
(2010) 04 AHC CK 0078

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 413 of 2004

Sir Shadilal Enterprises Ltd.

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 27-04-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Income Tax Act, 1922 — Section 34, 34(1)
Income Tax Act, 1961 — Section 147, 148, 80HHC
Penal Code, 1860 (IPC) — Section 26
Uttar Pradesh Trade Tax Act, 1948 — Section 21, 21(1), 21(2), 3AB, 4

Citation : (2010) 35 VST 86

Hon'ble Judges : Rajes Kumar, J; Pankaj Mithal, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Rajes Kumar, J.—By means of the present writ petition, the Petitioner seeks the following reliefs:

(i) To issue a suitable writ, order or direction in the nature of certiorari, quashing the reassessment proceedings u/s 21 of the U. P. Trade Tax Act, 1948 for the assessment years 1997-98 to 2000-01 in pursuance of notices dated March 5, 2004 (annexure 10 to the writ petition).

(ii) To issue a writ, order or direction in the nature of certiorari quashing the circular dated September 30, 2003 directing for the imposition of tax on poly pouches in which the country liquor was packed and sold (annexure 12 to the writ petition).

(iii) To issue a writ, order or direction in the nature of mandamus or prohibition be issued restraining/prohibiting Respondent No. 2 from taking any proceedings for imposition of tax on poly pouches for the assessment years 1997-98 to 2000-01 under the U. P. Trade Tax Act.

(iv) To issue any other suitable writ, order or direction as this honourable court may deem fit and proper in the circumstances of the case in favour of the Petitioner against the Respondents.

(v) To award the costs of the petition to the Petitioner throughout.

2. The Petitioner is a public limited company incorporated under the Indian Companies Act, 1956 and is registered both under the U. P. Trade Tax Act, 1948 as well as under the Central Sales Tax Act, 1956. The Petitioner has its sugar factory as well as its distillery at Shamli in the district of Muzaffar Nagar and has got another distillery known as Pilkhani Distillery in the district of Saharanpur. The Petitioner is engaged in the manufacturing and selling of country liquor. The country liquor is exempted from tax under the notification issued in exercise of power u/s 4 of the U. P. Trade Tax Act, 1948 (hereinafter referred to as, "the Act"). The Petitioner had sold the country liquor in packed form, in bottles or poly pouches. Admittedly, the prices of country liquor and prices of bottles or poly pouches had been separately charged in the bills. For the assessment years 1997-98 to 2000-01, both under the U. P. Trade Tax Act as well as under the Central Sales Tax Act, in the original assessments, the values of the bottles or poly pouches had not been assessed to tax. For the assessment years 1997-98 and 1998-99, the assessing authority has; examined the claim of exemption and held that it was not liable to tax in view of Section 3AB of the Act inserted in the statute with effect from August 1, 1990 by U. P. Act No. 28 of 1991.

3. It appears that when notice u/s 21 of the Act dated May 22, 1999 was issued for the assessment year 1997-98, the Petitioner filed Writ Petition No. 737 of 1999 challenging the said notice u/s 21 of the Act. Subsequently the writ petition has been withdrawn. In paragraph 28 of the writ petition, it is stated that the assessing authority has dropped the proceedings u/s 21 of the Act for the assessment year 1997-98. However, a fresh notice dated March 5, 2004 has been issued u/s 21 of the Act for the assessment year 1997-98 along with notice dated March 5, 2004 u/s 21 of the Act for the assessment years 1998-99 to 2000-01 on the basis of circular dated September 30, 2003 with a view to levy the tax on the values of bottles and poly pouches on the ground that the Petitioner had imported the bottles and poly pouches from outside the State of U. P. and had separately charged the values of packing materials from the customers, therefore, it is liable to tax and since they have not been assessed to tax in the original assessment orders, there was escaped assessment. Challenging the aforesaid notices u/s 21 of the Act, the Petitioner filed the present writ petition.

4. Heard Sri Bharat Ji Agrawal, learned Senior Advocate, assisted by Sri Piyush Agrawal, learned Counsel for the Petitioner and Sri S. P. Kesarwani, learned Additional Chief Standing Counsel.

5. Learned Counsel for the Petitioner submitted that in the original assessment orders for the assessment years 1997-98 and 1998-99, the assessing authority

had examined the issue in details. He submitted that the assessing authority on the consideration of the fact that the Petitioner had charged the value of the packing materials separately held that packing material was not liable to tax, as the country liquor was exempted from tax, in view of Section 3AB of the Act. He submitted that for the assessment year 1997-98, the notice u/s 21 of the Act has been vacated and, therefore, a fresh notice issued for the same cause is not justified. Learned Counsel for the Petitioner, however, fairly admitted that for the assessment years 1999-2000 and 2000-01 in the assessment orders, this issue has not been considered and examined and there is no finding in this regard. On these facts, he submitted that reopening of the proceedings on account of change of opinion is not justified. He further submitted that vide circular dated April 28, 2000 it has been clarified by the Government that even if the prices of country liquor and packing materials were separately charged, the value of packing material was not liable to tax. He submitted that the subsequent circular dated September 30, 2003 issued by the Commissioner of Trade Tax, U. P., Lucknow, which is annexure 12 to the writ petition, in which it has been opined that in case if the separate sales are made for the country liquor and poly pouches, etc., the benefit of Section 3AB is not available; and the benefit of Section 3AB is only available in a case where composite price for the goods and the packing materials has been charged, is manifestly erroneous.

6. Sri S. P. Kesarwani, learned Additional Chief Standing Counsel, submitted that the issue involved in the present writ petition came up for consideration before the Division Bench of this Court in Writ Petition No. 317 of 2004 Majhola Distillery & Chemical Works Majhola, District Pilibhit v. State of U.P. decided on October 4, 2007 [2010] 34 VST 292 (All) [App] wherein after considering the various decisions of the apex court and the aims and objects of introducing Section 3AB of the Act, it has been held that Section 3AB of the Act applies only in a case where a composite price for the goods and packing materials has been charged and it does not apply to a case where the prices of the goods and the packing materials have been separately charged. On the similar facts in the case of sale of country liquor where the prices of country liquor and the packing materials have been separately charged, it has been held that the provision of Section 3AB does not apply and the packing materials are liable to tax. He submitted that SLP filed against the said order has been dismissed by the apex court.

7. Sri S. P. Kesarwani, learned Additional Chief Standing Counsel, further submitted that the provision itself is a source and constitutes material to initiate the proceedings and, therefore, it cannot be said that there was no material to form the belief about the escaped assessment. In support of the contention, he relied upon the decisions in the case of Smt. Sarla Devi v. Controller of Estate Duty, U.P. reported in [1975] UPTC 178, Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa, and in the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi,

8. Sri Bharat Ji Agrawal, learned Counsel for the Petitioner, submitted that the Division Bench decision of this Court in the case of Majhola Distillery & Chemical Works, Majhola, District Pilibhit v. State of U. P. Writ Petition No. 317 of 2004, decided on October 4, 2007¹ requires reconsideration.

9. We have heard learned Counsel for the parties and perused the records and given our anxious consideration to the rival submissions.

10. The question on the merit, namely, where the prices for the country liquor and packing materials are separately charged whether the provision of Section 3AB applies or not is squarely covered by the Division Bench decision of this Court in the case of Majhola Distillery & Chemical Works, Majhola, District Pilibhit v. State of U. P. Writ Petition No. 317 of 2004, decided on October 4, 2007 : [2010] 34 VST 292 (All) [App] wherein it has been held that where the prices of the goods and the packing materials are separately charged, Section 3AB does not apply and accordingly it has been held that if the prices for the country liquor and the packing materials are separately charged, the value of the packing materials would not be exempted u/s 3AB of the Act. The Division Bench of this Court has considered in details the decisions of the apex court in the case of Premier Breweries Vs. State of Kerala, The Associated Cement Companies Ltd. Vs. Government of Andhra Pradesh and Another, Raj Sheel v. State of Andhra Pradesh reported in [1989] 74 STC 379 : JT [1989] (SC) 226 and Co-operative Company Ltd. v. Commissioner of Trade Tax, U.P. reported in [2007] 7 VST 174 : [2007] 4 SCC 480 and aims and objects of introducing Section 3AB of the Act. The Division Bench decision of this Court is well considered decision. The SLP against the said order has also been dismissed by the apex court. In this view of the matter, we do not see any reason to reconsider the issue and we respectfully agree with the view taken by the Division Bench. Accordingly, we are of the view that the view expressed in circular dated September 30, 2003 is legally correct and in accordance with the provisions of the Act.

11. So far as the submissions of learned Counsel for the Petitioner that the proceedings have been initiated on account of change of opinion, we are of the view that for the assessment years 1997-98 and 1998-99, the submissions of the Petitioner's counsel have a substance but for the assessment years 1999-2000 and 2000-01, the submissions of the Petitioner's counsel cannot be accepted. In the assessment orders, for the assessment years 1997-98 and 1998-99, the claim of the Petitioner that the value of the bottles or poly pouches were not liable to tax, has been considered in details; the facts that the prices of the liquor and the bottles and the poly pouches have been charged separately, have been noticed and on the consideration of the aforesaid facts, the assessing authority had held that the value of the bottles and poly pouches were not liable to tax in view of Section 3AB of the Act as the country liquor is exempted from tax. Therefore, the reopening of the proceedings for the assessment years 1997-98 and 1998-99 are only on account of change of opinion and cannot be sustained. So far as the assessment years 1999-2000 and 2000-01 are concerned, learned

Counsel for the Petitioner fairly admitted that the issue has not been considered in the original assessment orders, therefore, reopening of the proceedings u/s 21 of the Act cannot be said to be on account of change of opinion inasmuch as no opinion has been expressed in the order. It is settled principle of law that each year is a separate assessment year for the purposes of assessment. (See Bharat Sanchar Nigam Ltd. and Another Vs. Union of India (UOI) and Others,

12. Section 21(1) and (2) of the Act reads as follows:

Section 21. Assessment of tax on the turnover not assessed during the year.-(1) If the assessing authority has reason to believe that the whole or any part of the turnover of dealer, for any assessment year or part thereof, has escaped assessment to tax or has been underassessed or has been assessed to tax at a rate lower than that at which it is assessable under this Act, or any deductions or exemptions have been wrongly allowed in respect thereof, the assessing authority may, after issuing notice to the dealer and making such inquiry as it may consider necessary, assess or reassess the dealer or tax according to law:

Provided that the tax shall be charged at the rate at which it would have been charged, had the turnover not escaped assessment or full assessment as the case may be. Explanation I.-Nothing in this sub-section shall be deemed to prevent the assessing authority from making an assessment or full assessment to the best of its judgment.

Explanation II.-For the purposes of this section and of Section 22, "assessing authority" means the officer or authority who passed the earlier assessment order, if any, and includes the officer or authority having jurisdiction for the time being to assess the dealer.

Explanation III.-Notwithstanding the issuance of notice under this sub-section, where an order of assessment or reassessment is in existence from before the issuance of such notice, it shall continue to be effective as such, until varied by an order of assessment or reassessment made under this section in pursuance of such notice.

(2) Except as otherwise provided in this section, no order of assessment or reassessment under any provision of this Act for any assessment year shall be made after the expiration of three years from the end of such year or March 31, 1998, whichever is later:

Provided that if the Commissioner on his own on the basis of reasons recorded by the assessing authority, is satisfied that it is just and expedient so to do authorises the assessing authority in that behalf, such assessment or reassessment may be made after the expiration of the period aforesaid but not after the expiration of eight years from the end of such year notwithstanding that such assessment or reassessment may involve a change of opinion:

Provided further that the assessment or reassessment for the assessment year 1987-88 may be made by March 31, 1993:

Provided also that if the eligibility certificate granted u/s 4A has been amended or cancelled by the Commissioner under Sub-section (3) of Section 4A, the order of assessment or reassessment may be made within one year from the date of receipt by the assessing authority of the copy of the order amending or cancelling the aforesaid certificate or by March 31, 1995, whichever is later:

Provided also that the assessment or reassessment for the assessment year 1989-90 may be made by March 31, 1995.

13. Section 21(1) of the U. P. Trade Tax Act contemplates assessment and reassessment is equivalent to Section 147 of the Income Tax Act, 1961. Both the sections relate to the assessment of the escaped assessment to tax. In both the sections the proceeding can be initiated only if the assessing authority "has a reason to believe" that there is escaped assessment.

14. u/s 21(1) of the Act the words are "has reason to believe" and not "reason to suspect". The belief entertained by the assessing officer must not be arbitrary or irrational. It must be reasonable and based on reasons, which are relevant. It must be in good faith and not in mere pretence, should have a rational connection and relevant bearing on the formation of the belief, and should not be extraneous or irrelevant. The material should be relating to the particular year for which the assessment is sought to be reopened. It is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of income.

15. Perusal of Section 21(2) of the Act reveals that the proceedings can only be initiated if there is reason to believe that there is escaped assessment. The word "reason to believe" came up for consideration before the apex court and various High Courts in several decisions. The apex court held that the belief must be formed on the basis of the material, which has a nexus to the escaped turnover.

16. In Joti Parshad Vs. State of Haryana, the honourable Supreme Court while dealing with the meaning of expression "reason to believe" in Section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probable reasoning, conclude or infer regarding the nature of the thing concerned.

17. It is settled principle of law that in a writ jurisdiction under Article 226 of the Constitution of India, this Court cannot look into the sufficiency of the material on the basis of which a belief has been formed and notice u/s 21 of the Act has been issued. This Court can only examine whether there was any material and whether the material is relevant to form the belief of escaped income. (Vide Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another,

18. In the case of Commissioner of Income Tax, Gujarat II Vs. Kurban Hussain Ibrahimji Mithiborwala, the apex court has held that it is well-settled that the

Income Tax Officer's jurisdiction to reopen an assessment u/s 34 of the Income Tax Act, 1922, depends upon the issuance of a valid notice. If the notice issued by him is invalid for any reason the entire proceedings taken by him would become void for want of jurisdiction.

19. In the case of Johri Lal (H.U.F.), Agra Vs. The Commissioner of Income Tax, the apex court has held as follows (at page 439):

The formation of the required belief by the Income Tax Officer before proceedings can be validly initiated u/s 34(1)(a) is a condition precedent : The fulfilment of this condition is not a mere formality, it is mandatory, and failure to fulfil that condition would vitiate the entire proceedings. Further, the formation of the required belief is not the only requirement : The officer is further required to record his reasons for taking action u/s 34(1)(a) and obtain the sanction of the Central Board or the Commissioner, as the case may be.

20. In Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das, the honourable Supreme Court held that the reasons for the formation of the belief contemplated by reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of his belief. The honourable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, however, vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the Assessee from assessment.

21. The question whether the assessing officer had reasons to believe is a question of jurisdiction, a vital thing, which can always be investigated by the court under Article 226 of the Constitution as held in Daulatram Rawatmal Vs. Income Tax Officer and Another, JAMNA LAL KABRA Vs. Income Tax OFFICER, B WARD, BAREILLY, AND OTHERS., Calcutta Discount Company Limited Vs. Income Tax Officer, Companies District, I and Another, C.M. Rajgharia and Another Vs. Income Tax Officer and Others, and Madhya Pradesh Industries Ltd. Vs. Income Tax Officer, Special Investigation Circle "B", Nagpur,

22. If there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the assessing officer could not have reason to belief. In such a case, the notice issued by him would be liable to be struck down as invalid as held in the case of Ganga Saran and Sons P. Ltd. Vs. Income Tax Officer and Others,

23. In the case of Indra Prastha Chemicals (P) Ltd. and Others Vs. Commissioner of Income Tax and Another, this Court held as follows (at page 119 of ITR):

Thus, it is well-settled that the "reason to believe" u/s 147 must be held in good faith and should have a rational connection and relevant bearing on the formation of the belief and should not be extraneous or irrelevant. Further, this Court in proceedings under article 226 of the Constitution of India can scrutinize the reasons recorded by the assessing officer for initiating the proceedings u/s 147/148 of the Act. The sufficiency of the material cannot be gone into but relevancy certainly be gone into.

24. In the case of *Royal Trading Co., Saharanpur v. Trade Tax Officer, Saharanpur* reported in [2000] 16 NTN 290, the Division Bench of this Court while considering Section 21 of the U. P. Trade Tax Act held as follows:

Therefore, action u/s 21 of the Act cannot be taken on the whims of the assessing officer by resorting to conjecture of imagination. He has to have before him the facts which are germane to the issue and on the basis of which a rational man can have reason to believe that the whole or any part of the turnover has escaped assessment or has been under-assessed. In *Income Tax Officer and Others Vs. Madnani Engineering Works Ltd., Calcutta*, the honourable Supreme Court while dealing with somewhat similar provision u/s 147 of the Income Tax Act, 1961 held that the existence of reason to believe on the part of the ITO was a justifiable issue and it was for the court to be satisfied whether in fact the ITO had reason to believe that income had escaped assessment. In *Joti Parshad Vs. State of Haryana*, the honourable Supreme Court while dealing with the meaning of expression "reason to believe" in Section 26 of the Indian Penal Code held that the reason to believe is not the same as suspicion and a person must have reason to believe if the circumstances are such that a reasonable man would, by probabale reasoning conclude or infer regarding the nature of the thing concerned. In *Income tax Officer, Calcutta and Others Vs. Lakhmani Mewal Das*, the honourable Supreme Court held that the reasons for the formation of the belief contemplated by Section 147(a) of the Income Tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income Tax Officer and the formation of this belief. The honourable Supreme Court further observed that though it is true that the court cannot go into the sufficiency or adequacy of the material and substitute its own opinion for that of the Income Tax Officer on the point as to whether action should be initiated for reopening the assessment yet at the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the Assessee from assessment. This view was reiterated by the honourable Supreme Court while dealing with the provisions of Section 21 of the U. P. Trade Tax Act in *The Commissioner of Sales Tax, U.P. Vs. Bhagwan Industries (P) Ltd., Lucknow*, in which it was held that reasonable grounds necessarily postulate that they must be germane to the formation of the belief regarding escaped assessment. If the grounds are of an extraneous

character, the same would not warrant initiation of proceedings under this section. If however, the grounds are relevant and have a nexus with the formation of belief regarding escaped assessment, the assessing authority would be clothed with jurisdiction to take action under this section.

25. It is settled principle of law that the notice u/s 21 of the Act cannot be issued on account of change of opinion once the issue is considered, examined and opinion is formed on the basis of material available on record.

26. In the case of *Kalpana Kola Kendra, Kanpur v. Sales Tax Officer, Circle 20, Kanpur* reported in [1989] 75 STC 198 (All) : [1989] UPTC 597, the Division Bench held as follows (at pages 203 and 205 of STC):

Section 21 of the Act is based upon the theory that the taxes must be paid by the Assessee in correct sum and likewise it must be collected by the statutory machinery. The escapement from assessment whether it results on account of concealment practised or fraud played by the Assessee or as a result of negligence or ignorance of the assessing authority, in our opinion, is of no consequence, provided the action to reopen the assessment is otherwise justified and the assessing officer is not acting arbitrarily or in a capricious manner. The escapement of assessment contemplated under that section may be due to various reasons. The term "turnover has escaped assessment to tax" which includes under-assessment, may as well be result of lack of care on the part of the assessing officer or by reason of inadvertence on his part. Section 21 does not prohibit obtaining of information from the investigation of material on the record of the original assessment. The scope of that section is not circumscribed by a rider like the one that exists in Section 147(a) of the Income Tax Act, 1961, namely, the Income Tax Officer has reason to believe that by reason of the omission or failure on the part of the Assessee to disclose fully and truly all material facts necessary for the assessment for that year, income chargeable to tax has escaped assessment for that year. The escapement envisaged by Section 21 of the Act for the purposes of reassessment need not necessarily spring from a source extraneous to the original record. However, a second thought or a mere change of opinion, by the assessing authority on the same set of facts and the material on the record would not clothe the assessing authority with a valid jurisdiction.

...

We are not impressed by the argument that the instant case is a case of change of opinion. The change of opinion necessarily postulates that the assessing authority had an occasion to consider the material earlier, and on the same set of facts another opinion was sought to be formed. The question of change of opinion cannot arise where there has been no previous proceeding of assessment in respect of a turnover in dispute. As pointed out by the Calcutta High Court in *Income Tax Officer, "I" Ward and Others Vs. Mahadeo Lal Tulsyan*, , a change of opinion by the assessing officer contemplates, formation of two different opinions

or to make two different inferences at two stages on the same set of primary facts. The distinction between an inadvertent mistake or omission and change of opinion was pointed out by one of us after reviewing a large number of decided cases, both by this Court and by the Supreme Court, in Commissioner of Sales Tax, U.P. v. Madhu Chemical Works, Bareilly [1988] 71 STC 421 : [1988] UPTC 230. It was held that in a case where a particular point has been considered on merits, and a view is taken, it would not be a case of inadvertent mistake or omission, if it is found that the view taken earlier was wrong. It would be a case of change of opinion, but if it is not so, then it would be a case of non-application of mind and an action would be justified u/s 21 of the Act.

27. In the case of Commissioner of Sales Tax v. Gopalji, Varanasi reported in [1974] UPTC 277, the Sales Tax Officer got second thought about the applicability or effect of the survey and hence notice u/s 21 was issued. It was held that this would not constitute reason to believe within the meaning of Section 21 of the said Act. Hence notice u/s 21 was held invalid.

28. In the case of Palco Lining Company and Another Vs. The Sales Tax Officer, the assessment order recorded that the assessing authority has after elaborately considering the evidence taken the view what was being sold by the Petitioner was nothing but collar lining and its turnover of sale was held exempt from the Sales Tax Act. Under a notification the assessing authority, however, issued notice u/s 21 of the said Act for reassessing the same matter, hence it was held notice u/s 21 to be invalid.

29. In the case of Delhi Cloth and General Mills Co. Ltd. Vs. State of Rajasthan and Others, the apex court held as follows:

It does not permit reassessment of turnover which after the due consideration, had been found exigible to tax merely because the assessing authority subsequently comes to take different view of the matter.

30. To the similar effect is another decision where we find u/s 34 of the Income Tax Act, 1922, which is similar to the provision of Section 21 of the U. P. Sales Tax Act, after considering the provision of Section 34 of the said Act the following observation has been made by the apex court in the case of Commissioner of Income Tax, Gujarat Vs. Bhanji Lavji, Porbandar, , which is quoted as under (at page 583 of ITR):

When the primary facts necessary for assessment are fully and truly disclosed to the Income Tax Officer at the stage of the original assessment proceedings, he is not entitled, on a change of opinion, to commence proceedings for reassessment u/s 34(1)(a).

31. To the similar effect is also the decision in Commissioner of Income Tax, West Bengal II Vs. Dinesh Chandra H. Shah and Others, wherein it is held that (at page 371 of ITR):

...It appears that the Income Tax Officer clearly sought to justify the reopening

of the assessment u/s 34(1)(b) merely on the ground of change of opinion. It is well-settled by now, and Mr. Desai quite rightly does not dispute the proposition, that mere change of opinion could not be a valid ground for reopening the assessment u/s 34(1)(b) of the Act. We would accordingly uphold the answer returned by the High Court on the short ground that the reassessment for the year in question was sought to be reopened for the reason that the successor of the Income Tax Officer who had made the original assessment had changed his opinion which did not furnish a justifiable reason for taking action u/s 34(1)(b).

32. While considering Section 147 of the said Act in the case of the Income Tax Officer, Income Tax-cum-Wealth Tax Circle II, Hyderabad Vs. Nawab Mir Barkat Ali Khan Bahadur, Hyderabad, the same view has been taken. Having second thought on the same material does not warrant initiation of proceedings u/s 147 of the Income Tax Act.

33. In the case of Harbans Lal Malhotra v. Assistant Commissioner of Sales Tax, Ghaziabad reported in [1997] 107 STC 98 (All) : [1994] UPTC 1041, the Division Bench of this Court held that the authority cannot issue any notice on account of change of opinion nor in the absence of any material for the year in question. It has been further held that in the original assessment order all the documents of the Petitioner including the agreement in question the transfer of the goods has been held as stock transfer. The notice u/s 21 of the Act has been held amounts to re-examining the same matter again and to make fresh enquiry in the same matter, which is not permissible.

34. In the case of Ratan Industries (Pvt.) Limited Vs. Additional Commissioner, Trade Tax and Another, the Division Bench of this Court in page 117 of STC; paragraph 22 of NTN observed that "it is a well-settled principle of law that the question which has been examined in detail in the original assessment proceeding and thereafter the assessment order has passed, then the said assessment order cannot be reopened u/s 21 of the Act on mere change of opinion".

35. In the case of IL and IL and FS Investment Managers Ltd. Vs. Income Tax Officer and Others, the Bombay High Court held that the proceeding cannot be reopened merely because the assessing authority is of the view that the depreciation has been wrongly allowed merely on change of opinion.

36. In the case of Anil Kumar Bhandari Vs. Joint Commissioner of Income Tax and Others, the deduction was allowed u/s 80HHC. The case has been reopened on the ground that the deduction has been wrongly allowed. The Division Bench of the Calcutta High Court held that the initiation of reassessment proceeding by the assessing authority purported to reopen the assessment upon the change of opinion, the same fact is not justified.

37. Coming to the cases cited by the learned Additional Chief Standing Counsel in the case of Smt. Sarla Devi v. Controller of Estate Duty, U.P. reported in [1975] UPTC 178 the Division Bench of this Court has held that the correct

position of law coming to the notice of the authority as a result of research into law subsequent to the original assessment constitutes the information for reassessment purposes.

38. In the case of Maharaj Kumar Kamal Singh Vs. The Commissioner of Income Tax, Bihar and Orissa, the apex court has held that the word "information" includes information as to the facts as well as information as to the state of the law as contemplated u/s 34(1)(b) of the Income Tax Act.

39. In the case of Indian and Eastern Newspaper Society, New Delhi Vs. Commissioner of Income Tax, New Delhi, the apex court has held that the information u/s 147(b) of the Act contemplates information as to the law created by the formal source. The opinion of the internal audit report has been held as not an information as contemplated under this section as the audit party is not competent to interpret the law.

40. In none of the aforesaid cases, it has been held that the case can be reopened on account of change of opinion. The two decisions cited by the learned Counsel for the Revenue, namely, Commissioner of Income Tax, West Bengal II Vs. Dinesh Chandra H. Shah and Others, and in Diamond Sugar Mills Ltd. Vs. Income Tax Officer, "C" Ward and Others, wherein the view has been taken that the proceedings cannot be re-opened merely on the ground of change of opinion have been distinguished on the ground that in the said case the precise aspect of law on which the proceedings were sought to be re-opened was neither canvassed nor was any opinion held or expressed by the authority at the time of the original assessment and thus, there was no change of opinion.

41. No other point has been argued.

42. In the result, the writ petition is allowed in part. The notices u/s 21 of the Act for the assessment years 1997-98 and 1998-99 are hereby quashed and notices issued u/s 21 of the Act for the assessment years 1999-2000 and 2000-01 are held valid.