

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

**CWP No. 26125 of 2017 (O&M)
Date of Decision: 27 .04.2018**

Greater Mohali Area Development Authority, PUDA Bhawan, Sector 62,
Mohali

.....Petitioner

versus

Deputy Commissioner of Income Tax, Circle-6(1) Mohali

.....Respondent

**CORAM: HON'BLE MR. JUSTICE S.J.VAZIFDAR, CHIEF JUSTICE
HON'BLE MR. JUSTICE AVNEESH JHINGAN, JUDGE**

Present: Ms. Radhika Suri, Senior Advocate with
Mr. M.S. Kanda, Advocate for the petitioner.

Mrs. Urvashi Dhugga, Senior Standing Counsel
for the respondent.

AVNEESH JHINGAN, J.

The petition has been filed for quashing an order dated 27.11.2012 disposing of the petitioner's objections to the reasons recorded for re-opening the assessment under Sections 147 and 148 of the Income Tax Act, 1961 (for short 'the Act').

2. The petitioner filed a return for the assessment year 2010-11. The audited balance sheet was a part of the return. The Schedule of Current Liabilities and Provisions read as under:-

“Annual Statement of Accounts 2009-2010 GMADA”

GREATER MOHALI AREA DEVELOPMENT
AUTHORITY, SAS NAGAR,

SCHEDULE OF CURRENT LIABILITIES AND PROVISIONS

Particulars

A. Current Liabilities:

1 (i) to (viii) xx xx xx xx xx

B. Other Liabilities:

1. xx xx xx

2. External Development Charges
(From Land Developers)

3 to 6. xx xx xx

7. EDC Under Papra Act, 1995

8 to 12 xx xx xx xx

Previous year

31.03.2009

Total Amount

Rs.6,133,835,831.15

Current year

31.03.2010

Total amount

Rs. 7,311,864,244.78

3. The Assessing Officer (A.O.) by a letter dated 27.11.2012 issued a questionnaire item 9 whereof read: “*Please provide details for each Account amounting to Rs.7,31,18,64,244/-*”. The petitioner filed a reply dated 05.12.2012. The reply, regarding the said query read as follows:-

“8. Detail of sundry creditors is given as under:-

Current Liabilities	Year 31.03.2010 Amount (In Rs.)
> Creditors & Payables	
1. Creditors for supplies	13,074,974.59
2. Creditors for construction	1,75,530.00
3. Other creditors	26,526,492.28
4. Payable to staff	181,701.23
5. Provident Fund (Contributory)	(1,250,808.00)
6. Ex-Gratia payable	6,250.00
7. Stock payable	294,800.22
8. Works payable	1,103,717.00
TOTAL	40,112,657.12

9. Detail of Current Liabilities is given as under:-

Current Liabilities	Year 31.03.2010 Amount (In Rs.)
> Current liabilities as per detail given in point no.8	40,112,657.12
> Other liabilities	
1. Miscellaneous Accounts,	1,780,897.00
2. <u>External Development charges (From Land Developers)</u>	4,556,731,248.00
3. Change of land use (From Developers).	0.00
4. DD PO Civil Dispensary	2,995,199.00
5. Director Water Resources & Environment	0.00
6. Urban Development Fund	8,545,979.00
7. <u>EDC Under Papra Act</u>	75,397,249.00
8. License fee payable to Punjab Government.	2,526,174,188.00
9. Chq. Issued but not presented for payment.	9,699,299.01
10. Security fee plots	1,286,016.00
11. Pollution Control Board	1,187,500.00
12. Security Building Plan	87,954,012.65
TOTAL	7,311,864,244.78

4. The assessment under section 143(3) of the Act was finalized vide order dated 31.12.2012. The effect of the EDC upon the petitioner's income was not referred to in the assessment orders.

5. On 06/07.02.2017 a notice under Section 147/148 of the Act was issued proposing to re-open the assessment as according to the A.O., the petitioner's income chargeable to tax had escaped assessment. The reasons recorded on 12.06.2017 were supplied. As much turns on the reasons, it is necessary to refer to them in their entirety. They read as under:-

“Reasons for issue of notice under section 148 of the Income Tax Act, 1961 for the assessment year 2010-11 in the case of Greater Mohali Area Development Authority, Sector 62, PUDA Bhawan, Mohali (PAN-AAALG0872G).

