute under which the action complained of has been taken itself contains a mechanism for redressal of grievance still holds the field. Therefore, when a statutory forum is created by law for redressal of grievances, a writ petition should not be entertained ignoring the statutory dispensation.
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> 16. In the instant case, the Act provides complete machinery for the assessment/ reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). The remedy under the

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> statute, however, must be effective and not a mere formality with no substantial relief. In Ram and Shyam Co. v. State of Haryana {(1985) 3 SCC 267} this Court has noticed that if an appeal is from "Caesar to Caesar's wife" the existence of alternative remedy would be a mirage and an exercise in futility."

20. In ***Bellary Steels and Alloys Limited Vs. Deputy Commissioner, Commercial Taxes (Assessments) and Others***[15], the Supreme Court held thus:-

> 3. Before concluding, we may state that we have allowed the appellant(s) to withdraw the original writ petition as the said proceedings came to be filed against the show-cause notice. We have repeatedly held that in the absence of factual foundation, it would be impossible to decide matters of this kind. When the doctrine of promissory estoppel is invoked, the doctrine needs to be based on factual data which has not been pleaded. The High Court should not have interfered in the matter. In these cases, the writ petition was filed without reply to even the show-cause notice. In the circumstances, we could have dismissed these civil appeals only on the ground of failure to exhaust statutory remedy, but for the fact that huge investments involving the large number of industries is in issue.

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21. In ***Commissioner of Income-tax, Gujarat Vs. Vijaybhai N. Chandrani***[16], it has been held thus :-

> 14. In our considered view, at the said stage of issuance of the notices under Section 153C, the assessee could have addressed his grievances and explained his stand to the Assessing Authority by filing an appropriate

15 (2009) 17 SCC 547
16 2013 AIR SCW 4675

reply to the said notices instead of filing the Writ Petition impugning the said notices. It is settled law that when an alternate remedy is available to the aggrieved party, it must exhaust the same before approaching the Writ Court. In Bellary Steels and Alloys Ltd. v. CCT, (2009) 17 SCC 547, this Court had allowed the assessee therein to withdraw the original Writ Petition filed before the High Court as the said proceedings came to be filed against the show cause notice and observed that the High Court should not have interfered in the matter as the Writ Petition was filed without even reply to the show cause notice. This Court further observed as follows:

> "3....In the circumstances, we could have dismissed these civil appeals only on the ground of failure to exhaust statutory remedy, but for the fact that huge investments involving the large number of industries is in issue."

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15. We are fortified by the decision of this Court in Indo Asahi Glass Co. Ltd. v. ITO, (2002) 10 SCC 444, wherein the assessee had approached this Court against the judgment and order of the High Court which had dismissed the Writ Petition filed by the assessee wherein challenge was made to the show cause notice issued by the Assessing Authority on the ground that alternative remedy was available to the assessee. This Court concurred with the findings and conclusions reached by the High Court and dismissed the said appeal with the following observations:

> “5. This and the other facts cannot be taken up for consideration by this Court for the first time. In our opinion, the High Court was right in coming to the conclusion that it is appropriate for the appellants to file a reply to the show-cause notice and take whatever defence is open to them."

> 16. In the present case, the assessee has invoked the writ jurisdiction of the High Court at the first instance without first exhausting the alternate remedies provided under the Act. In our considered opinion, at the said stage of proceedings, the High Court ought not have entertained the Writ Petition and instead should have directed the assessee to file reply to the said notices and upon receipt of a decision from the Assessing Authority, if for any reason it is aggrieved by the said decision, to question the same before the forum provided under the Act."

