

IN THE HIGH COURT OF KARNATAKA AT BENGALURU**DATED THIS THE 02ND DAY OF JANUARY, 2018****BEFORE****THE HON'BLE Dr.JUSTICE VINEET KOTHARI****W.P.No.61671/2016 (T-IT)****BETWEEN**

M/S. KOTARKI CONSTRUCTIONS PVT. LTD.
REP. BY ITS CHAIRMAN & MANAGING DIRECTOR
SRI. SHANKER KOTARKI
VENATADRI UPSTAIRS, 1ST FLOOR
OPP. POLICE STATION, GANDHI GUNJ
BIDAR – 584 403.

...PETITIONER

(BY Mr. SHANKAR .A & Mr. ANNAMALAI .S, ADVOCATES)**AND**

1. THE ASST. COMMISSIONER OF INCOME TAX
CENTRAL CIRCLE 2(1), 3RD FLOOR
C.R. BUILDING, QUEEN'S ROAD
BENGALURU – 560 001.

2. THE ASST. COMMISSIONER OF INCOME TAX
CIRCLE-1, AAYAKAR BHAVAN
SEDAM ROAD, GULBARGA – 585 1015.

...RESPONDENTS

(BY Mr. E.I. SANMATHI, ADVOCATE)

THIS WRIT PETITION IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA, PRAYING TO, QUASH THE NOTICE ISSUED UNDER THE PROVISION OF SEC. 148 OF THE ACT ISSUED BY R-2 AS ENCLOSED AND MARKED AT ANNEX-A VIDE PAN:AACCK6097J/ACIT-GLB/2015-16 DATED 15-03-2016 FOR THE A.Y. 2010-11 AS ONE WITHOUT JURISDICTION & ETC.,

THIS PETITION COMING ON FOR ORDERS, THIS DAY, THE COURT MADE THE FOLLOWING:

2/28

ORDER

Mr. Shankar A & Mr. Annamalai S, Advs. for Petitioner.
Mr. E.I. Sanmathi, Adv. for Respondents.

The petitioner-assessee **M/s.Kotarki Constructions Pvt. Ltd.** has filed this writ petition in this Court on **29.11.2016** challenging the Notice for Re-assessment for the **A.Y. 2010-11** issued by the Assistant Commissioner of Income Tax, Circle-1, Kalaburgi, u/s. 147/148 of the Income Tax Act, 1961.

2. The reasons communicated on 15.03.2016 to the petitioner-assessee for such re-opening/re-assessment as produced on record are quoted below for ready reference:

*"In the assessment completed u/s 143(3), the assessee was allowed a deduction of Rs.1,82,03,125/- u/s 80-IA. However, it was verified during the assessment proceedings in the case of the assessee for the **AY 2013-14** that the **assessee is only a works contractor and not a developer within the meaning of Section 80-IA(4)**. As such, the assessee is not eligible to claim deduction u/s 80-IA. I, therefore, have reason to believe that income chargeable to tax has escaped assessment within the meaning of section 147 of the Income-tax Act, 1961.*

Accordingly notice U/s. 148 is issued with the prior approval of Pr. Commissioner of Income Tax, Gulbarga."

3. The original Assessing Authority, while passing the Assessment Order under Section 143(3) of the Act, earlier on **28.03.2013**, upon a detailed scrutiny of the records of the petitioner-assessee, engaged in the business of construction of roads, buildings, dams, National Highways etc., namely infrastructural facilities was allowed the deduction u/s. 80-IA(4) of the Act, for the A.Y.2010-11 vide **Annexure-C** dated **28.03.2013** after discussing all the relevant contracts and certificates issued by the concerned Executive Engineers of the National Highway Divisions of Public Works Department and others, and allowed the said claim of the deduction under Section 80-IA(4) of the Act, partly to the extent of 68.75% against the claim of the petitioner-assessee, and disallowed the remaining part on the ground that some of the works contracts were only for improvement and re-laying of the roads, which do not fall within the definition of "**Developing, operating and maintaining any infrastructure facility**" for which such deduction in the form of incentives is given to the Developers of the Infrastructure facilities u/s. 80-IA(4) of the Act.

4/28

4. The relevant part of the original Assessment Order passed by the Assessing Authority on **28.03.2013** is quoted below for ready reference:

"10-DEDUCTION CLAIMED U/S. 80-IA OF THE INCOME TAX ACT, 1961:

The assessee claimed deduction of Rs.1,22,33,272/- u/s. 80-IA of the Income Tax Act. In support of the above, the assessee also furnished audit report in Form No.10CCB. As per the audit report, the assessee is engaged in the business of Development, operation, maintenance of an infrastructure facility namely developing of roads.

It is claimed that the assessee company has undertaken the works of development of roads from various Government Departments which are eligible for the deduction u/s. 80-IA of the Income Tax Act, 1961. The details of works undertaken during the year are as under;

Sl.No.	Name of the Department	Amount (in Rs.)
1	GE Air Force Bidar	35,85,000
2	EE PWD Bidar	1,94,93,022
3	EE NH Dn Bijapur	3,24,91,540
4	EE PRE Dn Bidar	57,51,525
5	SENH MOST, Bangalore	13,03,866
7	PD DUDC (BUDA) Bidar	11,84,64,300
8	KRDCL Bangalore	59,50,963
9	SCR Department	36,88,234
	Total	19,07,28,450

5/28

*With regard to the nature of works undertaken from the above mentioned departments, the assessee has produced copies of contract agreements entered into with the concerned Departments. It is noticed from the contract agreements that the works undertaken by the assessee are mostly for the improvement to roads and in some cases **improvement and widening of roads.***

*However, it is seen that the **Central Board of Direct Taxes, New Delhi, vide Circular No.4/2010(F.No.178/14/2010-IT(A-I),dated18-05-2010** has issued clarification to the effect that "**widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility** for the purpose of section 80-IA. **However, simply re-laying of an existing road would not be classifiable as a new infrastructure facility for this purpose.***

In view of the above clarification, the assessee is not entitled to claim deduction u/s 80IA of the Income Tax Act since the works undertaken are only improvements to roads. Therefore, the assessee has been asked to clarify as to how the company is eligible to claim deduction u/s. 80-IA of the Income Tax Act.

In response to above, the assessee, vide its letter dated 25-03-2013, had stated as under.

"Section 80IA(4)(i) states that for the purpose of this clause, infrastructure facility means:

a) road including toll road, a bridge or a rail system.

6/28

b) A highway projects including housing or other activities being an internal part of the highway project.

The board in Circular No.4/2010 dated 18-05-2010 has clarified that "it is decided that widening of an existing road by constructing the additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80IA(4)(i). However, simply relaying of an existing road would not be classified as a new infrastructure facility for this purpose".

From the above the board has given explanation regarding a highway project and not for road including toll road, a bridge or a rail system, we have claimed deduction under first head as road including toll road, bridge or a rail system and not under the highway project.

We have taken certificates from the said departments regarding widening of an existing road by forming new roads and forming additional lanes, by these certificates the doubt about the new road formation will not be there and **we request you to allow the deduction under first section 80IA of Rs.1,19,95,895/-".**

The assessee also produced the certificates issued by the various Departments regarding the nature of works undertaken by the assessee which are mentioned here under:

7/28

1. The **Executive Engineer PWD Bidar** certified that "the tender has been given as formation and improvement of road works, it includes **widening of an existing road by constructing new roads**".
2. The **Executive Engineer NH Division Bijapur** stated that "This is to certify that, M/s. Kotarki Construction Pvt. Ltd, Bidar, Opp. Police Station, Gandhi Gunj, Chidri Road, Bidar has granted and executed the National High Way Road Works, the party has completed road works as per our tender work orders executed during the year 1-4-2009 to 31-3-2010, the total work done was Rs.3,24,91,540/-.

This is further certified that the tender has been given as formation and improvement of National Highway Road works, **it includes Widening of an existing road by constructing additional lanes** as part of a high way projects".

3. The Executive Engineer PRE Division Gulbarga certified that "the tender has been given as formation and improvement of Road works, **it includes widening of an existing road by constructing new roads**".
4. The Superintending Engineer NH MOST, Bangalore certified that "M/s. Kotarki constructing Pvt. Ltd, Bidar has awarded tendered for executed the National Highway Road Works. The nature of work has been

8/28

given as improvements to Road work as a part of National highway Project work”.

5. *The Project Director DUDC, Bidar has given a certificate that “the tender has been given as construction, formation and improvement of road works, it includes widening of an existing road by constructing additional lanes and this is further certified that the said work details are given as per our tender records”.*
6. *The Manager KRDCL Bangalore certified that “M/s. Kotarki construction Pvt. Ltd. Bidar has tendered an executed the State Highway Road Works, the nature of work has been given as formation and improvement of State Highway Road works, **it includes Widening of an existing road by constructing new roads as part of state highway projects”.***
7. *SCR, Secunderabad certified that “M/s. Kotarki constructing Pvt. Ltd. Bidar has awarded tendered for executed the State Highway Division Road Works. The nature of works has been given as new Improvements Diversion Road under Bridge as a part of Central Project Work”.*

*From the above certificates, it can be seen that EE PWD Bidar, EENH Division Bijapur, EE PRE Division, Gulbarga, PD DUC Bidar, have certified that the works given to the assessee are improvements to Road **includes Widening of an existing road by constructing additional***

9/28

lanes/roads. In view of the above certificates, it is to be treated that the works undertaken by the assessee in respect to the above departments are eligible for claiming deduction u/s. 80-IA of the Income Tax Act, 1961.

With regard to nature of work undertaken from by SENH MOST Bangalore, it was stated that the nature of work given is improvement to road work as a part of national highway work. **Since, the work executed is only improvements to road, this work is not treated as eligible for claiming u/s. 80IA of the Income Tax Act.**

With regard to the work relating to South Central Railway, Secunderabad, the nature of work is improvements to Diversion under Bridge. It is also seen from the letter of the Deputy Chief Engineer SCR, Secunderabad that the work proposed is temporary diversion of road. Since, the work undertaken is only the construction of Temporary diversion road, the **same cannot be treated as eligible for claiming deduction u/s.80IA of the Income Tax Act.**

With regard to the work undertaken from GE Air force, Bidar to the extent of Rs.35,85,000/- the assessee himself stated in his letter dated 25-03-2013 **that this work pertains to other than new road works and is not eligible for deduction u/s.80-IA of the income Tax Act, 1961.**

It is further stated by the Executive Engineer PWD, Bidar that out of the total work of Rs.1,94,93,022/- work to the

10/28

extent of Rs.4,88,236/- pertains to repairs and the work relating to the construction of road is Rs.1,90,04.786/-.

Taking into consideration of the above mentioned facts, the receipts eligible for claiming deduction u/s. 80-1A of the Income Tax Act, 1961 in respect of works shown against each is worked out as under:

Sl.No.	Name of the Department	Amount (in Rs.)
1	EE PWD Bidar	1,90,04,786
2	EE NH Dn Bijapur	3,24,91,540
3	EE PRE Dn Bidar	57,51,525
4	PD DUDC (BUDA) Bidar	11,84,64,300
5	KRDCL Bangalore	59,50,963
	Total	18,16,63,114

Since, the assessee has not maintained any separate books of accounts in respect of the road works, the income attributable to road works which is eligible for the deduction u/s. 80IA of the Income Tax act is worked out in proportion to the turnover. **The total turnover achieved by the assessee is Rs.26,42,24,105/-. Out of this, the turnover attributable to road works is Rs.18,16,63,114/- which works out to 68.75% of the total turnover. The total income assessed before claiming deduction u/s.80IA is Rs.2,64,77,275/-. The deduction u/s.80-IA of the Income Tax Act at the rate of 68.75% works out to Rs.1,82,03,125/- and the same is allowed as deduction."**

11/28

5. Heard Mr.Shankar A. and Mr.S.Annamalai, learned counsels appearing for the petitioner and Mr.E.I.Sanmathi, learned counsel for the Respondents-Department.

6. Mr.Shankar A. learned counsel for the assessee, argued that there was no failure on the part of the petitioner-assessee who truly and fully disclosed all the relevant facts and evidence for the developments of the roads and highway undertaken by the petitioner-assessee during the said year and therefore, the Re-assessment proceedings has been undertaken after the end of four years of the A.Y. 2010-11 pm **31.03.2011** after the original Order was passed by the Assessing Authority on **28.03.2013** by issuing the impugned Notice dated **15.03.2016** and thus the 2nd Respondent-Assessing Authority had no jurisdiction to issue the impugned Re-assessment Notice u/s. 147/148 of the Act.

7. He also urged before the Court that even the Central Board of Direct Taxes in its **Circular No.4/2010** issued on **18.05.2010** clarifying that the work of widening of an existing road by constructing additional lanes as a part of Highway project would be recorded as a new infrastructure facility for the purpose of Section 80-1A(4)(i) of the Act, however, simply re-laying or

12/28

improving by tarring again of an existing road would not be classifiable as a new infrastructure facility for this purpose.

8. The said Circular is also quoted below for ready reference:

"CIRCULAR NO.4 OF 2010 DT. 18TH MAY, 2010

Widening of existing road-Definition of a new infrastructure facility-Clarification regarding

18/05/2010

DEDUCTIONS

SECTION 80-IA(4)

References have been received by the Board as to whether widening of existing roads constitutes creation of new infrastructure facility for the purpose of section 80-IA(4)(i) of the Income-tax Act, 1961.

*Section 80-IA(4)(i) provides for a deduction to an undertaking engaged in **developing, or operating and maintaining,** or developing, operating and maintaining any **infrastructure facility** subject to satisfaction of the conditions laid down in the section. The Explanation to sub-section 80-IA(4)(i) states that for the purpose of this clause, infrastructure facility means inter alia:-*

"(a) a road including toll road, a bridge or a rail system;

13/28

(b) a highway project including housing or other activities being an integral part of the highway project;

*The issue has been examined by the Board. **It has been decided that widening of an existing road by constructing additional lanes as a part of a highway project by an undertaking would be regarded as a new infrastructure facility for the purpose of section 80-IA(4)(i).** However, simply relaying of an existing road would not be classifiable as a new infrastructure facility for this purpose.*

[F.No.178/14/2010-ITA.I]

(2010) 232 CTR (St) 231"

9. Mr.Shankar A., learned counsel, argued that the Assessing Authority without any material, took a different view in the Assessment Order passed for the subsequent A.Y. **2013-14**, Assessment Order vide **Annexure-J** dated **30.11.2015**, holding that the petitioner-assessee was engaged only in the business of works contract and therefore was not entitled to the deduction under Section 80-IA(4) of the Act, and on that basis alone the Assessing Authority could not have initiated Re-assessment proceedings for the previous A.Y. **2010-11**, which is challenged in the present writ petition.

14/28

10. The relevant extract of the subsequent Assessment Order for the A.Y. **2013-14** is also quoted below for ready reference:

"3.3 During the course of assessment proceedings details of the nature of these works were called for and examined. On verification of the details of nature of work, it is seen that most of these works relate to improvements, repairs and widening of already existing roads. **These roads and other projects are actually owned by the respective government departments and the assessee is merely a work contractor executing a part of them. By no stretch of imagination can it be said that the assessee company is the developer of these infrastructure facilities.** Explanation provided below Section 80-IA inserted by Finance Act, 2007 and later substituted by the Finance (No.2) Act, 2009 w.e.f.1-4-2000 clearly states that business in the nature of works contract is not eligible to claim the benefit u/s.80-IA. The explanation is reproduced hereunder:

Section 80-IA

Explanation-For the removal of doubts, it is hereby declared that nothing contained in this section shall apply in relation to a business referred to in sub-section(4) which is in the nature of a works contract awarded by any person (including the Central or State Government) and executed by the undertaking or enterprise referred to in sub-section(1).

3.4 Memorandum explaining the provisions in the Finance Bill, 2007 at (2007) 289 ITR 312 (St) explains the need for the insertion of the Explanation as under:

"Clarification regarding developer with reference to infrastructure facility, industrial park, etc. for the purposes of Section 80-IA: Section 80-IA, inter alia provides for a ten-year tax benefit to an enterprise or an undertaking engaged in development of infrastructure facilities, industrial parks and Special Economic Zones. The tax benefit was introduced for the reason that industrial modernization requires a massive expansion of, and qualitative improvement in, infrastructure (viz., expressways, highways, airports, ports and rapid urban rail transport systems) which was lacking in our country. The purpose of the tax benefit has all along been for encouraging private sector participation by way of investment in development of the infrastructure sector and not for the persons who merely execute the civil construction work or any other works contract.

Accordingly, it is proposed to clarify that the provisions of section **80-IA shall not apply to a person who executes a works contract entered into with the undertaking or enterprise referred to in**

16/28

the said section. Thus, in a case where a person makes the investment and himself executes the development work i.e, carries out the civil construction work, he will be eligible for tax benefit under section 80-IA. In contrast to this, a person, who enters into a contract with another person (including Government or an undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for the tax benefit under section 80-IA.

This amendment will take retrospective effect from 1st April, 2000 and will, accordingly, apply in relation to the assessment year 2000-01 and subsequent years."

4. Thus, it is amply clear from the above that the assessee company, being a mere works contractor, is not eligible to claim the benefit u/s.80-IA. As such, the deduction claimed u/s 80-IA is rejected and the total income of the assessee is estimated @ 8% of the gross receipts as discussed in Para 2 above."

11. In the aforesaid extract, the Memorandum explaining the provisions of the Finance Bill 2007 placed on the floor of the Parliament is also included.

17/28

12. Learned counsel for the petitioner-assessee therefore submitted that the Re-assessment proceedings for the A.Y. 2010-11 deserves to be quashed by this Court.

13. Per contra, Mr.E.I.Sanmathi, learned counsel for the Respondents-Income Tax Department, urged before the Court that Explanation substituted by Finance Bill with retrospective effect from 1st April, 2000, which is quoted above denied such deduction u/s. 80-IA of the Act, in relation to a business in the nature of works contract awarded by any person including the Central or State Government and executed by the Undertaking or Enterprises referred to in sub-section (1) of Section 80-1A and since the petitioner-assessee was only executing the works contracts, the deductions allowed to him by the original Assessing Authority u/s. 143(3) of the Act was wrong and therefore, the Re-assessment proceedings initiated u/s.147/148 were justified.

14. I have heard learned counsels and perused the records.

15. This Court is of the considered opinion that the present writ petition deserves to be allowed and the

18/28

Re-assessment Notice dated **15.03.2016** deserves to be quashed. The reasons are as follows:

(i) Firstly, the original Assessment Order discussed all the works of the Development of Infrastructural facility undertaken by the petitioner-assessee during the A.Y. 2010-11 in question and in accordance with the Provisions of the Act, 1961 u/s.80-IA(4) of the Act in the light of the CBDT Circular No.4/2010 dated 18.05.2010 only, the deduction u/s. 80-IA of the Act was allowed by the Assessing Authority in the original Assessment Order passed under Section 143(3) of the Act on 28.03.2013 as quoted above, to the extent of 68.75% of the claim made by the petitioner-assessee and the remaining part was disallowed.

(ii) For denial or withdrawal or undoing the 100% deduction allowed to the petitioner-assessee earlier, the subsequent Assessing Authority i.e., 2nd Respondent, who has issued the Re-assessment Notice to the petitioner-assessee and which are assailed in the present writ petition, had to satisfy the twin conditions (a) failure on the part of the petitioner-assessee to truly and fully disclose the relevant facts, and (b) that the original Assessing Authority did not consider or apply his mind to

19/28

the allowability of the deduction u/s.80-IA(4) of the Act on the facts and evidence placed before him while passing the Assessment Order.

16. After satisfying these twin conditions for invoking the jurisdiction u/s. 147/148 of the Act, the subsequent Assessing Authority had yet to further bring on record the relevant material to show that the deduction earlier allowed to the petitioner-assessee was *ex-facie* illegal or wrong. Such adverse material, the said Assessing Authority should have indicated as available on record before him to show that the deduction which was likely to be disallowed by him, would fall outside the ambit and scope of Section 80-IA(4) of the Act in the light of the said Circular No.4/2010. Merely making a bald averment that since the petitioner-assessee was engaged in the business of works contract, he is not entitled to deduction under Section 80-IA(4) of the Act, could not undo the effect of Section 80-IA(4) of the Act itself, which specifically gives such deductions to the petitioner-assessee engaged in the business of development of infrastructure facilities, which necessarily amounts to works contracts.

20/28

17. The contention of the learned counsel for the Revenue Mr.E.I.Sanmathi is that the Explanation substituted by the Finance Act, 2001, with retrospective effect from **01.04.2000** *per se* confers jurisdiction upon the Assessing Authority to reopen the concluded and considered Assessment orders in such cases and even the development work of laying down of even a new National Highway or a road will amount to a works contract and therefore, the works contract of development of new roads or additional lanes by widening of the existing roads, were not intended to be given the benefit of deduction u/S. 80-I(4) of the Act by the said Explanation, is not sustainable.

18. The said Explanation as explained in the Memorandum of Finance Bill 2007 as quoted above, clearly lays down the guidelines when it says, "*in contrast to this, a person, who enters into a contract with another person (including Government or an undertaking or enterprise referred to in section 80-IA) for executing works contract, will not be eligible for the tax benefit under section 80-IA*", intended to deny the benefit of such deduction only to the sub-contractors, who were executing such works contracts on behalf of the principal contractors and pure and simple they being the sub-contractors, naturally, the

double deduction in the hands of principal contractors and sub-contractors could not have been allowed by the Legislature u/S.80-IA(4) of the Act and that is why the said Explanation restricting the deduction of Section 80-IA(4) of the Act only to the principal works contractor of development of infrastructure facility which included laying of additional lanes by road widening as clarified by CBDT, could not have been denied such deduction on the anvil of the said Explanation as submitted by the learned Counsel for the Revenue. The said contention therefore is liable to be rejected and is hereby rejected.

19. The original assessment order passed in the present case u/S.143(3) of the Act clearly shows the complete and meticulous application of mind by the Assessing Authority to all the relevant facts, Certificates issued by the Executive Engineers and nature of work undertaken by the petitioner-assessee and the works like improvement of roads, re-laying of the roads, repair of the roads etc., have been excluded while computing the Deduction u/S.80-IA(4) of the Act. Therefore, the deduction allowed to the extent of 68.75% only for the works which fell within the four corners of Section 80-IA(4) of the Act could not have been disallowed or intended to be disallowed by resort to

22/28

Section 147/148 of the Act under the garb of subsequent Assessment order passed for the subsequent A.Y.2013-14, which also *prima-facie* indicates that the Assessing Authority has been swayed by the words "improvement, repairs and widening (*sic* !) of already existing roads". While the widening of the roads is intended to be included within the ambit of "infrastructure facility" by the CBDT, the Assessing Authority intends to deny the said claim under the sway of the word "works contracts" as employed in the Explanation inserted by the Finance Act, 2007. Such sweeping and general words before being used to invoke the reassessment powers u/S. 147/148 of the Act, the Assessing Authority has to record the detailed reasons with the relevant facts existing on record within the parameters of Section 147 of the Act, which would clearly disentitle the assessee from being given that deduction or would render the earlier allowing of such deduction by the original Assessing Authority *ex-facie* illegal.

20. Nothing of this sort appears from the record of the present case and the Assessing Authority appears to have very casually invoked its reassessment powers u/S.147/148 of the Act for the A.Y. 2010-11.

21. The powers of reassessment u/S.147/148 of the Act have to be invoked with great amount of circumspection and the relevant material on record, on the basis of which, a "reasonable opinion" can be framed in contrast with a mere "change of opinion" for initiating the reassessment proceedings.

22. Some guidance on this legal position can be deduced from the judgments of the Hon'ble Supreme Court and there are large number of judgments on this settled legal position. In the case of **Commissioner of Income Tax vs. Kelvinator of India Ltd., (2010) 320 ITR 561 (SC)**, the Hon'ble Supreme Court held as under:-

"6. 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 fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act (with effect from 1st April 1989), they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, **post-1st April 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe"** failing which, we are afraid, Section 147 would

24/28

give arbitrary powers to the Assessing Officer to reopen assessments on the basis of **"mere change of opinion", which cannot be per se reason to reopen.** We must also keep in mind the conceptual difference between power to review and power to 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. 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, 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. We quote hereinbelow the relevant portion of **Circular No. 549 dated October 31, 1989, ([1990] 182 ITR (St.), 1, 29),** which reads as follows:

25/28

"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."

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

23. In **Sitara Diamond Pvt. Ltd., vs. Deputy Commissioner of Income Tax & Others [(2012) 345 ITR 91]**, the Division Bench of Mumbai High Court, headed by Hon'ble Justice Dr.D.Y.Chandrachud, as his Lordship then was, held as under:-

"6. We have considered the rival submissions. By the impugned notice dated 20 June 2011, the assessment for assessment Year **2005-06** is sought to be reopened beyond a period of four years of the end of the relevant assessment year. The **condition precedent** to the exercise of the **jurisdiction to reopen** an assessment **beyond a period of four years** as spelt out in the proviso to Section 147 is **that there ought to be a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year**. In the present case, **the sole basis on which** the assessment proceedings were sought to be reopened is the **order which has been passed on 5 July 2011 for assessment year 2007-08**. In that order, according to the Revenue, it has been held that the assessee acts as a mere facilitator and is not a manufacturer so as to entitle it to the deduction under Section 10A. The issue, however, before the court, is as to whether that can form the basis of the reopening of the assessment beyond a period of four years. The reasons which have been disclosed by the **Assessing Officer do not set out as to what facts the assessee had failed to fully and truly disclose**. Even a prima facie reference to the basis on which it is sought to be inferred that there was a failure to disclose all material facts has not been set out in the reasons. In that view of the matter, we are of the view that the primary jurisdictional requirement for reopening the assessment beyond a period of four years has not been fulfilled in this case. Since the order passed by the Commissioner of Income-tax (Appeals) for assessment year 2007-08 has been passed after the assessment for assessment year 2005-06 has been sought

27/28

*to be reopened by the notice dated June 29, 2011, we have, for the purposes of this discussion, kept that circumstance out of consideration. We have come to the conclusion that the Assessing Officer having failed to establish that there was a failure on the part of the assessee to disclose fully and truly all material facts for assessment year 2005-06, **the reopening beyond a period of four years is clearly not valid. There was a finding of fact by the Assessing Officer in the assessment order for assessment year 2005-06 that the business activity of the assessee is manufacturing of jewellery in a Special economic zone.** That finding, as the assessment order notes, was based upon a consideration of the facts of the case and upon examining the contentions of the assessee.*

24. This Court is therefore satisfied that there was no material on record before the Assessing Authority indicating any failure on the part of the assessee to truly and fully disclose the relevant material before the original Assessing Authority while passing the original assessment order u/S.143(3) of the Act on **28.03.2013** and the Assessing Authority had discussed all the relevant facts and evidence and had rightly allowed, albeit partly, the deduction u/S.80-IA(4) of the Act to the assessee and there was no jurisdiction that the Respondent-Assessing Authority to invoke Section 147/148 of the Act for reassessment for the A.Y. **2010-11** in the present case.

28/28

25. The writ petition thus succeeds and is **allowed** with no order as to costs. The impugned Notice u/s. 147/148 of the Act **Annexure-A** dated **15.03.2016** and the reasons recorded for such reopening are liable to be quashed. The same are accordingly quashed.

In view of the dismissal of the writ petition, I.A.1/17 for interim directions does not survive for consideration and the same is also disposed of.

**Sd/-
JUDGE**

TL/SRL