IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 8143 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA Sd/-

and
HONOURABLE MR. JUSTICE ILESH J. VORA Sd/-

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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

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SAURABH NATVARLAL SOPARKAR
Versus
ASSISTANT COMMISSIONER OF INCOME TAX CIRCLE 4(2)

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Appearance:
MR MONAAL J DAVAWALA(6514) for the Petitioner(s) No. 1
MRS MAUNA M BHATT(174) for the Respondent(s) No. 1

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CORAM: **HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MR. JUSTICE ILESH J. VORA

Date : 02/02/2021

ORAL JUDGMENT

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs;

> *"(A) quash and set aside the impugned notice at Annexure-A to this Petition.*
>
> *(B) pending the admission, hearing and final disposal of this petition, to stay implementation and operation of the notice at Annexure-A to this petition and stay further proceedings for assessment for A.Y. 2012-13.*
>
> *(C) any other and further relief deemed just and proper be granted in the interest of justice."*

2. The writ applicant seeks to challenge the legality and validity of the notice issued by the respondent under Section 148 of the Income Tax Act, 1961 (for short "the Act, 1961") proposing to reopen the assessment for the year 2012-13 under Section 147 of the Act, 1961. It appears that the writ applicant filed his original return of income on 19th September, 2012, declaring total income at Rs.4,81,02,130/-. The case was selected for scrutiny and an order under Section 143(3) of the Act was passed on 26th February, 2015, determining the total income at Rs.4,81,02,130/-. Thereafter, an order under Section 154 of the Act was passed dated 25th May, 2018, determining the total income of Rs.4,81,18,350/-. In the original return of income, the TDS deducted by some of the parties was not included in the income and was also not claimed as TDS. In such circumstances, the amount of Rs.16,270/- was added to the total income of the assessee and the TDS of the same was also given under the order passed under Section 154 and, ultimately, the income was determined at Rs.4,81,18,350/-.

3. The reasons for reopening furnished to the writ applicant are as under;

> *"The assessee has filed original return of income on 19.09.2012 declaring total income of Rs.4,81,02,130/-. The case was selected for scrutiny and order u/s.143(3) of the Act was passed on 26.02.2015 determining total income of Rs.4,81,02,130/-. Thereafter, order u/s.154 of the Act was passed on 2.5.05.2010 determining total income of Rs.4,81,18,350/-. In the said order the TDS deducted by concerned parties was inadvertently not included in the income and only net of TDS income was offered in the return of income. Therefore, the amount of Rs.16270/- was added to the total income of the assessee. Accordingly, the revised total income has been determined at Rs.,4,81,18,350/-.*
>
> *2. Subsequently, it was revealed that the assessee has claimed exempt income of Rs.27,43,265/- on account of dividend. As per profit & loss account, the assessee has claimed administrative and other expenses. However, no disallowance u/s. 14A r.w.r. 8D(2)(iii) was made. The investment as per balance sheet as on 31.03.2011 and 31.03.2012 is Rs.12,92,89,822/- and Rs.19,90,90,993/- respectively. The average investment worked out to Rs.164190407/- (½ of Rs.12,92,89,822/- and Rs.19,90,90,993/-). Hence, 0.5% of average investment is worked out to Rs.8,20,952/- (Rs.1641900407 / 0.5%). The assessee has not disallowed Rs.8,20,952/- u/s. 14A r.w.r. 8D(2)(iii) which resulted into under assessment of Rs.8,20,952/.*
>
> *3. Therefore, I have reason to believe that income chargeable to tax has escape assessment within the meaning of section 147 of the IT Act and the assessee failed to disclose fully and truly all material facts necessary for its assessment for the A.Y. 2012-13. Therefore, I am satisfied that it is a fit case for reopening the assessment under section 147 of the Act.*
>
> *4. In this case, assessment order u/s.143(3) of the Act has been passed and hence the case is covered by explanation 2(c) to section 147 of the IT Act.*
>
> *5. In this case, four years have elapsed from the end*

of assessment year under consideration. Hence, necessary sanction to issue notice u/s. 148 has been obtained separately from the Pr. Commissioner of Income Tax-4, Ahmedabad as per the provisions of section 151(1) of the I.T. Act 1961."

