IN THE INCOME TAX APPELLATE TRIBUNAL, DELHI 'A' BENCH, NEW DELHI [THROUGH VIDEO CONFERENCE]

BEFORE SHRI N.K. BILLAIYA, ACCOUNTANT MEMBER, AND SHRI KULDIP SINGH, JUDICIAL MEMBER

ITA No. 5705/DEL/2016
[Assessment Year: 2008-09]

Bose Corporation India Pvt. Ltd., 3rd Floor, Plot No.4, Salcon Aurum, Jasola District Centre, New Delhi – 110 025	Vs.	DCIT Circle – 5(1), New Delhi
PAN No. AAACB 3260 A		
[Appellant]		[Respondent]

Date of Hearing : 01.09.2020
Date of Pronouncement : 03.09.2020

Assessee by : Shri K. M. Gupta, Adv
Revenue by : Ms Rakhi Vimal, Sr. DR

ORDER

PER N.K. BILLAIYA, ACCOUNTANT MEMBER,

This appeal by the assessee is preferred against the order of the Commissioner of Income Tax [Appeals] - 2, New Delhi dated 29.07.2016 pertaining to assessment years 2008-09.

2. The grievance of the assessee read as under:

1. *"That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in upholding the validity of the reassessment proceedings undertaken by the assessing officer ('Ld. AO') under*

section 147/148 of the Act and the jurisdiction over the Appellant for the year under consideration without appreciating the following:

1.1 That the said reassessment proceedings were barred by limitation in view of the proviso to section 147 of the Act as there was no failure on the Appellant's part to disclose fully and truly all material facts necessary for assessment.

1.2 That there is no fresh or tangible material comes into existence after completion original assessment.

1.3 That the reassessment proceedings were initiated merely on the basis of change ofopinion on the same set of facts which existed and considered at the timeof original assessment concluded under section 143(3) of the Act.

2. *That on the facts and in the circumstances of the case and in law, the Ld. CIT(A) erred in confirming the disallowance made by the Ld. AO amounting to Rs. 2,203,234 in respect of "Provision for Demo Inventory" charged to Profit & Loss account on conjectures and incorrect facts.*

The above grounds of appeal are without prejudice to each other.

That the Appellant reserves its right to add, alter, amend or withdraw any ground of appeal either before or at the time of hearing of this appeal."

3. The representatives of both the sides were heard at length, the case records carefully perused and with the assistance of the ld. Counsel, we have considered the documentary evidences brought on record in the form of Paper Book in light of Rule 18(6) of ITAT Rules and have also perused the Judicial decisions relied upon by the both the sides.

4. Briefly stated the facts of the case are vide order dated 08.10.2012 framed u/s 143(3) r.w.s 144C of the Act. The assessment was completed at an income of Rs.22,80,61,490/-.

5. Vide notice dated 24.12.2013 issued u/s 148 of the Act, the Assessing Officer assumed Jurisdiction to reopen the completed assessment for the following reasons:

> ***"Reasons for reopening the case u/s 148***
>
> ***M/s Bose Corporation (India) Pvt. Ltd., A.Y. 2008-09, PAN - AAACB3260A***
>
> *In this case, Assessee had filed a return electronically on 29.09.2008 declaring an income of Rs.11,18,75,620/. The case was selected for scrutiny and order u/s 143(3) of the act was passed on 08.10.2012 at an income of Rs.22,80,61,490/-. On examining the assessment records, it was found that as per schedule 15 under the Selling & Administration forming part of the P&L A/c for the year ended 31.03.2008 an amount of Rs.22,03,234/- has been debited to P&L A/c as Provision for Demo and testing equipment. Such expenses are apparently in the nature of future contingent expenditure and should have been disallowed.*
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> *In this regard it is submitted that any expenditure or deduction u/s 37(1) can be allowed in respect of expenditure which is actually incurred or laid out in present and not an expenditure which is a future contingent expenditure which may or may not arise.*
>
> *This issue was not examined during the course of assessment proceedings and the assessee failed to disclose fully and truly all material facts necessary for his assessment for A.Y. 2008-09.Therefore, I have reasons to believe that sum of Rs.22,03,234/-*
>
> *claimed as Provision for Demo and testing equipment should not be allowed as expense. Accordingly, income to such extent has escaped*

assessment within the meaning of Section 147."

