

IN THE HIGH COURT OF JUDICATURE AT MADRAS

ORDER RESERVED ON 16.09.2019

ORDER DELIVERED ON 26.09.2019

CORAM

THE HONOURABLE MR.JUSTICE K.RAVICHANDRABAABU

W.P.No.3648 of 2018

and

W.M.P.No.4476 of 2018

M/s.S.P.Mani and Mohan Diary
S4, Jeevanantham Street,
Kollampalayam, Erode - 638 002

...Petitioner

.Vs.

The Assistant Commissioner of Income tax
Central Circle I
Gandhiji Road,
Erode - 638 001

... Respondent

Writ Petition filed under Article 226 of the Constitution of India to issue a Writ of Certiorari to call for the records of the respondent in PAN.AAKFS133J and quash the proceedings dated 22.11.2017 and the consequential order disposing objection raised against issue of notice u/s 148 for AY 2011-12 dt. 04.01.2018 issued by the respondent herein.

For Petitioner : Ms.G.Vardhini Karthik
for Mr.B.Raveendran

For Respondent : Mr.A.P.Srinivas,
Senior Standing Counsel for Income-tax

O R D E R

The petitioner is aggrieved against the proceedings of the respondent dated 22.11.2017 and the consequential order disposing the objections raised against the issue of notice under section 148 of the Income Tax Act for the assessment year 2011-12 dated 04.01.2018.

2. The case of the petitioner in short is as follows:

i) The petitioner is an assessee under the respondent. They filed their return of income for the assessment year 2011-12, admitting the total income of Rs.1,72,77,830/-. The case was

selected for scrutiny and a notice under section 143(2) dated 22.09.2012 was issued. Thereafter, an order of assessment was passed on 14.03.2014, thereby disallowing 8% of their expenditure based on the nature of business by making an addition of Rs.35,37,000/-. The Assessing Officer also disallowed the expenses on the milk can purchases from Profit and Loss account and allowed only 15% depreciation in the Assessment Order. The petitioner did not file any appeal and accepted the demand and made the payment of tax and interest amounting to Rs.21,35,750/-. Thus, the petitioner had fully and truly co-operated with the department in participating in scrutiny and assessment proceedings and also in paying the tax without any delay. While so, the impugned notice dated 22.11.2017 was issued under section 148 of the Income Tax Act contending that the Assessing Officer had reason to believe that the petitioner's income for the assessment year 2011-12 had escaped assessment within the meaning of section 147 of the Income Tax Act, 1961. The petitioner, through letter dated 27.11.2017, requested the respondent to treat the return filed under Section 139 as the one filed as revised return for the purpose of reassessment under Section 147. In the very same communication, the petitioner also requested the respondent to give reason for reopening. By communication dated 08.12.2017, the respondent directed the petitioner to file a fresh return of income. On 26.12.2017, the petitioner made an e-filing of the return again by seeking reasons for reopening the assessment. On 19.12.2017, the respondent furnished the reasons.

ii) The materials on which reopening is done were already available at the time of assessment proceedings and the same were accepted by the respondent. Therefore, the present notice impugned based on such materials clearly amounts to change of opinion, which cannot be sustained in law. There was no allegation against the petitioner as if they had failed to disclose fully and truly all material facts necessary for his assessment. In the absence of an allegation that the escapement of the income has been occasioned by failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, the Assessing Officer is barred from reopening the assessment based on mere change of opinion. Therefore, the petitioner had filed their objections on 26.12.2017 and stated that there was no escapement of income and that the details were all furnished at the time of assessment proceedings itself. However, the respondent issued the impugned order dated 04.01.2018 rejecting the objections. Therefore, the present writ petition.

3. The respondent filed the counter affidavit wherein it is stated as follows:

i) The assessment for the year under consideration namely 2011-12 was initially completed under section 143(3) of the

Income Tax Act, 1961 on 14.03.2014. During the course of assessment proceedings of the assessment year 2014-15, the assessee was requested to clarify on expenses of Rs.3,65,452/- incurred under the head, Asset Written Off and Rs.3,30,000/- incurred under the head, Factory Land Development Charges for the assessment year 2011-12, as no such details were filed by assessee during the assessment period of that year. On perusal of the ledger account of Land Development Charges, it was noticed that cash payment of Rs.1,50,000/- and Rs.75,000/- were made on 12.10.2010 and 17.02.2011 respectively, in violation of provisions of Section 40(A) of the said Act. Such violation was not mentioned in the Tax Audit Report. The Asset Written Off ledger account reflects that the assessee has incorrectly claimed the amount as revenue expense, when in fact, the same was a capital loss or, at the most, assessee could have continued claiming depreciation on the assets. Thus, perusal of the ledge accounts prima facie indicate under assessment of income. During the course of assessment proceedings of the year 2011-12, the assessee had not filed the details representing the expense of Rs.3,65,452/- on account of Asset Written Off and the Factory Land Development Charge of Rs.3,30,000/-. Further, cash payment incurred under the head Factory Land Development Charge was not reported in the Tax Audit Report. Thus, during the course of assessment proceedings, the assessee failed to fully and truly disclose the material facts required for finalising the assessment. It was only during the course of verification carried out during the assessment proceedings of the assessment year 2014-15, these details were brought on record. Therefore, notice under section 148 was issued only on the basis of new facts that had come to light subsequently and not on account of change of opinion, as alleged by the petitioner. Therefore, the said notice is valid and well within the statutory time limit available under the said Act. The order dated 04.01.2018, impugned in this writ petition, is not an assessment order and therefore, the assessee has every opportunity to present his case before the Assessing Officer during the course of re-assessment proceedings.

