IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 19990 of 2019

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR. JUSTICE J.B.PARDIWALA
and
HONOURABLE MR. JUSTICE ILESH J. VORA

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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SANDESH PROCON LLP
Versus
THE ASSISTANT COMMISSIONER OF INCOME TAX, CIRCLE 3(3), AHMEDABAD

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Appearance:
MR B S SOPARKAR(6851) 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 : 05/02/2021

ORAL JUDGMENT
(PER : HONOURABLE MR. JUSTICE ILESH J. VORA)

1. By filing this writ application under Article 226 of the Constitution of India, the writ applicant has assailed the legality and validity of the impugned notice dated 26.07.2018 issued

under Section 148 of the Income Tax Act, 1961 (hereinafter referred to as "the Act" for short) proposing to re-assess the income of the writ applicant for the A.Y. 2012-13 on the ground that the income chargeable to tax for the said year had escaped assessment within the meaning of Section 147 of the Act.

2. The brief facts leading to filing of the present writ application are as under:

    1. The writ applicant is a Limited Liability Partnership (LLP) Firm carrying the business of real estate development.

    2. The writ applicant filed its return of income for the A.Y. 2012-13 on 30.09.2012 declaring total income NIL and claimed loss of Rs.3,66,93,809/-. The case was selected for scrutiny and the same was finalized under Section 143 of the Act on 05.03.2015 determining the total loss at Rs.3,32,86,950/- and subsequently, notice under Section 148 of the Act dated 26.07.2018 was issued and assessment was re-opened by recording the following reasons :

> *1. In this case, the assessee filed return of income for A.Y. 2012-13 on 30.09.2012 declaring a loss of Rs.3,66,93,809/-. During the period, the assessee has shown loss from business and profession and income from capital gains & other sources. The assessee is engaged in the business of real estate development.*

2. From the records, it is noticed that the assessee has debited interest expenses of Rs.9,77,80,572/- and had shown exempt income of Rs.34,06,856/-.

3. The assessee was required to make a disallowance under Section 14 A of the Act r.w.r 8 D of the IT Rules in such case as per the following calculation:

Average of investment: Rs.103,34,98,799/- [1/2 of Rs.206,23,83,210/- + Rs.46,14,388/-]

Average of total assets : Rs.219,02,72,277/- [1/2 of Rs.318,20,26,792//- + Rs.119,85,17,757/-]
Total interest Expenditure : Rs.9,77,80,572/-.

Disallowance :

(i) Nil
(ii) Rs.4,61,38,603/- = (Rs.9,77,80,572/- X 103,34,98,799//-) Rs.219,02,72,277/-
(iii) Rs.51,67,493/- = 0.5 % of Rs.103,34,98,799/-

Total disallowance = Rs.5,13,06,096/-.

4. The documents filed by the assessee during the course of assessment was perused.

5, The assessee was required to disallow an amount of Rs 5,13,06,096/u/s 14A of IT Act r.w.r 8D of IT Rules which the assessee failed to do.

6. The assessee was required to disallow an amount of Rs 5,13,06,096/u/s 14A of IT Act r.w.r 8D of IT Rules which the assessee failed to do. During the course of original assessment, disallowance was made only for Rs 34,06,859/- restricting to the extent of exempted income. Therefore, the income of Rs 4,78,99,237/- has escaped assessment. Considering the above facts, I have reason to believe that by omission on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, the -income chargeable to tax for AY 2012-13 has escaped assessment within the meaning of Section 147 of the IT Act.

"7. Not applicable.

8. The assessee was required to disallow an amount of Rs 5,13,06,096/u/s 14A of IT Act r.w.r 8D of IT Rules which the assessee failed to do. During the course of original assessment, disallowance was made only for Rs 34,06,859/- restricting to the extent of exempted income. Therefore, the income of Rs 4,78,99,237/has escaped assessment. . Considering the above facts, I have reason to believe that by omission on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, the Income chargeable to tax for A.Y 2012-13 has escaped assessment within the meaning of Section 147 of the IT Act.

9. In this case, return of income was filed for the AY 2012-13 by the assessee and regular assessment u/s 143(3) was made on 05/03/2015. Since, 04 years from the end . of the relevant year has expired in this case and the assessee has not truly and correctly disclosed material facts necessary for her assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer para 6 above). I have carefully considered the assessment records containing submissions made by the assessee In response to various notices Issued during the assessment proceedings and have noted that the assessee has not fully and truly disclosed the material facts related to the disallowance to be made u/s 14A of Income Tax Act r.w.r. Rule 8D of IT Rules necessary for his assessment for the year under consideration.

It is evident from the above facts that the assessee had not truly: and fully disclosed Material facts necessary for his assessment for the year under consideration thereby Necessitating reopening u/s 147 of the act. It is true that the assessee has filed a copy of annual report and audited P&L account and balance-sheet alongwith return of income where various information /material were disclosed. However, the requisite full and true disclosure of all

material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited par a/c and balance sheet or other evidences as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the act.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) and order sheet entries recorded during the assessment proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited P&L A/c, Balance sheet and books of accounts in such a manner that it would require due diligence by the AO to extract these Information. For aforestated reasons, it is not a case of change of opinion by the AO.

In this case more than four years have been lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s 148 has been obtained separately from Pr Commissioner of Income Tax as per the provisions of Section 151 of the act."

3. Pursuant to the issuance of notice dated 26.07.2018 for re-opening of the assessment, the writ applicant submitted its objections dated 27.06.2019, which reads thus:

"42. We are in receipt of the above

referred reasons recorded for re-opening of assessment in our case for AY 2012-13 wherein the reason for re-opening is that the disallowance u/s. 14 A r.w.r 8D ought to have been Rs.5,13,06,096/- instead of Rs.34,06,859/- made by the Assessing Officer in the regular assessment u/s. 143 (3).
In this regard, we submit that the return of income was filed on 30.09.2012 declaring loss of Rs.3,66,93,809/-. The exempt income earned during the year under consideration of Rs.34,06,859/- being in nature of dividend from mutual funds was duly disclosed in the return of income.

During the course of regular assessment u/s. 143 (3), the Assessing Officer proposed to disallow interest expenses u/s. 14A r.w.r 8D on the assumption that the expenses have been incurred by us in earning exempt income. In response to the said contention of the Assessing Officer, we file our reply dated 19.02.2015 wherein we explained that the dividend from mutual funds get directly accumulated in the fund and on redemption entire invested amount along with the dividend accrued till date is credited to the bank account and thus no administrative or other expenses have been incurred in earning the same. The extract of the letter dated 19.02.2015 are produced in the regular assessment order dated 05.03.2015 u/s. 143 (3) which is enclosed as Annexure 1 for year reference.

In spite of the above referred submission, the Assessing Officer disallowed Rs.34,06,859/- u/s. 14A of the Income Tax Act, 1961 (the Act) i.e. to the extent of exempt income earned by us.

Further, as mentioned in the reason for re-assessment, the disallowance u/s. 14A have been re-computed by you at Rs.5,13,06,096/-, which is much higher than the actual exempt income earned by us. Further, it is well settled law that the disallowance u/s. 14A r.w.r. 8D cannot exceed the exempt income. The said contention is supported by judicial decision in below mentioned cases:

a. PCIT Vs. State Bank of Patiala [99 taxmann.com 286 (SC)]
b. PCIT Vs. Caraf Builders &

Constructions (P) Ltd. [101 taxmann.com 167 (Del HC)]

The copies of the judgments are enclosed as Annexure 2 for your reference.

In view of the above, it is unquestionable beyond any doubt that the disallowance cannot exceed the exempt income and accordingly, the reason recorded for re-assessment does nos stand valid. Therefore, we request Your Honour to kindly drop the re-assessment proceedings and oblige."

4. On 04.10.2019, the order came to be passed overruling the objections raised by the assessee against the issuance of notice under Section 148 of the Act. The relevant portion of the order reads thus:

3. The objection filed by the assessee has duly. been considered. However, the same is not found acceptable for the following reasons.

1. The contention of the assessee that the disallowed should be restricted to the extent exempt income. In this connection, it is stated that as per Rule 8D u/s . 14 the Act. The expenditure in relation to income which does not form part of the total income shall be aggregate of following amounts, namely-

2. The amount of expenditure directly relating to income which does not form part of total income.

3. In a case where the assessee has incurred expenditure by way of interest during the previous year Which is not directly attributable to any particular Income or receipt, an amount computed in accordance with the following formula namely

A B/C*

A means = amount of expenditure by way of interest of other than the amount of interest included in clause(i) incurred during the previous year:

B -means = The average value of investment, income from which does not or shall not form _ part of the total income, as appearing in the balance sheet of the assessee, on the first day and the last day of the previous year.

C-means = the average of total assets as appearing in the balance balance sheet of the assessee, on the first day and the last day of the previous year

In the case of assessee, the expenditure incurred by way of interest is not directly attributable to any income and hence the disallowance is to be worked as above per above formula at Rs.5,13,06,096/- as per working given in the reasons recorded. Moreover, the Submission on merits if any will dealt with during the course of assessment proceeding after considering the evidence and submission made by the assessee during the course Of reassessment proceedings.

4. In view of the above facts, it becomes evident that this case has been re-opened 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 re-opening of the assessment was valid. In the case of Olwin Tiles (India) Pvt. Ltd. Vs. DCI in ITA No.17303, 18388 & 18389 of 2014, 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 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 Vs 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. Pashottamdas 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.

5 In view of the above discussion and the judicial pronouncements in Revenue's favor, the objections raised b the assessee against re-opening of assessment cannot be entertained.as the same are without any basis. It may be seen that while re-opening the assessment, proper procedure as per Income-tax law has been followed by the Assessing Officer. The case has been re-opened 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 {o believe that the income chargeable to tax has escaped assessment.

6. In view of the above discussion, I reject the objections of assessee, furnished vide letter dated 27.06.2019, against re-opening of assessment. The contentions raised by the assessee on merits are required verification with evidences produce by the assessee and hence

the same will be dealt with during the course of reassessment proceedings."

3. Being dissatisfied with re-opening of the assessment, the writ applicant has come up before this Court by filing present writ application with the prayer as indicated above.

4. We have heard Mr. Bandish S. Soparkar, the learned counsel appearing for the writ applicant and Mr. M.M.Bhatt, the learned Sr. Counsel assisted by Mrs. Mauna Bhatt, the learned Sr.Standing Counsel appearing for the Revenue.

5. Mr. Soparkar, the learned counsel for the writ applicant raised the following contentions :

    1. Referring to the Sections 147 and 148 of the Act, it was submitted that, the Assessing Officer no doubt has the power to reassess any income which escaped assessment for the year under consideration subject to the provisions of Section 148 to 153 of the Act, however, this power is conditional upon effect that, the Assessing Officer has some reason to believe that, the income has escaped assessment. Referring to the original assessment order made under Section 143(3) of the Act and the reasons for re-opening, it was submitted that, the re-opening of the assessment is bad on the ground that, the issue of disallowance under Section 14(8A)

of the Act was thoroughly gone into by the Assessing Officer and ultimately, the disallowance limited to Rs.34,06,859/-, which was the amount of exempt income earned. Therefore, on the same material, the Assessing Officer has formed his belief with regard to the escapement of income, which is nothing, but a change of opinion on the part of the Assessing Officer and therefore, he could not re-open the assessment in the absence of any tangible material.

2. It was further pointed out that, there is no income chargeable to tax has escaped assessment so far the disallowance under Section 148 A of the Act is concerned. On this ground, it was submitted that, the interest to the extent of entire exempt income already having disallowed at the time of original assessment, no further disallowance is permissible.

3. It was further pointed out that, the writ applicant had made all disclosures regarding the exempt income and the interest expenses claimed during the assessment proceedings, held under Section 143(3) of the Act and the issue of disallowance under Section 14A of the Act was discussed and after considering the records available with him as well as produced by the writ applicant, the

assessment was finally determined. Therefore, no failure on part of the writ applicant to disclose the facts fully and truly.

4. Referring to the decision of the Supreme Court rendered in the case of ***Patiyala Vs. State Bank of Patiyala [(2018) 99 Taxmann.com 286 (SC)]***, it was submitted that, the amount of disallowance under Section 14A of the Act could be restricted the amount of exempt income only and not at a higher figure. Therefore, even on merits, the interest to the extent of entire exempt income already having disallowed at the time of original assessment, no further disallowance is permissible. As a result, no income has escaped assessment and the action for re-opening of assessment initiated may kindly be quashed.

6. Making the above submissions, Mr. Soparkar, the learned counsel appearing for the writ applicant prayed that, the impugned notice and the proceedings may be quashed and set aside.

7. Mrs. Mauna Bhatt, the learned Sr. Standing Counsel appearing for the Revenue has vehemently opposed this writ application. Relying upon the contentions raised in the affidavit-in-reply by the Revenue, she would submit that, there was an omission on the part of the assesse to disclose

fully and truly material facts necessary for the assessment. She urged that on the basis of tangible material leading to conclusion that, there was escapement of income for the year under consideration and therefore, considering the material available with the Assessing Officer, he has reason to believe that, the income has escaped assessment. Mrs. Bhatt, the learned standing counsel for the revenue further submits that, as per the statutory provisions, while working out the disallowance under the provisions, the amount of Rs.5,13,06,096/- was required to be stated by the assessee, however, the assessee had incorrectly made disallowance of Rs.34,06,859/-. In this context, she would submit that, mere disclosure is not sufficient, but it has to be true and full disclosure and therefore, the Assessing Officer rightly come to the conclusion that the income has escaped assessment and such escapement occurred on account of failure on the part of the assessee to disclose fully and truly, all material facts necessary for the assessment for the year under consideration.

8. In the aforesaid circumstances, Mrs. Bhatt prays that there being no merits, present writ application may not be entertained.

9. We have carefully considered the contentions raised by both the parties and perused the materials placed on record.

10. It is the case of the Revenue that, the assessee was required to disallow an amount of Rs.5,13,06,096/- under Section 14A of the Act and during the original assessment, disallowance was made only upto Rs.34,08,859/- restricting the extent of exempted income. Therefore, as per the case of the revenue, the income Rs.4,78,99,237/- has escaped assessment for which the assessee failed to disclose fully and truly all material facts necessary for the assessment for the year under consideration. It is also undisputed fact that, the case of the assessee selected for further scrutiny and notice under Section 143(2) of the Act was issued and thereafter, notice under Section 142(1) of the Act along with questionnaire was served and pursuant to these notices, the assessee had furnished required details along with copy of return, audited accounts, balance sheet, profit and loss account etc. The issue of disallowance was considered by the respondent authority at length and disallowance of interest was restricted upto Rs.34,06,859/-. The observations with regard to disallowance made in the original assessment order reads thus:

"**3. Disallowance u/s. 14A of the IT Act**

On perusal of Balance sheet, it is observed that the assessee has invested a sum of Rs.2,04,22,70,664/- in shares/securities of different companies and he has earned dividend income of Rs. 34,06,859/-. It is also seen that the assessee has debited interest expenses of Rs.9,77,80,572/- in Profit and Loss account. As per provisions of the section 14A of the 1.T. Act

deduction of the expenditure cannot be allowed, if the same is incurred on account of exempt income which does not form a part of total income, in the instant case with a view to above facts, it is seen that the assessee has incurred expenses in respect to earned the Income which does not form a part of the total Income. Hence, provisions of section 14A would be applicable.

3.1. In view of the above, a show cause notice dated 19.02.2015 was issued and served to the assessee. For a ready reference relevant Para of the same Is reproduced below :

> *"On perusal of your balance sheet as on 31.03.2012, it is observed. that you have invested a sum of Rs.2,04,22,70,664/- in shares/securities of different companies, it is noticed that you have earned tax free dividend income of Rs.34,06,859/-. Hence, you are requested to explain as to why disallowance should not be made as per provision of section 144 of the Act to the extent of tax free income and added back to the total income of the assessment year under consideration.*

3.2. In response to the show cause notice assessee filed its reply dated 19.02.2015, For a ready reference the reply of the assessee is reproduced below :

"1. Vide your letter dated 19" February 2015 you have invited our attention to the exempt income of Rs 34,06,859 from Mutual Fund and our investment in shares of Apple woods Estate Private Limited. You have further sought our explanation in regard to disallowance of relevant expenditure, as per the provisions-of Section 14A of Income. tax Act, read with Rule 8 of the IT Rules.

2. In the above regard we wish to inform you that Sandesh Procon LLP is in the business of development of Real Estate. Applewoods Estate Private Limited is developing one of the largest township Project in Ahmedabad. To expand our presence. in Real Estate Market, we have strategically and in the ordinary course of business, acquired 70.79% stake in the said company. The business of Sandesh Procon LLP and Applewoods Estate Private Limited are very similar and therefore, our strategic investment in the same is business investment.

3. In the above regard, we wish to rely on the

direct ratio of the decision of the Hon'ble Delhi High Court in the case of CIT vs, Ho/cim (india) (P.) Ltd. (copy attached herewith), wherein it was held as under:

It is an undisputed position that respondent assessee is an investment company and had invested by purchasing a substantial number of shares and thereby securing right to management. Possibility of sale of shares by private placement etc. cannot be ruled out and is not an improbability. Dividend mayor may not be declared. Dividend is declared byt the company and strictly in legal sense, a shareholder has no control and cannot insist on payment of dividend. When declared, it is subjected to dividend distributor tax...

Further whether income earned in a subsequent year would or would not be taxable, made depend upon the nature of transaction entered into in the subsequent assessment year. For example, long term capital gain on sale of shares is presently not taxable where security transaction tax has been paid, but a private sale of shares in an off market attracts capital gains tax.

4. We also wish to invite your kind attention to the fact that we have not received any dividend income from the investment made by us in the shares of Applewoods Estate Pvt. Ltd, In this regard, we wish to rely on the direct ratio of a number of judicial pronouncements of various High Courts, including the Jurisdictional 'Gujarat High Court, wherein, it has-been clearly hald that-.no-disallowarice can be mate u/s, 144A, where the relevant Investment has not given rise to any exempt income. In this connection, we wish to reproduce the relevant observations of the latest decision of the Hon'ble Delhi High Court in the case of Haicim (Supra).

On the issue whether the respondent assessee could have earned dividend and disallowance of expenditure can be made, there are three decisions of the different High Courts directly on the issue and against the appellant revenue. No contrary decision of a High Court has been shown to us. The Punjab and Haryana High Court in Commissioner of Income Tax, Faridabad Vs. Mis. Lakhani Marketing Incl. ITA No.97012008, decided on 02.04.2014, made reference to two earlier decisions of the same Court in CIT Vs. Hero Cycles Limited, {2010} 323 ITR 518 and CIT Vs. Winsome Textile Industries Limited, [2009} 319 ITR 204 to hold that Section

14A cannot be invoked when no exempt income was earned. The second decision is of the Gujarat High Court in Commissioner o Income Tax-I Vs. Corrtech Energy P. Ltd, 20141 223 Taxmann 130 (Guj.). The third decision is of the Allahabad High Court in Income Tax Appeal No. 88 of 2014, Commissioner of Income Tax (li) Kanpu, Vs. M/s. Shivam Motors (P) Ltd. decided on 05.05.2014.

In the said decision it has been held: "As regards the second question, Section 144 of the Act provides that for the purposes of computing the total income under the Chapter, no deduction shall be allowed In respect of expenditure incurred by the assessee in relation to income which does not form part of the total income under the Act. Hence, what Section 14A provides is that if there is any income which does not form part of the income under the Act, the expenditure which is incurred for earning the income Is not an allowable deduction. For the year in question, the finding of fact Is that the assessee had not earned any tax free income. Hence, in the absence of any tax free income, the corresponding expenditure could not be worked out for disallowance.

5. As regard the dividend income of RS.34,06,859/- received from mutual funds, it virtually does not require any administrative expenditure. Dividend is accumulated in the fund and on redemption entire invested amount along with dividend accrued till date is credited to our bank account. It is only for the accounting purposes that the portion of dividend accrued is credited to investment account."

3.3. The submission of the assessee has been perused and considered carefully. However, same is not acceptable. On perusal of the Balance Sheet, it is verified that assessee has invested amount of Rs.2,04,22.70,664/- in shares/securities of different companies. The assessee firm has claimed interest expenses of Rs. 9,77,80,572/-. It is also ascertained that assessee has incurred expenses relatable partly to the taxable income and partly to be exempt income which does not form a part of the total income. The contention of the assessee that firm has earned exempt income of Rs. 34,06,859/- which is dividend income received from. the Mutual fund, for the same the assesses firm has not made any expenses, is not acceptable because the assessee firm has invested Rs. 2,04,22.70,664/- in shares/securities of different companies and the assessee firm has claiming interest expenses of Rs. 9,77,80,572/- which are relatable to the

investment made by the assessee firm which generates the income which does not form part of the total income. Hence, same ate required to disallowed as per the Provision of section 14 A of the I.T. Act. Therefore, disallowance of Rs. 34,06,859/- has been made to the extent of dividend income eared which is claimed as an exempt income and added to the total income."

5. Subject to the above remarks and data made available, the total income of the assessee is computed as under:

Total income from business or profession as per the computation of income (current year business loss)	*(-)Rs.2,51,48,441/-*
Add: Long term Capital Loss carried forward	*(-)Rs.1,15,45,388/-*
Total carried forward loss	*(-) Rs.3,66,93,809/-*

Add: Additional/Disallowance as discussed above

1. Addition u/s. 14A of the IT Act as discussed above	*Rs.34,06,859/-*
Total assessed loss	*(-)Rs.3,32,86,950/-*

11. We have perused the reasons for re-opening, wherein, the Assessing Officer observed that, during the course of original assessment, disallowance was made only Rs.34,06,859/- restricting to the extent of exempted income, as a result, income of Rs.4,78,99,237/- has escaped assessment on the ground that, there was an omission on the part of the assessee to disclose fully and truly all the material facts. It was further observed by the Assessing Officer that;

"it is true that the assessee has filed copy of annual report and audited P&L account and balance-sheet along with return of income where various information /material were disclosed.