6. As the assessment year under consideration is A.Y 2008-09 hence the notice dated 24.12.2013 seeking to reopen the assessment is after the expiry of four years of the relevant assessment year.

7. A perusal of the reasons recorded for reopening the assessment which are exhibited hereinabove show that there was no fresh material before the Assessing Officer as he himself acknowledges the fact "on examining the records" and on such examination, he found that as per schedule – 15 under the head selling and administration forming part of the P&L account and an amount of Rs.22,03,234/- has been debited to P&L account.

8. As mentioned above, the Assessing Officer had no new tangible material and the only material referred by the Assessing Officer is the assessment records of the assessee. We failed to persuade ourselves to believe that while framing the original assessment order, the Assessing Officer did not look into the Profit and Loss account of the assessee and the relevant schedule. Since the P&L account along with its schedules was very much available during the course of the original

assessment proceedings. It cannot be said that there was a failure on the part of the assessee to disclose all material facts.

9. In our considered opinion, first proviso to Section 147 of the Act squarely applies on the facts of the case in hand as discussed hereinabove and the same reads as under:

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

10. In light of first proviso, we find that the reasons for reopening the assessment do not specify any failure on the part of the assessee to disclose truly and fully all material facts. On the contrary, we find that full and true disclosure was duly made by the assessee.

11. We are of the considered opinion that all material information was duly filed and was available on record before the Assessing

Officer. Therefore, on perusal of reasons, it cannot be comprehended as to what more information remained to be disclosed by the assessee and moreover, no instance of any non disclosure has been pointed out by the Assessing Officer in the reasons recorded.

12. A perusal of the assessment framed u/s 143(3) r.w.s 147 of the Act shows that there is not even a whisper of non disclosure of any material facts. Moreover, there is no reference to any new fact or any new material which came to light of the Assessing Officer after framing original assessment order. In fact, adverse inference has been drawn only from material which, were very much available during the assessment proceedings. These glaring facts make the decisions relied upon by the ld. DR distinguishable.

13. The decision of the Hon'ble Supreme Court in the case of New Delhi Television Ltd 116 Taxmann.com 152 is very relevant on the facts of the case in hand. The observations of the Hon'ble Supreme Court read as under:

> "22. A perusal of the aforesaid judgments clearly shows that subsequent facts which come to the knowledge of the assessing officer can be taken into account to decide whether the assessment proceedings should be reopened

or not. Information which comes to the notice of the assessing officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the assessing officer under Section 147 of the Act.

23. The material disclosed in the assessment proceedings for the subsequent years as well as the material placed on record by the minority shareholders form the basis for taking action under Section 147 of the Act. At the stage of issuance of notice, the assessing officer is to only form a prima facie view. In our opinion the material disclosed in assessment proceedings for subsequent years was sufficient to form such a view. We accordingly hold that there were reasons to believe that income had escaped assessment in this case. Question No.1 is answered accordingly.

24. Coming to the second question as to whether there was failure on the part of the assessee to make a full and true disclosure of all the relevant facts. The case of the assessee is that it had disclosed all facts which were required to be disclosed.

25. The revenue has placed reliance on certain complaints made by the minority shareholders and it is alleged that those complaints reveal that the assessee was indulging in round tripping of its funds. According to the revenue the material disclosed in these complaints clearly shows that the assessee is guilty of creating a network of shell companies with a view to transfer its untaxed income in India to entities abroad and then bring it back to India thereby avoiding taxation. We make it clear that we are not going into this aspect of the matter because those complaints have not seen light of the day either before the High Court or this Court and, therefore, it would be unfair to the assessee if we rely upon such material which the

assessee has not been confronted with.

26. Even before the assessment order was passed on 03.08.2012, the assessing officer was aware of the entities which had subscribed to the convertible bonds. This is apparent from the communication dated 08.04.2011. The case of the revenue is that the assessee did not disclose the amount subscribed by each of the entities and furthermore the management structure of these companies. We are not in agreement with this submission of the revenue. It is apparent from the records of the case that the revenue was aware of the entities which subscribed to the convertible bonds. It has been urged that these are bogus companies, but we are not concerned with that at this stage. The issue before us is whether the revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso Section 147 of the Act. This can only be done if the revenue can show that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. The assessee, in our view had disclosed all the facts it was bound to disclose. If the revenue wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts.

27. The High Court held that there was no "true and fair disclosure" in view of the law laid down by this Court in Phool Chand's case (supra), and the judgment of the Delhi High Court in Honda Siel Power Products Limited vs. Deputy Commissioner IncomeTax and Another4. We have already

4 (2012) 340 ITR 53 (Delhi) 19

20 referred to the judgment in Phool Chand's case (supra), wherein it was held that where the transaction of a particular assessment year is found to be a bogus transaction, the disclosures made could not be said to be all "true" and "full".

Relying upon the said judgment the High Court held that merely because the transaction of convertible bonds was disclosed at the time of original assessment does not mean that there is true and full disclosure of facts.

28. We are unable to agree with this reasoning given by the High Court. The assessee as mentioned above made a disclosure about having agreed to stand guarantee for the transaction by NNPLC and it had also disclosed the factum of the issuance of convertible bonds and their redemption. The income, if any,arose because of the redemption at a discounted price. This was an event which took place subsequent to the assessment year in question though it may be income for the assessment year. As we have observed above, all relevant facts were duly within the knowledge of the assessing officer. The assessing officer knew who were the entities who had subscribed to other convertible bonds and in other proceedings relating to the subsidiaries the same assessing officer had knowledge of addresses and the consideration paid by each of the bondholders as is apparent from assessment orders dated 03.08.2012 passed in the cases of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. Therefore, in our opinion there was full and true disclosure of all material facts necessary for its assessment by the assessee.

29. The fact that stepup coupon bonds for US$ 100 million were issued by NNPLC was disclosed; who were the entities which subscribed to the bonds was disclosed; and the fact that the bonds were discounted at a lower rate was also disclosed before the assessment was finalised. This transaction was accepted by the assessing officer and it was clearly held that the assessee was only liable to receive a guarantee fees on the same which was added to its income. Without saying anything further on merits of the transaction we are of the view that it

cannot be said that the assessee had withheld any material information from the revenue.

30. According to the revenue the assessee to avoid detection of the actual source of funds of its subsidiaries did not disclose the details of the subsidiaries in its final accounts, balance sheets, and profit and loss account for the relevant period as was mandatory under the provisions of the Indian Companies Act, 1956. It is not disputed that the assessee had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets, etc. As such it cannot be said that the assessee was bound to disclose this to the Assessing Officer. The Assessing Officer before finalising the assessment of 03.08.2012 had never asked the assessee to furnish the details.

31. The revenue now has come up with the plea that certain documents were not supplied but according to us all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment. The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 03.08.2012 in the case of M/s.NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the

same date itself. Therefore, the entire material was available with the revenue.

32. A number of decisions have been cited as to what is meant by true and full disclosure. It is not necessary to multiply decisions, as law in this regard has been succinctly laid down by a Constitution Bench of this Court in Calcutta Discount Co. Ltd. vs. Income tax Officer, Companies District I, Calcutta and Another, wherein it was held as follows :"(8)…The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise — the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an 5 AIR 1961 SC 372 assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been proved, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be. (9) There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or

other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Incometax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — "I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account books and the documents." His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed. (10) Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else — far less the assessee — to tell the assessing authority what inferences — whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts,

it will be meaningless to demand that the assessee must disclose what inferences — whether of facts or law — he would draw from the primary facts. (11) If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?"
A careful analysis of this judgment indicates that the Constitution Bench held that it is the duty of the assessee to disclose full and truly all material facts which it termed as primary facts. Nondisclosure of other facts which may be termed as secondary facts is not necessary. In light of the above law, we shall deal with the facts of the present case.

33. In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuiness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew. The other facts relied upon by the revenue are the proceedings before the DRP and facts subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion

that there is nondisclosure of true and material facts by the assessee."

14. The Revenue has heavily relied upon Explanation 1 to section 147 of the Act. In our considered opinion, the onus is also on the Assessing Officer to show that primary disclosure was not sufficient for further investigation by the Assessing Officer.

15. The Hon'ble Delhi High Court in the case of Donaldson India Filters Systems (P.) Ltd. vs. DCIT 371 ITR 87 has very lucidly reconciled Explanation 1 and the first proviso to section 147 of the Act. The relevant findings read as under:

"22. Reading of the proviso to Section 147 and the decisions of this Court discussed above makes it amply clear that after a period of four years from the end of the Assessment Year, for the AO to assume jurisdiction, it becomes necessary that 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, or to disclose all material facts necessary for that assessment year.

23. We find force in the submissions advanced by Mr. Kaushik that in the present case, the test for reopening the assessment as per proviso to Section 147 has not been met. The questionnaire raised by the AO during the course of assessment proceedings categorically adverted to the

question of withholding tax. The details of the TDS paid and EDC charges were available with the AO. Revenue has sought to contend that even if the AO could have, with due diligence, discovered material from the tax audit report, it does not necessarily mean that the petitioner had made a full and true disclosure of material facts. The mere production of evidence before AO is not enough and there may be a failure to make full and true disclosure, if some material for the assessment lies embedded in that evidence which the AO could uncover, but did not do so. The aforesaid submissions may be correct proposition in law; however, each case has to turn on its own facts. In the present case, the details of the TDS and EDC charges paid to HUDA were brought to the notice of the AO. On this question, it would be sufficient to refer to the decision of this Court in ***Donaldson India Filters Systems Pvt. Ltd. vs. DCIT, (2015) 371 ITR 87 (Del****. In the said case, the Court held that the explanation clarifies the general refrain by the words "not necessarily". Burden is equally placed on the AO to exercise due diligence in examining the record (account books or evidence) produced before him in light of the declarations made in the return or responses to the notices or questionnaires. This is necessary as the AO has to gather "tangible" material which is a pre-requisite for reopening the matter under Section 147 of the Act. In* ***CIT v. Central Warehousing Corporation, (2015) 371 ITR 81 (Del.),*** *the Court held that the expression "reason to believe" on which a re-assessment under Section 147 of the Act can be validly ordered should necessarily be based on "tangible material" which an AO comes by after original assessment.*

24. It would also be profitable to refer to the decision of ***Central Warehousing Corporation (supra)*** *and* ***CIT vs Kelvinator of India Ltd., (2002) 256 ITR 1*** *and* ***CIT vs. Usha International Ltd., 348 ITR 485 (Del.)*** *and several*

other decisions wherein it has been repeatedly held that reopening initiated without any failure on the part of the Assessee in fully and truly disclosing all material facts without any fresh tangible material deserves to be quashed. In view of the aforesaid test laid down by this Court for re-opening of the assessment in cases where proviso to Section 147 of the Act is attracted, we find that in the present case, the test is not met. It is well settled proposition under the Income Tax Act that merely a change of opinion would not give the AO the jurisdiction to reopen the assessment under Section 147/148, as the same would amount to reviewing the earlier decision. There has to be some relevant tangible material for the AO to come to the conclusion that there is escapement of income from assessment, and there must be a live link with such material for the formation of the belief. The reasons should also disclose due application of mind as reopening of the assessment proceeding is not an empty formality. On a perusal of the recorded reasons, we are not able to discern as to how the AO has come to a conclusion that there is a failure on the part of the Assessee in fully and truly disclosing all material facts for the purpose of the assessment. Though, the recorded reasons allude to an ostensible failure on the part of the Assessee to disclose fully and truly all material facts, however, the recorded reasons except for using the expression "failure on the part of the Assessee to disclose fully and truly all material facts", do not specify as to what is the nature of default or failure on the part of the Assessee. The reasons also do not explain or specify as to what is the rationale connection between the reasons to believe and the material on record. The Supreme Court in ***Income Tax Officer v. Techspan Pvt. Ltd And Ors. (2018) 6 SCC 685*** *has held that "The use of the words "reason to believe" in Section 147 has to be interpreted schematically as the liberal interpretation of the*

word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of some facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature." The said judgment further held that "Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review."

25. It becomes evident on perusal of the Scrutiny questionnaires issued by the AO and the information furnished in response thereto by the Assessee that there has been no failure on the part of the Assessee in furnishing the information. On the other hand, there appears to be non application of mind on such material on the part of the AO to make an appropriate determination in accordance with law. Thus, the AO cannot now review its decision, having failed to perform its statutory duty and therefore the impugned action of reopening is nothing but a change of opinion.

