

IN THE INCOME TAX APPELLATE TRIBUNAL KOLKATA BENCH, "B" AT KOLKATA

(समक्ष) श्री ऐ. टी. वर्की, न्यायीक सदस्य एवं डॉ. अर्जुन लाल सैनी, लेखा सदस्य

[Before Shri A. T. Varkey, JM & Dr. A. L. Saini, AM]

I.T.A. No. 2032/Kol/2018

Assessment Year: 2010-11

Dipti Mehta [PAN: AESPM 0353 A]	Vs.	ITO, Ward 43(2), Kolkata
Appellant		Respondent

Date of Hearing	26.12.2018
Date of Pronouncement	01.03.2019
For the Appellant	Shri Anikesh Banerjee, Advocate & Mrs. Saswati Mitra (Dutta), Advocate
For the Respondent	Shri Sanjoy Mukherjee, Addl. CIT, Sr. DR

ORDER

Per Shri A.T.Varkey, JM

This is an appeal preferred by the Assessee against the order of Ld. CIT(A) – 13, Kolkata dated 02.07.2018 for Assessment Year 2010-11.

2. The main grievance of the assessee is against the legal validity of the reopening of the assessment. The legal issue the assessee has raised is that, where upon the issuance of a notice u/s 148, read with section 147, if the AO does not assess or reassess the income which he has reason to believe had escaped assessment and which formed the basis of the notice u/s 148, is it open to the AO to assess or reassess independently any other income which does not form the subject-matter of the notice.

3. The brief facts of the case is that the assessee filed her return of income for the year under consideration on 22.07.2010 declaring a taxable income of Rs. 4,00,320/- and return was processed u/s 143(1) on 31.03.2011. According to AO, he got information from the director of Income tax (I & CI) New Delhi intimating that details of beneficiaries of accommodation entries in M/s. Mahasagar Group of cases has been sent to the AO and suitable measure to initiate proceedings for reopening of these cases wherever deemed fit need to be undertaken. Based on that the AO recorded the reasons for reopening which is found placed at page 8 of the Paper Book which is reproduced as under:

“The captioned assessee is assessed to tax in this Ward-45(2), Kolkata and filed her last return of income for the A.Y 2010-11 on 22.07.2010 showing total income of Rs. 4,00,320/- as per records maintained by this office and the same was processed u/s.143(1) dated 31.03.2011.

Information has been received from the Director of Income Tax (I & CI), New Delhi & forwarded through the CCIT, Kolkata VIII, vide letter No. CCIT-VIII/Action Plan/Kol/2013-14/1954 dated 05.12.2013 intimating that *‘it may be recalled that data relate to beneficiaries of accommodation entries in M/s. Mahasagar Group of cases for assessment year 2006-07 onwards pertaining to your (this) jurisdiction was sent for taking suitable measures to initiate proceedings for reopening of these cases wherever deemed fit’*. A search action u/s 132(1) was conducted by the department in the case of Mahasagar Group of cases in Mumbai on 25.11.2009, where on Shri Mukesh Choksi is the key person, statement of Sri Mukesh Choksi, two of his employees and an agent i.e. Miss Anupama Patel (Employee), Shri Kapil Chaturvedi (Employee) and Shri Kamal Kishore Rati (Agent) were also recorded. In his sworn in statement recorded, Shri Mukesh Choksi admitted that he and his group were engaged in fraudulent billing activities and giving accommodation entries in order to enable the clients to declare speculation profit/loss, Short Term Capital Gain/Long Term Capital Gain, profit/loss on account of commodity Trading, introduce Share Application Money or introduce money in the form of gift.

In the latest duly sworn statement recorded on 16.01.2013 after perusing all seized documents/data produced before him, Shri Mukesh Choksi identified 829 names of the beneficiaries and certified that they are accommodation entries. Out of the 829 cases, Smt. Dipti Mehta [PAN- AESPM 0353 A] the captioned assessee is one of the beneficiary of above accommodation entries. As per ledger copy of Mahasagar Group cases, Smt. Dipti Mehta had taken beneficiary entry for loss of Rs.2,71,500/- during the F.Y 2009-10 relevant to A.Y 2010-11.

Since the return of income filed by the assessee on 31/03/2011 & was processed u/s 143(1) without verification of the above alleged transaction, which is/are bogus in nature on the basis of evidences gathered by the department. It result in under assessment by Rs.2,71,500/- representing the amount of loss accommodation entries taken by the assessee from the Mahasagar Group of Cases. I, therefore have reason to believe the above amount of loss Rs.2,71,500/- taken by the assessee by bogus accommodation entries from Mahasagar Group has escaped assessment and consider it a fit case for re-assessment by initiating proceeding u/s 147 of the I.T. Act, 1961.

So, it is reason to believe that the assessee has accrued a huge fund by way of escapement of income, hence the case is re-opened u/s 147 of the I.T. Act, 1961.”

4. Thereafter, the AO issued notice u/s 148 on 03.02.2014. The assessee after perusal of the reasons recorded objected to the reopening. However the AO proceeded to pass the reassessment order on 28.02.2015 wherein the AO made addition of Rs. 19,22,905/-, not accepting the claim of the share transactions which the assessee declared as exempt LTCG which was treated by the AO as STCG and made addition of Rs 19,22,905/- and disallowed u/s 14A of the Act Rs. 53,751/-. Aggrieved the assessee preferred an appeal before the Ld. CIT(A) who was pleased to confirm the order of the AO. Aggrieved the assessee is before us and has challenged the validity of the reopening as aforesaid in para 2 supra.

5. We have heard both the parties and perused the records. We note from the perusal of the reasons recorded that AO got information from Director of Income Tax (I&CI) that the assessee is one of the beneficiary of the accommodation entries provided by Shri Mukesh Choksi (Mahasagar Group of cases in Mumbai) and has taken accommodation entry for loss of Rs. 2,71,500/- during the F.Y. 2009-10 relevant to AY 2010-11. So, according to the AO, since the return of income of the assessee was processed only u/s 143(1), there was no occasion to verify the said transaction which, as per the statements/evidence gathered by the department from third parties was bogus in nature. This according to AO resulted in under assessment of Rs. 2,71,500/- representing the amount of loss as claimed by assessee which was nothing but an accommodation entry taken from Mahasagar Group of cases. Therefore, on the basis of the aforesaid facts/information, the AO had based his reason to believe the escapement of income to the tune of Rs. 2,71,500/- for this assessment year; and therefore, he after recording the reason [supra] consider it fit case for issue of notice u/s 148, read with section 147 for reopening the assessment and issued notice and assumed jurisdiction to re-assess the income of assessee. However, in the re-assessment order passed on 26.05.2015, pursuant to the notice to re-open, the AO did not made any assessment of Rs. 2,71,500/- representing the amount of loss claimed by assessee which according to AO in the reasons recorded was nothing but an accommodation entry taken from Mahasagar Group of cases and for the precise fact he reopened to assess this escaped income. According to the AR, the AO could not have proceeded to make any other additions without making any addition/disallowance on the issue on which he based his belief of the escapement of income for reassessment. For that he relied upon the order of the Hon'ble Bombay High Court in CIT vs Jet Airways (I) Ltd. (2010) 195 Taxman 117 (Bombay). We note that the legal issue which has been raised before us is no longer res integra and the Hon'ble Bombay High Court after taking note of the Explanation 3 inserted by the Finance Bill 2009 has answered this legal issue in favour of the assessee by holding as under:

2. The two appeals by the revenue pertain to assessment years 1994-95 and 1995-96. The Tribunal has noted that an identical issue was agitated by the assessee for assessment year 1997-98 and that the Tribunal, while allowing the claim of the assessee, held that the re-opening of the assessment was not valid in law. The Court has been informed that the appeal against the order of the Tribunal for assessment year 1997-98 has been dismissed for non-compliance of a conditional order of removing office objections. Be that as it may, having regard to the nature of the question of interpretation involved, we have heard arguments on the question of law as framed in these appeals and proceed to answer it on merits.

3. Section 147 of the Income-tax Act, 1961 provides that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income "and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section". The proviso deals with reopening of an assessment upon the expiry of a period of four years from the end of the relevant assessment year and does not fall for interpretation in this appeal. Explanation 3 to section 147 was inserted by the Finance (No. 2) Act of 2009, with effect from 1-4-1989. Explanation 3 provides as follows :

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

4. Prior to its amendment with effect from 1-4-1989, section 147 provided as follows :—

"147. Income escaping assessment. - If—

(a) the Income-tax Officer has reason to believe that, by reason of the omission or failure on the part of an assessee to make a return under section 139 for any assessment year to the Income-tax Officer or to disclose fully and truly all material facts necessary for his assessment for that year, income chargeable to tax has escaped assessment for that year, or

(b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Income-tax Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,

he may, subject to the provisions of sections 148 to 153, assess or reassess such income or recompute the loss or the depreciation allowance, as the case may be, for the assessment year concerned (hereafter in sections 148 to 153 referred to as the relevant assessment year)."

5. The condition precedent to the exercise of the jurisdiction under section 147 is the formation of a reason to believe by the Assessing Officer that any income chargeable to tax has escaped assessment. Upon the formation or a reason to believe, the Assessing Officer, before making the assessment, reassessment or recomputation under section 147 has to serve on the assessee a notice requiring him to furnish a return of his income. Upon the formation of the reason to believe that income chargeable to tax has escaped assessment, the Assessing Officer is empowered to assess or reassess such income "and also" any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under section 147.

6. The effect of Explanation 3 which was inserted by the Finance (No. 2) Act of 2009 is that even though the notice that has been issued under section 148 containing the reasons for reopening the assessment does not contain a reference to a particular issue with reference to which income has escaped assessment, the Assessing Officer may assess or reassess the income in respect of any issue which has escaped assessment, when such issue comes to his notice subsequently in the course of the proceedings. The reasons for the insertion of Explanation 3 are to be found in the Memorandum

explaining the provisions of Finance (No. 2) Bill of 2009. The Memorandum treats the amendment to be clarificatory and contains the following Explanation :

"Some courts have held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which the reasons have been recorded for reopening the assessment. He is not empowered to touch upon any other issue for which no reasons have been recorded. The above interpretation is contrary to the legislative intent.

With a view to further clarifying the legislative intent, it is proposed to insert an Explanation in section 147 to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under this section, notwithstanding that the reason for such issue has not been included in the reasons recorded under sub-section (2) of section 148."

7. In order to appreciate the reasons for the amendment inserting Explanation 3, it would be necessary to advert to some of the judgments of the High Courts, prior to the amendment.

The Punjab and Haryana High Court, in its decision, in *Vipan Khanna v. Asstt. CIT [2002] 255 ITR 220¹* dealt with the question as to whether, after initiating proceedings under section 147 on the ground that the petitioner had claimed depreciation at a higher rate, the Assessing Officer would be justified in launching an inquiry into issues which were not connected with the claim of depreciation. This question was answered in the negative.

A Division Bench of the Kerala High Court held in *Travancore Cements Ltd. v. CIT [2008] 305 ITR 170¹*, that upon the issuance of a notice under section 148(2), when proceedings were initiated by the Assessing Officer on issues in respect of which he had formed a reason to believe that income had escaped assessment, it was not open to the Assessing Officer to carry out an assessment, or reassessment in respect of other issues which were totally unconnected with the proceedings that were already initiated and which came to his knowledge during the course of the proceedings. The Division Bench held that in respect of an issue which is totally unconnected to the basis on which the Assessing Officer formed a reason to believe that income escaped assessment and issued a notice under section 148, it was open to him to issue a fresh notice by following sub-section (2) of section 148 with regard to the escaped income which came to his knowledge during the course of the proceedings. The Kerala High Court held as follows:

". . .The Assessing Officer gets jurisdiction under section 148 to assess or reassess the income which has escaped assessment only after sub-section (2) of section 148 is complied with. The question is whether sub-section (2) of section 148 has to be complied with if any other income chargeable to tax has escaped assessment, or which comes to his knowledge subsequently in the course of the proceedings. In other words, when proceedings are already on in respect of one item in respect of the income for which he had already recorded reasons is it necessary that he should record reasons for assessing or reassessing any of the items which are totally unconnected with the proceedings already initiated. Suppose under two heads, income has escaped assessment and those two heads are inter-linked and connected, the proceedings initiated or notice already issued under sub-section (2) of section 148 would be sufficient if the escaped income on the second head comes to the knowledge of the officer in the course of the proceedings. But if both the items are unconnected and totally alien then the assessing authority has to follow sub-section (2) of section 148

with regard to the escaped income which comes to his knowledge during the course of the proceedings."

Hence, the view of the Punjab and Haryana High Court and the Kerala High Court was that, once the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment and proceeds to issue a notice under section 148, it is not open to him to assess or, as the case may be, reassess the income under an independent or unconnected issue, which was not the basis of the notice for reopening the assessment.

8. Parliament stepped in to correct what it regarded as an incorrect interpretation of the provisions of section 147. The Memorandum explain-ing the provisions of Finance (No. 2) Bill of 2009 states in this background that some courts had held that the Assessing Officer has to restrict the reassessment proceedings only to issues in respect of which reasons have been recorded for reopening the assessment and that it was not open to him to touch upon any other issue for which no reasons have been recorded. This interpretation was regarded by Parliament as being contrary to legislative intent. Hence, Explanation 3 came to be inserted to provide that the Assessing Officer may assess or reassess income in respect of any issue which comes to his notice subsequently in the course of proceedings under section 147 though the reasons for such issue were not included in the reasons recorded in the notice under section 148(2).

9. The effect of section 147 as it now stands after the amendment of 2009 can, therefore, be summarised as follows : (i) The Assessing Officer must have reason to believe that any income chargeable to tax has escaped assessment for any assessment year; (ii) Upon the formation of that belief and before he proceeds to make an assessment, reassessment or recomputation, the Assessing Officer has to serve on the assessee a notice under sub-section (1) of section 148; (iii) The Assessing Officer may assess or reassess such income, which he has reason to believe, has escaped assessment and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section; and (iv) Though the notice under section 148(2) does not include a particular issue with respect to which income has escaped assessment, he may nonetheless, assess or reassess the income in respect of any issue which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section.

10. Now the submission of the learned counsel appearing on behalf of the assessee in the present case is that the words "and also" in section 147 postulate that the Assessing Officer may assess or reassess the income which he has reason to believe has escaped assessment together with any other income chargeable to tax which has escaped assessment and which comes to his notice during the course of the proceedings. In other words, unless the Assessing Officer assesses the income with reference to which he had formed a reason to believe within the meaning of section 147, it would not be open to him to assess or reassess any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings. On the other hand, it has been urged on behalf of the revenue that even if, during the course of assessment or, as the case may be reassessment, the Assessing Officer does not assess or reassess the income which he has reason to believe has escaped assessment and which formed the subject-matter of a notice under section 148(2), it is nonetheless open to him to assess any other income which, during the course of the proceedings is brought to his notice as having escaped assessment.

11. The rival submissions which have been urged on behalf of the revenue and the assessee can be dealt with, both as a matter of first principle, interpreting the section as it stands and on the basis of precedents on the subject. Interpreting the provision as it

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

The Shorter Oxford Dictionary defines the expression "also" to mean 'further, in addition, besides, too'. The word has been treated as being relative and conjunctive. Evidently, therefore, what Parliament intends by use of the words "and also" is that the Assessing Officer, upon the formation of a reason to believe under section 147 and the issuance of a notice under section 148(2) must assess or reassess: (i) 'such income'; and also (ii) any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under the section. The words 'such income' refer to the income chargeable to tax which has escaped assessment and in respect of which the Assessing Officer has formed a reason to believe that it has escaped assessment. Hence, the language which has been used by Parliament is indicative of the position that the assessment or reassessment must be in respect of the income in respect of which he has formed a reason to believe that it has escaped assessment and also in respect of any other income which comes to his notice subsequently during the course of the proceedings as having escaped assessment. If the income, the escapement of which was the basis of the formation of the reason to believe is not assessed or reassessed, it would not be open to the Assessing Officer to independently assess only that income which comes to his notice subsequently in the course of the proceedings under the section as having escaped assessment. If upon the issuance of a notice under section 148(2), the Assessing Officer accepts the objections of the assessee and does not assess or reassess the income which was the basis of the notice, it would not be open to him to assess income under some other issue independently. Parliament when it enacted the provisions of section 147 with effect from 1-4-1989 clearly stipulated that the Assessing Officer has to assess or reassess the income which he had reason to believe had escaped assessment and also any other income chargeable to tax which came to his notice during the proceedings. In the absence of the assessment or reassessment of the former, he cannot independently assess the latter.

12. *In CIT v. Sun Engg. Works (P.) Ltd. [\[1992\] 198 ITR 297¹](#), the Supreme Court dealt with the following question of law in the course of its judgment:—*

"Where an item unconnected with the escapement of income has been concluded finally against the assessee, how far in reassessment on an escaped item of income is it open to the assessee to seek a review of the concluded item for the purpose of computation of the escaped income?"

The issue which arose before the Supreme Court was whether, in the course of a reassessment on an escaped item of income could an assessee seek a review in respect of an item which stood concluded in the original order of assessment. The Supreme

Court dealt with the provisions of section 147, as they stood prior to the amendment on 1-4-1989. The Supreme Court held that the expression "escaped assessment" includes both "non-assessment" as well as "under assessment". Income is said to have escaped assessment within the meaning of the section when it has not been charged in the hands of an assessee during the relevant assessment year. The expression "assess" refers to a situation where the assessment of the assessee for a particular year is, for the first time, made by resorting to the provisions of section 147. The expression "reassess" refers to a situation where an assessment has already been made but the Assessing Officer has reason to believe that there is under assessment on account of the existence of any of the grounds contemplated by Explanation 1 to section 147. The Supreme Court adverted to the Judgment in V. Jaganmohan Rao v. CIT [1970] 75 ITR 373 , which held that once an assessment is validly reopened, the previous under assessment is set aside and the Income-tax Officer has the jurisdiction and duty to levy tax on the entire income that had escaped assessment during the previous year. The Court held that the object of section 147 enures to the benefit of the revenue and it is not open to the assessee to convert the reassessment proceedings as an appeal or revision and thereby seek relief in respect of items which were rejected earlier or in respect of items not claimed during the course of the original assessment proceedings.

The judgment in V. Jaganmohan Rao's case (supra) dealt with the language of sections 22(2) and 34 of the Act of 1922 while the judgment in Sun Engg. Works (P.) Ltd.'s case (supra) interprets the provisions of section 147 as they stood prior to the amendment on 1-4-1989.

13. The effect of the amended provisions came to be considered in two distinct lines of precedent on the subject. The first line of authority, to which a reference has already been made earlier, adopted the principle that where the Assessing Officer has formed a reason to believe that income has escaped assessment and has issued a notice under section 148 on certain specific issues, it was not open to him during the course of the proceedings for assessment or reassessment to assess or reassess any other income, which may have escaped assessment but which did not form the subject-matter of the notice under section 148. This view was adopted in the Judgment of the Punjab and Haryana High Court in Vipin Khanna's case (supra) and in the judgment of the Kerala High Court in Travancore Cements Ltd.'s case (supra). This line of authority, would now cease to reflect the correct position in law, by virtue of the amendment which has been brought in by the insertion of Explanation 3 to section 147 by Finance (No. 2) Act of 2009. The effect of the Explanation is that once an Assessing Officer has formed a reason to believe that income chargeable to tax has escaped assessment and has proceeded to issue a notice under section 148, it is open to him to assess or reassess income in respect of any other issue though the reasons for such issue had not been included in the reasons recorded under section 148(2).

14. The second line of precedent is reflected in a judgment of the Rajasthan High Court in CIT v. Shri Ram Singh [2008] 306 ITR 343 . The Rajasthan High Court construed the words used by Parliament in section 147 particularly the words that the Assessing Officer 'may assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings' under section 147. The Rajasthan High Court held as follows:

". . . if is only when, in proceedings under section 147 the Assessing Officer, assesses or reassesses any income chargeable to tax, which has escaped assessment for any assessment year, with respect to which he had "reason to believe" to be so, then, only in addition, he can also put to tax, the other income, chargeable to tax, which has escaped

assessment, and which has come to his notice subsequently, in the course of proceedings under section 147.

To clarify it further, or to put it in other words, in our opinion, if in the course of proceedings under section 147, the Assessing Officer were to come to the conclusion, that any income chargeable to tax, which, according to his "reason to believe", had escaped assessment for any assessment year, did not escape assessment, then, the mere fact that the Assessing Officer entertained a reason to believe, albeit even a genuine reason to believe, would not continue to vest him with the jurisdiction, to subject to tax, any other income, chargeable to tax, which the Assessing Officer may find to have escaped assessment, and which may come to his notice subsequently, in the course of proceedings under section 147."

15. Parliament, when it enacted the Explanation (3) to section 147 by the Finance (No. 2) Act, 2009 clearly had before it both the lines of precedent on the subject. The precedent dealt with two separate questions. When it effected the amendment by bringing in Explanation 3 to section 147, Parliament stepped in to correct what it regarded as an interpretational error in the view which was taken by certain courts that the Assessing Officer has to restrict the assessment or reassessment proceedings only to the issues in respect of which reasons were recorded for reopening the assessment. The corrective exercise embarked upon by "Parliament in the form of Explanation 3 consequently provides that the Assessing Officer may assess or reassess the income in respect of any issue which comes to his notice subsequently in the course of the proceedings though the reasons for such issue were not included in the notice under section 148(2). The decisions of the Kerala High Court in Travancore Cements Ltd.'s case (supra) and of the Punjab & Haryana High Court in Vipan Khanna's case (supra) would, therefore, no longer hold the field. However, insofar as the second line of authority is concerned, which is reflected in the judgment of the Rajasthan High Court in Shri Ram Singh's case (supra), Explanation 3 as inserted by Parliament would not take away the basis of that decision. The view which was taken by the Rajasthan High Court was also taken in another judgment of the Punjab & Haryana High Court in CIT v. Atlas Cycle Industries [\[1989\] 180 ITR 319](#)¹. The decision in Atlas Cycle Industries' case (supra) held that the Assessing Officer did not have jurisdiction to proceed with the reassessment, once he found that the two grounds mentioned in the notice under section 148 were incorrect or non-existent. The decisions of the Punjab & Haryana High Court in Atlas Cycle Industries' case (supra) and of the Rajasthan High Court in Shri Ram Singh's case (supra) would not be affected by the amendment brought in by the insertion of Explanation 3 to section 147.-

16. Explanation 3 lifts the embargo, which was inserted by judicial interpretation, on the making of an assessment or reassessment on grounds other than those on the basis of which a notice was issued under section 148 setting out the reasons for the belief that income had escaped assessment. Those judicial decisions had held that when the assessment was sought to be reopened on the ground that income had escaped assessment on a certain issue, the Assessing Officer could not make an assessment or reassessment on another issue which came to his notice during the proceedings. This interpretation will no longer hold the field after the insertion of Explanation 3 by the Finance Act (No. 2) of 2009. However, Explanation 3 does not and cannot override the necessity of fulfilling the conditions set out in the substantive part of section 147. An Explanation to a statutory provision is intended to explain its contents and cannot be construed to override it or render the substance and core nugatory. Section 147 has this effect that the Assessing Officer has to assess or reassess the income ("such income") which escaped assessment and which was the basis of the formation of belief and if he

does so, he can also assess or reassess any other income which has escaped assessment and which, comes to his notice during the course of the proceedings. However, if after issuing a notice under section 148, he accepted the contention of the assessee and holds that the income which he has initially formed a reason to believe had escaped assessment, has as a matter of fact not escaped assessment, it is not open to him independently to assess some other income. If he intends to do so, a fresh notice under section 148 would be necessary, the legality of which would be tested in the event of a challenge by the assessee.

17. We have approached the issue of interpretation that has arisen for decision in these appeals, both as a matter of first principle, based on the language used in section 147(1) and on the basis of the precedent on the subject. We agree with the submission which has been urged on behalf of the assessee that section 147(1) as it stands postulates that upon the formation of a reason to believe that income chargeable to tax has escaped assessment for any assessment year, the Assessing Officer may assess or reassess such income "and also" any other income chargeable to tax which comes to his notice subsequently during the proceedings as having escaped assessment. The words "and also" are used in a cumulative and conjunctive sense. To read these words as being in the alternative would be to rewrite the language used by Parliament. Our view has been supported by the background which led to the insertion of Explanation 3 to section 147. Parliament must be regarded as being aware of the interpretation that was placed on the words "and also" by the Rajasthan High Court in Shri Ram Singh's case (supra). Parliament has not taken away the basis of that decision. While it is open to Parliament, having regard to the plenitude of its legislative powers to do so, the provisions of section 147(1) as they stood after the amendment of 1-4-1989 continue to hold the field.

18. In that view of the matter and for the reasons that we have indicated, we do not regard the decision of the Tribunal in the present case as being in error. The question of law shall, accordingly, stand answered against the revenue and in favour of the assessee. The appeal is, accordingly, dismissed. There shall be no order as to costs.

6. We note that in the present case in hand, the facts on the basis of which the reasons were recorded by AO for invoking jurisdiction for reopening the assessment was that the assessee had taken accommodation entries for loss of Rs. 2,71,500/- from Mahasagar Group of Cases which fact led the AO to the belief that income has escaped assessment. However, in the reassessment order the AO has not made any addition/disallowance on this issue. So, without making any addition/disallowance on this accommodation entry for loss of Rs. 2,71,500/-, the AO ought not to have proceeded to re-assess the assessee on other incomes like the addition of STCG and disallowance u/s 14A of the Act. The jurisdictional fact which empowered the AO to invoke the jurisdiction to reopen by issue of notice u/s. 148 r.w.s. 147 of the Act as deciphered from the reasons recorded is the accommodation entry of loss of Rs.2,71,500/-. So, when AO desired to reopen this assessment year, he had information of assessee in receipt of accommodation entry of loss from Mahanagar Group, which fact was recorded to re-open the assessment. This precise fact was the foundation

based on the information from Director of income Tax and the AO recorded the reason which warranted him to hold the belief that income chargeable to tax has escaped assessment and thereafter, the AO usurped the jurisdiction to reopen the assessment. In other words is the 'income' which according to the AO escaped assessment while recording reasons for reopening assessment u/s 147 r.w.s. 148 of the Act. This 'income' which AO records in his reasons recorded has escaped assessment and which constituted the bedrock/basis for reopening is the jurisdictional fact which empowered him to usurp the jurisdiction to reopen and reassess the escaped income as contemplate u/s 147/148 of the Act. So, when that income which was the foundation on which he based his belief of escapement of income is absent /disappeared then the AO's very usurpation of jurisdiction is on non-existing jurisdictional fact which renders his usurpation of jurisdiction to reopen the assessment legally untenable and so null in the eyes of law and therefore, the assessee succeeds and therefore, we quash the reassessment made by the AO without jurisdiction.

7. In the result, the appeal of the assessee is allowed.

Order is pronounced in the open court on 1st March, 2019

Sd/-

Sd/-

Dr. A. L. Saini
Accountant Member

Dated : 1st March, 2019

(Aby. T. Varkey)
Judicial Member

Biswajit (Sr.P.S.)

Copy of the order forwarded to:

1. Appellant – Dipti Mehta, 161/1 M.G. Road, Ground Floor, Kolkata – 700 007.
2. Respondent – ITO, Ward 43(2), Kolkata.
3. The CIT(A),
4. CIT ,
5. DR,

/True Copy,

By order,

Assistant Registrar/H.O.O
ITAT, Kolkata