However, requisite full and true disclosure of all material facts necessary has not been made, but it would require due diligence by the AO to extract these information. For aforesaid reasons, it is not a case of change of opinion.

12. A bare perusal of the reasons and original the assessment order made under Section 143(3) of the Act, the facts emerge that, the respondent authority had determined the issue of disallowance after considering the material available and now again without any tangible material available with the Assessing Officer based on the same materials, which were relied at the time of original assessment proceedings, has reason to believe that there is escapement of income. Therefore, in this circumstances, we are of the view that, the material available with the Assessing Officer, at the relevant point of time, while making original assessment under Section 143 (3) of the Act and at the time of re-opening of the assessment, the materials available with the Assessing Officer were the same and there was no any new material surfaced during the reassessment proceedings.

13. After close scrutiny of the reasons for re-opening of assessment, we are of the view that, all the material facts relating to Section 14(A) of the Act were before the Assessing Officer during the course of the original assessment and now, he could not re-open the assessment after 4 years where there is no failure on the part of the assessee to disclose fully and truly all the

facts necessary for assessment. It is settled by the Apex Court in the case of ***CIT Delhi Vs. Kelvinator of India Limited. [(2010) 320 ITR 577]*** that the existence of tangible material is essential to safeguard against the arbitrarily exercised of power. Therefore, as discussed above, at the time of recording the reasons, there were no fresh materials on which the Assessing Officer could have formed a requisite belief with regard to the escapement of the assessment. The record further indicates that, the assessee had disclosed all materials fully and truly before the respondent at the time of original assessment. Even on merits, it is settled that, disallowance under Section 14A of the Act cannot exceed the exempt income of the assessee. Thus, the twin conditions as provided under Section 147 of the Act, which are condition precedent for re-opening of the assessment made after 4 years are not satisfied.

14. We have examined the contentions raised by the learned counsel appearing for the writ applicant with regard to disallowance under Section 14A of the Act would restrict to the amount of exempt income and not at a higher figure. In this regard, reliance has been placed on the case of ***Principal Commissioner of Income Tax Vs. State Bank of Patiala [(2018) 99 Taxmann.com 286]***, wherein, the Apex Court has dismissed the SLP after considering the case of Principal CIT Vs. Case of State Bank of Patiala held that, the

amount of disallowance under Section 14A of the Act was restricted to the amount of exempt income only and not at a higher figure. Therefore, applying the same principle to the facts of the present case, the proposed amount is exceed the exempt income of the assessee. In that view of the matter on merits, invoking the provisions for re-opening of the assessment under Section 147 of the Act is bad in law.

15. We may also refer to and rely upon the case of ***State of U.P. Vs .Aryaverth Chaval Udhyog [2015 (17) 324]***. Paras 28 and 29 thereof reads thus:

> *"28. ……...In case of the same material being present before the assessing authority during both, the assessment proceedings and the issuance of notice for reassessment proceedings, it cannot be said by the assessing authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See DCM v. State of Rajasthan : [1980] 4 SCC 71).*
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> *29. The standard of reason exercised by the assessing authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See: Binani Industries Limited, Kerala v. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore : [2007] 15 SCC 435 : [2007] 6 VST 783 (SC) and A.L.A. Firm v. Commissioner of Income-tax : [1991] 2 SCC 558 : [1991] 189 ITR 285 (SC). If a conscious application of mind is made to the relevant facts and material available or existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an*

assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment."

16. Considering the facts and circumstances of the present case as well as legal principles on the subject "change of opinion" as propounded by the Apex Court, we have no hesitation to hold that, there was no basis or jurisdiction for assessing officer to form a belief that, any income of the assessee chargeable to tax for the year under consideration had escaped assessment within the meaning of Section 147 of the Act and the reasons recorded could not have led to formation of any belief that income had escaped assessment within the meaning of the aforesaid provision. Therefore, the impugned notice dated 26.07.2018 issued under Section 148 of the Act is required to be quashed and set aside and accordingly, the same is hereby quashed and set aside.

17. In view of the aforesaid foregoing reasons, the present writ application is allowed. There shall be no order as to costs.

(J. B. PARDIWALA, J)

(ILESH J. VORA,J)

SUCHIT