26. The AO in paragraph 2 of the recorded reasons quotes that "EDC is covered by the provisions of Section 194 of the Income Tax Act,1961. The Assessee has failed to deduct TDS on the payments made to the HUDA ". There is no explanation or rationale for the aforesaid observation made by the AO. We, therefore, cannot understand as to how the payment of

EDC-being in the nature of statutory fees, could be subject to withholding tax under Section 194 of the Act, a provision that is applicable to dividends. The nature of dividend payment is intrinsically different from EDC and, therefore, the apparent reason for reopening seems to be erroneous, irrational and fallacious. The subsequent observation in paragraph 2 "as per the provisions of Section 40(a)(ia) of the Income Tax Act, any sum payable on which tax is deductable at source under Chapter XVII B but the same has not been deducted" appears to be based on the understanding that the provisions of Section 194 are attracted to EDC and, therefore, it is subject to withholding tax and consequently the provisions of Section 40 (a) (ia) of the Act would be attracted. Even if one were to ignore the provision of law quoted and relied upon by the AO, and we were to agree with the contention of Revenue that while exercising the power, the source may not be specifically referred to or if wrongly mentioned to, it would not render the exercise of such power to be invalid, yet, we are unable to fathom as to how the AO has arrived at the conclusion that EDC payment was subject to tax deduction at source. Revenue in its counter affidavit has sought to elaborate on the aforesaid reasons by contending that the EDC payment is akin to rent. However, we are not impressed with this submission. Firstly, such an understanding is not borne out from the recorded reasons and, secondly, the department cannot by way of a counter affidavit supplement the recorded reasons by introducing such legal submissions. The source of the power in this case, as sought to be argued, is not discernible.

27. If the AO harboured a reason to believe that the payment of EDC requires TDS under the provisions of the Income Tax Act, it ought to have disclosed the basis for such a view. The entire reasoning disclosed in the recorded reasons, for

initiating the proceedings is completely silent on this aspect. It merely states that "Since, EDC has Income Character, therefore it should have been subjected to TDS by Assessee." The AO has further proceeded to observe since the Assessee is a development authority of State of Government of Haryana and is a taxable entity, TDS provisions could be applicable on EDC payable by the Assessee through HUDA. Apart from making aforenoted observations and referring to Section 194 and Section 40 (a) (ia), there is no apparent rationale for assumption of jurisdiction by the AO. The judgment in ***Greater Mohali Area (supra)*** *is of no assistance to the Revenue as the same is distinguishable on facts. In the said case, the Petitioner who was recipient of EDC had approached the Court seeking quashing of the order disposing of its objections to the reasons recorded for reopening the assessment under Section 147 and 148 of the Act. In the assessment under Section 143 (3) of the Act, the effect of EDC upon Petitioner's income was not referred to, the AO sought to reopen the assessment on the basis of reason to believe that income on account of EDC had escaped assessment. In these circumstances, since, the assessment order, did not deal with the character of the income of EDC or its effect on Petitioner's income, the Court upheld the action of reopening on the ground that the issue had not been considered at the time of the assessment. Likewise, the other judgment relied upon by the Revenue in the case of* ***M/s New Okhla Industrial Development Authority (supra)*** *is also distinct on facts. In the said case, the Court was examining as to whether Greater Noida and Noida Authorities were local authorities within the meaning of Section 10(20) of the Income Tax Act and whether their income was exempt from income tax. Deciding this question, the Court held that the Noida and Greater Noida are not local authorities for the*

purpose of the Act. Therefore, the aforesaid decision has no relevance to the facts of the present case.

28. We would also like to reflect on Section 194-I and its explanation which deals with rent and has been relied upon by the Revenue to contend that the definition of "rent' is broad and would also envisage the payment of EDC and is subject to withholding tax. In support of this provision, Revenue has relied upon the observations of the Supreme Court in ***M/s New Okhla Industrial Development Authority (supra)****, the relevant portion whereof is reproduced herein below:-*

"The definition of rent as contained in the Explanation is a very wide definition. Explanation states that "rent" means any payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land. The High Court has read the relevant clauses of the lease deed and has rightly come to the conclusion that payment which is to be made as annual rent is rent within the meaning of Section 194-I, we do not find any infirmity in the aforesaid conclusion of the High Court. The High Court has rightly held that TDS shall be deducted on the payment of the lease rent to the Greater Noida Authority as per Section 194-I. Reliance on the Circular dated 301-1995 has been placed by the Noida/Greater Noida Authority. A perusal of the Circular dated 30-1-1995 indicate that the query which has been answered in the above circular is "Whether requirement of deduction of income tax at source under Section 194-I applies in case of payment by way of rent to Government, statutory authorities referred to in Section 10(20-A) and local authorities whose income under the head "Income from house property" or "Income from other sources" is exempt from income tax."

