

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 16127 of 2018****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR.JUSTICE J.B.PARDIWALA Sd/-****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	NO
2	To be referred to the Reporter or not ?	NO
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

ASIAN TUBES PVT. LTD.**Versus****DY. COMMISSIONER OF INCOME TAX CIRCLE (1)(1)****Appearance:****MR SUDHIR M MEHTA(2058) for the Petitioner(s) No. 1****MS SHAILEE S MEHTA(5873) for the Petitioner(s) No. 1****MRS MAUNA M BHATT(174) for the Respondent(s) No. 1****CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****Date : 16/03/2020****CAV JUDGMENT****(PER : HONOURABLE MR. JUSTICE BHARGAV D. KARIA)**

1. **Rule** returnable forthwith. Mrs. Mauna Bhatt, learned Standing Counsel waives service of notice of rule for and on behalf of the respondent no.1.

2. Having regard to the controversy involved in the present case which lies in a very narrow compass, with the consent of the learned advocates for the respective parties, the matter is taken up for final hearing.

3. By this petition under Article 226 of the Constitution of India, the petitioner has prayed for the following relief(s):-

"8(A) Your Lordships may be pleased to admit and allow this petition.

(B) Your Lordships may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction for quashing and setting aside the impugned notice dated 29.03.2018 u/s. 148 of the Income Tax Act, 1961 at Annexure-A and the order dated 07.08.2018 disposing the objections at Annexure-H.

(C) Your Lordships may be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate writ, order or direction asking the respondent not to proceed further in pursuance of impugned notice dated 29.03.2018 u/s. 148 of the Income Tax Act, 1961 at Annexure-A and the order dated 07.08.2018 disposing the objections at Annexure-H.

(D) Pending admission, hearing and final disposal of the present petition, be pleased to stay the implementation, operation and execution of the impugned notice dated 29.03.2018 u/s 148 of the Income Tax Act,

1961 at Annexure-A and the order dated 07.08.2018 disposing the objections at Annexure-H.

(E) Your Lordships may be pleased to grant any other and further relief which may be deemed fit and proper in the interest of justice."

4. The petitioner is a Private Limited Company incorporated under the provisions of the Companies Act, 1956. The petitioner is engaged in the business of manufacturing of M.S. & G.I. Tubes & Pipes. The petitioner filed its return of income on 30.09.2011 declaring total income of Rs.18,60,90,480/-.

4.1 The Assessing Officer passed an assessment order under Section 143(3) of the Income Tax Act-1961 (for short the "Act") after considering the replies filed by the petitioner pursuant to the various notices issued under Sections 142(1) and 143(2) of the Act.

4.2 It appears from the record that the respondent issued notice under Section 148 of the Act dated 29.03.2018. On request of the petitioner, reasons for reopening of the assessment were furnished on 24.05.2018 to the petitioner. The reasons recorded by the respondent reads as under:-

"2. Brief details of information collected/received by the AO:- On perusal of the assessment records for the year under consideration, it is noticed that the assessee has debited a sum of Rs.18,19,576/- on account of "Wharfage expenses" which includes payment of Rs.5,86,487/- made to M/s Damani Shipping Pvt.Ltd. On further perusal details of Wharfage expenses it is seen that

TDS was not deducted on the payment made to M/s Damani Shipping Pvt.Ltd whereas the assessee was liable to deduct TDS thereon. It is pertinent to mention here that Wharfage is a charge assessed by a shipping terminal or port when the goods are moved through the location and it is one of the costs of transport goods within the distribution system used by a business to bring its goods to market. The wharfage charges are usually proportionate to time for which such space is occupied by unpicked goods. In view of this, it is evident that that Wharfage is actually the rent charged for the space occupied by the unpicked goods beyond the expiry of the free time for such removal and hence, the TDS provisions of Section 194I of the Act clearly applicable in such expenses. Since the assessee has failed to comply with the provisions of Chapter - XVII-b of the Act, the expenses claimed to the tune of Rs.5,86,487/- is not allowable in view of Section 40(a)(ia) of the Act.

2.1 During the course of examination of case records for the year under consideration, it is further noticed that the assessee has debited a sum of Rs.1,64,109/- on account of import expenses to M/s. Damani Shipping Pvt.Ltd. This expenditure was in addition to the agency charges debited by the assessee on which the assessee has deducted TDS. Therefore, it is evident that the assessee was also required to deduct TDS on the payment of Rs.1,64,109/- made to M/s Damani Shipping Pvt.Ltd Deduction of TDS on the payment made to M/s Damani Shipping Pvt.Ltd on account of agency charges substantiates that TDS is required to be deducted also on the payment of Import expenses. However, no TDS was deducted on the same though the assessee was required to deduct TDS thereon. Thus, it is evident that the assessee has failed to comply the provision of chapter XVII-B of the IT Act on the payment of

Rs.1,64,109/- and therefore in view of the Section 40(a)(ia) of the Actm the impugned expenditure is not allowable.

2.2 It is also seen that the assessee company has debited a sum of Rs.97,593/- payable to Gujarat Energy Transmission Commission for Operation and Maintenance of its Windmills (O&M charges for transmission lines). On this payment TDS was required to be deducted by the assessee however, the assessee has failed to deduct TDS thereon. Thus, it is evident that the assessee has failed to comply the provision of chapter XVII-B of the IT Act on the payment of Rs.97,593/- and therefore in view of section 40(a)(ia) of the Act, the impugned expenditure is not allowable.

2.3 During the course of examination of case records for the year under consideration it is noticed that the assessee company, despite earning huge profit, has not declared any dividend. It is also observed that the three directors of promoter family, also own over 99.3% of share holding of the assessee company have received Bonus. The details of the same is tabulated below:-

Sr.No.	Name	Percentage shareholding	Bonus paid in Rs.
1	B.L.Agrawal	52.16%	7,70,000/-
2	Laxmidevi Agawal	32.21%	2,10,000/-
3	Nirmaladevi Agarwal	13.97%	2,10,000/-
	Total	99.34%	14,90,000/-

As per the section 36(1)(ii) of the Act, any sum paid to the employee as bonus or commission for services rendered, where such sum would not have been payable to him as profits or dividend if it had not been paid as bonus or commission is deductible. One of the condition is that the amount payable to employees as bonus or commission is

deductible. One of the condition is that the amount payable to employees as bonus or commission should not otherwise have been payable to them as profit or dividend. The plain reading if this clause means that the profit of a business will not be allowed to be dwindled by merely describing the payment as bonus or commission, if the payment is in lieu of dividend or profit. In the instant case, the assessee has earned huge profit and the same could have been distributed as dividend; however, the decision of the shareholder directors to pay bonus instead of declaring dividend was obviously with the intention to reduce profit for avoiding payment of taxes as the assessee company had derived tax advantage. In light of these facts, it is ample clear that he bonus paid by the assessee company was in lieu of dividend or profit and therefore cannot be allowed as deduction u/s 36(1)(ii) of the Act.

3. Analysis of Information collected/received:- As per the Section 40(a) (ia) of the Act no deduction shall be allowed from "Profits and Gains of Business or Profession" for any interest, commission or brokerage, etc. payable to a resident, on which tax is deductible at source under Chapter-XVII-B and such tax has not been deducted or after deduction has not been paid before due date of furnishing return. It has already been dealt in the preceding para that the assessee is liable to deduct TDS on the following payment:

Sr.No	Nature of Payment	Amount of Payment in Rs.
1	Wharfag Expenses	5,86,487/-
2	Import expenses	1,64,109/-
3	O&M charges	97,593/-
	Total	8,48,189/-

Despite the fact that the assessee was liable to deduct TDS on the above mentioned expenditure, the assessee without deducting the applicable TDS has made payment. Thus, it is clear that there is failure on the part of the assessee to comply the provision of Chapter XVII-B of the I.T.Act and therefore the expenditure claimed to the tune of Rs.8,48,149/- is not allowable as deduction.

3.1 In so far as bonus amounting to Rs.14,90,000/- paid three directors is concerned, the same is not allowable in view of Section 36(1)(ii) of the Act. As per section 36(1)(ii) of the Act, Bonus or Commission paid to the employee for services rendered allowable subject to the condition that the payment is not made in lieu of dividend. It is well settled facts that if the bonus or commission is paid to the shareholders in lieu of profit or dividend then the impugned bonus/commission will not be allowed as deduction within the meaning of section 36(1)(ii) of the Act. In present case, the assessee company has paid bonus to the employee directors (as mentioned supra), who owned almost all of the shares of the assessee company and also are the decision making authorities of the assessee company. During the year under consideration, the assessee company has earned substantial profits however it has not declared dividend. Instead of declaring/distributing dividend, the substantial shareholder directors decided to pay bonus to the above mentioned persons in order to avoid tax payments by reducing its profit. In light of the facts mentioned above, it is ample clear that the payment of bonus is in lieu of dividend or profit and thus cannot be allowed as deduction.

4. Enquiries made by the AO as sequel to information collected/received: The facts

enumerated above have been found out on examination on the case records of the assessee and are self-explanatory. Therefore, no further enquiry is required in this case. On the basis of the same there are reasons to believe that the income chargeable to tax has escaped assessment.

5. Findings of the AO:- While examination of the case records, it is noticed that the assessee was required to deduct TDS on the payment made to the tune of Rs.8,48,189/- (as discussed supra). However, the assessee has not deducted TDS thereon and therefore it is ample clear that the assessee has violated the provision laid down in Chapter-XVII-B of the I T Act. In such circumstances, the expenditure claimed by the assessee to the extent of Rs.8,48,189/- is not allowable in view of Section 40(a)(ia) of the Act. Section 40(a)(ia) of the Act evidently emphasis that failure to comply wit the provisions of TDS on the sum covered of Profit and Gains of Business or Profession. In view of the facts narrated above and considering the provision of Section 40(a)(ia) of the Act it can explicitly be concluded that the deduction on account of impugned expenditure cannot be allowed.

5.1 With respect to the bonus paid by the assessee company to the employee directors, owning almost all of the shares of the assessee company, it has already been established in the preceding paras that the bonus paid by the assessee company is in lieu of dividend or profit. It is settled legal position that any expenditure on account of payment of bonus/commission to the employee/share holder is allowable subject to the condition that the payment is not in lieu of dividend or profit. In the instant case, the assessee company, with an intention to diminish the the profit has paid bonus to its employee directors. The entire arrangment was

made only to avoid the tax liability, and therefore, it can reasonably be concluded that there is a failure on the part of the assessee to disclose the true facts in respect of the impugned issue. In light of the facts discussed above and considering the provision of section 36(1)(ii) of the Act, payment of bonus claimed by the assessee as deduction is not allowable.

6. Basis of forming reason to believe and details of escapement of income:- During the course of examination of the case records of the assessee company for the year under consideration the above enumerated facts and issues have been found. While examination of the case records, it is noticed that the assessee was required to deduct TDS on the payment made to the tune of Rs.8,48,189/-. However, the assessee has not deducted TDS thereon and therefore it is ample clear that the assessee has violated the provision laid down in Chapter XVIII-B of the I T Act. In such circumstances, the expenditure claimed by the assessee to the extent of Rs.8,48,189/- is not allowable in view of section 40(a)(ia) of the Act.

Further, with respect to the bonus paid by the assessee company to the employee directors, owing almost all the shares of the assessee company, it has been established that the bonus was paid is in lieu of dividend or profit with an intention to diminish the profit. The employee directors, to whom the impugned bonus was paid, are the decision making authority and the decision of the shareholder directors to pay the bonus instead of dividend was obviously with the intention to reduce profit for avoiding payment of taxes as the assessee company had derived tax advantage and therefore, cannot be allowed as deduction in view of Section 36(1)(ii) of the Act.

The facts enumerated above amply

substantiate that there is an escapement of income to the tune of Rs.23,38.189/-. Therefore, I have reasons to believe that income chargeable to tax to the extent of Rs.23,38,189/- has escaped the assessment within the meaning of section 147 of the I.T.Act for AY 2011-12 and it is fit case to issue notice u/s 148 of the Act."

4.3 The petitioner filed objection before the respondent on 22.06.2018 with a request to drop reopening proceedings contending that there was no failure on the part of the petitioner to disclose truly and fully all material facts and the reasons refer to the material already on record.

5. However, objections raised by the petitioner were rejected by the Assessing Officer Vide order dated 07.08.2018.

6. Learned advocate for the petitioner Mr. Sudhir Mehta, submitted that the impugned notice under Section 148 of the Act was issued by the respondent only on the basis of information received from audit party. It was pointed out that the respondent, without considering the material on record, issued the impugned notice by recording reasons with regard to the issues which are already considered during the course of regular assessment proceedings and as such there was no failure on part of the petitioner to disclose truly and fully all material facts.

6.1 Learned advocate for the petitioner, thereafter, pointed out that for each of the reasons recorded by the respondent, there was inquiry made by the

Assessing Officer during the regular assessment proceedings.

6.2 Attention of this Court was invited with regard to particulars called for by the Assessing Officer in notices dated 10.10.2012 and 26.10.2012 issued under Section 142(1) of the Act to point out that the details of TDS and income related which was credited in the profit and loss account and names, addresses etc. of Directors and relatives of the Directors to whom remuneration/salary was paid along with details of service rendered by them was called for.

6.3 It was pointed out from the materials on record that as per Point No.19 of the notice dated 26.10.2012 copy of TDS return in Form-26Q was also called for. The petitioner provided such information on 22.10.2012 and 02.08.2013. On 17.02.2014, copies of bills of wind mill maintenance were also provided by the petitioner. The petitioner also explained in the letter dated 17.02.2014 with regard to the TDS not deducted on the amount of Rs.5,86,487/- paid for the wharfage expenses. The petitioner also tendered justification for remuneration paid to the directors in the said letter. Therefore, it was submitted that the petitioner has disclosed truly and fully all material facts during the course of assessment and the Assessing Officer, after considering the explanation tendered by the petitioner, passed assessment order under Section 143(3) of the Act.

6.4 Learned advocate for the petitioner further

submitted that the reasons recorded are on perusal of the assessment record for the year under consideration, and therefore, there is change of opinion on the part of the respondent for reopening of the reassessment which is not permissible in view of the settled legal position.

6.5 It was submitted that the notice for reopening is issued beyond a period of 4 years on the basis of the verification of the material available during the scrutiny assessment and there is no allegation against the petitioner of failure to disclose truly and fully all material facts, and therefore, the impugned notice is required to be quashed and set aside.

6.6 Learned advocate for the petitioner, in support of his submissions, relied upon the following decisions :- सत्यमेव जयते

A. Commissioner of Income Tax Vs. Eicher Ltd reported in (2007) 294 ITR 310 (Delhi)

B. Commissioner of Income-tax, Delhi Vs. Kelvinator of India Ltd. reported in (2010) 320 ITR 561 (SC).

C. Patel Alloy Steel (P) Ltd. Vs. Assistant Commissioner of Income Tax (OSD) Circle-5, Ahmedabad reported in (2013) 35 taxmann.com 353 (Gujarat)

D. Commissioner of Income Tax-1 Vs. Converttech Equipments (P.) Ltd. reported in (2013) 36

taxmann.com 314 (Delhi).

E. Shree Sayan Vibhag Sahkari Vs. Deputy Commissioner of Income-Tax reported in (2016) 69 taxmann.com 245(Gujarat)

7. On the other hand, learned counsel Mrs. Mauna Bhatt for the respondent relied upon the following averments made in the affidavit-in-reply and submitted that the notice for reopening is just and valid:-

"5. At the outset, I humbly submit that the impugned notice has been issued on four grounds. The first ground of reopening is that the petitioner failed to deduct TDS on Wharf age expenses of Rs.5,86,487/- paid to M/s. Damani Shipping Pvt. Ltd. and therefore the said amount was not allowable in view of Section 40(a)(ia) of the Act.

The second ground of reopening is that the petitioner had not deducted TDS on payment of import expenses of Rs.1,64,109/- to M/s to Damani Shipping Pvt Ltd, and therefore, the said amount was not allowable in view of Section 40(a)(ia) of the Act.

The third ground of reopening is that the petitioner debited a sum of Rs.97,593/- payable to Gujarat Energy Transmission Commission for Operation and Maintenance of its Windmills (O & M charges for transmission lines). However, the petitioner did not deduct TDS, and therefore, the said expenditure was not allowable under Section 40(a)(ia) of the Act.

The fourth ground of reopening is that the petitioner paid bonus amounting to Rs.14,90,000/- to the three directors having 99.3% shareholding instead of declaring dividend despite earning huge profits. The bonus paid to the directors was in lieu of dividend, and therefore, cannot be allowed

as deduction u/s 36(1)(ii) of the Act. I submit that the assessment is reopened after recording reasons to believe that income chargeable to tax has escaped assessment due to failure on part of the petitioner to disclose fully and truly all material facts necessary for assessment."

8. Having heard the learned advocates for the respective parties and having gone through the material on record, it appears that the impugned notice under Section 148 of the Act for reopening of the assessment for the Assessment Year 2011-12 is admittedly issued beyond a period of four years from the end of relevant assessment year. Therefore, the only short question which arises for consideration is whether income chargeable to tax has escaped assessment for the failure on part of the assessee to disclose fully and truly all material facts, is emerging from the reasons recorded?

9. For each reason recorded by the respondent in Paragraph No.2, expression used "on perusal of the assessment records for the year under consideration..." or "During the course of examination of case records for the year under consideration..." in Paragraph No.2.1 to 2.3, "While examination of the case records..." in Paragraph No.5, and "During the course of examination of the case records of the assessee company..." in Paragraph No.6. Thus, the respondent has recorded reasons on verification of the material already on record during the original assessment proceedings. Moreover, it is not alleged in the reasons recorded that there was failure on the part of the petitioner to disclose

truly and fully all material facts. It is noticed that during the original assessment proceedings, the petitioner had furnished the requisite details pertaining to the payment of Rs.5,86,487/- towards wharfage expenses. Therefore, the reasons recorded with regard to applicability of Section 40(a)(ia) of the Act was already considered by the Assessing Officer during the course of assessment proceedings.

10. Similarly, details of bonus and remuneration paid to the directors and details with regard to payment of dividend and profit etc. to the directors of the petitioner were also furnished during the course of the assessment, and therefore, issue with regard to propose disallowance in view of Section 36(1)(ii) of the Act would not arise.

11. With respect to the issue of TDS, the respondent has recorded reason that while examination of the case record, it is noticed that the assessee was required to deduct TDS on payment made to the tune of Rs.8,48,189/-. However, it was pointed out by the learned advocate for the petitioner that the details of TDS were furnished during the course of assessment proceedings.

12. With regard to similar question of reopening of assessment ,the Delhi High Court in the case of Eicher Ltd (supra) has held as under:-

"16. Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the

assessed before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessed, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessed should be made to suffer the consequences of that lapse.

17. In so far as the present appeal is concerned, we find that the assessed had placed all the material before the Assessing Officer and where there was a doubt, even that was clarified by the assessed in its letter dated 8th November, 1995. If the Assessing Officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessed or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the Assessing Officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the Assessing Officer or his successor to reopen the assessment of the assessee.

13. The Supreme Court in the case of Kelvinator of India Ltd (supra) has held as under:-

"4. On going through the changes, quoted above, made to [Section 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 Assessing Officer to make a back assessment, but in [section 147](#) of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment,

confers jurisdiction to re- open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. 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. Our view gets support from the changes made to [Section 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 [Section 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 Assessing Officer. We quote herein below the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

"7.2 Amendment made by the [Amending Act](#), 1989, to reintroduce the expression 'reason to believe' in [Section 147](#).--A number of representations were received against the omission of the words 'reason to believe' from [Section 147](#) and their substitution by the 'opinion' of the Assessing Officer. 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 [section 147](#) would give arbitrary powers to the Assessing

Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 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 section 147, however, remain the same."

5. For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

14. This Court in the case of Patel Alloy Steel (P) Ltd (supra) has held as under:-

"7. The impugned notice has been issued beyond the period of 4 years from the end of the relevant Assessment Year. Question of income chargeable to tax escaping assessment for the failure of the assessee to disclose truly and fully all material facts, would therefore, assume significance.

8. In all four reasons recorded by us herein above, the Assessing Officer starts with an expression that on verification of record. Thus, the Assessing Officer has based his reasons on verification of the material already on record during the original assessment. In the reasons recorded, or the notice issued for reopening it is not even alleged that there was failure on the part of the assessee to disclose truly and fully all material facts. On this short ground, we are inclined to allow the petition.

9. Additionally, we notice that during the assessment proceedings, the assessee had brought to the pointed notice of the Assessing Officer that the assessee had paid interest of amount of Rs.12,80,617/- to IDBI. Along with such answer in the correspondence, copy of the ledger account of the interest paid was already enclosed. Thus full details of the borrowing, interest paid, etc. were part of the assessment proceedings.

10. With respect to disallowance of expenditure relatable to tax free income in terms of section 14A of the Act, it is undoubtedly true that rule 8D of the Income Tax Rules, 1962 was not in operation

at that time. The determination, therefore, could not have been based on such formula. This is, however, not to suggest that there could be no disallowance at all under section 14A of the Act if it was found that expenditure was incurred for earning tax free income. However, in this case also the crucial question is, did the assessee withhold true and full facts during the course of assessment leading to escapement of income chargeable to tax? Answer has to be in the negative.

11. With respect to the question of TDS, the Assessing Officer himself has recorded that the tax was deducted and return was duly filed. He only required to reconcile the expenditure and the tax deducted at source which may lead to a possible disallowance under section 40(a)(ia) of the Act. Surely, for such a fishing inquiry reopening of assessment could not be permissible that too assessment beyond the period of four years from the end of the relevant assessment year when it is not even the case of the Department that the assessee had not disclosed truly and fully all material facts."

15. The Delhi High Court in the case of Converttech Equipments (P) Ltd (supra) has held as under:-

"7. This Court is of the opinion that in view of the fact that no fresh circumstances have come to notice to take a different view, no substantial question of law arises on the point of the disallowance under section 36(1)(ii). The decisions of the income tax authorities involved concurrent findings on pure questions of fact. Moreover, a Division Bench of this Court in *Metplast Pvt. Ltd. v. DCIT*, (2012) 341 ITR 563, after referring to the judgment of the Bombay High Court in *Loyal Motors Services Company Ltd. v. CIT*, (1946) 14 ITR 647 opined that the commission, if found to be paid for services rendered by the director as per the terms of the appointment, cannot be said to be distribution of dividend or profits in the guise of commission. It was noticed that while commission was paid as a form of remuneration for actual services rendered, dividend is a return of investment and is paid to all its shareholders equally. It was thus held that if the commission is

paid for actual services rendered, section 36(1) (ii) will not apply. This decision was followed by this Court in CIT v. Career Launcher India Ltd. (2012) 250 CTR 240 (Del). These decisions apply to the present case. The substantial question of law in ITA No.669/2012 is answered in favour of the assessee."

16. This Court in the case of Shree Sayan Vighag Sahkari (supra) has held as under:-

"7. In the facts of the present case, the impugned notice under section 148 of the Act has been issued on 25.03.2015 for reopening the assessment for assessment year 2008-09, which is clearly beyond a period of four years from the end of the relevant assessment year. Under the circumstances, in view of the first proviso to section 147 of the Act, the Assessing Officer is required to record twin satisfaction, viz., that income chargeable to tax has escaped assessment and that such escapement is by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for its assessment for the year under consideration. On a perusal of the reasons recorded it is amply clear that there is nothing stated therein to the effect that there was any failure on the part of the petitioner to disclose fully and truly all material facts. Thus, the second condition precedent for exercise of powers under section 147 of the Act is clearly not satisfied. Moreover, even as regards the first condition, namely, that the Assessing Officer should record satisfaction that income chargeable to tax should have escaped assessment, in the light of the reasons recorded by this court in the case of Shri Chalthan Vibhag Khand Udhayog Sahakari Mandali Ltd. v. Deputy Commissioner of Income Tax (supra), it cannot be said that on the reasons recorded for reopening the assessment, the Assessing Officer could have formed the belief that income chargeable to tax has escaped assessment. Therefore, even the first condition precedent for exercise of powers under section 147 of the Act, is not satisfied. Under the circumstances, the impugned notice issued under section 148 of the Act cannot be sustained."

17. In view of above settled legal proposition and in the facts of the case, when the impugned notice issued under Section 148 of the Act is clearly beyond the period of four years from the end of relevant assessment year, in view of the first proviso to Section 147 of the Act, the respondent has to record the reason as to whether the income chargeable to tax has escaped assessment for the failure on part of the assessee to disclose truly and fully all material facts for its assessment for the year under consideration.

18. On perusal of the reasons recorded as well as material on record, it is evident that there was no failure on the part of the petitioner to disclose truly and fully all material facts. It is settled proposition of law that for fishing inquiry, reopening of assessment is not permissible, that too, reopening beyond the period of four years from the end of the relevant assessment year when it is not even the case of the respondent that there is a failure on the part of the petitioner to disclose truly and fully all material facts.

19. In view of the aforesaid fact situation, there is no tangible material for the respondent to come to the conclusion that there is escapment of income from assessment. Moreover, there is no live link for formation of such belief while recording the reasons for reopening the assessment. In such circumstances, when the entire material had been placed by the petitioner before the Assessing Officer, who accepted

the view canvassed by the assessee then merely because he did not record such acceptance in assessment order would not be a ground to conclude that income has escaped the assessment, and therefore, the assessment is required to be reopened.

20. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned notice dated 29.03.2018 issued by the respondent under Section 148 of the Income Tax Act-1961 is hereby quashed and set aside. Rule is made absolute. No order as to cost.

Sd/-
(J. B. PARDIWALA, J)

Sd/-
(BHARGAV D. KARIA, J)

GIRISH