4. The writ applicant lodged his objections to the above noted reasons as under;

"The issue of investments and exempt income was examined at the time of original assessment and as opinion was formed that no disallowance u/s.14A was called for. It is therefore submitted that an opinion once formed is not open to change and therefore the notice u/s. 148 is bad and must be dropped . It is submitted that vide letter dated 2.07.2014 the then assessing officer had called various details including the details about the income claimed exempt and the expenses incurred for earning such exempt income. Vide letter dated 19.08.2014, I had replied to the same giving details of the exempt income earned and also stated that no expenditure was incurred to earn such income. Further, pursuant to personal hearing a specific submission was made regarding non-applicability of section 14A r.w.r. 8D vide letter dated 11.09.2014. It is submitted that the issue was scrutinized in detail at the time of original assessment and therefore by issue of notice u/s. 148 an opinion that was originally formed is sought to be change which is not permissible in law. It is therefore submitted that the notice is bad and be dropped. The law on this point is explained by the Supreme Court in Kelvinator of India Ltd. (2010) 320 ITR 561(SC). I annex herewith the copy of letter dated 25.07.2014, 19.8.2014 and 11.09.214 as Annexure-A.

4.2 For the impugned Assessment Year 2012-13 the assessment order u/s.143(3) was passed on 26.02.2015. As per the proviso to section 147, no action can be taken under this section after the expiry of four years from the end of the assessment year, unless the 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 of a notice issued u/s.142(3) or 148 or to disclose fully and truly all material facts necessary for

his assessment, for that assessment year. It is submitted that in the reasons recorded, there is no allegation of the assessee not having disclosed fully and truly all material facts necessary for his assessment. It is submitted that the reasons are recorded on the basis of all facts already available with the assessing officer originally disclosed during the assessment proceedings. It is therefore submitted that the notice is time barred as no action can be taken under this section after the expiry of four years from the end of the assessment year. The law on this point is explained by the Supreme Court in Lakhmani Mewal Das (1976) 103 ITR 437 (SC).

4.3 It is further submitted that the notice u/s. 148 is issued due to revenue audit objection. It is submitted that view expressed by revenue audit / internal audit party on a point of law could not be regarded as "information" for purposes of initiating proceedings under section 147. An opinion ought to be formed by the assessing officer alone. The law on this point is explained by the Supreme Court in Indian & Eastern Newspaper Society (1979) 119 ITR 996 (SC).

5) It is therefore submitted that the reasons recorded and the subsequent notice issued are bad and illegal and therefore may be dropped at once.

6) In view of the decision of the Apex Court in the case of GKN DRIVE SHAFT (INDIA) LTD. vs. ITO (259 ITR 19). It is requested that you pass a speaking order dealing with the objection raised against the reasons recorded by you."

5. It appears that the writ applicant was asked to clarify why no disallowance with respect to the expenses were made under Section 14(A) of the Act read with Rule 8D of the Rules. In this regard, the writ applicant clarified vide letter dated 11.09.2014. The same reads as under;

"I state that I have received tax free income from Shares/ mutual fund and Bond. You have asked me to clarify why no disallowance with respect to expenses has been

made under section 14A of the Income Tax Act read with Rule 8D of Income Tax Rules. In this regard I would like to state that no disallowance is required because of following reasons.

On facts Section 14A and rule 8D are not applicable in any case as I have incurred almost no expenditure to earn the exempt income. Further, large part of the income is received through ECS hence no expenditure is incurred to earn such income at all.

On Law: Pleader refer rule 8D. Relevant para is produced hereunder for reference.

"(1) Where the Assessing Officer, having regard to the accounts of the assessee of a previous year is not satisfied with-

(a) the correctness of the claim of expenditure made by the assessee, or

(b) the claim made by the assessee that no expenditure has been incurred.

In relation to income which does not form part of the total income under the Act for such previous year, he shall determine the amount of expenditure in relation to such income in accordance with the provisions of sub-rule (2).

The clause 1(b) states that the sub-rule 2 of rule 8D is only applicable if the A.O. Is not satisfied with claim that no expenditure is incurred.
In my case from the perusal of the profit and loss it is clear that I have not made payment of interest and further no expenditure for earning tax free income is incurred. Hence calculation under rule 8D is not applicable. Please note that all the expenses incurred by me are for professional activity only. No part of any expenses pertain to my investment at all. Whatever little expenditure that I might have incurred like Dmat expenditure, the same have been directly taken to capital account and not charged to Income and Expenditure Account. The details thereof are attached hereto.