16. In light of the judicial decisions discussed hereinabove, the assessment order could be quashed."

17. We further find that in the reasons supplied, the Assessing Officer alleges that the appellant had failed to disclose fully and truly all material facts necessary for assessment. However, we find that no details have been disclosed as to the material, which was allegedly not disclosed either truly or fully because of that failure leads to escapement of income chargeable to tax. Our view is fortified by the decision of the Hon'ble High Court of Bombay in the case of S.S. Landmark vs. ITO 117 taxman.com 825. The relevant findings read as under:

> *"..**11**. It is also to be noted merely alleging that there is failure to disclose truly and fully all material facts necessary for assessment, would not satisfii the jurisdictional requirement unless the reasons indicate what material facts the Petitioner had failed to disclose fully and truly during the course of the regular assessment. In fact our Court in the case of Bombay Stock Exchange Ltd. v. Deputy Director of Income-Tax (Exemption) and others - I2014] **365** ITR 181 (Bom.) has observed as follows :*
>
> *'In the present case, admittedly, there are no details given by the Assessing Officer (respondent no. i)asto which fact or material was not disclosed by the petitioner that led to its income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the petitioner to disclose fully and truly all material facts without giving any details thereof. This being the case, the impugned notice is bad in law and on this ground alone the petitioner is entitled to succeed in this writ petition.*

In the above view also the impugned notice is without jurisdiction as the proviso to section 147 of the Act will be applicable in these facts."

18. Further in the reasons recorded, the Assessing Officer has alleged that an amount of Rs.22,03,234/- which is debited to P&L Account is in the nature of future content expenditure and should have been disallowed. In our considered opinion these details were very much available during the course of the original assessment proceedings, therefore, imagine on the part of the Assessing Officer not to apply the law correctly cannot confer power on the Assessing Officer to reopen the case. For this preposition, we derives support from the decision of the Hon'ble Jurisdictional High Court in the case of Atma Ram Properties Pvt. Ltd. in ITA No.52/2010 order dated 11.11.2011. The relevant finding read as under:

"If the Assessing Officer had failed to apply legal provisions/section of the Act, the fault cannot be attributed to the appellant assessee*. The requirement is that the assessee should have failed or omitted to make full and true disclosure of material facts. The assessee is not required to disclose, state or explain the law. It cannot be said that the appellant-assessee had failed to make full and true disclosure of material facts. Full and true facts were stated by the assessee."*

19. The DR vehemently stated that the Assessing Officer did not examine the impugned issue during the course of the original

assessment proceedings nor any specific query was raised. The Assessing Officer, therefore, was within his rights in reopening the assessment. However, we find that the Hon'ble High Court of Delhi in the case of IHHR Hospitality (P.) Ltd. 415 ITR 459 had the occasion to consider a similar contention raised by the Counsel for the Revenue and the Hon'ble High Court observed as under:

> *"6. It is far too well settled that any notice under Section 147/148 is to be premised on fresh or tangible material - made available with the Revenue within the time granted or within the extended time under Section 147. The only other circumstance when it can seek recourse to the reassessment power is if material documents, having significance on the reassessment, are withheld or improperly disclosed. The duty of the AO, it has been repeatedly emphasised from the decision of the Supreme Court in Calcutta Discount Co. Ltd. v. ITO [**1961**] **41 ITR 191** is to truly assess the income disclosed by the assessee. The corresponding duty or the responsibility of the ssessee is to disclose all material facts. Once that duty is discharged, the inability of the AO to carry out the task assigned to him by the statute properly does not authorize a second opinion, based upon which the AO can issue reassessment notice.*
>
> *7. In the present case, it is plain that the reassessment notice was based upon a second opinion or revisiting of the same facts by a subsequent Assessing Officer and no more. For these reasons, the reassessment notice has to be quashed."*

20. As mentioned elsewhere, the reopening is not based on any fresh new tangible material, evidence brought on record, therefore, the ratio laid down by the Hon'ble Supreme Court in the case of Kelvinator of India Ltd. 320 ITR 561 squarely apply wherein the Hon'ble Supreme

Court has held that Assessing Officer cannot proceed to reopen the assessment on the basis of mere change of opinion. The Hon'ble Supreme Court held as under:

> "... *Therefore, post-ist 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 reassess. 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 link with the formation of the belief."*

