(1980) 05 CAL CK 0015

Calcutta High Court

Case No: Civil Rule No. 2099W of 1978

Rasiklal Jivanlal Shah		APPELLANT
	Vs	
Income Tax Officer		RESPONDENT

Date of Decision: May 5, 1980

Acts Referred:

- Constitution of India, 1950 - Article 226
- Income Tax Act, 1922 - Section 10, 34
- Income Tax Act, 1961 - Section 142, 147, 148, 23, 24

Citation: (1981) 5 TAXMAN 300

Hon'ble Judges: Chandan Kumar Banerjee, J

Bench: Single Bench

Advocate: Sanjay Bhattacharjee, Sardar Amjad Ali and Miss Aparna Dutta, for the Appellant;B.L. Pal and Samar Banerjee, for the Respondent

Final Decision: Dismissed

Judgement

Chandan Kumar Banerjee, J.

The petitioners Nos. 3 to 7 along with Kantilal Jivanlal Shah and Manganlal Chhaganlal Shah, both since deceased, were partners of M. Ambica Cold Storage, a partnership firm constituted on the 23rd April, 1958, and registered under the Indian Partnership Act. The firm has since been dissolved. The case of the petitioners is that the firm commenced business in the middle of February, 1959, and was for the first time assessable and assessed to income tax for the assessment year 1960-61. The accounting period of the firm was the English calendar year ending on the 31st December of each such year and under the deed of partnership the first accounting period for completion of the accounts of the firm was 31st December, 1959. On the 25th July, 1958, the firm purchased 3 bighas 7 cottahs 5 chittaks more or less of land at Sheoraphully for Rs. 19,857.19, and on the 25th April, 1961, it purchased further 1 bigha 5 cottahs 7 chittacks of adjacent land for Rs.

10,225. Although the land was first purchased in July, 1958, as the negotiations for the purchase were completed by May, 1958, the purchase of materials for construction as well as the work of construction of cold storage on the said land was started from May, 1958, and such construction was fully completed by December, 1963, and minor repairs were made thereafter from time to time. The cost of construction was met mostly from borrowings. The first accounts of the firm was closed on 31st December, 1959, and the income tax return for the assessment year 1960-61 disclosing a loss of Rs. 65,714 was filed. At the hearing of the said assessment, Jayantilal Umedlal Doshi, the authorised representative and accountant of the firm, produced before the assessing ITO full particulars and other evidence as to purchase of the land, expenses and cost of construction, who considered the same and after ascertaining the actual cost of the said cold storage building assessed the loss at Rs. 15,043 after allowing depreciation on the said building on the basis of its actual cost and in proportion to the use thereof in accordance with the then I.T. Rules. Similarly, all particulars of the construction of the cold storage were filed before the assessing ITO at the time of the assessments for the assessment years 1961-62 and 1963-64. There was no omission or failure on the part of the firm to disclose fully or truly any material facts or particulars necessary for the said assessments.

2. For the assessment year 1961-62, the firm filed a return showing a loss of Rs. 47,534. The assessing ITO, however, assessed the total income at Rs. 1,24,911 and allowed depreciation on the written down value of the cold storage building of Rs. 1,58,508 at the rate of 21/2% and also a further depreciation at the said rate on the additional cost of construction. On appeal by the firm against the said assessment the AAC allowed depreciation at the full rate of hundred per cent, but disallowed certain other claims. From the said order of the AAC, the firm preferred a further appeal to the income tax Appellate Tribunal and obtained further reliefs.

3. By a letter dated the 25th September, 1975, respondent No. 1 called upon the firm to submit details of the expenses for the construction of the said cold storage. In reply, the firm by a letter dated the 29th September, 1975, inter alia, informed respondent No. 1 that the said cold storage had been sold away to one Mayur Udyog and did not belong to the firm any more.

4. By a letter dated the 25th November, 1975, respondent No. 1 called upon the advocate of the firm to file the details as asked for in the said letter dated the 25th September, 1975, as the liability to produce the books of account was that of the partners of the firm to whom a formal notice u/s 142 of the income tax Act, 1961, was being issued. By a letter dated the 7th January, 1977, respondent No. 1 intimated to the petitioners that it appeared from the assessment records of the firm that a sum of Rs. 46,000 was spent for the construction of the cold storage in the calendar year 1959 relevant to the assessment year 1960-61, but as per the valuer''s report of the petitioners'' the cost of construction for the said period came

to Rs. 4,00,000. After considering the increase in the value of the cost of construction during the intervening period up to the date of the valuation by the said valuer, the cost of construction was estimated at Rs. 2,58,000 while it was shown by the firm at only Rs. 46,000. Thus, Rs. 2,12,000 which was spent for the said construction escaped assessment for the assessment year 1960-61, and the petitioners were asked to explain why the said sum should not be assessed to tax and why proceedings u/s 147 of the income tax Act, 1961, should not be taken and in default of a written reply within 7 days, it would be presumed that the petitioners have no explanation to offer and the case should be reopened u/s 147.

5. By a letter dated the 17th January, 1977, the petitioners gave a reply to the said letter. Under cover of a letter dated the 21st March, 1977, respondent No. 1 sent several notices u/s 148 of the income tax Act, 1961, all dated March 21/22, 1977, for reopening the assessment of the firm for the assessment year 1960-61. Several notices u/s 148 of the Act, all dated the 2nd March, 1978, were also served on the petitioners for reopening the assessment of the firm for the assessment year 1961-62 on similar grounds.

6. The petitioners have made this writ petition under article 226 of the Constitution, inter alia, challenging the said notices.

7. No affidavit-in-opposition has been filed on behalf of the respondents. By consent of parties, the petition of the respondents, for vacating or modifying the interim order made herein is treated as the affidavit-in-opposition of the respondents, and the affidavit-in-opposition filed by the petitioners to the said application is treated as the affidavit-in-reply of the petitioners.

8. Mr. Sanjoy Bhattacharjee, learned advocate for the petitioners, submitted that the first accounting period of the firm was'' closed on the 31st December, 1959, and the firm was for the first time assessable and assessed to income tax for the assessment year 1960-61. The basic fact of the construction of the cold storage and the cost of such construction were disclosed to the assessing ITO in the very first assessment of the firm, who went into the matter, considered the same and allowed depreciation on the building of the cold storage. The said assessment could not, therefore, be reopened on the ground that the assessing ITO did not consider the matter properly either being hoodwinked or blinkers having been put by the assessee. The depreciation was allowed by the assessing ITO on the cold storage building for both the assessment years 1960-61 and 1961-62, on the basis of the actual cost of construction of the building as will appear from the assessment orders for the said assessment years and Mr. Bhattacharjee referred to the same. Mr. Bhattacharjee also referred to and relied on the statements made in paras. 19 and 20 of the petition wherein it is stated that a chart and complete list showing day to day expenses of construction of the cold storage building were submitted to the assessing ITO at the time of the said assessments, who went into and considered the entire cost of construction right from the commencement of the construction,

had full discussion in the matter with the authorised representative of the firm and being fully satisfied about the cost of construction, allowed the depreciation on the building.

9. Mr. Bhattacharjee next urged that it would appear from the reasons recorded by respondent No. 1 that for reopening the said assessments he has proceeded solely on the basis of the valuation made in February, 1968, by the assessee''s valuer for the purpose of obtaining loan from the bank and he took the opinion of the departmental valuer in making valuations for every year on the basis of the said valuation made by the assessee''s valuer, by resorting to back calculation. The opinions of the valuers could not be made the basis for the formation of the belief for reopening an assessment as valuation may differ from person to person. The cost of acquisition of the land by the assessee was proved by the conveyance. The cost of construction of the building was proved by the receipts, vouchers and other documents. These were the positive and primary evidence which were placed by the assessee before the assessing ITO at the time of the said assessments which could not be brushed aside by respondent No. 1 on the basis of opinions or inferences of valuers. Even if the valuations made by the valuers were correct, the assessee might have so arranged his affairs that the cost of construction was much less than what would have been incurred generally by others. A higher valuation made by the valuer could not necessarily lead to the inference that there was some income of the building and for setting up of the cold storage. The basis of the calculations made, by respondent No. 1 as disclosed in the recorded reasons was back calculation on the basis of hypothetical rates of increase in the cost of construction and in the value of the land informally given by the departmental valuer. The assessee''s valuer in making the valuation did not state the nature and extent of the construction or if any further construction was made between 1963 and 1968, which might have increased the value of the construction. The valuation by the assessee''s valuer was made of the cold storage for the purpose of taking loan and not for ascertaining the market value of the construction. The departmental valuer did not ascertain whether such valuation was correct or not. Thus, there was no nexus between the 1968 valuation and the valuations in other years from 1959 onwards. Mr. Bhattacharjee urged that valuation was a matter of opinion which depended on various factors. The increase in the valuation might be in the opinion of one person at a particular rate while in the opinion of another person at some other rate. Such opinion could not be made the basis for reopening an assessment u/s 147 of the Act and for valuing a particular construction, more so when the valuation is made at a much later date and of the entire construction which was complete. This could not be made the basis of valuation of the construction in earlier years when it was in the process of construction. Mr. Bhattacharjee next urged that valuation of a property and cost of construction thereof were not synonymous. Valuation could not provide a reasonable basis as to what would or could have been the cost of construction in 1958 or in 1959 particularly when the valuation was made after 9 or 10 years in

1968. The valuation made in 1968 might provide a clue for determining the cost of construction in 1968 if at all, but not of any earlier years. It was further urged that in view of the positive assertion made by the assessee that full particulars of the cost of construction and all documents in support thereof were produced before and considered by the assessing-ITO at the time of the said assessments the valuation in 1968 could not be made the basis for reopening of the assessments in the absence of denial of such assertions by the assessing-ITO and in that view of the matter the assessee could not be charged with omission or failure to disclose fully and truly all or any facts material to the said assessments. The two conditions precedent that, (i) the ITO must have reason to believe that income has escaped assessment, and (ii) he must have further reason to believe that such escapement was 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 the relevant years were not satisfied as the said assertions made by the assessee were not denied by the assessing-ITO. The assessee in its original assessments duly disclosed the primary fact of construction of the cold storage and it was for the assessing-ITO to find out the cost of construction thereof. The assessee disclosed all relevant documents and papers before the assessing-ITO and if he was satisfied and did not make any further enquiries, then it could not be said that the assessee had failed to disclose fully and truly all or any material facts. Mr. Bhattacharjee next urged that in the recorded reasons there is no charge against the assessee of omission or failure to disclose fully or truly any material facts necessary for the said assessments. Thus, even if any income had escaped assessment, there could not be any reopening of the completed assessments u/s 147 of the Act. Mr. Bhattacharjee contended that respondent No. 1 sought to reopen the assessments on the basis of the valuation made by the assessee''s valuer for obtaining a loan from bank, which was a piece of information. Thus, if at all the assessments could be reopened under, section 147 and not u/s 147 of the Act. The time-limit for reopening the assessments u/s 147 of the Act having long expired, the said assessments could not be reopened any more. Mr. Bhattacharjee submitted that the contentions raised by him in this rule also applied to the proposed assessment for the assessment year 1959-60, the subject-matter of the other rule being C.R. 2494(W) of 1978, and to the reopening of the assessment for the assessment year 1961-62. With regard to the assessment year 1959-60, Mr. Bhattacharjee submitted that the categorical case of the assessee was that it had no income in the accounting year relevant to the said assessment year. The initial burden was on respondent No. 1 to show that the assessee had any income in the said year and that such income could be said to have escaped assessment which, not having been discharged by respondent No. 1, he could not initiate any proceeding in respect of the said assessment year u/s 147 of the Act. The nil return filed by the assessee for the said assessment year was accepted by the assessing-ITO.

10. In support of his contentions, Mr. Bhattacharjee cited the following decisions:

ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC). This was a case of reopening of an assessment u/s 147 of the income tax Act, 1961. The Supreme Court ''observed that the reasons for formation of the belief must have a rational connection with or relevant bearing on the formation of the belief and there must be a direct nexus or live link between the material coming to the notice of the ITO and formation of his belief that income of the assessee had escaped assessment in the particular year on account of his failure to disclose fully and truly all material facts. The powers of the ITO to reopen an assessment, though wide, are not plenary. The words in the statute are "reason to believe" and not "reason to suspect".

11. Narayandas Pammananddas v. ITO [1911] 107 ITR 79 (Cal.). Here, the assessee challenged in a writ petition the notices u/s 148 of the income tax Act, 1961, for reopening certain assessments. Sabyasachi Mukharji J. found that the transactions of the assessee with Messrs. Atlas Agencies and with various other parties were disclosed by the assessee and were scrutinised by the ITO. The statement made in the petition that the assessee had full discussions regarding existence, validity and genuineness of all parties including Atlas Agencies remained uncontradicted. The learned judge observed that it was not certain whether the facts gathered by the ITO on which the assessments were sought to be reopened could not have been gathered from the materials before him in the original assessments and held that the revenue had not discharged the onus which lay on it to establish its case that the facts came to his knowledge subsequent to the original assessments from which it could be said that there was omission or failure on the part of the assessee to disclose fully and truly material facts necessary for the assessments, on account whereof the income chargeable to tax escaped assessment.

12. Jeewanlal (1929) Ltd. v. ITO [1978] 115 ITR 465 (Cal.). Here, before the completion of the original assessment, the assessee is said to have informed the ITO that it had filed a suit against the tenant of Sarat Bose Road property and did not accept rent from him. Reopening of the assessment was sought to be made on the ground that as the tenant deposited rents with the Rent Controller, the same was deemed income of the assessee which was not disclosed and included in the return filed. Sabyasachi Mukharji J. held that on the basis of the above facts and, in the absence of any affidavit by the ITO who made the original assessment or from any person who had knowledge about the said assessment and in view of the recorded reasons, there was no failure or omission on the part of the assessee to disclose fully and truly any fact which entitled the ITO to reopen the assessment u/s 147 of the income tax Act, 1961.

13. Smt. Minoti Halder v. ITO [1978] 115 ITR 471 (Cal.). This was a case of reopening of an assessment u/s 147 of the income tax Act, 1961. In para. 5 of the petition, the assessee stated that all materials were disclosed before the assessing-ITO in the original assessment and he discussed the same. Sabyasachi Mukharji J. held that in the absence of any affidavit of the assessing-ITO controverting the said statements,

the same should be accepted as true and there was no failure or omission on the part of the assessee to disclose fully or truly any material facts.

14. Grindlays Bank Ltd. v. ITO [1979] 116 ITR 710 (Cal.). Here, the assessments were sought to be reopened u/s 147 of the income tax Act, 1961, on the ground that the assessee did not disclose that the contribution to the Grind-lays Superannuation Fund was debited to its Indian profit and loss account and no evidence was produced in the original assessments that the said fund was a recognised one. In the writ petition, the assessee alleged that the said fact was brought to the notice of the assessing-ITO who, being satisfied, allowed the same as admissible expense which was not denied by the said ITO. The learned judge found that the said fund had been disclosed and claim for deduction thereof was made in the original assessments which was allowed as an admissible expense due to an error on the part of the assessing-ITO and not due to any omission or failure on the part of the assessee to disclose any primary and material facts. The learned judge also held that the Public Accounts Committee of Parliament was not a person or body or authority authorised to form an opinion and, therefore, any opinion formed by it could not be information within the meaning of section 147 of the income tax Act, 1961.

15. ITO v. Madnani Engineering Works Ltd. [1979] 118 ITR 1 (SC). Here, an assessment was sought to be reopened by the ITO u/s 147 of the income tax Act, 1961, on the ground that the transactions or loans represented by certain hundis were bogus and no interest was paid by the assessee to any of the alleged hundi creditors deduction whereof was wrongly allowed in the original assessment and thus the income of the assessee escaped assessment by reason of its failure to disclose fully and truly all material facts necessary for the assessment. The Supreme Court held that the assessee produced all hundis on which it had obtained loans from the creditors as also entries in the books of account showing payments of interest. It was for the ITO to investigate and determine whether those documents were genuine or not. It could not, therefore, be said that the assessee failed to make a full and true disclosure of the material facts by not admitting before the ITO that the hundis and the entries in, the books of account were bogus. Thus, there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment and the conditions precedent for the applicability of section 147 were not satisfied. The statement of the ITO that he discovered that the hundi loan transactions were bogus, was merely a statement of his belief, and did not set out any material on the basis of which he arrived at such belief.

16. Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC). Here, the Supreme Court held that the opinion of the internal audit party of the income tax Dept. on a point of law could not be regarded as "information" within the meaning of section 147 of the income tax Act, 1961, and could not be taken into account by the ITO. The effect and consequence of the law mentioned in the audit note should in every case be determined by the ITO himself and he should come to his

conclusion thereon. The opinion of the audit party in regard to law could not for the purpose of his belief add to or colour the significance of such law.

17. Mr. Bhattacharjee further contended that the impugned notices were defective. To appreciate the contention of Mr. Bhattacharjee relevant portion of one of the impugned notices which are all in similar language is set out below:

income tax Officer 1(1)/G

Dated 21/22-3-1977

"To

Rasiklal Jivanlal Shah, on behalf of

Kantilal Jivanlal Shah (decd.)

Ramdas Maganlal Shah on behalf of Maganlal

Chhaganlal Shah (decd.)

Hiralal J. Shah

Jeevanlal Ch. Shah

Rangildas Ch. Shah

Ramdas Maganlal Shah

Probhudas Rangaldas Shah

Tansukhlal Jeevanlal Shah

Rasiklal Jeevanlal Shah

(as partners of M/s. M. Ambica Cold Storage, now defunct, C/o. Kissendas Kalidas, 12, Ramlochan Mullick Street, Calcutta-7.)

Whereas I have reason to believe that your income The income of chargeable to tax for the assessment in respect of which you are assessable for the assessment year 1960-61 has escaped assessment within the meaning of section 147 of the income tax Act, 1961."

18. Mr. Bhattacharjee urged that Rasiklal Jeevanlal Shah and Ramdas Maganlal Shah, the first two persons named in the impugned notices were described and

served with the notices as legal representatives of Kantilal Jeevanlal Shah, deceased, and Chhaganlal Shah, deceased, respectively. The legal representatives of the deceased partners were not liable for the income of the partnership firm. The notices mentioned: "Your income chargeable to tax in the assessment year 1960-61 has escaped assessment." The notices, therefore, did not specify whose income chargeable to tax had escaped assessment. No income of the petitioners who were served with the notices escaped assessment but alleged escapement, if any, was that of the firm which was a distinct entity and unit of taxation under the income tax Act. u/s 148 of the Act, a notice was required to be served on the assessee which was the firm in this case. Thus, there was no service of the notice on the assessee. From the above facts, it was clear that the impugned notices were issued by respondent No. 1 without the application of mind.

19. In support of his contention, Mr. Bhattacharjee relied on the following decisions:

20. Sewlal Daga v. CIT [1965] 55 ITR 406 (Cal.). Here the original assessment was of one Chandrabhan Johurmull in the status of an individual who died in May, 1949. Thereafter, a notice u/s 34 of the Indian income tax Act, 1922, was issued to assessee''s son, Sewlal Daga, describing the assessee as "Messrs. Chandrabhan Johurmull, karta, Sewlal Daga ". It was contended on behalf of Sewlal Daga that the notice was not served on him as the legal representative of the deceased and was, therefore, illegal. A Division Bench of this court held that the service of a notice on the assessee was a condition precedent to the assumption of jurisdiction by the ITO u/s 34 and the notice issued and served being invalid, the proceedings before the ITO were, consequently, illegal and void.

21. B.K. Gooyee v. CIT [1966] 62 ITR 109 (Cal.). Here, the notice issued and served u/s 34 of the Indian I.T. Act, 1922, did not contain the signature of the ITO. A Division Bench of this court held that the service of a valid notice being a condition precedent to the jurisdiction of the ITO to take further proceedings u/s 34, all proceedings taken pursuant to the notice were invalid.

22. ITO v. Chandi Prasad Modi [1979] 119 ITR 340 (Cal.). Here, there were two assessees of the name of Bhimraj Bansidhar, one being assessed as HUF and the other being separately assessed as a partnership firm, both of which carried on business at the same place. The ITO issued a notice u/s 148 of the I.T. Act, 1961, addressed to Messrs. Bhimraj Bansidhar of 180, Mahatma Gandhi Road, Calcutta. A Division Bench of this court held that the ITO, having full knowledge of the separate identity of the two concerns, issued the impugned notice and there being nothing to show to which of the two concerns the notice was issued, the impugned notice was vague.

23. In support of his contention that the initial burden was on respondent No. 1 that the assessee had income in the accounting year relevant to the assessment year 1959-60 which could be said to have escaped assessment, Mr. Bhattacharjee cited

two passages at pp. 12 and 852 of Kanga and Palkhivala''s Law and Practice of income tax, Vol. I, 7th Edn., which are set out below:

The burden is on the revenue authorities to show that a receipt constitutes income and that the income is liable to tax under the statute, but the onus of showing that a particular class of income is exempt from tax lies on the assessee.

The presumption is in favour of good faith and non-concealment of income, but that presumption may be displaced by circumstantial evidence, e.g., the state of affairs which admittedly existed in earlier years and the extent of the assessee''s business in the relevant accounting year. The initial burden of finding some material, however slight, to support a finding of concealed income, is on the department.

24. Mr. B.L. Pal, learned advocate for the respondents, urged on the other hand that respondent No. 1 discovered some material which showed that what was stated by the assessee in the original assessments was not correct. The assessee''s own valuer valued the cold storage on the 21st February, 1968, at Rs. 23,27,428 which in ten years'' time from 1958 to 1968 could not appreciate to the extent as revealed by the said valuation. Mr. Pal relied on the very same passage cited by Mr. Bhattacharjee at p. 852 of Kanga''s book and submitted that in the present case the presumption in favour of good faith or non-concealment of income was displaced by circumstantial evidence. If the requirements of section 147 were fulfilled then the proceedings initiated thereunder would be valid. Mr. Pal referred to the recorded reasons and submitted that according to the assessee the total cost incurred by it for construction of the cold storage including the land, building, plant and machinery and racks, etc., was Rs. 8,61,262 and he referred to the break-up for each year between 1958 to 1965 given by respondent No. 1 in annex. "A" to the recorded reasons. From the report of the assessee''s valuer, as noted in the recorded reasons, the admitted position was that the cold storage went into operation in 1959. Respondent No. 1 did not accept the view of the revenue audit. He was not even aware of the fact that the property would appreciate in value between 1958 and 21st February, 1968. But the appreciation from Rs. 8 lakhs to Rs. 23 lakhs was unusual and inexplicable. Respondent No. 1 was neither a valuer nor a valuation expert and, therefore, he took the help of the departmental valuer and sought his advice in the matter. Respondent No. 1 noted in the recorded reasons that according to the assessee''s own valuation report the value of the building itself was Rs. 16.2 lakhs while the cost of construction as shown by the assessee was only Rs. 1,86,283. Working the figures by book calculation keeping in view the rise in the cost of construction, respondent No. 1 found glaring understatement of the cost of construction of the building which gave rise to his reasons for the belief that there were understatements by the assessee as to the cost of construction of the building as well as cost of installation of the plant, machinery and racks, etc. The assessee having understated the cost, there was no full and true disclosure of all material facts by it. That being the position, there was no question of the onus being

discharged by respondent No. 1. Although the assessee filed a "nil" return for the assessment year 1959-60, it claimed the depreciation for that year u/s 10 of the Indian income tax Act, 1922, in its assessment for the assessment year 1960-61, which was allowed. The assessee also claimed development rebate for; the assessment year 1959-60 in its assessment for the assessment year 1960-61 which was, however, not allowed and he referred to the assessment order of the assessee for the assessment year 1960-61. In support of his contention, Mr. Pal relied on a decision of the Supreme Court in Kantamani Venkata Narayana & Sons v. First Addl. ITO [1967] 63 ITR 638. This was a case of reopening of assessment u/s 34 of the Indian income tax Act, 1922. The Supreme Court observed as follows (P. 644):

It is clearly implicit in the terms of sections 23 and 24 of the income tax Act that the assessee is under a duty to disclose fully and truly material facts necessary for the assessment of the year and that the duty is not discharged merely by the production of the books of account or other evidence. It is the duty of the assessee to bring to the notice of the income tax Officer particular items in the books of account or portions of documents which are relevant. Even if it be assumed that from the books produced, the income tax Officer, if he had been circumspect, could have found out the truth, the income tax Officer may not on that account be precluded from exercising the power to assess income which had escaped assessment.

25. Mr. Pal urged that merely because the assessee disclosed in the original assessments that it has constructed the cold storage and purchased land or produced some documents as evidence thereof, the assessee could not be said to have made a full and true disclosure of all material facts necessary for the said assessments if it suppressed the actual cost incurred for construction of the cold storage.

26. Mr. Pal next contended that at the time of the original assessments the assessee did not file any valuation report on the constructions made. Subsequent valuation by the valuer in February, 1968, showed that the value of the cold storage was Rs. 23,27,428. The revenue audit noted the difference between the value of the cold storage as disclosed by the assessee in the original assessment and the valuation made by the assessee''s valuer which clearly showed that there was escapement of income of the assessee which was utilised in the construction of the cold storage. Respondent No. 1, therefore, took the opinion of the departmental valuer. At the original assessments, the assessee showed the construction cost in 1959 at Rs. 46,000 but as no report of a valuer was filed by the assessee, the cost of construction as shown by the assessee; was, therefore, accepted by the assessing-ITO. Subsequently, the assessee had the cold storage Valued in 1968 at Rs. 23,27,428 for obtaining a loan from the Hongkong & Shanghai Bank. The departmental valuer who was consulted by respondent No. 1 took into account the periodical increase in the cost of construction from year to year and on that basis the cost of construction in 1959 came to Rs. 2,58,000 and the escapement of income

was, therefore, Rs. 2,12,000 in 1959 alone.

27. Mr. Pal submitted that the observations of the Supreme Court in Kantamani Venkata Narayana & Sons [1967] 63 ITR 638 fully applied to the facts and circumstances of this case. Mr. Pal urged that the assessee gave no explanation as to the disproportionate valuation of the cold storage in 1968. In Kantamani Venkata Narayana [1967] 63 ITR 638, the reason to believe that income of the assessee escaped assessment due to its failure to disclose fully and truly all material facts was formed on the discovery of a large accretion of its wealth which had not been disclosed in the assessment proceedings. The case was similar here. The valuation made by the valuer in 1968 showed disproportionate increase in the valuation of the cold storage than that disclosed by the assessee in its assessment proceedings. Thus, respondent No. 1 had prima facie reason to believe that the income of the assessee had escaped assessment. Mr. Pal in support of his contention relied on para. 11 of the petition of the respondents for vacating the interim order where it is alleged that the assessee in filing the return did not give the correct figures and particulars as to the cost of construction of the cold storage and, proceeding on the basis of the valuation of the said property made by the assessee''s own valuer, respondent No. 1 in calculating the cost of construction of the said property found that there was a glaring understatement in the cost of construction of the building. Mr. Pal urged that the valuation report given to the bank by the assessee in 1968 clearly showed that what was disclosed by the assessee to the assessing-ITO at the time of the original assessment was not correct and something must have been kept back so that there was such an unusual increase in the valuation. Mr. Pal also referred to the assessment order for the assessment year 1960-61 that depreciation was allowed only on usable units and. such units were constructed every month. The depreciation was given on the units used in the year and not on brick, mortar or other construction materials.

28. In support of his contention, Mr. Pal cited the following decisions:

CIT v. T.S. PL. P. Chidambaram Chettiar [1971] 80 ITR 467 (SC). Here, a mortgage suit for Rs. 5,50,573 was compromised for Rs. 3,50,500 in full satisfaction of the mortgagee''s claim. During the assessment proceeding of the son of the mortgagee who died in the meantime, the assessing-ITO received information that during the relevant accounting period the mortgagor had secretly paid certain amount to the mortgagee which was not included in the compromise decree which was, however, denied by the assessee. The ITO completed the assessment pending further investigation in the matter. After further inquiry, the ITO issued a notice to the assessee for the said assessment year u/s 34 of the Indian income tax Act, 1922. On these facts, the Supreme Court observed that the fact that the ITO could make further enquiry into the matter before completing the assessment did not take the case out of section 34, particularly when the assessee had failed to disclose fully and truly all the material facts for the said assessment.

29. Smt. Nirmala Birla v. WTO [1976] 105 ITR 483. A Full Bench of this court observed that an assessment could not be reopened on a mere change of opinion unsupported by new information but it could be reopened on a change of opinion supported by new information.

30. Mr. Pal referred to section 10 and (vi) of the Indian income tax Act, 1922, providing for allowance on profits and gains of business, profession or vocation which are allowed every year and submitted that for determining such allowance yearwise valuation could be made and additions made and used in the business from time to time had to be considered. Mr. Pal contended that the notices were not bad and he relied on section 283 of the income tax Act, 1961, which, inter alia, provides that in the case of a firm which is dissolved, the notice under the Act in respect of the firm may be served on any person who was a partner, immediately before its dissolution. Mr. Pal also referred to the impugned notices and submitted that it was clear from the notices that the petitioners were served as partners of M/s. Ambica Cold Storage, now defunct, and so far as Rasiklal Jivanlal Shah and Ramdas Maganlal Shah, they were also served on behalf of two of the deceased partners. In support of his contention, Mr. Pal cited a decision of the Mysore High Court in K.L. Parvathamma v. ITO [1974] 93 ITR 138, where it was held that u/s 283 of the income tax Act, 1961, notice served on any person who was a partner of the dissolved firm was sufficient and it was not necessary to issue notice to all the persons who were members of the dissolved firm. Mr. Pal further submitted that the petitioners were fully aware and were apprised of the fact that the income of the dissolved firm was sought to be assessed u/s 147 of the Act as would appear from the letter dated the 7th January, 1977, written by respondent No. 1 to the petitioners and the reply thereto given by the petitioners on the 17th January, 1977. The parties, therefore, understood whose income was sought to be assessed by the notices which should be construed reasonably and not strictly. It was also urged by Mr. Pal that if the income of the individual partners was sought to be assessed then a joint notice to all the partners could not be given; they should have been served with separate notices and only because the income of the firm was to be assessed that is why the petitioners were given a joint notice.

31. In my opinion, if the assessing-ITO accepted the accounts and figures given by the assessee with regard to the cost of construction of the building of the cold storage or of the land, plant and machinery and other accessories as disclosed before him by the assessee in the original assessments without making any further investigation in the matter there should, therefore, be no complaint afterwards that the assessee did not file valuation reports in respect thereof in the said assessments. It was open to the assessing-ITO to make further investigation with regard thereto if he was not satisfied with the particulars and data furnished by the assessee. If he did not do so, it could not be said afterwards that there was no true or full disclosure of the material facts by the assessee for the said assessments. u/s 147, clause (a) or (b), the ITO has no unchartered power to reopen an assessment.

Such power of the ITO is subject to the limitations contained in the said section which are conditions precedent to the exercise of such power. u/s 147 the limitations are, firstly, he must have reason to believe that the income of the assessee has escaped assessment and, secondly, that the income has so escaped by reason of omission or failure on the part of the assessee to disclose fully and truly the material facts. The material facts which the assessee is required to disclose are only primary facts; no duty is cast upon him to indicate what factual or legal inference should be drawn therefrom. Here, the categorical statement made by the petitioners in the writ petition is that there was no omission or failure to disclose fully and truly all particulars of income of the said firm for the said assessment years and details of the accounts with regard to the constructions of the cold storage and of the expenses incurred for the same were duly filed before the assessing-ITO who on examination of all the materials completed the assessments. These statements made by the petitioners remain uncontroverted by the assessing-ITO. In Kantamani Venkata Narayana [1967] 63 ITR 638 (SC), the proceedings for reassessment u/s 34 of the Indian income tax Act, 1922, were initiated on the discovery that there was a large accretion to the wealth of the assessee which was not disclosed in the proceedings for its assessment. Therefore, there was failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment and that duty was not discharged merely by the production of books of account or other evidence, but it was the duty of the assessee to bring to the notice of the ITO particular items in the books of account or portions of the documents which were relevant. Here, however, the case is not of large accretion to the wealth of the said firm but in February, 1968, the assessee caused the said cold storage to be valued for the purpose of obtaining a loan from the Hongkong & Shanghai Bank where the value of the cold storage was shown at Rs. 23,27,428. That is the basis on which respondent No. 1 proceeded on a process of back calculation up to the year 1958 on the date for increase in the valuation year-wise supplied to him by the departmental valuer. The valuation of a particular property or asset is an opinion of a particular valuer who has valued the same. The cold storage was completed in 1963 and the valuation was made 5 years thereafter in 1968. The increase in the valuation could be on (account of) various factors and not merely on the increase in the valuation of the land or on the cost of construction such as construction materials, labour, etc., but on the site, the development thereof in course of years, development, if any, of the area or locality as a whole in which the cold storage is situate and such other factors. Thus, the data given to respondent No. 1 by the departmental valuer as to the increase in the cost of construction in various years from 1958 to 1968 that there was 60% increase from 1958 to 1968 or 55% increase from 1959 to 1968 or 50% increase from 1960 to 1968 or 25% increase between 1961 and 1968, could not, even if correct, give the basis for any correct valuation of'' the cold storage in different years between 1958 and 1968. Respondent No. 1 proceeded on the basis that the valuation made in February, 1968, by the assessee''s valuer was a correct valuation. That was again the opinion of the valuer who made the valuation which

might or might not be correct. Mr. Bhattacharjee is right in his contention that the departmental valuer whom respondent No. 1 consulted did not ascertain whether the valuation made by the assessee''s valuer was correct or not and it was taken for granted that the said valuation was correct and sacrosanct. The contention of Mr. Bhattacharjee that no enquiry was made by respondent No. 1 whether there was any further construction between 1963 and 1968 which might have gone to increase the value of the construction is not without force. The basis on which respondent No. 1 initiated the instant proceeding will appear from the recorded reasons, relevant portion whereof is set out below:

The assessee-firm constructed a cold storage at Sheoraphully at a cost of Rs. 8,61,269 over O. yrs. 1958 to 1965. The cost of each constituent of cold storage, such as land, building, plant and machinery, racks, etc., in the individual years is indicated in the statement attached to the proposal as annexure ''A''.

Annexure ''A'' would show that nearly 56.6% of the investment on the cold storage was made in the O. Yr. 1958. As a matter of fact the cold storage went into operation in 1959 as is evident from the following categorical statement in the report of the assessee''s valuer.

''Cold Storage was constructed along with all other structures in 1958 and commissioned in 1959.''

Any subsequent investments were obviously by way of additions and extensions to the cold storage. The assessee got the cold storage valued by a qualified private valuer as on February 21, 1968. The valuer valued the cold storage at Rs. 23,27,428. The revenue audit noted the remarkable difference between the cost of construction of the cold storage, as per assessee''s books (which also is reflected in the annexure ''A'' referred to above) and the valuer''s valuation of it and remarked that income to the extent of Rs. 18,69,590, had escaped assessment.

32. From the above, it will appear that respondent No. 1 admits that any subsequent investments after 1959 when the cold storage was commissioned in 1959 were obviously by way of additions and extensions to the cold storage. The cost of construction of the cold storage at Rs. 8,61,269 was shown by the assessee between calendar years 1958 to 1965. Respondent No. 1 did not make any investigation or try to find out if there was any further additions or extensions after 1965 and up to February, 1968, when the said cold storage was valued by the assessee''s valuer.

33. Unlike Kantamani Venkata Narayana''s case [1967] 63 ITR 638 (SC), here the categorical statement of the petitioners is that they disclosed before the assessing-ITO full particulars about the purchase of the land, detailed list of expenses and other evidence showing cost of construction of the cold storage which were considered by the assessing-ITO and after ascertaining the actual cost of the building, he not only made the assessments but also allowed the depreciation which could not have been allowed without ascertaining the cost of the building. That

depreciation was allowed is evident from the assessment orders and is undisputed. The statement as to disclosure of full details of the costs and expenses and consideration thereof by the assessing-ITO are not controverted by the said ITO. Therefore, as observed by the Supreme Court in Kantamani Venkata Narayana''s case [1967] 63 ITR 638 (SC), with regard to the duty of the assessee in assessment proceeding, appears to have been discharged by the firm.

34. In my opinion, the valuation of a completed cold storage in 1968 could not furnish the basis for the valuation of the land, building, structures, plants, machinery and other accessories in the process of construction and setting up of the cold storage during the years 1958 to 1963. Admittedly, the cold storage was not complete until 1963. What was considered in the said assessments were the costs and expenses incurred by the firm for the purchase of the land and for construction of the building and structures and setting up of the plant and machinery and other accessories and not the valuation of the same taken as a whole as a complete cold storage. Thus, the process of back calculation resorted to by respondent No. 1 in finding out the value of the construction of the cold storage in the several years between 1958 and 1963 based on the data furnished to him by the departmental valuer on the basis of the valuation of the cold storage made by the assessee''s valuer in 1968 could not be said to be material for the formation of the belief of respondent No. 1 either that income of the firm had escaped assessment or that such escapement was due to any failure on the part of the firm to disclose fully and truly any material facts relevant for the assessment.

35. In my view, there was also no independent exercise of mind or formation of belief by respondent No. 1 so as to enable him to exercise his power u/s 147 of the Act. Respondent No. 1 has proceeded solely on the opinion of the departmental valuer resting on a further opinion of the assessee''s valuer.

36. On the view that I have taken, it is not necessary to go into the other points raised on behalf of the parties.

37. For all the above reasons, the petitioners succeed in this rule. The impugned notices u/s 148 of the income tax Act, 1961, are quashed and the rule is made absolute. There will be no order as to costs. This order will govern the other rule in C.R. No. 2494(W) of 1978. Operation of the order will remain stayed for a period of three weeks as prayed for.