Please refer direct decision of Mumbai ITAT Bench "J" in the case of Justice Sam P. Barucha vs. Addl. Conm. Of Income Tax 53 SOT 192. The head note is as under;

" Section 14A of the Income-tax Act, 1961 read with Rule 8D of Income-tax Rules, 1942- Expenditure incurred in relation to income not includible in total income- Assessment year 2008-09- Whether section 14A has within it implicit notion of apportionment in cases where expenditure is incurred for composite indivisible activities in which taxable and non-taxable income is received. Held, yes- Whether , however, when it is possible to determine actual expenditure in relation to exempt income or when no expenditure has been incurred in relation to exempt income, then principle of apportionment embedded in section 14A has no application- Held yes- whether where assessee had not incurred any expenditure on earning dividend and other exempt income and expenses- claimed by assessee were in nature of expenditure for earning professional income section 14A had no application- Held yes [in favour of assessee]"
The said decision is recently followed in the case of a Senior Advocate of Mumbai viz. Shri Iqbal M. Chagla (ITA No.877/Mum./2013) where the facts are identical to the facts of my case. A copy of the said order is attached hereto.

From the above it is clear that the no disallowance is required under Section 14A."

6. Ultimately, the objections raised by the writ applicant came to be disposed of vide order dated 25th April, 2019, which reads as under;

"The objection filed by assessee has duly been considered. However, the same is not found acceptable on following grounds;

a) Regarding the contention of the assessee that he has disclosed all details and facts with documentary evidence is not acceptable. In this connection, it is stated that in the original assessment order, the

Assessing Officer has not formed any opinion regarding disallowance u/s. 14A r.w.r 8D. Therefore, when no opinion has been formed by the Assessing Officer, the question of change of opinion does not arise.

b) Regarding disclosure of all material facts necessary for the assessment, it is stated that in view of the facts , this case has been re-opened only after following the due procedure prescribed in the IT Act and was based on the tangible material leading to the conclusion that there was escapement of income from assessment. It may also be pointed out that mere furnishing of details about income does not mean that all material facts have been fully and truly disclosed. In the case of Indo-Aden Salt Manufacturing and Trading Co.(P) Ltd. vs. Commissioner of Income Tax 159 ITR 624 (SC) , the Hon'ble Supreme Court has held that even if the assessee had supplied details but if it had not disclosed true facts which the ITO could have found by further proving, the reopening of the assessment was valid. In the case of Olwin Tiles (India) Pvt. Ltd. vs. DCIT in ITA No.17303, 18388 & 18389 OF 2015, Hon'ble Gujarat High Court vide its order dated 5th January 2016 has held that once the reasons are recorded properly the proceedings initiated u/s. 147 of the Act are valid. In the case of Shree Krishna (P) Ltd. vs. Income-Tax Offier 221 ITR 538 (SC), the Hon'ble Supreme Court reiterated that it was the duty of the assessee to disclose material facts fully and truly. The disclosure of a loan, which was subsequently discovered to be false,would make the reassessment valid. In the case of ITO vs. Selected Debur Bank Coal Co. Pvt. Ltd. 21 ITR 597 (SC), the Supreme Court had stated that on the failure to disclose material facts, re-assessment could be resorted to. Attention is also drawn to the case of Phool Chand Bajrang Lal vs. Income Tax Officer 203 ITR 456 (SC), wherein the Hon'ble Supreme Court had laid down the proposition that discovery of new and important facts constitute information on the basis of which re-assessment proceedings could be initiated. In the case of ITO vs. Parshottamdas Bangar 224 ITR 362 (SC), the Hon'ble Supreme Court had held that letter from DDIT (Inv) constituted for re-opening of assessment.

c) The next objection is that the reassessment is invalid as the same is made merely on the basis of audit objection. The above objection is not acceptable. The

assessment has not been reopened merely on the basis of audit objection. But after receipt of audit objection, the Assessing Officer has applied his mind and found that the information given by the audit party is correct. The Revenue Audit is constituted by the constitution of India to find out any mistake of law or of facts. Therefore, the mistake pointed out by the Audit is to be considered as information. However, such information should not be followed blindly by the Assessing Officer. In the instant case, the Assessing officer has taken cognizance of the information given by the Revenue Audit Party and thereafter to facts pointed out by the Audit has been verified and after applying the mind found that the mistake pointed out was correct. Therefore, after following due procedure, the assessment was reopened. Therefore, the reopening of the assessment is valid as per law.

5. In view of the above discussion and the judicial pronouncements in Revenue's favour, the objections raised by the assessee against reopening of assessment cannot be entertained as the same are without any basis. It may be seen that while reopening the assessment, proper procedure as per income tax law has been followed by the Assessing Officer. The case has been reopened well within the time limit prescribed as per the provisions of the Income Tax Act, 1961 and also on account of the fact that there was reason to believe that the income chargeable to tax has escaped assessment.

6. *In view of the above facts, it becomes evident that this case has been reopened only after following the due procedures prescribed in the IT Act and was based on the tangible material leading to the conclusion that there was escapement of income from assessment. It may also be pointed out that mere furnishing of details about income does not mean that all material facts have been fully and truly disclosed. In the case of Indo-Aden Salt Manufacturing and Trading Co. (P) Ltd. vs. Commissioner of Income Tax 159 ITR 624 (SC) , the Hon'ble Supreme Court has held that even if the assessee had supplied details but if it had not disclosed true facts which the ITO could have found by further probing the reopening of the assessment was valid. In the case of Olwin Tiles (India) Pvt. Ltd. vs. DCIT in ITA No.17303, 18388 & 18389 of 2015, Hon'ble Gujarat High*

Court vide its order dated 5th January, 2016 has held that once the reasons are recorded properly, the proceedings initiated u/s.147 of the Act are valid. In the case of Shree Krishna (P) Ltd. vs. Income Tax Officer 221 ITR 538 (SC), the Hon'ble Supreme Court reiterated that it was the duty of the assessee to disclose material facts fully and truly. The disclosure of a loan, which was subsequently discovered to be false, would make the re-assessment valid. In the case of ITO vs. Selected Debut Bank Coal Co. Pvt. Ltd. 217 ITR 597 (SC), the Supreme Court had stated that on the failure to disclose material facts, re-assessment could be resorted to. Attention is also drawn to the case of Phool Chand Bajrang Lal vs. Income tax Offier 203 ITR 456 (SC) wherein the Hon'ble Supreme Court had laid down the proposition that discovery of the new and important facts constitute information on the basis of which re-assessment proceedings could be initiated. In the case of ITO vs. Parshottamas Bangar 224 ITR 362 (SC), the Hon'ble Supreme Court had held that letter from DDIT (Inv.) constituted good information for reopening of assessment.

7. In view of the above discussion and the judicial pronouncements in Revenue's favour, the objections raised by the assessee against reopening of assessment cannot be entertained as the same are without any basis. It may be seen that while reopening the assessment, proper procedure as per income tax law has been followed by the Assessing Officer. The case has been reopened well within the time limit prescribed as per the provisions of the Income Tax Act,1961 and also on account of the fact that there was reason to believe that the income chargeable to tax has escaped assessment. It is not a case that there is no reason for reopening of the assessment."

7. Being dissatisfied with the above, the writ applicant is here before this Court with the present writ application.

8. Mr. B.S. Soparkar, the learned counsel appearing for the writ applicant vehemently submitted that the case on hand is nothing but a mere change of opinion. Mere change of opinion

would not constitute a sufficient ground to reopen the assessment proceedings and that too beyond the period of four years in a case of scrutiny assessment under Section 143(3) of the Act. Mr. Soparkar submitted that during the course of the original assessment proceedings, the Assessing Officer, vide his letter dated 25th July, 2014, had called for various details including the details about the income claimed exempt and the expenses incurred for earning such exempt income. He pointed out that vide letter dated 19th August, 2014, the writ applicant had replied to the same, furnishing details of the exempt income earned and had also clarified that no expenditure was incurred to earn such income. He further submits that in the course of the personal hearing, a specific submission was made regarding the non-availability of Section 14A read with Rule 8D. He would argue that the issue regarding the non-applicability of Section 14A read with Rule 8D was scrutinized in detail at the time of the original assessment. In such circumstances, according to Mr. Soparkar, it could be said that the Assessing Officer consciously took a particular decision and now such decision is sought to be changed based on the same set of facts.

9. The second argument of Mr. Soparkar is that there is no failure on the part of the writ applicant to disclose truly and fully all the material facts. He would argue that merely because the Assessing Officer has a reason to believe that income had escaped would not be sufficient to reopen the assessment beyond the period of four years. The escapement of income must also be occasioned by a failure on the part of the writ applicant to disclose fully and truly all the material facts. The third argument of Mr. Soparkar is that the

reopening is on the basis of audit objection. Mr. Soparkar would submit that the same would not be a sufficient ground to reopen the assessment proceedings. Mr. Soparkar placed reliance on two decisions (i) ***Adani Exports vs. Deputy Commissioner of Income Tax (Assessment),*** (1999) 240 ITR 224 and (ii) I***ndian & Eastern Newspaper Society vs. CIT, (1979) 119 ITR 996 (SC)***. By placing reliance on these two decisions, it is submitted that the opinion expressed by the internal audit party is not "information" for the purpose of Section 147 of the Act.

10. In the last, Mr. Soparkar submitted that even otherwise no income has escaped assessment. In such circumstances, Section 14A will have no applicability.

11. On the other hand, this writ application has been vehemently opposed by Mr. Manish Bhatt, the learned senior counsel appearing for the Revenue. Mr. Bhatt would submit that in the return filed by the writ applicant, the assessee claimed exempt income of Rs.2,743,265/- on account of the dividend and also claimed administrative and other expenses in the profit and loss account. However, the assessee failed to make dissallowance of expenditure related to the exempt income under Section 14A read with Rule 8D(2)\(iii) . He would argue that the Assessing Officer has reason to believe that the income chargeable to tax has escaped assessment within the meaning of Section 147 of the Act and the assessee failed to disclose fully and truly all the material facts necessary for its assessment for the A.Y.2012-13.

12. Mr. Bhatt would argue that cogent reasons have been assigned while overruling all the objections raised by the writ

applicant to the reasons assigned for the purpose of reopening of the assessment.

13. Mr. Bhatt would argue that in the case on hand, the escapement of income was noticed relying upon some tangible material.

14. Mr. Bhatt invited the attention of this Court to few relevant averments made in the affidavit-in-reply filed on behalf of the Revenue. We quote the relevant averments relied upon by Mr. Bhatt;

> *"3.2 With reference to para 2.3, it is submitted that the contention of the petitioner is not correct. Regarding disclosure of all material facts necessary for the assessment, it is submitted that mere furnishing of details about income does not mean that all material facts have been fully and truly disclosed. In the case of Indo-Aden Salt Manufacturing and Trading Co. (P) Ltd. Vs. Commissioner of Income-tax 159 ITR 624 (SC), the Hon'ble Supreme Court has held that even if the assessee had supplied details but if it had not disclosed true facts which the ITO could have found by further probing, the reopening of the assessment was valid. In the case of Olwin Tiles (India) Pvt. Ltd. Vs. DCIT in ITA No.17303, 18388 & 18389 of 2015, Hon'ble Gujarat High Court vide its order dated Sth January 2016 has held that once the reasons are recorded properly, the proceedings initiated u/s.147 of the Act are valid. In the case of Shree Krishna (P) Ltd. Vs. Income-tax Officer 221 ITR 538 (SC), the Hon'ble Supreme Court reiterated that it was the duty of the assessee to disclose material facts fully and truly The disclosure of a loan, which was subsequently discovered to be false, would make the re-assessment valid. In the case of ITO vs. Selected Dabur Bank Coal Co. Pvt. Ltd. 21 ITR 59 (SC), the Supreme Court had stated that on the failure to disclose material facts, re-assessment could be resorted to. Attention ts also drawn to the case of Phool Chand Bajrang Lal Vs. Income-tax Officer 203 ITR 456 (SC), wherein the Hon'ble Supreme Court had laid down the preposition that discovery of*

new and important facts constitute information on the basis of which re-assessment proceedings could be initiated. In the case of ITO Vs. Parshottamas Bangar, 224 ITR 362 (SC), the Hon'ble Supreme Court had held that letter from DDIT (Inv) constituted good information for re-opening of assessment.

In this case escapement was noticed relying upon the tangible material. The notice u/s.148 was issued as the income chargeable to tax has escaped assessment on account of failure on part of the assessee to disclose fully and truly all material facts.

With reference to para 2.4, it is submitted that the assessment was reopened as the assessee has claimed exempt income of dividend and also incurred administrative and other expenses. However the assessee failed to disallow the expenses related to exempt income under rule 8D(2(iii). Thus, though the assessee was aware about the disallowance of administrative and other expenses under rule 8D(iii), the same was not disallowed in the original return filed which has resulted in to escapement of income. Therefore the A.O. Issued notice u/s 148 of the act. The disallowance of expenditure was worked out at 0.5% of average investment as per Balance Sheet as on 31.03.2011 and 31.03.2012 at Rs.8,20,952/-. Therefore, reopening of the assessment is valid as per law.

3.4 With reference to para 3.1, it is submitted that the assessment was reopened on the basis of tangible materials leading to the conclusion that income chargeable to tax has escaped assessment u/s.147 of the I.T. Act. The assessee failed to disallow the expenses related to exempt income in the return of income filed for the A.Y. 2012-13. Therefore, the reopening of the assessment was valid as per law.

3.5 With reference to para 3.2, it is submitted that the above contention of the assessee is not acceptable. It is submitted that the assessment was reopened only after following the due procedure described under the Income tax Act and was based on tangible materials leading to the conclusion that income chargeable to tax has escaped assessment Further, it is submitted that mere furnishing of details about income does not means that

all material facts have been fully and truly disclosed. Further, during the course of original assessment proceedings the Assessing Officer has not formed any opinion regarding issue of disallowance of expenses related to exempt income u/s.14A. Therefore, the question of change of opinion does not arise.

3.6 With reference to para 3.3 and 3.4, it is submitted that contention of the assessee is not correct. It is submitted that the assessment was reopened on the basis of tangible materials leading to the conclusion that there was escapement of income from the assessment. It may also be pointed out that mere furnishing of details about income does not mean that all material facts have been fully and truly disclosed. In the case of Indo-Aden Salt Manufacturing and Trading Co. (P) Ltd. Vs. Commissioner of Income-tax 159 ITR 624 (SC), the Hon'ble Supreme Court has held that even if the assessee had supplied details but if it had not disclosed true facts which the ITO could have found by further probing, the reopening of the assessment was valid. In the case of Olwin Tiles (India) Pvt. Ltd. Vs. DCIT in [TA No.17303, 18388 & 18389 of 2015, Hon'ble Gujarat High Court vide its o1der dated Sth January 2016 has held that once the reasons are recorded properly, the proceedings initiated u s.147 of the Act are valid. In the case of Shree Krishna (P) Ltd. Vs. Income-tax Officer 221 ITR 538 (SC), the Hon'ble Supreme Court reiterated that it was the duty of the assessee to disclose material facts fully and truly. The disclosure of a loan, which was subsequently discovered to be false, would make the reassessment valid. In the case of ITO Vs. Selected Dabur Bank Coal Co. Pvt. Ltd. 217 ITR 597 (SC), the Supreme Court had stated that on the failure to disclose material facts, re-assessment could be resorted to. Attention is also drawn to the case of Phool Chand Bajrang Lal Vs. Income-tax Officer 203 ITR 456 (SC), wherein the Hon'ble Supreme Court had laid down the preposition that discovery of new and important facts constitute information on the basis of which re-assessment proceedings could be initiated. In the case of ITO Vs. Parshottamas Bangar, 224 ITR 362 (SC), the Hon'ble Supreme Court had held that letter from DDIT (Inv) constituted good information for re-opening of assessment.

With reference to para 3.5, it is submitted that the contention of the petitioner that the assessment was reopened merely on the basis of Audit Objection is not correct. It is submitted that the assessment has not been reopened merely on the basis of audit objection. But after receipt of information by way of audit objection, the Assessing Officer has applied her mind and found that the information given by the audit party is correct. The Revenue Audit is constituted by the constitution of India to find out any mistake of law or of facts. Therefore, the mistake pointed out by the Audit is to be considered as information. However, such information should not be followed blindly by the Assessing Officer. In the instant case the Assessing Officer has taken cognizance of the information given by the Revenue Audit Party and thereafter to facts pointed out by the Audit has been verified and after applying her mind found that the mistake pointed out was correct. Therefore, after following due procedure the assessment was reopened. Therefore the reopening of the assessment is valid as per law.

With reference to to para 3.6, it is submitted that the contention of the petitioner is that he has not incurred any expenses for earning tax free income is not correct The assessee has claimed exempt income of dividend of Rs.2743265/- and also claimed administrative and other expenses in Profit & Loss account. However, the assessee failed to make disallowance of expenditure related to the exempt income u/s.14A r.w.r. 8D(2)(iii). The disallowance was worked out under Rule 8D(2)(iii) at Rs.8,20,952 - being 0.5% of average investment as per Balance Sheet as on 31.03.2011 and 31.03.2012. Therefore, the provision of Rule-8D(2)(iii) is applicable to the petitioner case. Hence, the disallowance under rule-8D(2)(ili) has been correctly worked out.

3.9 With reference to para 4, it is submitted that the contention of the petitioner is not correct. It is submitted that the petition is filed at a pre-mature stage inasmuch as only a notice u/s.148 read with section 147 of the Income Tax Act ('the Act' for short) has been issued. In the event, the petitioner is aggrieved by the reassessment, alternative efficacious remedy is available by way of an Appeal to the CIT(A) and thereafter to the Tribunal as per the provisions of the Act. On this ground

alone, I humbly submit that the petition is devoid of any merits and be summarily rejected."

15. In such circumstances, referred to above, Mr. Bhatt prays that there being no merit in this writ application, the same be rejected.

ANALYSIS

16. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the only question that falls for our consideration is whether the impugned notice issued under Section 148 of the Act is sustainable in law.

17. We are of the view that the writ applicant should succeed on the first two contentions i.e. (i) change of opinion and (ii) no failure to truly and fully disclose all the material facts. We take notice of the fact that a notice under Section 142(1) of the Act, 1961 dated 25th July, 2014 was issued to the writ applicant, calling for certain information. One of the informations called for, as contained in Clause (5), reads thus;

"(5) Please provide details of working and documentary evidence in respect of income claimed exempt. You are also requested to provide what expenses you have incurred for earning such exempt income."

18. The following information was furnished by the writ applicant vide letter dated 19th August, 2014.

"During the year I have received following tax free income.

a. PPF interest Rs.336423/-
b. Dividend from Mutual Fund and Indian Companies

Rs.2743465/-

c. Interest on IFFCL Tax Free Bond Rs.458950/-

d. Long Term Capital Gain Rs.2507836/-

Copy of accounts and documentary evidence attached herewith. I have not expended any amount to earn above mentioned income."

19. Thus, from the aforesaid information, it is evident that a specific query was raised by the Assessing Officer with respect to Section 14A and the same was appropriately replied by the writ applicant. The same was accepted at the relevant point of time. Once again the very same issue is sought to be raised for the purpose of reopening which is otherwise not permissible in law on mere change of opinion. It cannot be said that there was any failure on the part of the assessee to fully and truly disclose all the material facts. This writ application, in our opinion, could be said to be squarely covered by the decision of the Supreme Court rendered in the case of ***CIT vs. Kelvinator India,*** reported in (2010) 2 SCC 723, wherein the Supreme Court observed as under;

"5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the 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 1-4- 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 reopen the assessment. Therefore, post-1-4- 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, 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.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition 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.

7. 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 1-4-1989, the 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. 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 reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

8. We quote hereinbelow the relevant portion of Circular No.549 dated 31-10-1989, 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 the 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." (emphasis supplied)

9. For the aforestated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."(Emphasis given by us)"

20. In the overall view of the matter, we are convinced that the impugned notice under Section 148 of the Act issued to the assessee for the purpose of reopening of the assessment beyond the period of four years and that too in a case of scrutiny assessment under Section 143(3) of the Act is not sustainable in law having regard to the facts of this case.

21. In the result, this writ application succeeds and is hereby allowed. The impugned notice is hereby quashed.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

Vahid