During perusal of records in this case, it was seen that the assessee had received External Development Charges (EDC) from Land Developers/Colonizers/Real Estate

Builders/Promoters during the F.Y. 2008-09. The said External Development Charges were not brought to the ambit of tax by the assessee but were instead shown as a liability in its Balance Sheet under the head “Other Liabilities”.

It is pertinent to mention here that External Development Charges are received from the Land Developers/Colonizers/Real Estate Builders/Promoters who seek approval from the assessee (i.e. Greater Mohali Area Development Authority) or other Competent Authority to develop a Residential or Commercial or Institutional Zone on their piece/chunk of land. The said amount received under the nomenclature “*External Development Charges*” is supposed be used by the assessee for carrying on of External Development Works and other related jobs outside the land of the Land Developer/Colonizer/Real Estate Builder/Promoter who has paid the External Development Charges (EDC).

Thus, it is seen that the receipt of External Development Charges by the assessee is attributable to its regular business. Further, the receipt and expenditure of the said amount is a regular, routine and re-occurring phenomenon as External Development Charges are being regularly received by the assessee from Land Developers/Colonizers/Real Estate Builders/Promoters in every year and similarly these are being regularly expended/utilized/spent for the purpose of carrying out External Development Works and other related jobs.

In light of the above, it is observed that both the receipts as well as the expenditure related to External Development Charges (EDC) are clearly revenue in nature as they are attributable to the regular business of the assessee and are also a routine, regular and re-occurring phenomenon.

Accordingly, the assessee was required to credit the receipts of External Development Charges to its P&L Account and debit the expenses incurred on account of the same. Since, the assessee is following Cash System of accounting, therefore, the net amount received by the assessee during the year as External Development Charges was required to be brought to the ambit of tax by crediting the receipts earned during the year and debiting the expenses incurred on account of external development work and other related jobs.

However, the assessee had failed to do so and has rather shown the External Development Charges (EDC) received as a liability in its Balance Sheet. The said failure on the part of the assessee has led to escapement of taxable income as the net income earned on account of the External Development Charges has escaped the ambit of taxation.

Thus, after independent verification of records with respect to the above mentioned facts, I have reasons to believe that an income of Rs.1,27,70,37,351/- has escaped assessment within the meaning of Section 147 of the Income Tax Act, 1961.

A calculation of the same is as under:-

i.	Opening Balance of External Development Charges (EDC) as on 01.04.2009.	Rs.327,96,93,897/-
ii.	EDC Received during the year	Rs.136,41,70,883/-
iii.	Utilization during the year	Rs.8,71,33,532/-
iv.	Closing Balance of External Development Charges (EDC) as on 31.03.2010.	Rs.455,67,31,248/-.
v.	Net amount received during the year on account of External Development Charges (i.e. (iv) - (i))	Rs.127,70,37,351/-.

This escapement of income is due to failure of the assessee to fully and truly disclose all the material facts relating to its income and due to default on its part by not treating the amount received on account of External Development Charges (EDC) as Revenue receipt.”

6. The petitioner filed objections. The respondent disposed of the objections vide order dated 27/30.06.2017. It was held that re-opening of the assessment was not based on a change of opinion and that the proceedings are valid. The petitioner was directed to show-cause why addition should not be made. The grounds for the objections filed and the reasons for the order rejecting them were raised before us. It is not necessary, therefore, to refer to the same here.

7. The question that arises is whether the proceedings for reassessment are maintainable in view of the petitioner’s reply dated 05.12.2012 to the respondents’ queries raised in their letter dated 27.11.2012.

Section 147 of the Act is as follows:-

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and

also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :

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 subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year :

Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject-matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

Explanation 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;
- (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance

or relief in the return ;

- (c) where an assessment has been made, but—
 - (i) income chargeable to tax has been under assessed ; or
 - (ii) such income has been assessed at too low a rate ; or
 - (iii) such income has been made the subject of excessive relief under this Act ; or
 - (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

8. The petitioner was assessed under Section 143(3) of the Act. Notice has been issued beyond four years from end of the relevant Assessment Year. The case is, therefore, covered by the first proviso to Section 147. As Mrs. Suri, the learned senior counsel for the petitioner rightly submitted, there are two pre conditions for assuming jurisdiction to re-open the case viz. (i) Reason to believe that income chargeable to tax escaped assessment; and (ii) failure on the part of assessee to disclose fully and truly all material facts.

(A) In *Assistant Commissioner of Income Tax Versus Rajesh Jhaveri Stock Brokers P. Ltd.* 291 ITR 500(SC), the Supreme Court held:-

“Section 147 authorizes and permits the assessing officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word “reason” in the phrase “reason to believe” would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion. The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers. As observed by the Supreme Court) in *Central Provinces Manganese Ore Co. Ltd. v. ITO* (1991) 191 ITR 662] for initiation of action under Section 147(a) (as the provision stood at the relevant time)

fulfillment of the two requisite conditions in that regard is essential. At that stage, the final outcome of the proceeding is not relevant. In other words, at the initiation stage, what is required is “reason to believe”, but not the established fact of escapement of income. At the stage of issue of notice, the only question is whether there was relevant material on which a reasonable person could have formed a requisite belief. Whether the materials would conclusively prove the escapement is not the concern at that stage. This is so because the formation of belief by the assessing officer is within the realm of subjective satisfaction [see *ITO v. Selected Dalurband Coal Co. (P) Ltd.* [(1996) 217 ITR 597 SC] ; *Raymond Woollen Mills Ltd. v. ITO* [: (1999) 236 ITR 34(SC)].

The scope and effect of Section 147 as substituted with effect from 1-4-1989, as also Sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of Section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under Section 147(a) two conditions were required to be satisfied, firstly, the assessing officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly, he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the assessing officer could have jurisdiction to issue notice under Section 148 read with Section 147(a) but under the substituted Section 147 existence of only the first condition suffices. In other words if the assessing officer for whatever reason has reason to believe that income has escaped assessment it confers jurisdiction to reopen the assessment. It is however to

be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to Section 147. The case at hand is covered by the main provision and not the proviso.

So long as the ingredients of Section 147 are fulfilled, the assessing officer is free to initiate proceeding under Section 147 and failure to take steps under Section 143(3) will not render the assessing officer powerless to initiate reassessment proceedings even when intimation under Section 143(1) had been issued.”

(B) *In Duli Chand Singhania v. Assistant Commissioner of Income Tax*, (2004) 269 ITR 192 P&H, this Court held:-

"..... In other words, in order to assume jurisdiction under section 147, in a case where assessment has been made under sub-section (3) of section 143 of the Act, two conditions are required to be satisfied, viz.:

(i) The Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment; and

(ii) He must also have a reason to believe that such escapement occurred by reason of failure on the part of the assessee either:

(a) to make a return of income under section 139 or in response to notice issued under sub-section (1) of section 142 or section 148; or

(b) to disclose fully and truly all material facts necessary for his assessment for that purpose.

The aforementioned requirements of law must be held to be conditions precedent for invoking the jurisdiction of the Assessing Officer to reopen the assessment under section 147 of the Act in cases which are covered by the proviso. Both the conditions are cumulative and must co-exist. Thus, in cases where assessment has been made under section 143(3) of the Act and action under section 147 is sought to be taken after the expiry of four years from the end of the

relevant assessment year, it is necessary that condition No. (i) and either of conditions Nos. (ii)(a) or (ii)(b) must co-exist. In case, any of the said two conditions is not satisfied, the very initiation of proceedings under section 147 of the Act shall be wholly without jurisdiction."

(c) In *Hindustan Liver Ltd. v. R.B. Wadkar Asstt. Commissioner of Income Tax*, (2004) 268 ITR 332 (Bom.), the Bombay High Court held:-

"Reading of proviso to section 147 makes it clear that if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under section 147, or re-compute the loss or the depreciation allowance or any other allowance, as the case may be for the concerned assessment year. However, where an assessment under sub-section (3) of section 143 has been made for relevant assessment year, no action can be taken under section 147 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 reasons of the failure on the part of the assessee to disclose all material facts necessary for his assessment for that assessment year*. (Emphasis supplied by us)"

In our view, both the conditions precedent are satisfied.

9. Mrs. Suri also rightly submitted that it is essential that the Assessing Officer had reason to believe that income chargeable to tax escaped assessment and that a mere change of opinion is no ground to initiate proceedings for reassessment.

(A) In *Commissioner of Income tax Versus Kelvinator of India Ltd.*

(2010) 320 ITR 561 SC, the Supreme Court held:-

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be *per se* reason to reopen. 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 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion"

in Section 147 of the Act."

(B) In *State Bank of Patiala Versus Commissioner of Income Tax and others* (2015) 375 ITR 109 (P&H), this Court held:-

"The reason for reopening, thus, being merely a change of opinion on account of the assessment being made for the subsequent years would not give the Assessing Officer the jurisdiction to reopen as he would, thus, be reviewing his earlier decision which has been held not to be permissible. Thus, keeping in view the above, writ petitions are allowed and the notice dated March 27, 2012 (annexure P3) and the order dated March 25, 2013 (annexure P1) are, accordingly, quashed."

(C) In *Commissioner of Income Tax Versus ITW India Ltd.* (2015) 377 ITR 195 (P&H), this Court held:-

"The reason for reopening, thus, being merely a change of opinion on account of the subsequent judgment of the Hon'ble Apex Court would not give the Assessing Officer the jurisdiction to reopen as he would, thus, be reviewing his earlier decision which has been held not to be permissible. Similarly, in the absence of allegations that the assessee failed to disclose fully and truly all material facts, the assumption of jurisdiction was not justified."

10. The reasons for re-opening which we quoted earlier clearly indicate that the Assessing Officer had reason to believe that income on account of EDC had escaped assessment. The assessment order, as we noted, did not deal with EDC or its effect upon the petitioner's income. The reasons on the other hand deal in considerable detail with the concept of EDC, the purpose of EDC, the manner in which it is paid and received and then accounted for and utilized. None of these aspects are even remotely adverted to in the assessment order and as we will indicate later, in the assessment proceedings that preceded it. Based on these facts, the Assessing Officer

drew his inferences of law viz. that EDC is revenue in nature. We do not for a moment suggest that the reasons draw the correct inferences. All that we say is that the Assessing Officer had reason to believe though not to hold that income on account of EDC had escaped assessment.

11. We will shortly deal with the question whether the reasons constituted a mere change of opinion.

12. Mrs. Suri also rightly submitted that once the relevant material has been disclosed and the Assessing Officer's attention thereto has been drawn, it is no part of the assessee's duty to enumerate the possible interference that arise or may arise therefrom.

(A) In *Calcutta Discount Co. Ltd. v. Income Tax Officer*, AIR 1961 SC 372, the Supreme Court held:-

"(12) It may be pointed out that the Explanation to sub-section has nothing to do with "inferences" and deals only with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income-tax Officer, could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section by casting a duty on the assessee to disclose "inference" to draw the proper inferences being the duty imposed on the Income-tax Officer.

13-14) We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this."

(B) In *Commissioner of Income Tax, Calcutta Versus Burlop Dealers Ltd.* 79 ITR 609 SC, the Supreme Court held:-

" We are of the view that under Section 34(1)(a) if the assessee has disclosed primary facts relevant to the assessment, he is under no obligation to instruct the Income Tax Officer about the inference which the

Income Tax Officer may raise from those facts. The terms of the Explanation to Section 34(1) also do not impose a more onerous obligation. Mere production of the books of account or other evidence from which material facts could with due diligence have been discovered does not necessarily amount to disclosure within the meaning of Section 34(1), but where on the evidence and the materials produced the Income Tax Officer could have reached a conclusion other than the one which he has reached, a proceeding under Section 34(1)(a) will not lie merely on the ground that the Income Tax Officer has raised an inference which he may later regard as erroneous.

The assessee had disclosed his books of account and evidence from which material facts could be discovered; it was under no obligation to inform the Income Tax Officer about the possible inferences which may be raised against him. It was for the Income Tax Officer to raise such an inference and if he did not do so the income which has escaped assessment cannot be brought to lay under Section 34(1)(a)."

(C) In *I.TO. I-Ward, Hundi Circle, Calcutta and others v. Madnani Engineering Works Ltd.* 118 ITR 1 SC, the Supreme Court held:-

"It will thus be seen that according to this judgment, there was no obligation on the assessee to disclose that the partnership agreement produced by it was bogus and that the entries made by it in its books of accounts were false. The assessee discharged the obligation which lay upon it by disclosing its books of account and evidence from which material facts could be discovered and it was for the Income Tax Officer to decide whether the documents produced by the assessee were genuine or false. Here also the respondents produced all the hundis on the strength of which it had obtained loans from creditors as also entries in the books of account showing payment of interest and it was for the Income Tax Officer to investigate and determine whether these documents were genuine or not. The respondent could not be said

to have failed to make a true and full disclosure of the material facts by not confessing before the Income Tax Officer that the hundis and the entries in the books of account produced by it were bogus. We do not see any distinction at all between *Burlop Dealers case* and the present one and the language of Section 147(a) being identical with that of Section 34(1)(a), the ratio of the decision in *Burlop Dealers case* must govern the decision of the present case. We must, therefore, hold that there was no failure on the part of the respondent to disclose fully and truly all material facts necessary for its assessment and the condition for the applicability of Section 147(a) was not satisfied."

(D) In *Winsome Textile Industries Ltd. v. Union of India and others* (2005) 278 ITR 470 (P&H), this Court held:-

'The limitation of four years provided in the proviso to section 147 has been made applicable only to cases where assessments have already been completed under sub-section (3) of section 143 or under section 147. There is a specific purpose behind it. Where the return is processed under section 143(1)(a), the Assessing Officer has no jurisdiction to examine the genuineness of the claims made in the return of income. He has only limited powers of making adjustments on the basis of information available in the return. However, when an assessment is made under section 143(3) of the Act, the Assessing Officer has very wide power to examine the genuineness of the claims made in the return and require the assessee to furnish whatever information the Assessing Officer deems necessary. In the present case, the assessment had been made under section 143(3) of the Act and if the Assessing Officer was of the view that he required profit and loss account and depreciation charts of the assessment years 1995-96 and 1996-97 for examining the correctness of the claim under section 80-IA of the Act, he could have required the assessee to produce the same. Failure of the Assessing Officer to do so, cannot be treated at par with the failure of the assessee to

disclose fully and truly all material facts necessary for its assessment."

13. The reasons furnished by the Assessing Officer do not indicate that the decision to initiate proceedings under sections 147/148 was on account of the petitioner not having informed the Assessing Officer the effect of the receipt of EDC on its income. Indeed the petitioner was not likely to say that it was income revenue in nature and liable to be taxed. In the reasons for reopening the assessment, the Assessing Officer has drawn his own inferences albeit only tentative. The Assessing Officer never drew any inferences regarding the petitioner's receipts of EDC in the original assessment proceedings.

14. We will proceed on the basis that the mere fact that the assessment order does not indicate that the Assessing Officer had considered the effect of EDC on the petitioner's income would not indicate that the Assessing Officer had not considered it. Mrs. Suri relied upon the following judgments:-

(A) In *Commissioner of Income Tax v. Usha International Ltd.* (2012) 348 ITR 485 Delhi HC Full Bench, Delhi High Court held:-

"The reason is that experience shows that the Assessing Officers do examine several aspects and raise queries but when the written opinion is expressed in form of the assessment order, there is no discussion or elucidation on certain aspects and issues decided or held in favour of the assessee. Assessee is not the author of the assessment order and has no control over what the Assessing Officer wants to state or mention. It is in this context that Delhi High Court in *Commissioner of Income Tax v. Eicher Ltd.*, (2007) 294 ITR 310, observed as under:

"In *Hari Iron Trading Co. v. Commissioner of Income Tax*, (2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court

observed that an assessed has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's Explanations are rejected and additions/disallowances are made. We agree.

Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessed before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessed, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, Therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessed should be made to suffer the consequences of that lapse.”

xx xx xx xx

It is, therefore, clear from the aforesaid position that:

- (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;
- (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of “change of opinion”.

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act."

(B) In *Bedmutha Industry Ltd. Vs. Dy. Commissioner of Income Tax*, Writ Petition No. 10655 of 2011 Bombay HC, Bombay High Court held:-

"It was submitted that the issue regarding depreciation on goodwill and set off of unabsorbed depreciation was an issue considered by respondent No. 1 in order dated 18th December, 2006 and was not reviewed by him. The only basis for the above submission is that the order of assessment does not discuss the issues raised for the purposes of reassessment.

This very issue as raised by the counsel for the Revenue has been considered by this court in the matter of *Idea Cellular Ltd. v. Deputy Commissioner of Income tax* in 301 ITR 407 wherein it has been held as follows:

"It was also sought to be contended that since the Assessing Officer had not expressed any opinion regarding this matter in his original

assessment order, it could not be said that there was any change of opinion in this case. In our view, once all the material was before the Assessing officer and he chose not to deal with the several contentions raised by the Petitioner in his final assessment order, it cannot be said that he had not applied his mind when all the material was placed before him

To a similar effect is the decision of the Full Bench of Delhi High Court in the matter of *Commissioner of Income Tax v. Kelvinator of India Ltd.* Reported in 256 ITR 1 and the division bench of Gujarat High Court in the matter of *CIT v. Nirma Chemical Works* reported in 309 ITR 67. In view of the above, the submission of the Revenue that the reopening is not on account of change of opinion as no opinion was expressed in the order of Assessment dated 18th, December 2006 must be negated."

15. The mere absence in the assessment order of a reference to the EDC received by the petitioner is not conclusive. What is important is the reason for its absence. In our view it was on account of the assessee's failure to disclose fully and truly all material facts. The words "all material facts are significant". Moreover, section 147 requires the assessee to declare the material not merely fully but also "truly". In our view these requirements were not met either in the return or in the answer to the query relating to EDC.

16. A questionnaire was indeed issued during the assessment proceedings. There was, however, no specific question with regard to EDC. The petitioner was requested to provide "details of current liabilities for each Account amounting to Rs.7,311,864,244.78".

Although the Assessing Officer called upon the petitioner to provide details of current liabilities for each account, the petitioner merely forwarded the details mentioned in the said schedule to the balance sheet. The manner in which these details were forwarded is important. Let us first proceed on the basis that the details were forwarded strictly as stated in the balance sheet. As we noted earlier, the balance sheet included a “SCHEDULE OF CURRENT LIABILITIES AND PROVISIONS”. The Schedule was divided into two parts - ‘A’ and ‘B’. The caption of part A was “Current Liabilities” and the caption of part-B was “Others Liabilities”. The query related only to part ‘A’ i.e. current liabilities.

As the query was with respect to current liabilities it is obvious that the Assessing Officer would have applied his mind only to the entries under “A Current Liabilities” and not the entries under “B Others Liabilities”. EDC was not referred to in part “A” Current Liabilities” but only in part “B Other Liabilities”. Thus the Assessing Officer’s attention was not focused on the entries under “B Others Liabilities”.

17. It is true that the query refers to the amount of Rs. 7,311,864,244.78 which is the aggregate of “A Current Liabilities” and “B Others Liabilities”. Mrs. Suri’s reliance upon the fact that as this included amounts under “B Other Liabilities”, it follows that the AO considered the effect of EDC is not well founded. It is possible that the Assessing Officer mentioned the amount only because it stood at the foot of the Schedule.

18. From a perusal of the order sheet of the A.O. it is evident that after the filing of the reply to the questionnaire, details were asked only regarding administrative expenses incurred office-wise, installments

received of houses and details of houses and their costs, as to why CPF contribution may not be dis-allowed. This itself shows that there was no discussion or application of mind by the A.O. on the issue of EDC.

19. Moreover in answer to the queries the petitioner did not at least clearly show EDC to be a current Liability. We set out the relevant portion of the reply dated 05.12.2012. Paragraph-8 thereof had the caption “Detail of sundry creditors is given as under:-....” The table below had two columns, namely, headed “Current Liabilities” and “Year 31.03.2010 Amount (In Rs.....)” Below the heading of the first column of the table “Current Liabilities” was a list of 8 “Creditors and Payables”. EDC was not referred to in paragraph-8. Paragraph-9 of the reply had the caption “Detail of Current Liabilities is given as under:-...” The table below had two columns with the headings “Current Liabilities” and “Year 31.03.2010 Amount (In Rs.....)”. Below the heading of the first column were two headings/items, the first heading “Current Liabilities as per the detail given in point No.8” and the second heading “Other Liabilities”. There are no items mentioned under the first heading. However, EDC is referred to in items 2 and 7 of the second heading “Other Liabilities”. Thus, reading paragraphs 8 and 9 together gives the impression that the current liabilities were as stated in Point No.8/para-8. As noted earlier, paragraph-8 purported to furnish the details of sundry creditors; the table thereunder had the column current liabilities below which were the caption “creditors and payables”. The 8 items thereunder did not include EDC. The other caption in the first column of the table in paragraph-9 was “Other Liabilities” and it is under this caption that the EDC is referred to. Thus the impression on a conjoint reading of paragraphs 8 and 9 is that the EDC was not stated to be a “current

liability”. The Assessing Officer’s query in the letter dated 27.11.2012 pertains to the details of current liabilities. The Assessing Officer’s attention would obviously have been focused on the items referred to by the assessee under the caption “current liabilities” as the query was in respect of “current liabilities”. If the assessee intended EDC to be considered a current liability, it should have been more specific and included EDC under the caption “current liabilities” at least in answer to the Assessing Officer’s query. That the method of indicating EDC under the caption “other liabilities” may be permissible under the provisions of the said Act, the Company Act and under the accounting procedure is not relevant for the present purpose.

20. Added to all this is the fact that apart from the two amounts of EDC being mentioned in the annexure to the balance sheet and in the answer to the queries, there was no disclosure of any material by the petitioner. The petitioner thereby indicated that there was nothing else to be considered with respect to EDC.

21. This is not a case where any inference had been drawn by the A.O. regarding EDC. The case would have been different if the A.O. during the course of assessment had raised a query with regard to the EDC. The assessee would have produced the material relating to it and thereafter the A.O. would have either accepted the contentions or rejected them. In such circumstances, the primary facts would have been before the A.O. It would have been for him to probe further, if so required. This is not the situation in this case. Hence, the reopening cannot be said to be without jurisdiction.

22. There is no requirement under Section 147 of the Act that the material forming the basis for reason to believe should be from an outside source. The material on record can also be the basis to re-open the

assessment. We will assume that there was tangible material before the A.O. on record for formation of reason to believe that there was an under assessment. It would not affect the right to reassess.

(A) In *R.K. Malhotra, ITO, Group Circle v. Kasturbhai Lalbhai (HUF)* AIR 1977 SC 2129, the Supreme Court held as under:

"Jurisdiction of the Income-tax Officer to reassess income arises if he has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment. That information, must, it is true, have come into the possession of the Income-tax Officer after the previous assessment, but even if the information be such that it could have been obtained during the previous assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law, but was not in fact obtained, the jurisdiction of the Income-tax Officer is not affected.

11. The Court further observed that 'information' means instruction or knowledge derived from an external source. But the words "external source" cannot be construed as implying that the source must be outside the record. The 'information' may be gathered from the assessment record itself."

....(emphasis supplied)

(B) In *Phool Chand Bajrang Lal and another Versus Income Tax Officer and another*, 1993 (Income Tax Reports) SC 457, the Supreme Court held as under:

"From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen an assessment under [Section 147\(a\)](#) read with [Section 148](#) of the Income Tax Act, 1961 only if on the basis of specific, reliable and

relevant information coming to his possession subsequently, he has reasons, which he must record, to believe that, by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profits or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income-tax Officer, at the time of making the original assessment could or could not have found by further enquiry or investigation, whether the transaction was genuine or not if, on the basis of subsequent information, the Income-tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in [Section 147\(a\)](#) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted

Burlop Dealer's case (1971) 79 ITR 609 (SC) as laying down law to the contrary fell into error and did not appreciate the import of that judgment correctly.

28. We are not persuaded to accept the argument of Mr. Sharma that the question regarding truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the plain phraseology of [Sections 147\(a\)](#) and [148](#) of the Act and is against the settled law laid down by this Court. We have to look to the purpose and intent of the provisions. One of the purposes of [Section 147](#), appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude."

.(emphasis supplied)

(C) At the cost of repetition, we reproduce para-15 from a decision made by the Supreme Court in *Calcutta Discount's case* (supra), as under:

"15. The position therefore is that if there were in fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of "underassessment" that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notices under Section 34. Whether these grounds were adequate or not for arriving at the conclusion that there was a non disclosure of material facts would not be open for the court's investigation." (emphasis supplied).

23. At this stage, the Court is not to consider the adequacy of the reasons or the ultimate decision of the issue involved.

The petitioner cannot absolve itself of its responsibility to fully and truly disclose the material to the authorities. Merely because EDC was mentioned in the balance sheet and in the reply to the questionnaire it would not render the A.O. powerless to re-open the case.

The following observations of the Supreme Court in *Malegaon Electricity Co. P. Ltd. v. Commissioner of Income Tax, Bombay, 1970 (Income tax Reports) SC 466* are important:-

"It is true that if the Income-tax Officer had made some investigation particularly if he had looked into the previous assessment records, he would have been able to find out what the written down value of the assets sold was and consequently he would have been able to find out the price in excess of their written down value realized by the assessee. It can be said that the Income-tax Officer if he had been diligent could have got all the necessary information from his records. But that is not the same thing as saying that the assessee had placed before the Income-tax Officer truly and fully all material facts necessary for the purpose of assessment. The law casts a duty on the assessee to 'disclose fully and truly all material facts necessary for his assessment for that year'. Further, the *Explanation* to section 34(1) says :

"Production before the Income-tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure within the meaning of this section". If the assessee had disclosed to the Income-tax Officer, the surplus price realised by it over and above the written down value of the assets sold or in the alternative if it had informed the Income-tax Officer the price realised as well as the written down value of the assets sold, then it could have

been said that the assessee had done its duty and it was for the Income-tax officer to draw any inference on the facts placed before him." (emphasis supplied).

24. This case goes a step further. There was material even outside the record with the Assessing Officer which requires consideration. There are detailed provisions regarding the EDC. The Act deals with the liabilities to pay EDC. It also deals with the nature of the charge. The statutory agreements to be entered into and declarations to be filed with the authorities also referred to the payment of the EDC. EDC has been the subject matter of litigation before this Court. None of this was before the Assessing Officer in the assessment proceedings. Thus apart from the material on record, there was other tangible material that was not considered during the assessment proceedings.

There is no question in the facts of the present case of the re-opening being on account of a change of opinion. The issue of change of opinion could only arise if the issue had been dealt with or the material with regard to EDC was there before the A.O. at the time of framing the assessment. As is apparent from the record, the issue was not considered at the time of assessment. There was no occasion for the A.O. to make further inquiry with regard to EDC.

In Dr. Amin's Pathology Laboratory Versus P.N. Prasad, Joint Commissioner of Income Tax and others 2001 (Income Tax Reports) (Bom.) 673, the Bombay High Court held as under:

"Under Explanation 1 to the proviso, mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance-

sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso. In the present case, the facts show that the Assessing Officer over looked the aforestated item. That, he noticed it subsequently. That, at the time of passing the original order of assessment, he could not be said to have opined on the above item. Therefore, there was no change of opinion."

25. There cannot be any quarrel with the proposition that the assessee has no control over the framing of an assessment order. There can be cases where after discussion the A.O. may be satisfied on the issue and does not find it appropriate to discuss the same in the assessment order. This is not the case here. The petitioner has failed to establish that there was any discussion or adjudication on the said issue. In such circumstance, there would be no occasion for the petitioner to argue that merely because the said issue has not been discussed in the assessment order, it will not mean that it was not considered.

26. In this view of the matter it is not necessary to consider Mrs. Dugga's other submissions including as to the maintainability of the petition and the authority of the petitioner to file this petition.

27. The writ petition is dismissed.

(S.J. VAZIFDAR)
CHIEF JUSTICE

(AVNEESH JHINGAN)
JUDGE

27 .04.2018
reema/ravinder

Whether speaking/reasoned

√Yes/No

Whether Reportable:

√Yes/No