21. While framing the reopening and the assessment, CIT(A) has drawn support from the decision of the Hon'ble High Court of Delhi in the case of Consolidated photo and Finvest Limited 151 Taxman 41. We find that this decision is no longer good law at the time of initiation of proceedings. In view of the subsequent decision of the Hon'ble Delhi High Court in the case of Rolls Royce Industrial Power India Ltd. 394

ITR 547. The relevant findings of the Hon'ble Delhi High Court read as under:

> *"…16. The fact of the matter is that later Benches of this Court, including two Full Benches in CIT v. Kelvinator of India Ltd.(supra) and CIT v. Usha International Ltd., (2012) 348 ITR 485 have disagreed with the view expressed by the DB in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax(supra). In fact, the decision of the FB in CIT v. Kelvinator of India Ltd.(supra) was affirmed by the Supreme Court in CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561/187 Taxman 312.*
>
> *17. The Full Bench of this Court in CIT v. Usha International Ltd.(supra), specifically overruled the decision of the DB in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax(supra). Even prior thereto, in KLM Royal Dutch Airlines v. ADIT [2007] 292 ITR 49, another DB of this Court noticed the anomaly that had resulted from the decision in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax (supra), which was contrary to other decisions, including the decision of the FB in CIT v. Kelvinator of India Ltd.(supra). This was noticed by the DB in KLM Royal Dutch Airlines v. ADIT (supra) where it observed:*
>
> > *"16. The Full Bench of this Court in Commissioner of Income-Tax v. Kelvinator of India Ltd. [2002] 256 ITR 1 had opined that the amendments introduced into Section 147 with effect from 1.4.1989 have not altered the position that a mere change of opinion of the AO was not sufficient ground for embarking on a reassessment. Calcutta Discount was duly considered and applied by the Full Bench. The Full Bench further observed that an order of assessment must be presumed to have been passed by the AO concerned after due and proper application of mind. In these circumstances the decision of the Division Bench in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax , inasmuch as it is irreconcilable with the views of the Full Bench, must be held not to lay down the correct law. This is especially so since the assessment proceedings had not come to an end under the first sub-section*

of Section 143, but under the third Sub-section. A Division Bench of a particular High Court is fully bound by the view preferred by a larger Bench of that Court, regardless of the fact that another High Court prefers a different view in this case that of the Gujarat High Court as in Gruh Finance Ltd. v. Joint Commissioner of Income-Tax (Assessment) , Praful Chunilal Patel v. M.J. Makwana, Assistant CIT and Garden Silk Mills Ltd. v. Deputy CIT (No. 1). The Full Bench of this Court has taken into consideration both Praful Chunilal Patel as well as Garden Silk Mills. In Kelvinator the Full Bench had also analysed the earlier Division Bench decisions, namely, Jindal Photo Films Ltd. v. Deputy Commissioner of Income-Tax presided over by R.C. Lahoti J. (as learned Chief Justice of India then was) and Bawa Abhai Singh v. Deputy Commissioner of Income-Tax [2002] 253 ITR 83 comprising Arijit Pasayat and D.K. Jain JJ. (as their Lordships then were). It is quite possible that had the Court in Consolidated Photo been made aware of the consistent opinion of this Court in Jindal Photo and Bawa Abhai Singh, their conclusion may have been totally different, notwithstanding alternative view of the Gujarat High Court."

18. There is no manner of doubt that the decision of the DB of this Court in Consolidated Photo and Finvest Ltd. v. Assistant Commissioner of Income-Tax(supra) is no longer good law. The main plank of the Revenue's case before this Court, therefore, fails. Nevertheless, the Court proceeds to examine the question of validity of the reopening of the assessments for the AYs in question."

22. On the facts of the case in hand, in the light of the Judicial decision discussed hereinabove, we are of the view that all the decisions relied upon by the Learned DR are clearly distinguishable and do no good to the Revenue.

23. In the light of the judicial decision on the facts of the case in hand, we are of the considered opinion that exemption of jurisdiction

u/s 147 of the Act by issue of notice u/s 148 of the Act is bad in law and deserves to be quashed. We hold accordingly.

24. Since we have quashed the assessment order. We do not find it necessary to dwell into the merit of the case. Appeal filed by the assessee is allowed.

25. In the result, appeal filed by the assessee is allowed.

The order is pronounced in the open court on 03.09.2020.

Sd/-	**Sd/-**
[KULDIP SINGH]	[N.K. BILLAIYA]
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Dated: 03 September, 2020

PY/

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi