IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'A': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI G.S. PANNU, VICE PRESIDENT
AND
SHRI SUDHANSHU SRIVASTAVA, JUDICIAL MEMBER

I.T.A No.735/Del/2013
(ASSESSMENT YEAR 2004-05)

M/s Bharti Cellular Ltd. (Now Bharti Airtel Limited) Bharti Crescent 1, Nelson Mandela Road, Vasant Kunj, Phase-II, New Delhi- 110 070 PAN-AAACB 2894G	Vs.	Dy.CIT Circle-2(1), New Delhi.
(Appellant)		**(Respondent)**

Appellant By	**Sh. Anil Bhalla, CA**
Respondent by	**Sh. Satpal Gulati, CIT- DR**
Date of Hearing	**12.01.2021**
Date of Pronouncement	**12.04.2021**

ORDER

PER SUDHANSHU SRIVASTAVA, JM:

This appeal is preferred by the assessee against order dated 13.11.2012 passed by the Learned Commissioner of Income Tax (Appeals)-V, New Delhi {CIT(A)} for Assessment Year 2004-05.

2.0 The brief facts of the case are that the return of income for the Assessment Year was filed declaring income at Rs. Nil and the same was assessed at Nil income vide order u/s 143(3) of the Income Tax Act, 1961 (hereinafter called 'the Act') after adjusting brought forward losses of Rs.2,09,40,31,589/-. In the assessment framed u/s 143(3) of the Act, the Assessing Officer had made an addition in respect of free air time to distributors amounting to Rs.54.29 crores and roaming charges amounting to Rs.13.74 Crores.

2.1 Subsequently, proceedings u/s 147 of the Act were initiated by issuance of notice u/s 148 of the Act after recording of reasons. The first re-opening was initiated on 10.04.2008 which reached finality at the ITAT on 14.07.2017 whereas the second re-opening was initiated on 24.02.2011. The case was reopened for the second time in view of the findings of the Hon'ble Delhi High Cour in the case of *CIT vs. Idea Cellular Ltd. as reported in (2010) 325 ITR 148 (Delhi)* that free time allowed to the distributors and roaming services provided to the customers fell within the ambit of section

194H and 194J of the Act and as such were liable for deduction of tax at source. Since, no tax had been deducted at source, disallowance in terms of section 40(a)(ia) of the Act were warranted. The assessee raised objections against the reopening of the case which were dismissed by the Assessing Officer. The re-assessment was completed after making a disallowance of Rs.69,04,34,000/- which included disallowance of Rs.51,82,86,000/- on account of discount in the shape of free air time and disallowance of Rs.17,21,48,000/- on account of roaming and interconnection charges.

2.2 Aggrieved, the assessee preferred an appeal before the Ld. First Appellate Authority, who dismissed the assessee's appeal both on the ground of the issue of assumption of jurisdiction as well as on the merits of the case.

2.3 Aggrieved, the assessee has now approached this Tribunal challenging the dismissal of its appeal by the Ld. CIT(A) and has raised the following grounds of appeal:

"1. That the learned Commissioner of Income Tax (Appeals) ["CIT (A)"] has erred both on fact and in law in confirming the action of the Assessing Officer [AO] in assuming jurisdiction under section 147 of the Income-tax Act, 1961 ("the Act"), disregarding the facts that the ingredients for applying the provisions of Section 147 were missing and thus the assumption of jurisdiction u/s 147 was incorrect in law.

2. That the AO erred both on facts and in law in completing the impugned assessment vide order dated 09.11.2011 under section 147 /143(3) of the Act at an income of Rs.69,04,34,000 as against NIL income declared by the appellant.

3. That in framing the assessment the learned AO has erred in making the following additions and disallowances:

Disallowance of free airtime to distributors u/s 40(a)(ia)	*Rs. 51,82,86,000*
Disallowance of roaming charges u/s 40(a)(ia)	*Rs. 17,21,48,000*

4. That the learned CIT (A) has erred both on facts and in law in confirming the additions made by the AO of Rs. 51,82,86,000 representing free airtime given as discount/ trade margin to the distributors on retail price of prepaid coupons under section 40(a)(ia) of the Act.

4.1 That the learned CIT (A) has erred both on facts and in law in confirming the action of the AO in holding that discount/ trade margin given to the distributors on retail price of the prepaid products was in the nature of commission expense on

which tax was required to be deducted at source under section 194H of the Act.

4.2 That the learned CIT (A) has erred both on facts and in law in confirming the action of the AO in holding that the business relationship between the appellant and distributors of prepaid products was in the nature of agency as against actual relationship of principal to principal, which does not fall within the purview of section 194H of the Act.

4.3 Without prejudice, that the disallowance under section 40(a)(ia) of the Act should have been restricted only to transactions where no tax has been deducted at source at all.

4.4 Further, without prejudice, that the AO failed to appreciate that disallowance under section 40(a)(ia) of the Act was, in any case, not warranted, since non deduction of tax at source was on account of bona fide view taken by the appellant.

4.5 Further, without prejudice, that the AO failed to appreciate that disallowance under section 40(a)(ia) of the Act should have, if at all, been restricted to the amount remaining as payable as on the last date of the relevant previous year.

4.6 Further without prejudice, the learned CIT (A) has erred both on facts and in law in confirming the action of AO in applying the provisions of Section 40(a)(ia) of the Act ignoring the fact that the distributor has declared income in respect of the transactions of prepaid products and thus such income would have been subject to payment of income tax and the assessee would not be deemed to be an assessee in default under the proviso to sub-section (1) of Section 201.

5. That the learned C1T (A) has erred both on facts and in law in confirming the action of the AO in disallowing roaming charges of Rs. 17,21,48,000 paid to other telecom operators under section 40(a)(ia) of the Act.

5.1 That the learned CIT (A) has erred both on facts and in law in confirming the action of the AO in holding that roaming charges paid by the appellant were on account of technical services provided by other telecom operators on which tax was required to be deducted at source under section 194J of the Act.

5.2 Without prejudice, that the AO failed to appreciate that services, if any, were being rendered by other telecom operators directly to the subscribers of the appellant and the appellant's role was only restricted to collecting such roaming charges from its subscribers and making payment to the telecom operators on

their behalf, which, in any case, did not involve rendering of any technical services.

5.3 Without prejudice, that the AO failed to appreciate that the telecom operators were only sharing their revenue in relation to use of their gateway/networks, which did not constitute 'technical service' within the meaning of section 194J of the Act.

5.4 Without prejudice, that the AO further failed to appreciate that disallowance under section 40(a)(ia) of the Act was, in any case, not warranted, since non-deduction of tax at source was on account of bona fide view taken by the appellant.

5.5 Without prejudice, that the AO further failed to appreciate that disallowance under section 40(a)(ia) of the Act should have, if at all, been restricted to the amount remaining as payable as on the last date of the relevant previous year.

5.6 Further without prejudice the AO has erred both on facts and in law in applying the provisions of Section 40(a)(ia) of the Act ignoring the fact that the other telecom service providers have declared income in respect of the transactions of telecom roaming and thus such income would have been subject to payment of income tax and the assessee would not be deemed to be an assessee in default under the proviso to sub-section (1) of Section 201.

6. That the AO erred on facts and in law in not allowing the set off of brought forward losses and unabsorbed depreciation under 72 and section 32(2) of the Act respectively.

7. That the AO erred on facts and in law in charging interest under sections 234B of the Act.

The appellant craves to add, amend, alter or vary, any of the aforesaid grounds of appeal before or at the time of hearing of the appeal."

3.0 The Ld. Authorized Representative (AR) submitted that this was the second time that the assessee's case had been reopened u/s 148 of the Act for the year under consideration. It was submitted that the original assessment u/s 143(3) of the Act was completed on 29.12.2006 which was rectified u/s 154 of the Act on 27.07.2007. The order of the Ld. CIT(A) against the assessment was passed on 10.12.2009 and subsequently, the appeal before the ITAT was disposed off vide order dated 24.01.2013. It was further submitted that in the meanwhile notice u/s 148 of the Act was issued for the first time on 10.04.2008 and the order u/s 147 read with section 143(3) of the Act was passed on 30.10.2009 and the

assessee's appeal was decided in its favour by the Ld. CIT(A) vide order dated 02.09.2013. It was further submitted that the Department's appeal against order of the Ld. CIT(A) was decided in favour of the assessee by the ITAT vide order dated 14.07.2017. It was submitted that in these proceedings u/s 148 of the Act, the issue was disallowance of software expenses. The Ld. AR further submitted that the second round of proceeding u/s 148 were initiated on 24.02.2011 when the notice u/s 148 of the Act was issued. The Ld. AR submitted that this re-assessment proceeding was after a period of four years from the end of the relevant assessment year. The Ld. AR further submitted that in these re-assessment proceedings the issue is disallowance u/s 40a(ia) of the Act with respect to non-deduction of tax u/s 194H of the Act on the discount enjoyed by the distributors on sale of prepaid cards amounting to Rs.51,82,86,000/- and u/s 194J of the Act pertaining to payment of roaming charges to Telecom Service providers amounting to Rs.17,21,48,000/-.

3.1 The Ld. AR drew our attention to the 'reasons recorded' in this case and submitted that in terms of first proviso to section 147 of the Act wherein an assessment has been made u/s 143(3) of the Act, no action can be taken by the Assessing Officer after four years from the end of the assessment year unless there has been a failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment for that relevant assessment year. Drawing our attention to the reasons recorded, it was submitted that a perusal of the reasons would show that there is effectively no mention in the reasons recorded with respect to any failure on the part of the assessee to have disclosed fully and truly all material facts required for the purpose of assessment. It was further submitted that no specific material or information has been shown to have been received by the Assessing Officer with respect to the impugned issues subsequent to the original assessment proceedings. It was further submitted that all the facts relating to the impugned expenditure were available on records during the course of original assessment proceedings itself. It was submitted that information with respect to discount/free

time to distributors amounting to Rs.51,82,86,000/- was duly reflected in Note-7 of Schedule-21 of the audited annual accounts of the assessee whereas the information about roaming charges amounting to Rs.17,21,48,000/- was available in Schedule-9 of the audited accounts. It was submitted that, therefore, it was apparent that there was no failure on the part of the assessee to have truly disclosed the material facts necessary for the purpose of assessment. The Ld. AR placed reliance on numerous judicial precedents in support of his contention that if there is no failure on the part of the assessee as contemplated by the first proviso to Section 147 of the Act and where there has been no suppression of primary facts, initiation of reassessment proceedings would be bad in law. The Ld. AR reiterated that merely having a reason to believe that income had escaped assessment is not sufficient to reopen the assessment beyond a period for four years if there has been no failure on the part of the assessee to disclose material facts fully and truly.

3.2 The Ld. AR also pointed out that while invoking the provisions of Section 147, the Assessing Officer had placed reliance on the judgment of the Hon'ble Delhi High Court in the case of *CIT Vs. Idea Cellular Ltd. as reported in (2010) 325 ITR 148 (Delhi)* as was apparent from the assessment order itself, but reopening on the basis of such judgment cannot be treated as information for the purposes of reopening. It was submitted that as per provisions of Section 147, the Assessing Officer has to have 'reasons to believe' which should have a live link to the new information or knowledge which comes in the possession of the Assessing Officer whereas the judgment of the Hon'ble Delhi High Court cannot be termed as information but rather interpretation of law by the Hon'ble Delhi High Court. It was submitted that there was no change in the facts of the case, they remained the same and, therefore, the subsequent judgment by the Hon'ble Delhi High Court would not be considered an information to justify reopening after four years.

3.3 It was further submitted that the reopening based on the judgment of Hon'ble Delhi High Court in the case of Idea Cellular

Ltd. (supra) is a debatable interpretation and is on applicability of section 201 of the Act and, therefore, it does not automatically lead to disallowance u/s 40a(ia) of the Act. The Ld. AR also submitted that subsequent to the judgment of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) other High Courts and Co-ordinate Benches of the ITAT have held that the provisions of section 194H are not attracted on the discount enjoyed by the distributors of prepaid cards. Our attention was drawn to the judgment of the Hon'ble Karnataka High Court in the case of *Bharti Airtel Ltd. as reported in [2015] 372 ITR 33 (Kar.)* and on another judgment of Hon'ble Kerala High Court in the case *Vodafone ESSAR Cellular Ltd. Vs. ACIT as reported in [2011] 332 ITR 255* had duly been considered and it had been held that the provisions of section 194H were not attracted to the discount enjoyed by the distributors on the prepaid cards.

3.4 On merits of the disallowance, the Ld. AR argued that the impugned disallowance has been confirmed by the Ld. CIT(A) purely on the ground that the provisions u/s 201 of the Act one applicable to the discount enjoyed by the distributors of prepaid

cards and is subject to deduction of tax u/s 194H as held in the case of Idea Cellular Ltd. (supra). It was submitted that this judgment is not on the issue of disallowance u/s 40a(ia) of the Act but on the issue of applicability of Section 201 of the Act and, therefore, the said judgment has been wrongly applied by the Assessing Officer. It was submitted that there were numerous orders in favour of the assessee company prior to this judgment of the Hon'ble Delhi High Court wherein it had been held that no tax was deductible at source on such discounts. It was also reiterated that the other Hon'ble High Courts like the Hon'ble High Court of Karnataka and Hon'ble Rajsthan High Court have held that such discounts were not liable to deduction of tax at source. The Ld. AR also referred to an order of the Delhi Bench in the case of Bharat Sanchar Nigam Ltd. in ITA No.920/Del/2017 wherein it was held by the Tribunal that in case of discount offered to prepaid distributors, the provision of Section 194H did not apply and, therefore, there can be no disallowance u/s 40a(ia) of the Act. Reference was also made to the judgment of *Hon'ble Delhi High Court in the case of JDS Apparents as reported in 53 taxmann.com 139,* wherein it had been

held that section 40a(ia) itself is a penal consequence and the principles of doubtful penalization, which requires strict interpretation, will have to be applied to determine whether indeed a disallowance can be made u/s 40a(ia) of the Act.

3.5 It was also submitted that the assessee was under bonafide belief that tax was not to be deducted at source while making the impugned payments and, therefore, such an act under a bonafide belief would not warrant disallowance u/s 40a(ia) of the Act. It was submitted that on this count also, no fault can be attributed to the assessee for not having deducted tax at source. It was submitted that for the period 1995 to December, 2010 both the Revenue as well as the assessee were proceeding on the premise that provisions of Section 194H of the Act were not applicable. It was further submitted that a similar plea had been made in the case of Bharti Airtel Ltd. before the Tribunal in Assessment Year 2007-08 and 2008-09 in MA Nos.27/Del/2017 and M.A No.28/Del/2017 relating to the ITA No.5363/Del/2011 and 5816/Del/2012 and it had been held by the Tribunal that in view of the divergent view of the Hon'ble High Court and Co-ordinate

Benches, no fault can be found with the assessee in not deducting the tax at source. It was submitted that the Co-ordinate Benches of the Tribunal had followed the judgment of the Hon'ble Bombay High Court in the case of *CIT vs. Kotak Securities Ltd. as reported in 340 ITR 333* while coming to this conclusion.

3.6 It was further submitted that similarly the disallowance of Rs.17,21,48,000/- with respect to failure to deduct tax u/s 194H was confirmed by the Ld. CIT(A) by following his decision on an identical issue relating to Hexacom Ltd., which was deleted by ITAT Delhi Bench vide order dated 21.04.2016.

4.0 In response, the Ld. CIT-DR submitted that as far as the issue of reopening was concerned, mere production of an information in the financial statements would not tantamount to adequate disclosure by the assessee so as to take the assessee out of the ambit of the first proviso to Section 147 of the Act. It was further submitted that the Assessing Officer was duty bound to follow the judgment of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) and, therefore, the reopening was valid in

the eyes of law. It was further submitted that at the time of recording of reasons, sufficiency of material is not relevant. It was submitted that the reopening itself is an indication that there was a failure on the part of the assessee to have disclosed material facts truly and fully. It was further submitted that judgments which are relevant but not considered at the time of original assessment would constitute information u/s 148 of the Act even if the judgment was rendered subsequent to the passing of the original assessment order and therefore, the reopening can be made. The Ld. CIT-DR placed reliance on numerous judicial precedents in support of his contention.

4.1 On merits of the case, the Ld. CIT-DR placed reliance on the orders of the lower authorities.

5.0 We have heard the rival submissions and have also perused the material on record. Before we proceed with the adjudication of the issue as to whether the jurisdiction u/s 147 of the Act was rightly invoked by the Assessing Officer or not, it would

be worthwhile to reproduce the reasons recorded. They are reproduced as under:

> *"Return of income in this case for A.Y. 2004-05 was filed on 01/11/2004 declaring Nil income. The same was assessed u/s 143(3)/154 of the I.T. Act at Nil income on 27/07/2007. Further, assessment u/s 143(3)/147 of the I.T. Act was also made in this case on 30/10/2009 at Nil income after setting off brought forward losses to the tune of Rs.2,92,59,37,829.*
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> *An information in this case was received from DCIT(TDS), Circle-57, Kolkata vide his letter no. DCIT(TDS)/Circle-57/194H/10-l 1/1139 dated 16/12/2010 that the assessee company has paid Rs.32,60,471 in the form of discount to it's franchises/distributors without effecting TDS u/s 194H of the I.T. Act. Hon'ble ITAT, B-Bench Kolkata in it's order in ITA Nos. 1678 & 1679 (Kol) of 2005 (unreported) has held that these payments were liable for deduction of TDS u/s 194H of the I.T. Act. Hence, the payment of Rs.32,60,471/- are to be disallowed u/s 40(a)(ia) of the I.T._Act. This issue has also been adjudicated by Hon'ble Delhi High Court (Jurisdictional High Court) in the favour of revenue in the judgment of CIT vs. Idea Cellular Ltd. (2010) TIOL 139, wherein the relationship between the assessee, who was also telecom service provider like the assessee in the present case, and the distributors was held to be one of principal to agent and the claimed discounts were held as commission liable to TDS u/s 194H of the I.T. Act.*

Hence, the sum of Rs.32,60,471/- has escaped escapement within the meaning of clause c(i) of Explanation 2 below 2nd Proviso appended to Section 147 of the I.T. Act.

Besides, the above, the sum of Rs.32,60,471/- is related to Kolkata Circle only. Actually the discount to distributors/franchises is huge on all India basis in the form of free airtime/discount which has been paid without effecting TDS u/s 194H of the I.T. Act. Assessee has also paid roaming/inter-connection charges without effecting TDS u/s 194J of the I.T. Act, which is clearly and unambiguously in the nature of fees for technical services. The same also needs examination. Moreover, the assessee has disclosed sales revenue net of discount/free airtime to it's distributors/franchises in it's audited accounts and also not disclosed that roaming charges/interconnection charges were in the nature of fee for technical services. Assessee has classified these payments in it's accounts in such a way, so that the same could not be identified by the Assessing Officer as commission or fee for technical services and also not effected TDS as per provisions of the I.T. Act. Hence, taxable income on these issues have escaped assessment by reasons of the failure on part of the assessee company.

In view of the above, I have reasons to believe that income of Rs.32,60,471/- as discussed above, which is to be disallowed u/s 40(a)(ia) of the I.T. Act and un quantified income to be disallowed u/s 40(a)(ia) of the I.T. Act for other circles on account of free airtime/discount to distributors/franchises in the "nature

of commission and roaming/ interconnection charges in the nature of fee for technical services for non deduction of TDS u/s 194H and 194J respectively, has escaped assessment within the meaning of section 147 of the I.T. Act and it is a fit case for the issue of notice u/s 148 of the I.T. Act.

Notice u/s 148 of the I.T. Act will be issued after taking approval of the Commissioner of Income Tax, Delhi u/s 151(1) of the I.T. Act."

5.1 It is undisputed that the in the present case, the impugned notice was issued after four years from the end of the relevant assessment year. A perusal of the reasons, as reproduced above, would also show that the case was reopened in view of the judgment of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) that free time allowed to the distributors and roaming service provided to the customers come within the ambit of section 194H and 194J respectively and as such are liable for deduction of tax at source. Reference has also been made by the Assessing Officer to an information having been received from the DCIT (TDS) Circle-57, Kolkata regarding payment by the assessee company in form of discount to its distributors without deduction of

tax at source u/s 194H of the Act. Reference has also been made in the reasons to an order of the Kolkata Bench of ITAT wherein it had been held that such payments were liable for deduction of tax at source. It is undisputed that the Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) has taken a view that discount paid to distributors was liable for deduction of tax at source. It is also undisputed that the judgment of the Hon'ble Delhi High Court in the case of Idea Cellular Ltd. (supra) was rendered subsequent to the original assessment order passed u/s 143(3) of the Act which was dated 29.12.2006 and also subsequent to the order passed u/s 147/143(3) of the Act which was passed on 30.10.2009. It is the assessee's contention that the assessee had made complete disclosure of all the material facts necessary for the purpose of assessment and that there was not failure on the part of the assessee to have disclosed fully and truly all the material facts. It has also been argued that there has been no mention in the recorded reasons with regard to any failure on the part of the assessee to disclose fully and truly all material facts required for the purpose of assessment. The Ld. AR has also drawn our attention to

the Notes to the audited annual account wherein the relevant information regarding discount as well as roaming charges has been disclosed. On the other hand, it is the contention of the Department that assessment completed earlier can be reopened subsequently on the basis of a judgment of the Hon'ble Apex Court or the Hon'ble High Court. It has been pleaded by the Ld. CIT-DR that such judgments would constitute information for the purpose of reopening even if such judgment was pronounced subsequent to the completion of the original assessment proceedings.

5.2 After having given a thoughtful consideration to the submissions made by both the parties on the issue of validity of reassessment proceedings, the factual and legal position as appearing on perusal of relevant records including the recorded reasons is that-

(i) The impugned notice under Section 148 of the Income Tax Act has been issued after the expiry of 4 years from the end of relevant assessment year.

(ii) Nowhere in the recorded reason has the Assessing Officer specifically stated that there was any omission or failure on the part of the assessee in disclosing fully and truly the material facts necessary for assessment under Section 143(3) of the Act.

(iii) At the time of passing the assessment order under Section 143(3) of the Income Tax Act, 1961 it was settled legal position by various judicial precedents that the provisions for deduction of tax at source were not applicable in respect of discounts and roaming charges.

5.3 It is trite that in order to reopen an assessment made under Section 143 (3) of the Act after the expiry of four years from the end of the relevant assessment year, the reasons recorded must allege that there was failure on the part of the assessee to disclose fully and truly material facts necessary for its assessment. Such allegation is necessary since it is a condition precedent to the assumption of jurisdiction. In the absence of such allegation, the reassessment proceedings have to be held as without jurisdiction.

5.4 We note that at the time when the assessee's assessment was completed, the law as it stood was that there was no liability to deduct tax at source in respect to discount and roaming charges. Therefore, in our considered opinion, there cannot even be an allegation of failure to disclose fully and truly any material fact necessary for assessment. Reliance by the Revenue on the judgment of the Hon'ble Supreme Court in the case of *A.L.A. Firm vs. CIT as reported in [1999] 189 ITR 285 (SC)* is misplaced in as much as this judgment of the Hon'ble Apex Court relates to reopening of assessment within a period of four years on the basis of information, being a judgment which came to the notice of the Assessing Officer subsequent to the assessment. In our considered opinion, this principle will not apply where the assessment is sought to be reopened after the expiry of four years from the end of the relevant assessment year on the basis of a subsequent judgment of the Hon'ble Delhi High Court which is being interpreted as reversing the legal position and in such case the Assessing Officer will have to establish failure on the part of the assessee to

disclose fully and truly all material facts necessary for the assessment. The Hon'ble Apex Court in the case *DCIT vs. Simplex Concrete Piles (India) Ltd. as reported in [2013] 358 ITR 129 (SC)* held as under:

> *"We see no error in the observation made by the Division Bench of the High Court in the impugned period of four years provided under Section 147/149 (lA) of the Income Tax Act, 1961, (for short, "the Act") expires then the question of reopening by the Department does not arise. In any event, at the relevant time, when the assessment order got completed, the law as declared by the jurisdictional High Court, was that the civil construction work carried out by the assessee would be entitled to the benefit of Section 80HH of the Act, which view was squarely reversed in the case of CIT vs N.C. Budharaja and Co. reported in (1993) 204 ITR 412. The subsequent reversal of the legal position by the judgment of the Supreme Court does not authorise the Department to reopen the assessment, which stood closed on the basis of the law, as it stood at the relevant time." (emphasis supplied by us).*

5.5 We also draw support from the judgment of the Hon'ble Kolkata High Court in the case of *Tantia Construction Co. Ltd. vs.*

DCIT & Ors as reported in [2002] 257 ITR 84 (Kol) wherein it was held as under:

> *"But, in the present case, the reasons disclosed with the affidavit-in-opposition admittedly only show escapement of assessment and that too according to the explanation of the law by the apex court subsequent to the assessment. There is no material that the second requirement of failure on the part of the petitioner to disclose fully and truly any material fact, has even been alleged. Learned counsel for the respondents relied on the law as decided by the apex court in the case of Raymond Woollen Mills Ltd. v. ITO [1999] 236 ITR 34 for showing that this court, at this stage of issuance of notice, is not to assess the correctness or sufficiency of materials. But this contention cannot be accepted as at this stage not the correctness or sufficiency of the materials but the very existence of the allegation is being considered and that is within the power of the court when the notice is challenged."*
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> *"But in the present case the respondents have failed to show that the second condition was satisfied at all. Therefore, in such circumstances, I am of the opinion that in the absence of satisfaction of one of the statutory requirements as contained in Section 147, the notices impugned under Section 148 cannot be held to be valid as they were issued after the expiry of four years from the last date of the concerned assessment year and*

there was an assessment under Section 143(3) in respect of the assessee."

5.6 Similarly, the Bombay High Court in the case of Titanor Components Ltd. vs. ACIT, as reported in [2012] 343 ITR 183 (Bombay) held as under:

"Nowhere has the Assessing Officer stated that there is any failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Having regard to the purpose of the section, we are of the view that the power conferred by Section 147 does not provide a fresh opportunity to the Assessing Officer to correct an incorrect assessment made earlier unless the mistake in the assessment so made is the result of a failure of the assessee to fully and truly disclose all material facts necessary for assessment. Indeed, where the assessee has fully disclosed all material facts, it is open for the Assessing Officer to reopen the assessment on the ground that there is a mistake in assessment. Moreover, it is necessary for the Assessing Officer to first observe whether there is a failure to disclose fully and truly all material facts necessary for assessment and having observed that there is such a failure to proceed under Section 147. It must follow that where the Assessing Officer does not record such a failure he would not be entitled to proceed under Section 147.

As observed earlier, the Assessing Officer has not recorded the failure on the part of the petitioner to fully and truly disclose all material facts necessary for assessment year 1997-98. What is recorded is that the petitioner has wrongly claimed certain deductions which he was not entitled to. There is a well known difference between a wrong claim made by an assessee after disclosing all the true material facts and a wrong claim made by the assessee by withholding the material facts fully and truly. It is only in the latter case that the Assessing Officer would be entitled to proceed under Section 147. We are supported in this view by a decision of a Division Bench of this Court in Hindustan Lever Ltd. vs R.B. Wadkar, Asst. CIT (No. l) (2004) 268 ITR 332 (Bom) where in a similar case the Division Bench held that reason that there was a failure to disclose fully and truly that all material facts must be read as recorded by the Assessing Officer and it would not be permissible to delete or add to those reasons and that the Assessing Officer must be able to justify the same based on material record. The Division Bench observed as follows:

"He must disclose in the reason as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence."

5.7 The Hon'ble Calcutta High Court *in the case of Calcutta Club Ltd. vs. Income Tax Officer, in W.P. No.719 of 2014*, vide order dated 14.02.2020, after duly considering the judgment of the Hon'ble Apex Court in *A.L.A. Firm vs. CIT (supra), ITO vs. Saradbhai M. Lakhani [2002], 242 ITR 01 (SC) and Maharaj Kumar Kamal Singh vs. CIT [1959] 35 ITR 01 (SC)* concluded that when there was not even a whisper in the reasons that there was any omission or failure on the part of the assessee in disclosing fully and truly material facts for assessment, subsequent decision of the Hon'ble Apex Court reversing the legal position prevailing at the time of assessment cannot be called an omission or failure on the part of the assessee in disclosing fully and truly the material facts necessary for relevant assessment. The Hon'ble Calcutta High Court went on to quash the notice issued u/s 148 of the Act and the proceedings u/s 147 of the Act.

5.8 Therefore, in view of the above mentioned judicial precedents, we find that in the circumstances, the impugned notice is not sustainable and is liable to be quashed. Therefore, we hold

that the impugned notice u/s 148 of the Income Tax Act and the proceedings u/s 147 of the Act are not sustainable in law for the reason that there is no whisper in the recorded reason that there was any omission or failure on the part of the assessee in disclosing fully and truly facts for assessment. We quash the reassessment proceedings accordingly.

5.9 Since, we have quashed the reassessment proceedings, the grounds raised by the assessee on the merits of the addition do not require any adjudication as they have become academic in nature.

6.0 In the final result, the appeal of the assessee stands allowed.

Order pronounced on 12th April, 2021.

Sd/-	Sd/-
(G.S.PANNU)	**(SUDHANSHU SRIVASTAVA)**
VICE PRESIDENT	**JUDICIAL MEMBER**

Dated: 12/04/2021
PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI