IN THE INCOME TAX APPELLATE TRIBUNAL,
DELHI BENCH: 'C' NEW DELHI

BEFORE SHRI AMIT SHUKLA, JUDICIAL MEMBER
AND
SHRI O.P. KANT, ACCOUNTANT MEMBER
[Through Video Conferencing]

ITA No.3768/Del./2017
Assessment Year: 2009-10

Addl.CIT, Special Range-4, New Delhi	**Vs.**	IRCON International Ltd., C-4, District Centre, Saket, New Delhi
		PAN :AAACI0684H
(Appellant)		**(Respondent)**

Appellant by	Shri Gurmel Singh, Sr. DR
Respondent by	Dr. Rakesh Gupta, Adv.

Date of hearing	06.01.2021
Date of pronouncement	22.01.2021

ORDER

PER O.P. KANT, AM:

This appeal by the Revenue is directed against order dated 10/02/2017 passed by the Learned Commissioner of Income-tax (Appeals)-39, New Delhi [in short 'the Ld. CIT(A)'] for assessment year 2009-10 raising following grounds:

1. *On the facts and circumstances of the case, the Ld. CIT(A) has erred in holding the reopening of the assessment by issuing notice u/s 148 of the Act as void ab initio.*
2. *The appellant craves leave, to add, alter or amend any ground of appeal raised above at the time of hearing.*

2. Briefly stated facts of the case are that the assessee is a Government company engaged in execution of turnkey projects in India and abroad relating to railway and highway construction etc. The scrutiny assessment for the year under consideration under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 30/12/2011 at total income of ₹ 168,77,00,674/-against the returned income of ₹ 7,84,81,841 /-. Subsequent to the assessment, the Assessing Officer noticed that the assessee company had translated the accrued interest on deferred IRAQI dues and provision for interest to subcontractors at exchange rate on last settlement date from Government of India and not at the rate prevalent as on 31/03/2009 (i.e. last date of the relevant financial year). According to the Assessing Officer, non-observation of the mandatory provision of translating the foreign-exchange transaction on the last date of the financial year, the profit declared by the assessee was lower by an amount of ₹ 6,90,40,000/- and, therefore, the said income was escaped assessment. The Assessing Officer, accordingly, recorded reasons to believe that income escaped assessment and issued notice under section 148 of the Act on 24/03/2014. In the reassessment proceedings completed on 20/02/2015, the Assessing Officer after restating the interest liability keeping in view the dollar exchange rate on the last date of the balance-sheet for the year under consideration, made addition of ₹ 6,90,40,000/-.

2.1 Before the Ld. CIT(A), the assessee challenged legality of reassessment proceeding as well as addition on merit. The Ld. CIT(A) quashed the reassessment proceeding on the ground that

there was no tangible material before the Assessing Officer to form reasons to believe and it was based merely on the 'change of the opinion' on same set of record. The relevant finding of the Ld. CIT(A) is reproduced as under:

> *"5.5 It is also observed from the submissions of the appellant that its objection to the reopening stood on the same ground whether at the assessment stage or at the appellate stage. The AR of the appellant has harped on only one thing - the tangible external material which led to the reason for the belief that "income has escaped assessment" in view of the fact that the material on the basis of which the assessment was reopened was not only available in the records at the time of the original assessment but also was essentially a part of the Notes to Accounts forming part of the return of income. Further, it was emphasized during the appeal hearing that the point regarding the nonrestatement of interest on deferred Iraqi dues as on the balance sheet date as on 31/03/2009 was already argued at the time of the original assessment by mentioning, inter alia, "Original assessment in this case was made u/s 143(3) after considering the relevant material having bearing on the issue at hand explaining as to why the outstanding liabilities cannot be restated on the balance sheet date of this year or of earlier years since payment has not been forthcoming since last two decades".*
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> *While the decision of the Hon'ble Gujarat High Court in the cases mentioned above rests on the plank that up to four years an assessment is open to the AO's unreserved consideration on his formation of the requisite belief whose formation is not a judicial decision but an administrative decision, yet in that case the AO while making an order of protective assessment in respect of AY 1993-94 found that there was a transfer in favour of the partnership firm by the assessee of his trade stock-in-trade on 19/09/1990, the capital account of the assessee in the firm was credited by Rs.14 lakhs and though the stock-in-trade was sold to that firm on that day, it remained to be taxed in the case of that assessee in that AY 1991-92. Even in the case of Bawa Abhai Singh, the Hon'ble Delhi High Court (jurisdictional high court) it has been observed, inter alia, "...What is really necessary to be adjudicated in a case of this nature is about existence of relevant material which form foundation of a belief and constitutes reasons for entertaining a belief about escapement of an income...". Further, it is held legally that an Assessing Officer does not have power to review an assessment. Hence, merely giving reason that perusal of records or a past assessment has formed the reason for the belief that income has*

escaped assessment does not per se make the reopening of an assessment stand in the court of law. In fact, in Madhukar Khosla vs. CIT (2014) 367ITR 165 (Del), relied on by the appellant, it has been observed, inter alia, "The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or materials constitute the driver, or the key which enables the authority to legitimately reopen the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the reopening of assessment amounts to "review" or "change of opinion" arises. In other words, if there is no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review...".

5.6 It is also observed from the appellant's submissions, both at the assessment stage and at the appellate stage mentioned earlier, that it had placed reliance on the decision of the jurisdictional High Court (Delhi HC) that has been ratified by the Hon'ble Supreme Court with regard to the reopening and the manner in which the foundation for the belief that "income has escaped assessment. In CIT Vs Kelvinator of India Ltd (2002) 256 ITR 1 (Del) it was observed that an order that has been purportedly passed without application of mind could not itself confer jurisdiction upon the AO to reopen the proceeding "without anything further" as that would amount to "giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong". Further, upholding this decision of the Delhi High Court, the Hon'ble Supreme Court in CIT Vs. Kelvinator of India Ltd (2010) 320 ITR 561 (SC) observed that the power to reopen assessments w e f 1/04/1989 was much wider and also observed, inter alia, "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1s April, 1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."*

5.7 From the above paras, it is observed that the arguments and submissions given by the AR of the appellant appear plausible as they are borne out from records and in accordance with the existing law in this regard. Further, the issue regarding non-restatement of interest in foreign currency and not including it in its income exigible to income tax is by the appellant was already considered and accepted in the original assessment u/s 143(3). Also, the absence of tangible material which formed the basis of the belief - the question as to how did the AO come to peruse the assessment records when the assessment was already completed necessarily, in my opinion, constitutes a 'review' which, an AO is not permitted to do under the Act. Accordingly, in due deference to the decisions of the apex court and the jurisdictional high court mentioned supra, the reopening of the original assessment u/s 143(3) by resorting to Section 147 of the Act based on the reasons mentioned above is, in my opinion, void ab initio and accordingly, the rejection of the appellant's objection to the reopening of the original assessment u/s 143(3) as well as the subsequent order of reassessment u/s 143(3) r w 147 of the Act are cancelled (albeit without going into the merits of the addition of the income escaping assessment."

2.2 Aggrieved with the finding of the Ld. CIT(A), the Revenue is in appeal before the Tribunal raising the grounds as reproduced above .

3. Before us, Ld. DR submitted that assessment has been reopened within four years from the last date of the assessment year and, therefore, the proviso to section 147 of the Act is not applicable, where it is mentioned that beyond four years from the end of the relevant assessment year except failure on the part of the assessee in disclosing fully and truly all material facts, no assessment can be reopened. He submitted that in the original assessment no view or opinion was formed on the issue of restating of the interest liability by the Assessing Officer, and therefore, the question of 'change of opinion' does not arise. The Ld. DR also relied on the decision of the Hon'ble Delhi High Court in the case of Bawa Abhai Singh Vs DCIT (2001), 253 ITR 83 (Del) and decision of Hon'ble Gujrat High Court in the case of

Praful Chunnilal Patel Vs M. J. Makwana CIT, (1999) 236 ITR 832 (Guj).

4. The Ld. Counsel of the assessee filed a paper-book electronically containing pages 1 to 211. He submitted that disclosure of the facts relating to Iraqi dues was made in note No.14 of schedule 'R" of balance-sheet of the assessee company and this note was appearing in assessee's accounts for more than last 10 years. He submitted that during this period several scrutiny assessments have been done and no objection had been raised in any of those years. According to him, taking different view of the matter in the instant year amounts to change of opinion. He relied on the order of the Ld. CIT(A) to support his arguments. He further submitted:

(i) that in view of the following decisions, in absence of any fresh tangible material, the Assessing Officer is excluded from reopening the assessment even within four years from the end of the assessment year merely on the 'change of the opinion' on the same set of records available before him:

- PCIT Vs Century Textiles & Industries Ltd (2018) 259 Taxman 360 (SC)
- Jalaram Enterprises P ltd Vs ITO (2019) 262 Taxman 404 (Bom)
- Tulsi Developers Vs DCIT (2013) 353 ITR 530 (Guj)
- HK Buikscon Ltd Vs ITO (2011) 339 ITR 535 (Guj)

- ACIT Vs Nityanand Infrastructre Ltd. (ITA No. 2255/Mum/2017)
- ACIT Vs Ms Seema Dilip Vora (ITA No. 582/Mum/2017
- Replika Press Private Limited & Anr Vs DCIT (2013) 92 DTR 153 (del)
- Madhukar Khosla Vs ACIT(2014) 367 ITR 165 (Del)
- PCIT Vs Tupperware India private limited (2016) 284 CTR 68(del)
- Turner Broadcasting Systems Asia Pacific Inc. vs DCIT (2016) 380 ITR 412 (del)
- Rasalika Trading and Investemnt Co. Pvt Ltd Vs DCIT (2014) 365 ITR 447(Del)

(ii) that the Assessing Officer has not applied his mind while adopting rate of US dollar for computing interest liability and therefore, reasons need to be rejected on the ground of non-application of mind also.

(iii) that no addition has been made on this account in subsequent years and no case of prior year has either been reopened on this account also.

5. We have heard rival submission of the parties on the issue in dispute and perused the relevant material on records. In the case, the assessment completed u/s 143(3) of the Act in 2009-10, and subsequently, the assessment has been reopened on 24/03/2014, therefore, the assessment has been reopened within

four years from the end of relevant assessment year. In case of reopening of assessment completed u/s 143(3) of the Act, beyond four years, the Act has provided that except failure on the part of the assessee to disclose all material facts fully and truly necessary for assessment, reopening is not permitted. The relevant proviso below section 147 of the Act is reproduced as under:

> ***"Income escaping assessment.***
>
> ***147.*** *..... :*
>
> ***Provided*** *that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"*

5.1 In the case before us, the assessment which was completed under section 143(3) of the Act, has been reopened within four years from the end of the relevant assessment year. Therefore, issue in dispute before us is that in what circumstances assessment can be reopened within the period of four years from the end of the relevant assessment year. This issue has been discussed and adjudicated by Hon'ble High Court's and Supreme Court in various decisions, which have been cited by parties before us.

5.2 In the case of **Bawa Abhai Singh Vs CIT** (supra) relied upon by the Learned DR, the issue involved the issue involved was

whether the report of the valuation officer constitute information on the basis of which assessment can be reopened. The Hon'ble High Court in their decision dated 23/03/2001 analyzed the provisions of section 147 of the Act prior to 31/03/1989 and provisions thereafter and held that '*after the amendment to section 147 of the Act, an assessment can be reopened u/s 147 within the period of four years from the end of relevant assessment year, even if there is a full and true disclosure of all material facts in the original assessment*' The relevant finding of the Hon'ble High Court is reproduced as under:

> ***"7.*** *The crucial expression is "reason to believe". The expression predicates that AO must hold a belief.....by the existence of reasons for holding such a belief. In other words, it contemplates existence of reasons on which belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran & Sons (P) Ltd. vs. ITO (1981) 22 CTR (SC) 112 : (1981) 130 ITR 1 (SC) : TC 51R.639, expression "reasons to believe" is stronger than the expression "is satisfied". Belief entertained by the AO should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. In S. Narayanappa vs. CIT (1967) 63 ITR 219 (SC) : TC 51R.651 it was noted by the apex Court that expression "reasons to believe" in s. 147 does not mean purely a subjective satisfaction on the part of the AO, belief must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether reasons for the belief have a rational nexus or a relevant bearing to the formation of belief and are not extraneous or irrelevant for the purpose of the section. To that limited extent, action of the AO in initiating proceedings under s. 147 can be challenged in a Court of law. As was observed by this Court in R. Dalmia vs. Union of India (1972) 84 ITR 616 (Del) : TC 51R.385 that there should be facts before the AO that reasonably give rise to a belief, as noted above, but then it may not be conclusive to support the tentative conclusion. A mere fanciful belief that income has escaped assessment which is not based on law will not justify action under s. 147. It has been observed by the apex Court in several cases that belief of the AO is as to escapement of income and belief should not be a product of imagination or speculation. There must be reason to induce*

belief. The same should be by reason of omission or failure on the part of assessee to disclose fully and truly his income. The position has changed after 1st April, 1989.

Upto 31st March, 1989, two conditions were required to be fulfilled to confer jurisdiction on the AO to act under s. 147(b). They were (1) he must have information which comes into his possession subsequent to the making of the original assessment order, and (2) that information must lead to his belief that income chargeable to tax has escaped assessment, or that it has been underassessed or assessed at too low a rate or has been made the subject of excessive relief.

After 1st April, 1989, the position is somewhat different. Sec. 147 w.e.f. 1st April, 1989, provides that where AO has reasons to believe that any income chargeable to tax has escaped assessment for any assessment year he may apply the provisions of ss. 148 to 153. He may assess or reassess the income which has escaped assessment. It is to be noted that s. 147 as it stands w.e.f. 1st April, 1989, not only merges cls. (a) and (b) of the pre-amended s. 147 but also brings about a significant change in the preliminary requirement of certain conditions mandatory in character before reassessment proceedings should be initiated in the pre-amended section. Conditions precedent for initiation of action under s. 147(a) or 147(b) of the pre-amended situation, is highlighted above. The amendment provisions are contextually different and the cumulative conditions spelt out in cl. (a) or (b) of s. 147 prior to its amendment, are not present in the amended provision. The only condition for action is that AO should have reason to believe that income has escaped assessment, which belief can be reached in any manner and is not qualified by a precondition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended s. 147(a) of the Act and AO can under the amended provisions legitimately reopen the assessment in respect of an income which has escaped assessment. Viewed in that angle power to reopen assessment is much wider under the amended provision and can be exercised even after assessee has disclosed fully and truly all the material facts. To similar view were the conclusions of this Court in Rakesh Aggarwal vs. Asstt. CIT (1997) 142 CTR (Del) 272 : (1997) 225 ITR 496 (Del) : TC S51.4080. It is to be noted at this juncture that twin conditions must be fulfilled if the case is one which is covered by the proviso to s. 147 operative w.e.f. 1st April, 1989."

5.3 The Hon'ble High Court of Gujarat in the case of **Praful Chunnilal Vs MJ Makwana CIT** (supra) has in their decision dated 19/02/1998 expressed that '*though the material was*

available on record at the time of assessment, when no conscious consideration of the material is made, it will not put an embargo under the provision of 147 of the Act, as prima facie, there could not be change of opinion in such scenario'. The relevant finding of the Hon'ble Court is reproduced as under:

> ***"6.*** *There is no dispute about the fact that the impugned notice under s. 148 of the Act, has been issued within four years from the end of the relevant asst. yr. 1991-92. Under s. 147 of the said Act, within four years from the end of the relevant assessment year, the AO, where he has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, may assess or reassess such income. However, after four years, the proviso would be attracted and no action can be taken under this section unless such income has escaped assessment by reason of failure on the part of the assessee to make return under s. 139 or in response to a notice under s. 142(1) or s. 148 of the said Act, to disclose fully and truly all material facts for his assessment for that assessment year. Therefore, it is only when the case falls under the proviso that the question of non-disclosure of material facts would become relevant. In such cases, if the assessee has made full disclosure on record, then even if such income has escaped assessment, no action can be initiated by the AO under this section. Where, however, the said period of four years has not expired, the conduct of the assessee regarding disclosure of material facts need not be the basis for initiating the proceedings and they can be commenced if the AO has reason to believe that the income has escaped assessment notwithstanding that there was full disclosure of material facts on record. The assessee in such cases cannot defend the initiation of action on the ground that the facts were already placed on record and that the AO must have or ought to have considered them. Expln. 1 to s. 147 of the said Act has a bearing on disclosure aspect and it applies to the proviso to the extent it allows initiation of the proceedings under s. 147 on account of non-disclosure of material facts by the assessee.*
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> *Expln. 2 applies to the entire section and it enumerates deemed cases where income has escaped assessment. Clause (a) thereof covers the case where no return is filed though the income had exceeded the maximum amount which is not chargeable to income-tax. In such cases, in order to put it beyond the pale of doubt or controversy, the provision is made that they will be deemed to be cases of escaped assessment so as to warrant the*

proceedings even beyond the said period of four years, since, in that event, the case would fall in the enabling part of the proviso. Clause (b) deals with cases where no assessment is made and the AO notices that the income is understated or excessive loss, deduction allowance or relief is claimed in the return. These would be cases where the return is accepted without scrutiny and no formal assessment is made. Clause (c) would cover cases where, in the assessment already made, income was underassessed or assessed too low or excessive relief is given or that excessive loss or depreciation allowance or other allowance under the Act has been computed. In the aforesaid deemed cases of escapement of income, the AO can initiate the proceedings on finding or discovering such cases and no debate whether they constitute cases of escapement of income, would be permissible.

7. *It will thus, be seen that in the proceedings taken under s. 147, the AO may make an assessment or reassessment or recomputation, as the case may be. The word 'assess' refers to a situation where the assessment was not made in the normal manner while the word 'reassess' refers to a situation where an assessment is already made, but it is sought to be reassessed on the basis of this provision.*

In cases where the AO has not made an assessment of any item of income chargeable to tax while passing the assessment order in the relevant assessment year, it cannot be said that such income was subjected to an assessment. In the assessment proceedings, the AO would ascertain on consideration of all relevant circumstances the amount of tax chargeable to a given taxpayer. The word 'assessment' would mean the ascertainment of the amount of taxable income and of the tax payable thereon. In other words, where there is no ascertaining of the amount of taxable income and the tax payable thereon, it can never be said that such income was assessed. Merely because during the assessment proceedings the relevant material was on record or could have been with due diligence discerned by the AO for the purpose of assessing a particular item of income chargeable to tax, it cannot be inferred that the AO must necessarily have deliberated over it and taken it out while ascertaining the taxable income or that he had formed any opinion in respect thereof. If looking back it appears to the AO, (albeit within four years of the end of the relevant assessment year) that a particular item even though reflected on the record was not subjected to assessment and was left out while working out the taxable income and the tax payable thereon, i.e., while making the final assessment order, that would enable him to initiate the proceedings irrespective of the question of non-disclosure of material facts by the assessee. In fact, if there is material placed on record which would show

existence of income chargeable to tax and which ordinarily ought to have been included in the ascertainment of taxable income made in the assessment order but was not so included, that would itself provide a cause or justification for a belief to the AO that such income had escaped assessment and the AO in such cases would be ex facie justified in initiating the proceedings on such basis. The cases of non-assessment of an item of income chargeable to tax would warrant formation of requisite belief to initiate the proceedings within four years of the end of the relevant assessment year, even where full disclosure were made and yet an income chargeable to tax had escaped from being included in the final assessment order in which taxable income was worked out. In such cases the AO has in fact a duty to exercise his jurisdiction. The AO has not to conclusively come to any finding on the facts which prompted his reason to believe, at the stage of the issuance of notice under s. 148 pursuant to which the assessee is to be heard; and the order if adverse, can be questioned under the provisions of the Act.

8. *The cases of underassessment or excessive relief which are deemed cases of escapement of income leave no scope for an argument that they are not the cases of income having escaped assessment. If the AO prima facie finds or discovers that the case falls in any of the clauses of Expln. 2, then those cases will be of deemed cases of income that has escaped assessment and without anything more beyond such find or discovery, he can initiate the proceedings under s. 147 of the Act. On a proper interpretation of s. 147 of the Act, it would appear that the power to make assessment or reassessment within four years of the end of the relevant assessment year would be attracted even in cases where there has been a complete disclosure of all relevant facts upon which a correct assessment might have been based in the first instance, and whether it is an error of fact or law that has been discovered or found out justifying the belief required to initiate the proceedings. In our view, the words "escaped assessment" where the return is filed, are apt to cover the case of a discovery of a mistake in the assessment caused by either an erroneous construction of the transaction or due to its non-consideration, or, caused by a mistake of law applicable to such transfer or transaction even where there has been a complete disclosure of all relevant facts upon which a correct assessment could have been based.*

9. *As noted above, the provision of s. 147 requires that the AO should have reason to believe that any income chargeable to tax has escaped assessment. The word "reason" in the phrase 'reason to believe' would mean cause or justification. If the AO has a cause or justification to think or suppose that income had*

escaped assessment, he can be said to have a reason to believe that such income had escaped assessment. The words "reason to believe", cannot mean that the AO should have finally ascertained the facts by legal evidence. They only mean that he forms a belief from the examination he makes and if he likes from any information that he receives. If he discovers or finds or satisfies himself that the taxable income has escaped assessment, it would amount to saying that he had reason to believe that such income had escaped assessment. The justification of his belief is not to be judged from the standards of proof required for coming to a final decision. A belief though justified for the purpose of initiation of the proceedings under s. 147, may ultimately stand altered after the hearing and while reaching the final conclusion on the basis of the intervening enquiry. At the stage where he finds a cause or justification to believe that such income has escaped assessment, the AO is not required to base his belief on any final adjudication of the matter. In the present case, from the first assessment it appeared to the AO, while making an order in respect of the asst. yr. 1993-94, that the amount of taxable income in the form of capital gains in respect of the transfer of the land which was treated as stock-in-trade on 19th Sept., 1990, in favour of the firm and the tax payable thereon not being ascertained, there was escapement of income. Since the AO at the first assessment in the year 1991-92 never really formed an opinion on the question whether there was a transfer on 19th Sept., 1990, of the land in question to the firm and that the amounts credited to the accounts of the partners who had contributed the lands to the firm, were meant to be the price of the land which was to be actually paid from the collections received by the firm from membership fees as soon as received, as was envisaged admittedly in para. 11 of the partnership deed, there was no question of any change of opinion when on the relevant facts being found the AO, while protectively assessing the petitioner-assessee for the year 1993-94, noted that this was a case for issuance of a notice under s. 148, which came to be issued thereafter. When the amount of taxable income and of the tax payable thereon were not ascertained at all by the AO in respect of the transfer made by the assessee in favour of the firm on 19th Sept., 1990, there obviously was no opinion formed in that regard and consequently, there would not arise any question of a mere change of opinion. In cases where the AO had overlooked something at the first assessment, there can, in our opinion, be no question of any change of opinion when the income which was chargeable to tax is actually taxed as it ought to have been under the law but was not, due to an error committed at the first assessment."

5.4 The full bench of Hon'ble Delhi High Court in the case of **Commissioner of Income-tax Vs Kelvinator of India Ltd., 256 ITR 1 (Del)(FB)** in their decision dated 19/04/2002 did not subscribe to the finding in the case of Bawa Abhay Singh (supra) and Praful Chunilal Patel (supra) and held that *'the AO does not have any jurisdiction to review its own order and initiate reassessment proceeding upon mere change of opinion based on the material which was already available before the Assessing Officer'.* The relevant finding of the Hon'ble High Court is reproduced as under

> ***"15.*** *It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the ITO does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the Revenue is not without remedy. Sec. 263 of the Act empowers the CIT to review an order which is prejudicial to the Revenue.*
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> ***16.*** *In Bawa Abhai Singh's case (supra) a Division Bench of this Court of which one of us (D.K. Jain, J.) is a Member, clearly held :*
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> *"The crucial expression is "reason to believe". The expression predicates that the AO must hold a belief.....by the existence of reasons for holding such a belief. In other words, it contemplates existence of reason on which belief is founded and not merely a belief in the existence of reasons inducing the belief. Such a belief may not be based merely on reasons but it must be founded on information. As was observed in Ganga Saran & Sons (P) Ltd. vs. ITO (1981) 22 CTR (SC) 112 : (1981) 130 ITR 1 (SC) : TC 51R.639, the expression "reason to believe" is stronger than the expression "is satisfied". The belief entertained by the AO should not be irrational and arbitrary. To put it differently, it must be reasonable and must be based on reasons which are material. In S. Narayanappa vs. CIT (1967) 63 ITR 219 (SC) : TC 51R.651, it was noted by the apex Court that the expression "reason to believe" in s. 147 does not mean purely a subjective satisfaction on the part of the AO, the belief must be held in good faith; it cannot be merely a pretence. It is open to the Court to examine whether the reasons for the belief have a rational nexus or a relevant bearing to the formation of the belief and are not extraneous or irrelevant*

for the purpose of the section. To that limited extent, the action of the AO in initiating proceedings under s. 147 can be challenged in a Court of law."

It was further observed :

"Upto 31st March, 1989, two conditions were required to be fulfilled to confer jurisdiction on the AO to act under s. 147(b). They are : (1) he must have information which comes into his possession subsequent to the making of the original assessment order, and (2) that information must lead to his belief that income chargeable to tax has escaped assessment, or that it has been under-assessed or assessed at too low a rate or has been made the subject of excessive relief.

After 1st April, 1989, the position is somewhat different. Sec. 147 w.e.f. 1st April, 1989, provides that where AO has reasons to believe that any income chargeable to tax has escaped assessment for any assessment year he may apply the provisions of s. 148 to 153. He may assess or reassess the income which has escaped assessment. It is to be noted that s. 147 as it stands w.e.f. 1st April, 1989, not only merges cls. (a) and (b) of the pre-amended s. 147 but also brings about a significant change in the preliminary requirement of certain conditions mandatory in character before reassessment proceedings should be initiated in the pre-amended section. The conditions precedent for initiation of action under s. 147(a) or 147(b) of the pre-amended situation, is highlighted above. The amendment provisions are contextually different and the cumulative conditions spelt out in cl. (a) or (b) of s. 147 prior to its amendment, are not present in the amended provision. The only condition for action is that the AO should have reason to believe that income has escaped assessment, which belief can be reached in any manner and is not qualified by a precondition of faith and true disclosure of material fact by an assessee as contemplated in the pre-amended s. 147(a) of the Act and AO can under the amended provisions legitimately reopen the assessment in respect of an income which has escaped assessment. Viewed in that angle power to reopen assessment is much wider under the amended provision and can be exercised even after assessee has disclosed fully and truly all the material facts. To similar view were the conclusions of this Court in Rakesh Aggarwal vs. Asstt. CIT (1997) 142 CTR (Del) 272 : (1997) 225 ITR 496 (Del) : TC S51.4080, it is to be noted at this juncture that the twin conditions must be fulfilled if the case is one which is covered by the proviso to s. 147 operative w.e.f. 1st April, 1989."

[Emphasis, italicised in print, supplied by us].

It is evident from the afore-extracted position of the decision that it is not an authority for the proposition that a mere change in the opinion would also confer jurisdiction upon the AO to initiate a proceeding under s. 147 of the Act as was contended by Mr. Jolly.

17. *A decision as is well known, is an authority for the proposition that it decides and not what can logically be deduced therefrom. A point not raised nor argued at the Bar cannot be said to be the ratio of the decision.*

18. *Another aspect of the matter cannot be also lost sight of. The Board has power to issue circulars under s. 119 of the said Act. It is trite that the circulars which are issued by the CBDT are legally binding on the Revenue [See UCO Bank vs. CIT (1999) 154 CTR (SC) 88 : (1999) 237 ITR 889 (SC)]. Recently in CIT vs. Anjum M.H. Ghaswala & Ors. (2001) 171 CTR (SC) 1 : JT 2001 (9) SC 61, the apex Court following the said decision observed :*

"It is true that by this press release the Board had interpreted the provisions of the Act in a particular manner. Be that as it may, we would like to make it clear that every clarificatory note or press release issued by the Board does not have the statutory force like the circulars issued by the Board under s. 119 of the Act. It is only those circulars issued by the Board under the provisions of s. 119 of the Act, will have the statutory force and will be binding on every IT authorities. Therefore, the press release relied upon by Shri Ramamurti not being a circular issued under s. 119 of the Act will not be of any assistance to the respondents in support of their contentions."

If further observed that :

"Learned Solicitor General has pointed out that by virtue of the power vested in the Board under s. 119(2)(a) of the Act, the Board has issued circulars by Notification No. F. No. 400/234/95-IT(B), dt. 23rd May, 1996. As per this circular, it has empowered that the Chief CIT and Director General of Income-tax may waive or reduce interest charged under ss. 234A, 234B and 234C of the Act in the class of cases or class of incomes specified in para. 2 of the said order for the period and on conditions which are enumerated therein. He submitted that in view of the said circular, the same authority can be exercised by the commission since the said circular would amount to relaxation of the rigor of ss. 234A, 234B and 234C of the Act. We are in unison with this submission of the learned Solicitor General. This Court in a catena of cases has held that the circulars of the CBDT are legally binding on the Revenue. [See UCO Bank vs. CIT (supra). Since these circulars are beneficial to the assessees, such benefit can

be conferred also on the assessees who have approached the Settlement Commission under s. 245C of the Act on such terms and conditions as contained in the circular. In our opinion, it is for this purpose that s. 245F of the Act has empowered the Settlement Commission to exercise the power of an IT authority under the Act. We must clarify here that while exercising the power derived under the circulars of the board, the Commission does not act as a subordinate to the Board but will be enforcing the relaxed provisions of the circulars for the benefit of the assessee in the process of settlement."

19. *The Board in exercise of its jurisdiction under the afore-mentioned provisions had issued the circular on 31st Oct., 1989. The said circular admittedly is binding on the Revenue. The authority, therefore, could not have taken a view, which would run counter to the mandate of the said circular. Clause 7.2 as referred to hereinbefore is important.*

From a perusal of cl. 7.2 of the said circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out i.e., only with a view to allay the fears that the omission of the expression "reason to believe" from s. 147 would give arbitrary powers to the AO to reopen past assessment on mere change of opinion.

It is, therefore, evident that even according to the CBDT a mere change of opinion cannot form the basis for reopening a completed assessment.

20. *The submission of Mr. Jolly to the effect that the said circular cannot be construed in such a manner whereby the jurisdiction of the statutory authority would be taken away is not apposite for the purpose of this case. In Union of India & Ors. (supra), whereupon Mr. Jolly had placed strong reliance, the apex Court was dealing with an administrative instructions whereby no right was conferred upon the respondents to have the house rent amount included in their emoluments for the purpose of computing overtime allowance. The apex Court held that otherwise also the Government's instructions have to be read in conformity with the provisions of the Act. Therein the apex Court was not concerned with the statutory powers of a statutory authority to issue binding circulars.*

21. *Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra vires Art. 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is*

trite, should be favoured.

In the event it is held that by reason of s. 147 if ITO exercises its jurisdiction for initiating a proceeding for reassessment only upon mere change of opinion, the same may be held to be unconstitutional. We are, therefore, of the opinion that s. 147 of the Act does not postulate conferment of power upon the AO to initiate reassessment proceeding upon his mere change of opinion.

We, however, may hasten to add that if "reason to believe" of the AO if founded on an information which might have been received by the AO after the completion of assessment, it may be a sound foundation for exercising the power under s. 147 r/w s. 148 of the Act.

22. *We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the AO had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself.*

23. *We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the AO to initiate a proceeding under s. 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-s. (1) of s. 143 or sub-s. (3) of s. 143. When a regular order of assessment is passed in terms of the said sub-s. (3) of s. 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of cl. (e) of s. 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the AO to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.*

For the reasons afore-mentioned we are of the opinion that answer to the question raised before this Bench must be rendered in the affirmation i.e., in favour of the assessee and against the Revenue. No order as to costs."

5.5 The decision of the Hon'ble Delhi High Court in the case of Kelvinator of India Ltd. (supra) has been approved by the Hon'ble Supreme Court in **CIT Vs. Kelvinator of India Ltd 320 ITR 561(SC)** on 18/01/2010 and held that *'AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.* The relevant finding of the Hon'ble Supreme Court is reproduced as under:

> ***"4.*** *On going through the changes, quoted above, made to s. 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, reopening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the AO to make a back assessment, but in s. 147 of the Act (w.e.f. 1st April, 1989), they are given a go by and only one condition has remained, viz., that where the AO has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post 1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The AO has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the AO. Hence, after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to s. 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in s. 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe",*

Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the AO. We quote hereinbelow the relevant portion of Circular No. 549, dt. 31st Oct., 1989 [(1990) 82 CTR (St) 1], which reads as follows :

> *"7.2 Amendment made by the Amending Act, 1989, to re-introduce the expression 'reason to believe' in s. 147.—A number of representations were received against the omission of the words 'reason to believe' from s. 147 and their substitution by the 'opinion' of the AO. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of Court rulings in the past and was well settled and its omission from s. 147 would give arbitrary powers to the AO to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended s. 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new s. 147, however, remain the same."*

5.6 In the case of **PCIT Vs Century Textiles Industries Ltd.** (supra) cited by the Ld. counsel of the assessee, during regular scrutiny proceedings, the Assessing Officer raised specific queries with regard to the claim of section 80IC of the Act, which was duly responded by the assessee and the assessment was completed after reducing the claim under section 80IC of the Act. Subsequently, the Assessing Officer reopened the assessment on the ground that excess deduction was allowed to the assessee due to the reason that deduction was claimed on receipt/income, which were not derived from the business of the undertaking. The Hon'ble Bombay High Court in the case in their decision dated 03/04/2018 held that where the Assessing Officer has consciously made inquiries on an issue in regular assessment proceeding, he cannot reopen the assessment on the same issue.

The relevant finding of the of the Hon'ble High Court is reproduced as under:

> ***"11.*** *The undisputed position in the present case is that the regular assessment was completed under Section 143(3) of the Act and the re-opening has been issued within a period of four years from the end of the relevant Assessment Year. Thus, the rigour of the first proviso to Section 147 of the Act is not to be satisfied for issue of a reopening notice i.e. failure to disclose all material facts truly and fully necessary for assessment. It is also not disputed that in the regular assessment proceedings, queries were raised in respect of claim under Section 80IC of the Act and the same were responded to by the Respondent-Assessee resulting in reduction of claim for deduction under Section 80IC of the Act. In the above facts, it is self evident that the Assessing Officer was conscious of the claim of deduction made by the Respondent-Assessee under Section 80IC of the Act which led to the enquiry. It is for the Assessing Officer to decide the extent and nature of enquiry in respect of claim under Section 80IC of the Act. Therefore, when the Assessing Officer has taken a conscious decision of making enquiry under Section 80IC of the Act then it is not open to him to turn around and claim that certain aspects of the claim under Section 80IC of the Act were not considered by him. It is undisputed as pointed out above, Section 80IC of the Act was a subject matter of enquiry and this resulted in disallowance of Rs. 11.49 Crores out of the claim for Rs. 33.67 Crores made by the Respondent under Section 80IC of the Act. The decision of this Court in Export Credit Guarantee Corpn. of India Ltd. (supra), in our view, would have no application to the present facts as in that case admittedly during the regular assessment proceedings, the Assessing Officer has not applied his mind to the issue sought to be raised in the re-opening proceedings. In the aforesaid decision, it was held that the Assessing Officer has ignored relevant material in arriving at an assessment contrary to law. It was also found as a fact in the above case of Export Credit Guarantee Corpn. of India Ltd. (supra) that no query was raised during the course of the regular assessment proceedings. Thus, the occasion for the Assessing Officer to apply his mind to the claim by the Respondent- Assessee in that case, did not arise. As against the above in this case the Assessing Officer consciously considered the claim for deduction under Section 80IC of the Act as is admittedly evident from the issues raised during the regular assessment proceedings. This by itself would be evidence of the fact that the Assessing Officer had occasion to apply his mind to the claim for deduction under Section 80IC of the Act during the*

regular assessment proceedings and had taken a view on the claim of deduction under Section 80IC of the Act.
12. *Moreover, we find that the reasons."*

5.7 The SLP filed against the above decision of the Hon'ble High Court has been dismissed by the Hon'ble Supreme Court in their order dated October 2018, which is reported in (2018) 99 taxmann.com 206(SC).

5.8 In the case of **Jalaram Enterprises Private Limited** (supra), cited by the learned Counsel of the assessee, the assessment for assessment year 2013-14 was completed under section 143(3) on 09/03/2016. This assessment was reopened on 27/03/2018 (within period of four years from the end of the relevant assessment year). The reasons recorded, the Assessing Officer mentioned that as per the information received from Investigation Wing, the assessee was one of the beneficiary of the bogus entities, which are controlled and operated by Mr. Vipul Vidhur Bhatt. The Hon'ble High Court in their order dated 01/03/2019 observed that summons were received by the assessee and the period relevant to assessment year 2010-11 and, therefore, action to reopen the assessment for 2013-14 was bad in law. The Hon'ble High Court relied on the finding in the case of assessee's writ petition, wherein it is held as under:

"5. Under similar circumstances, while disposing of assessee's petition being Writ Petition No. 11811 of 2018, we had accepted the petitioner's such ground making following observations:-
.....
8. While disposing of the objections, the Assessing Officer did not clearly meet with this opposition of the petitioner. He instead, gave a rather general disposal to this ground. The petitioner has also produced with this petition, correspondence entered into by the petitioner with the Assessing Officer during the assessment

> *for the assessment year 2010-11, in which the petitioner had supplied full details of the said receipts from the said two entities. Clearly therefore, the petitioner has built up a strong case to establish that the receipts in question never related to the present assessment year. The Assessing Officer simply cannot take shelter under the ground that all these aspects can be examined under the reassessment proceedings. When the very foundation of the reassessment is missing, it would be impermissible for the Assessing Officer to carry on the reassessment based on such notice.*

5.9 Evidently, the facts of the above case are distinguishable from the fact of the instant case and, therefore, the ratio of the above decision is not applicable in the case of the assessee.

5.10 In the case of **Tulsi Developers** (supra), assessment for assessment year 2005-06 was completed under section 143(3) of the Act on 10/10/2007. In the said assessment interest income from fixed deposits was treated as part of business profit and deduction for salary to the partners was given accordingly after computing book profit under section 40(b) of the Act. The assessment was reopened by view of issue of notice dated 05/02/2010 on reasons recorded that the interest from FDR should have been taxed under the head "income from other sources" and thus book profit and salary to the partner had been allowed in excess in the regular assessment. In background of these facts, the Hon'ble High Court in the order dated 15/04/2011 held that entire facts in relation to FDR bank interest were available with the Assessing Officer and who framed his opinion that interest from FDR was business income only and therefore reopening amounts to "change of opinion". The relevant finding of the Hon'ble High Court is reproduced as under:

> *"9. Insofar as the exclusion of interest income while computing book profit is concerned, it is apparent that during the course of assessment proceedings, the entire facts regarding FDR bank interest were furnished to the then AO who appears to have been of the opinion that the entire investment and income pertains to business only and accordingly net income was worked out and salary paid to partners under s. 40(b) of the Act came to be computed. Considering the material placed before the AO, it would appear that the AO must have applied his mind in taking into consideration the interest income while computing book profit under s. 40(b) of the: Act. Moreover, in the light of the decision of the Bombay High Court in the case of CIT vs. Paramount Premises (P) Ltd. (supra), the view taken by the AO is a plausible view. Once the view taken by the AO is a plausible view, reopening of assessment on the ground that another view which is more beneficial to the Revenue is possible, is nothing but a mere change of opinion. In the circumstances in the light of the decision of the Supreme Court in the case of CIT vs. Kelvinator of India Ltd. (supra) wherein it has been held that one needs to give a schematic interpretation to the words "reason to believe" failing which, s. 147 would give arbitrary powers to the AO to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen; the reopening of assessment is bad in law."*

5.11 In the case of HK Buildcon Ltd. (supra), original assessment for assessment year 2005-06 was framed on 26/12/2007 and subsequently, it was reopened by view of issue of notice dated 24/09/2009 (within four years from the end of the relevant assessment year). The original assessment was completed on project completion method, whereas in the reasons recorded by the Assessing Officer recorded that the assessment should have been completed on percentage completion method. The Hon'ble High Court in the order dated 12/04/2010 held that a specific query was raised by the Assessing Officer in the regular assessment in relation to the very issue which forms the basis of reasons recorded in the petition and replied the same in response to notice under section 142(1) before the assessment was

originally framed, thus the successor AO has come to a different opinion on the same set of the facts. The finding of the Hon'ble High Court is reproduced as under:

> *"9. A plain reading of the reasons recorded would indicate that the assessing officer is of the opinion that the method of accounting employed by the Assessee was to be given a go-bye and estimated profit had to be worked out by applying rate of 10 per cent to the value of work-in-progress. In the entire reasons recorded, there is nothing on record to show as to what income had escaped assessment for which the assessing officer received information subsequently, either from external source, or from any other source.*
>
> *10. As against that, when one goes through the various submissions made by the Petitioner in response to notices under Section 142(1) of the Act, before the assessment was originally framed on 26-12-2007, it becomes clear that in relation to the very issue which forms the basis of reasons recorded, a specific query was raised by the assessing officer and the Petitioner had replied on 24-12-2007 in the following words:*
>
> *(1) Accounting system adopted:*
>
> *We are following completion method for transferring work-in-progress to land and building account since we directly purchase materials and hire labours for development and construction activity. We book the members on their interest basis irrespective of stage of work. We allot shares to them to part with ownership of land and building. We are not preparing any profit and loss account for our company in the period of construction as all the expenditure are debited to work-in-progress and transfer at the completion of work to land and building account on one side and members contribution to reserve and surplus account under building fund. We are enclosing herewith details of dwelling and shop units proposed floor-wise along with total size of floor and constructed areas for your kind perusal. Annex. 1.*
>
> *11. Thus, it is apparent that, on the same set of facts and material available on record, the successor assessing officer has come to form a different opinion and recorded reasons thereupon without establishing any lapse on part of the Petitioner or any fresh information. The settled legal position in this regard has been reiterated by the apex court recently in the case of CIT v. Kelvinator of India Ltd. : (2010) 2 SCC 723:(2010) 34 DTR (SC) 49, wherein the court has held in para No. 6 of the judgment that there is a conceptual difference between power to review and*

power to reassess. The assessing officer has no power to review; he has only power to reassess. It is further laid down that reassessment has to be based on fulfillment of certain precondition and if the concept of change of opinion is removed, then, in the garb of reopening the assessment, review would take place. It is further laid down that one must treat the concept of change of opinion as an inbuilt test to check abuse of power by the assessing officer. After referring to Circular No. 549, dated 31-10-1989, explaining the amendment made by amending Act, 1989 to reintroduce the expression reason to believe in Section 147 of the Act, the apex court has come to the conclusion that if the phrase reason to believe is omitted, the same would give arbitrary powers to the assessing officer to reopen the past assessment on mere change of opinion and this is not permissible even as per legislative intent."

5.12 In the case of **Nityanand Infrastructure Ltd.** (supra) also the Tribunal observed that the Assessing Officer had called for assessee's explanation on the issue, which was in opinion needed consideration and only after verification of the details passed the original assessment order, accordingly, it was held that once an assessment is completed under section 143(3) of the Act, after raising a query on the particular issue and accepting assessee's reply to the query, the AO had no jurisdiction to reopen the assessment unless and until there is additional information/tangible material before the Assessing Officer to come to the conclusion that there is escapement of income. Similar finding has been given by the Tribunal in the case of **Ms. Seema Dilip Vohra** (supra). The relevant paragraph of the decision is reproduced as under:

"2.19. Under the amended provisions of section 147, an assessment can be reopened if the Assessing Officer has "reason to believe" that income chargeable to tax has escaped assessment; but if he wants to do so after a period of four years from the end of the assessment year, he can do so only if the assessee has fallen short of his duty to disclose fully and truly all material facts necessary for his assessment. It does not follow that he cannot reopen the assessment even within the period of

four years as aforesaid if he has reason to believe that the assessee has failed to make the requisite disclosure. All that the section says is that in a case where the assessment is sought to be reopened after the period of four years, the only reason available to the Assessing Officer is the non-disclosure of material facts on the part of the assessee. The Act places a general duty on every assessee to furnish full and true particulars along with the return of income or in the course of the assessment proceedings so that the Assessing Officer is enabled to compute the correct amount of income on which the assessee shall pay tax. The position has been further clarified by the proviso itself in a case where assessment under sub-section (3) of section 144 of the Act or this section has been made for the relevant assessment year, no action shall be taken after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such year by the reason of failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose truly and fully all material facts necessary for his assessment for that assessment year. It is also noted that the scope of newly substituted (w.e.f. 01/04/1989) section 147 has been elaborated in department circular number 549 dated 31st October, 1989, meaning thereby, on or after 01/04/ 1989, initiation of reassessment proceedings has to be governed by the provisions of section 147 to 151 as substituted (amended) w.e.f. 01/04/1989. Still, power u/s 147 of the Act, though very wide but no plenary. We are aware that Hon'ble Gujarat High Court in Praful Chunilal Patel: Vasant Chunilal Patel vs ACIT (1999) 236 ITR 82, 840 (Guj.) even went to the extent that action under main section 147 is possible in spite of complete disclosure of material facts. The primary condition of reasonable belief having nexus with the material on record is still operative. However, we are of the view, that mere fresh application of mind to the same set of facts or "mere change of opinion" does not confer jurisdiction to the Assessing Officer even under the post 1989 section 147 of the Act. Our view find support from the decision from Hon'ble Delhi High court in Jindal Photo Films Ltd. vs DCIT (1998) 234 ITR 170 (Del.), Garden Silk Mills Pvt. Ltd. vs DCIT (1999) 151 CTR (Guj.) 533, Govind Chhapabhai Patel vs DCIT 240 ITR 628, 630 (Guj.), Foramer vs CIT (2001) 247 ITR 436 (All.), affirmed in CIT vs Foramer Finance (2003) 264 ITR 566, 567 (SC), Ipica Laboratories vs DCIT (2001) 251 ITR 416 (Bom.), Ritu Investment Pvt. Ltd.(2012) 345 ITR 214 (Del.), Ketan B. Mehta vs ACIT (2012) 346 ITR 254 (Guj.), Ms. Praveen P. Bharucha vs DCIT (2012) 348 ITR 325 (Bom.), CIT vs Usha International Ltd. 348 ITR 485 (Del.), Agricultural Produce Market Committee vs ITO (2013) 355 ITR 348 (Guj.), B.B.C. World News Ltd. vs Asst. DIT (2014) 362 ITR 577 (Del.). Identical ratio was laid down in CIT vs

Malayala Manorma Company Ltd. (2002) 253 ITR 378 (Ker.) We think this thread runs through the various provisions of the Act. But Explanation 1 to the section confines the duty to the disclosure of all primary and material facts necessary for the assessment, fully and truly. As to what are material or primary facts would depend upon the facts and circumstances of each case and no universal formula may be attempted. The legal or factual inferences from those primary or material facts are for the Assessing Officer to draw in order to complete the assessment and it is not for the assessee to advise him, for obvious reasons. The Explanation, however, cautions the assessee that he cannot remain smug with the belief that since the assessee has produced the books of account before the Assessing Officer from which material or evidence could have been with due diligence gathered by him,he has discharged his duty. It is for him to point out the relevant entries which are material, without leaving that exercise to the Assessing Officer. The caveat, however, is that such production of books of account may, in the light of the facts and circumstances, amount to full and true disclosure; this is clear from the use of the expression "not necessarily" in the Explanation. Thus, the question of full and true disclosure of primary or material facts is a pure question of fact, to be determined on the facts and circumstances of each case. No general principle can be laid down. It was observed by the Hon hie Apex Court, in various cases that there should be some "tangible material" coming into the possession of the Assessing Officer in such cases to enable him to resort to section 147 of the Act. Despite being a case of full and true disclosure, tangible material coming to the possession of the Assessing Officer after he made the original assessment under section 143(3), would influence the opinion, formed or presumed to have been formed earlier, by the assessing authority; he can with justification change it, but that would not be a case of a "mere change of opinion" unguided by new facts or change in the legal position. It will be a case of the assessing authority having "reason to believe", notwithstanding that full and true particulars were furnished by the assessee which were examined, or presumed to be examined, by him. There was a divergence of opinion amongst various High Courts as to what constitute "Information" for the purposes of section 34(1)(b) of the 1922 Act (which corresponds to section 147(b) of the 1961 Act) the Hon'ble Apex Court in CWT vs Imperial Tobacco Company Ltd. (1966) 61 ITR 461 has noted such divergence of opinion on the point. Hon'ble jurisdictional High Court in CIT vs Sir Mohammad Yusuf Ismail (1944) 12 ITR 8 (Bom.) held that mere change of opinion on the same facts are on question of law or mere discovery of mistake of law is not sufficient information and that in order to sustain action u/s 34 by further holding that reassessment is not permissible. The

Hon'ble Apex Court in Simon Carves Ltd. (1976) 105 ITR 212 held that errorless legally correct order cannot be reopened, therefore, it is settled law that without any new information and on the basis of mere change of opinion, reopening of assessment is not permissible. As was held in CIT vs TTK Prestige ltd. (2010) 322 ITR 390 (Karn.) SLP dismissed in 2010 322 ITR (St.) 14 (SC). Reference also made to Asian Paints ltd. vs DCIT (2009) 308 ITR 195 (Bom.), Andhra Bank Ltd. vs CIT (1997) 225 ITR 447 (SC). The observations of the Supreme Court are a protection against the abuse of power; they also protect the Revenue which can, in the light of subsequent coming into light of facts or law, reopen the assessment. In the light of the aforesaid discussion, since, there was no new tangible material available with the Assessing Officer while resorting to section 147/148 of the Act, more specifically, while framing original assessment u/s 143(3) of the Act, there was full disclosure of material facts by the assessee and on the basis of those facts, assessment was completed u/s 143(3) of the Act."

5.13 In the case of **Replika Press Private Limited & ANR** (supra), the assessment year involved is 2006-07 and the reassessment proceedings were initiated within four years from the end of the relevant assessment year. The said assessee was engaged in the business of printing of text books and in the original assessment deduction under section 10B of the Act was allowed to the assessee. Subsequently, in the reasons to believe recorded, the Assessing Officer noted that according to CBDT circular No. 347 dated 07/07/1982, the assessee was not a manufacturer for the purpose of deduction under section 10B of the Act. The Hon'ble High Court in the order dated 05/08/2013 observed that "*as per the reasons to believe, the AO had formed an erroneous legal opinion in the original assessment order and thus held that such cases cannot be covered and cannot be made subject of reassessment proceeding under section 147 of the Act and appropriate remedy available to the Revenue was to initiate*

proceeding under 263 of the Act". The relevant finding of the Hon'ble High Court is reproduced as under:

> *"11. Learned counsel for the respondent-assessee has drawn our attention to the full bench decision of this Court in Commissioner of Income Tax Vs. Usha International Ltd., [2012] 348 ITR 485 (Delhi) wherein, reference is made to the judgment of the Supreme Court in ALA Firm Vs. CIT, (1991) 189 ITR 285 (SC). Our attention was drawn to proposition No.4; that information as required by Section 147(b) can relate to an earlier decision on the point of law but that information should have come to the knowledge of the Assessing Officer by his own efforts. Such information may be gathered after examination of the assessment records. Decision in was referred to in Usha International (supra) in a different context and purpose. Observations made by the Supreme Court was with reference to the term "information" and conceptually there is a difference between the scope and ambit of the reassessment provisions incorporated with effect from 1st April, 1989. The new statutory provisions do not refer to the word "information" and nature, type or character of information. No doubt, the scope and ambit of the amended reassessment provisions is wider, but what is relevant and important is that cases of "change of opinion" are not covered or protected under the re-enacted reopening provisions. ……"*

5.14 In the case of **Rasalika Trading and Investment Company Private Limited** (supra), the assessment for assessment year 2005-06 was completed on 24/12/2007 under section 143(3) of the Act. Subsequently, on receipt of information from the DIT (Investigation), that the assessee is beneficiary of bogus accommodation entries, the assessment was reopened by view of issue of notice under section 148 of the Act. Before the Hon'ble High Court, the assessee submitted that the material on the basis of which records to section 148 of the Act was proposed, existed even when the original regular assessment was completed and therefore reasons recorded were based on stale material. It was submitted that matter had been specifically enquired and gone into by the Revenue. The Hon'ble High Court in the order dated

14/02/2014 held that the issue already enquired in original assessment proceedings on the basis of the information available, it amounts to "change of opinion". The relevant finding of the Hon'ble High Court is reproduced as under:

> *"It is evident from the above discussion that the reassessment proceedings were initiated by the impugned notice which expressly and plainly states that "reasons to believe" are based upon the materials contained in an investigation report of 13.3.2006. The notice itself does not spell out that the report was not on the record when the original assessment was completed on 24.12.2007 nor did the revenue even suggest so in the counter affidavit filed in the proceedings. It is only in a subsequently filed additional affidavit that the position is sought to be clarified. Clearly this Court refrains from making such an enquiry, at a time when the AO has, in the first instance, failed to spell out clearly in the section 148 notice itself that such report was not on record. In other words "the reasons to believe" do not state that even in one sentence that the investigation report of 13.3.2006 was not with the AO when he completed the assessment. The material on record in fact suggests otherwise; the nature of the queries put to assessee and the replies and confirmation furnished to the AO in the course of the regular assessment clarify that what excited the suspicion was indeed gone into by the AO himself while framing the assessment under section 143(3). This Court is fortified in its conclusions by the decision of the Supreme Court in Commissioner of Police v. Goverdhan Das Bhanji AIR 1952 SC 16 where it was held that public orders made by public authorities intended to have effect on the public should be construed objectively with reference to the language used rather than explanations subsequently offered. This principle was reiterated in a somewhat different vein in MS Gill V. Chief Election Commissioner, AIR 1978 SC 851 by the Supreme Court. Such being the case this Court has no doubt that the impugned notice, in the circumstances of the case is based upon stale information which was available at the time of the original assessment and in fact appears to have been used by the AO at the relevant time i.e. during the completion of proceedings under section 143(3). Therefore, the attempt to reopen the proceedings under section 147/148 is really the result of a change of opinion - and thus beyond the pale of the AD's jurisdiction and falling under the illustration spelt out in Kelvinator (India) Ltd. (supra). Consequently, the impugned notice and all proceedings further thereto are beyond the authority of law and are hereby quashed."*

5.15 In the case of **Tupperware India Private Limited** (supra), the return of income filed by the assessee for assessment year 2003-04 was processed under section 143(1) of the Act and no assessment under section 143(3) of the Act was completed. The notice under section 148 of the Act was issued on 21/10/2005 (within four years from the end of the relevant assessment year). In the reasons recorded, the Assessing Officer noted that in the audit report it was mentioned that the assessee had made certain payments without deduction of tax at source and, therefore, such payment was inadmissible under section 40(a)(ia) of the Act. The Hon'ble High Court in the order dated 10/08/2015 observed that question examined by the court in CIT Vs. Orient Craft Ltd., (2013) 354 ITR 536 (Del.), was identical to the question sought to be projected by the Revenue in the appeal.

5.16 In the case of **Madhukar Khosla Vs ACIT** (supra), the Hon'ble Delhi High Court held that in absence of trigger in the form of new material, the reassessment cannot be valid as the Assessing Officer did not possess jurisdiction to reopen the assessment. The Hon'ble High Court observed that whether the reopening amounts or review the change of the opinion is next stage. The relevant finding of the Hon'ble High Court is reproduced as under:

> *"9. In this case, the reasons provided under Section 148 are that in "absence of the source of the addition with documentary evidence on records, the same is required to be brought on tax net as per provisions of section 68 of the Income tax Act, 1961 as the assessee had offered no explanation about the nature and source of the said additions..." and thus, must be treated as income which escaped assessment. No details are provided as to what such information is which excited the AO's notice and attention. The reasons must indicate specifically what such objective and*

new material facts are, on the basis of which a reopening is initiated under Section 148. This reassessment is clearly not on the basis of new (or "tangible") information or facts that which the Revenue came by. It is in effect a re-appreciation or review of the facts that were provided along with the original return filed by the assesse. The Supreme Court in Kelvinator (supra) frowned against such exercise of power:

> *"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.*
>
> *……"*

11. The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made. The impugned notice, the AO's order rejecting the objections, and the arguments of the Revenue nowhere indicate how the AO was impelled to seek re-opening of the assessee's

case, as distinguished from the several other completed assessments."

5.17 In the case of **Turner Broadcasting System Asia-Pacific Inc.** (supra), to assessment years i.e. assessment year 2007-08 and assessment year 2008-09 are involved. In both assessment years assessments are completed under section 143(3) of the Act and notices under section 148 of the Act were issued within four years from the end of the relevant assessment year. The Hon'ble High Court in the order dated 08/10/2015 held that on perusal of the regular assessment orders, it was clear that on opinion was formed by the Assessing Officer on the issue of taxation of advertisement and distribution revenue, and the reasons recorded for reassessment, the Assessing Officer merely intended to revisit the concluded assessment and it was a clear case of change of opinion, which was not permissible under law. The relevant finding of the Hon'ble High Court is reproduced as under:

"16. The power to reopen an assessment was conferred by the Legislature but not with the intention to enable the ITO to reopen the final decision made against the revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods - CIT v. Rao Thakur Narayan Singh [1965] 56 ITR 234 , 239(SC).

17. In Phool Chand Bajrang Lai. v. ITO [1993] 203 ITR 456 (SC), their Lordships have held while interpreting section 147 as it stood in the assessment year 1963-64:-

> *". . An Income-tax Officer acquires jurisdiction to reopen an assessment under section 147(a) read with section 148 of the Income-tax Act, 1961, only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the*

concluded assessment proceedings, any part of his income, profits or gains chargeable to income-tax has escaped assessment. He may start reassessment proceedings either because some fresh facts had come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income- tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. . . .” (p. 477)

18. Following the settled trend of judicial opinion and the law laid down by their Lordships of the Supreme Court time and again, different High Courts of the country have taken the view that if an expenditure or a deduction was wrongly allowed while computing the taxable income of the assessee, the same could not be brought to tax by reopening the assessment merely on account of subseouentlv the assessing officer forming an opinion that earlier he had erred in allowing the expenditure or the deduction - Siesta Steel Construction (P.) Ltd. v. K.K. Shikare [1985] 154 ITR 547 (Bom.), Satpal Automobile Co. v. ITO [1983] 141 ITR 450 (All.), Gopal Films v. ITO [1983] 139 ITR 566 (Kar.), CWT v. Manilal C. Desai [1973] 91 ITR 135 (MP).

(underlining supplied)

20. On applying, the above principles to the facts of the present case and on perusal of the reasons we find that no fresh information or material has been referred to in the reasons recorded for seeking to reopen the assessment. The material that is referred to is the very same material that was already before the Assessing Officer at the time of framing of the assessment under Section 143 (3) of the Act and even the reasons record that 'from the perusal of the assessment record, it is observed that'. This clearly shows that the assessing officer has sought to re-appreciate the material that was already there at the time when

the assessment was framed under Section 143 (3). Thus, as seen from above, it is clearly a case of change of opinion, which is clearly not permissible."

5.18 The Hon'ble High Court has relied the decision of the full bench of Hon'ble Delhi High Court in the case of CIT Vs Usha International Ltd (supra), wherein the Hon'ble High Court has held that in case in original assessment an issue or query has been raised in which has been answered by the assessee and thereafter the Assessing Officer does not make any addition in the assessment order, in such situation , he forms an opinion and the three assessment will be invalid on the ground of 'change of opinion' because the Assessing Officer at formed the opinion in the original assessment order.

5.19 On detailed analysis of the decisions cited by the Revenue, we find that in those decisions it is held that in view of the amendment to section 147 of the Act with effect from 01/04/1989, where the original assessment is completed under section 143(3) of the Act, the reassessment within four years from the end of the relevant assessment year is valid even if there is a **true and full disclosure of material facts** by the assessee in the original assessment proceeding. The learned counsel, however, of the view that even after amendment to section 147 w.e.f. 01.04.1989, the principle that merely on 'change of opinion' without any fresh material the Assessing Officer is not permitted to reopen the assessment within four years from the end of relevant assessment year, if the same was completed u/s 143(3) of the Act. The issue of reopening of regular assessments from the end of the relevant assessment year has been examined by the

Hon'ble Delhi High Court (Full bench) in the case of Kelvinators India Ltd. (supra) , which has been further upheld by the Hon'ble Supreme Court, it is held that where the assessing officer has applied his mind on particular issue in regular assessment proceeding, the assessment cannot be reopen within the period of years from the end of the relevant assessment year, merely on the change of the opinion without any tangible material.

5.20 We have already discussed the decisions cited by the learned counsel of the assessee wherein the Hon'ble Court has held change of opinion i.e. Century Textile Industries Ltd. (supra), Tulsi Developers (supra), HK Buildcon Ltd. (supra), Nitynand Infrastructure Ltd (supra), Replika Press Private Limited (supra), Rasalika Trading and Investment Company Private Limited (supra). In all these cases, queries were raised on particular issue and same was responded by the assessee in the original assessment proceeding and the assessment was reopened within four years from the end of the relevant assessment year.

5.21 The Hon'ble Delhi High Court in the case of **Usha International Ltd.** (supra), in their decision dated 24/09/2012 by a majority view, held that when on a particular issue the Assessing Officer has raised a query and the assessee has responded in regular assessment proceeding, then in such circumstances even if no addition has made in the assessment order, it shall be treated as a opinion has been framed by the Assessing Officer and subsequently, reopening on the same issue would amount to 'change of opinion'. The Hon'ble High Court in para 39 of the decision has further held that where the Assessing Officer has not raised any written query on the particular issue in

the original assessment, then such matters require deeper scrutiny or examination of the records to ensure whether any opinion was framed by the Assessing Officer on that particular issue. Thus, there is no doubt that where regular assessment is completed under section 143 (3) of the Act the assessment cannot be reopened within four years from the end of the relevant assessment year merely on the basis of change of opinion without any tangible material.

5.22 Before us, the learned counsel of the assessee has drawn our attention to the decision of the Hon'ble Delhi High Court in the case of Madhukar Khosla(supra), wherein it is held that first of all the "trigger" in the form of new information or facts for issuance of notice of re-assessment should be seen and then the question whether the reopening of the assessment amounts to "review" or "change of opinion" should be seen at a next stage.

5.23 This "trigger" or "cause" is one of the basic requirement, which necessarily postulates that the Assessing Officer is satisfied to act under section 147 read with section 148 and, therefore, he must put in writing as why he holds that income has escaped assessment. "Why" for holding such belief must be reflected from the reasons recorded by the Assessing Officer. The word "reason" in the phrase "reason to believe" mean cause or justification. If the Assessing Officer has cause or justification to think or suppose that income is escaped assessment, he can be said to have reason to believe that such income has escaped assessment. Under the provisions of section 147 of the Act, the AO has been authorized to re-assess the income subject to condition provided, but the AO does not have power to review his own judgment.

5.24 In the instant case before us, the information regarding dues from Iraqi Government was available at the time of regular assessment u/s 143(3) in the form of notes to account of annual report, which is evident from the reasons recorded, which are reproduced as under, for ready reference :

> *"The assessment 143(3) of the IT Act, of M/s. Ircon International Ltd. for the assessment year 2009-10 was completed on 30.12.2011 at income of Rs. 1,68,77,00,674/-. On perusal of the record, it is revealed that the assessee company has translated the accrued interest on deferred Iragi dues and provisions for interest to sub-contractors at exchange rates prevalent in 1995 and not translated at the rates prevalent on 31.03.09. Due to non observing the aforesaid mandatory provision of translating the foreign exchange transactions, the profit of the assessee were lower by Rs. 6,90,40,000/-. By doing so, the assessee has reduced the total income to the extent of Rs.6,90,40,000/- and not disclosed its income truly to the extent of the same amount.*
>
> *Based on the above facts, 1 have reason to believe that the income of the assessee chargeable to tax to the extent of Rs.6,90,40,000/- has escaped assessment."*

5.25 When we examine the reasons recorded by the Assessing Officer in the instant case in the light of the decision of the Hon'ble Delhi High Court in the case of **Madhukar Khosla** (supra), it is evident that the Assessing Officer has merely perused the records available with him and formed reason to believe that income had Assessment. There is no mention of any 'trigger' as how the Assessing Officer came to know this under assessment. If without any information or any new fact came into his possession, he simply revisit or peruse the completed assessment, it definitely amounts to review of the assessment by the Assessing Officer, which is not permitted in law. Even in the instant case, no addition has been made on this issue either in

the earlier or subsequent regular assessments. As the reassessment in the instant case fails at this stage of examining "reasons to believe", we are not required to examine the stage of "change of opinion".

6. In view of the above discussion, we are of the opinion that there is no infirmity in the order of the Ld. CIT(A) on the issue-in-dispute, accordingly, we uphold the same. The ground of the appeal of the Revenue is dismissed.

7. In the result, the appeal of the Revenue is accordingly dismissed.

Order pronounced in the open court on 22nd January, 2021.

Sd/-	***Sd/-***
(AMIT SHUKLA)	**(O.P. KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 22nd January, 2021.
RK/-(D.T.D.S.)
Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar, ITAT, New Delhi