22. In the matter at hand, in the reasons recorded under Section 148 (2) for initiation of action under Section 148 of the Act the facts of the matter has been discussed in detail mentioning that the report of DVO i.e. AVO-II, Mumbai was submitted on 17-3-2015 and that the valuation report was prepared under Section 55A after affording opportunity of hearing to the petitioner. This report prepared in exercise of powers under the Act was not properly considered and given effect to in the original assessment and has, thus, escaped assessment due to inadvertence or a mistake committed by the AO, which amounts to information as held by the Supreme Court in ***Kalyanji Mavji & Co.*** (supra). Even otherwise, the final report of DVO was submitted on 12-6-2015, after the assessment. Thus, this was not available earlier.

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23. In ***ACC Ltd. v District Valuation Officer and Others***[17] the Division Bench of Delhi High Court {Sanjiv Khanna, J. {as His Lordship then was} and R.V. Easwar, J.} had an occasion to consider a similar matter where also DVO's report was called, but was not available, therefore, the protective assessment order was passed mentioning that the capital gain is computed on the basis of the revised claim submitted by the assessee, but on receipt of the valuation report, long term capital gain would be recomputed on the basis of the said valuation report. The assessee relied on the judgment rendered by ***Assistant Commissioner of Income Tax, Gujarat v Dhariya Construction Company***[18], however, distinguishing the said judgment it was observed thus in para 11 :

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> 11. The petitioner placed reliance on the judgment of the Supreme Court in ACIT v. Dhariya Construction Co. (supra) and the judgment of Division Bench of this Court in CIT v. Smt. Suraj Devi (supra). In these cases, it has been held that the reopening of an assessment under Section 147 of the Act on the basis of the report of the DVO is bad in law. A deeper study of the judgment of the Supreme Court discloses that what has been held therein is that "the opinion of the DVO per se is not an information for the purpose of reopening assessment under Section 147 of the Income-tax Act, 1961" and that "the Assessing Officer has to apply his mind to the information, if any, collected and must form a belief thereon". It may be possible to contend that the judgment of

17 (2013) 357 ITR 160
18 (2010) 15 SCC 251

the Supreme Court interdict only a mechanical or robot-like reliance on the report of the DVO for the purpose of reopening the assessment under Section 147 and that if the reopening is based on an independent application of the mind of the Assessing Officer to the report obtained from the DVO and an independent formation of a belief on that basis, then the reopening would be valid. We are not to be understood as expressing any opinion on the applicability of the judgment to the action, if any, that may be taken on the basis of the report of the DVO. The judgment of the Supreme Court has been adverted to by the Division Bench of this Court in CIT v. Smt. Suraj Devi (supra). The question before this Court was not with regard to the validity of the reopening of the assessment on the basis of the report of the DVO. There, on the basis of a search conducted in the premises of the assessee, in which a registered purchase deed for a property was recovered, the Assessing Officer, suspecting that the market value of the property was more than the disclosed purchase price, made a reference to the DVO under Section 142A. The DVO estimated the market value of the property at an amount which was much higher than the amount shown in the document. The Assessing Officer added the difference between the two figures as undisclosed investment. It was in this background that this Court held that the report of the DVO, per se, is not information and cannot be relied upon without the books of account maintained by the assessee being rejected. While coming to this conclusion, the Court relied on the judgment of the Supreme Court dated 19.10.2009 in Civil Appeal No.6973/2009, in which case the Supreme court had held that without rejecting the books of accounts, the Assessing Officer could not have referred the matter to the DVO for the purpose of making an addition for undisclosed investment. It will be noticed that the judgment of this Court in Smt. Suraj Devi‟s case was not concerned with the validity of a

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> reference made to the DVO under Section 55A of the Act for the purpose of estimating the fair market value of a property as on 01.04.1981 for computing the capital gains nor was the Court concerned with the validity of a reference made to the DVO under Section 55A, which was pending when the assessment order was passed (proceedings were completed). This judgment does not touch upon the point raised by the petitioner in the present writ petition.

24. Before the Delhi High Court also the assessee had argued that the DVO's report cannot be treated to be a material for forming reason to belief. Negativing the contention, it is held thus in para 9 :

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> 9. A perusal and a plain reading of the section shows the circumstances under which the Assessing Officer may refer the valuation of the property to the DVO. The section can be invoked by the Assessing Officer for ascertaining the fair market value of a capital asset for the purpose of Chapter IV of the Act, which includes the provisions relating to capital gains. Sections 45 to 55 fall under the chapter, under the sub head "E.-Capital Gains". Section 55 (2) (b)(i) gives the assessee the option to substitute the fair market value of the property as on 01.04.1981 in the place of the cost of acquisition thereof, if the property had been acquired by the assessee before 01.04.1981. The option given to the petitioner was exercised by the petitioner by filing the letter dated 18.11.2010 before the Assessing Officer under which the original computation of the capital gains was sought to be substituted by a revised computation in which the cost of the property was taken at the fair market value as on 01.04.1981 at `21,72,95,000/- on the basis of the registered valuer‟s report. This letter was

filed about 1½ months before the date on which the assessment would have become barred by time. The Assessing Officer while examining the computation of the capital gains was of opinion that the figure of `21,72,95,000/- shown as the fair market value of the property as on 01.04.1981 was on the higher side and accordingly referred the matter to the DVO, Government Valuation Cell, New Delhi on 20.12.2010. In doing so, he was only exercising his power under Section 55A (b)(ii) of the Act under which he may refer the valuation to the DVO if he considers it necessary so to do, having regard to the nature of the asset and other relevant circumstances. The contention of the petitioner that the Assessing Officer had no basis to form the opinion is not acceptable. The original computation of the capital gains as per the return filed by the petitioner was `130.19 crores as seen from para 14.1 of the assessment order. After the revised computation/ modification of the capital gains was filed, the figure of capital gains came down drastically to `14,07,16,551/- there was thus a reduction of approximately `116 crores in the computation of the capital gains and this was significantly due to the claim that the fair market value of the land as on 01.04.1981 was `21,72,95,000/-. It was on this basis that the Assessing Officer took the view that the valuer‟s report filed by the petitioner showed the figure on higher side and came to the conclusion that the matter should be referred to the DVO for valuation. The Assessing Officer obviously had the registered valuer‟s report filed by the petitioner before him. It cannot, therefore, be said that he had no basis or material to form the opinion that a reference ought to be made to the DVO. The reference was made before the assessment order was passed and during the pendency of the assessment proceedings. The contention of the petitioner to the contrary is therefore rejected.

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25. The belief of the ITO/AO being based on the germane and relevant information which has rational connection for formation of belief, the sufficiency of reasons for forming such belief is not for the Court to judge. The Court can interfere only to a limited extent as to whether there in fact existed no belief or that the belief was not at all a *bona fide* one or was based on vague, irrelevant and non-specific information. The writ Court at the stage of issuance of notice for reassessment would not sit in appeal over the sufficiency of reasons {See: ***Phool Chand Bajrang Lal*** (supra)}.

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26. In ***Chhabil Dass*** (supra) the Supreme Court has observed that the Act provides complete machinery for the assessment/ reassessment of tax, imposition of penalty and for obtaining relief in respect of any improper orders passed by the Revenue Authorities, and the assessee could not be permitted to abandon that machinery and to invoke the jurisdiction of the High Court under Article 226 of the Constitution when he had adequate remedy open to him by an appeal to the Commissioner of Income Tax (Appeals). Similar view has been taken by the Supreme Court in ***Bellary Steels and Alloys Limited*** (supra) and ***Vijaybhai N. Chandrani*** (supra).

27. In ***Calcutta Discount Co. Ltd. v Income Tax Officer, Companies District I, Calcutta***[19] the only ground for reopening was that the company had failed to disclose the true intent behind the sale of shares, therefore, in the said factual background the Supreme Court held that non disclosure of true intentions behind sale of shares cannot be said to be an omission on the part of the assessee to disclose the material fact, however, in the case at hand, the impugned notice has been issued on the basis of report of DVO which was not appreciated by the AO at the time of original assessment and the said constitutes information/material fact. Thus, in our considered opinion the decision rendered in ***Calcutta Discount Co. Ltd.*** (supra) is distinguishable on the basis of background facts being different in the matter. Similarly, in ***Jeans Knit Pvt. Ltd. Bangalore v DCIT, Bangalore***[20], the order of remand has been passed on the basis of judgment rendered in ***Calcutta Discount Co. Ltd.*** (supra).

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28. In so far as the judgments rendered in ***Asian Paints Ltd. v DCIT and Another***[21] and ***Aroni Chemicals Limited v The DCIT-2(1) and another***[22] is concerned, the same were not in a case where the assessment was time barring. In the case at

19 AIR 1961 SC 372 : 1960 LawSuit (SC) 246
20 2016 SCC Online SC 1536
21 (2008) 296 ITR 90 (Bom)
22 2014 SCC Online Bom 221

hand, the assessment orders have to be passed within a particular date, therefore, the ratio laid down by the Bombay High Court in the aforesaid decisions would not apply.

29. It also needs to mention here that a Single Bench of this Court has decided the issue regarding maintainability of the writ petition challenging the reassessment notice in ***Arun Kumar Agrawal*** (supra)***, Hariom Rice Mill Private Limited*** (supra) and ***M/s Precision Engineering*** (supra) on the basis of law laid down by the Supreme Court in ***Phool Chand Bajrang Lal*** (supra) and ***Chhabil Dass*** (supra). In those matters the writ petitions were dismissed as not maintainable.

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30. In so far as the decision of the Supreme Court in ***Dhariya Construction Company*** (supra) is concerned, it is to be seen that when the reassessment notice is issued only on the basis of DVO's report without application of mind, the same may not be permissible in law, but in the case in hand, the writ petitioner herself submitted two different valuation reports and thereafter, the DVO's report was called for under Section 55A of the Act and thereafter, the reasons recorded was with due application of mind and not merely by mechanically referring to the DVO/AVO's report.

31. In so far as the issue as to whether the revenue should have resorted to Section 263 of the Act instead of Section 147 is concerned, it is to be noted that if issuance of reassessment notice is on the basis of information or material having foundation for formation of belief and the exercise of power under Section 147 is found permissible in law, Sectio 263 cannot be invoked. The said provision would attract only when condition precedent for issuance of reassessment notice under Section 147 is not satisfied. The revenue cannot be compelled to resort to some other provision even after finding that the reopening of assessment is based on material or information which has nexus with the subject.

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32. Section 263 is invokable when the assessment order is not only erroneous but is also prejudicial to the interest of the Revenue and every loss of tax to the revenue cannot be treated as being prejudicial to the interest of the revenue. The expression "prejudicial to the interest of the Revenue" while not to be confused with the loss of tax will certainly include an erroneous order which results in a person not paying tax which is lawfully payable to the Revenue. [See : ***The Commissioner of Income Tax-XIII v Ashish Rajpal***[23]].

23 2010 (320) ITR 674 (Delhi)

33. To sum up the matter, when there existed reason to belief which is formed on the basis of material available having nexus with the subject, writ Court ought not to have entertained the writ petition more so when assessment orders have already been passed during pendency of the writ petition, therefore, we set aside the order passed by the writ Court and relegate the writ petitioner to prefer an appeal against the reassessment order which may be filed within a period of 30 days from today. The writ petitioner would be at liberty to raise all grounds both factual and legal in the said appeal. The appellate authority shall entertain the appeal for decision on merits without raising objection as to limitation.

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34. In the result, the writ appeal is allowed to the extent indicated above, leaving the parties to bear their own cost(s).

Sd/- Sd/-

(Prashant Kumar Mishra)
Judge

(Parth Prateem Sahu)
Judge

Gowri