4. The learned counsel for the petitioner contended as follows:

i) The impugned notice under Section 148 dated 22.12.2017 was issued after expiry of four years from the end of the assessment year 2011-12 and therefore, the very notice for reopening itself is barred by limitation. Even to attract the first proviso to Section 147, there must be a clear cut finding about the failure to disclose fully and truly all material facts. No such finding is given in the impugned proceedings. On the other hand, all the material facts referred to as the reasons for reopening are already disclosed in the original return itself. Therefore, it is only a change of opinion of the

Assessing Officer on those materials, which cannot be the basis for reopening. A sum of Rs.3,65,452/- towards Asset Written Off and a sum of Rs.3,30,000/- towards Factory Land Development charges were already shown in the Profit and Loss account filed along with the return and therefore, the respondent is factually not correct in stating that there is no full and true disclosure of all material facts.

ii) In support of her contention the learned counsel relied on the recent decision of the Apex Court reported in 2018(6) SCC 685 (CIT vs. Techspan India Private Limited & another) and a decision made by this Court in W.P.No.1589/2017 etc. dated 13.11.2017.

5. Per contra, the learned Senior Standing Counsel appearing for the respondent contended as follows:

i) Mere disclosure is not enough without there being further material facts in connection with such disclosure. The audit report is also not clear since it is stated therein that it was not possible for the auditor to verify whether the payment exceeding Rs.20,000/- have been made otherwise than by account payee, cheque or bank draft, as the necessary evidence is not in possession of the assessee. The non-disclosure of material facts was noticed during the subsequent assessment proceedings of the year 2014-15 and therefore, based on such tangible material, the reopening is made and thus, the same is sustainable. When the reopening is made based on such tangible material, it is not open to the petitioner to contend as if the reopening is made based on change of opinion. The issue raised in the reopening was not discussed in the original assessment order. Therefore, there is no question of saying that there is a change of opinion. An escaped assessment includes under assessment. The issue regarding under assessment, if not properly considered at the time of original assessment, is entitled to be considered by way of reopening. In other words, an issue not properly considered entitles for reopening.

ii) In support of his contention, the learned counsel relied on the following case laws.

i) 1976(12) ITR 287 (SC) (Kalyanji Mavji & Co. v. Commissioner of Income-tax)

ii) 1989 (46) Taxman 13 (Mad) (Virudhunagar Co-operative Milk Supply Society Ltd.v. Commissioner of Income-tax)

iii) 1986 (25) Taxman 356 (SC) (Indi-Aden Sald Mfg. & Trading co.P.Ltd..v. Commissioner of Income-tax)

iv) 1999 (236) ITR 34 (SC) (Raymond Woolen Mills Ltd. v. Income-tax Officer)

v) 1993 (69) taxman 625 (SC) (Phool Chand Bajrang Lal v. Income-tax Officer)

vi) (2016)75 taxmann.com 172 (Girilal & Co.

v.Income-tax Officer,Mumbai)
vii)2016 (387) ITR 122 (SC) (Girilal & Co.
v.Income-tax Officer,Mumbai)
viii) (2018) 409 ITR 502 (A.Sridevi v.
Income-tax Officer, Non-Corporate Ward 16(1))

6. Heard both sides and perused the materials placed before this Court.

7. The petitioner is aggrieved against the reopening of the assessment. The relevant assessment year is 2011-12. An order of assessment under Section 143(2) was already passed on 14.03.2014, based on the return filed by the petitioner and subsequent to the scrutiny made, by issuing notice under Section 143(2) dated 22.09.2012.

8. Section 147 of the Income Tax Act, 1961, empowers the Assessing Officer to reopen the assessment if he has reason to belief that any income chargeable to tax has escaped assessment. However, the first proviso to Section 147 stipulates that no action shall be taken under section 147 after the expiry of four years from the end of relevant assessment year where the assessment under Section 143(3) was passed. However, such embargo will not apply to cases where any income chargeable to tax has escaped assessment for such assessment year by reason of failure on the part of the assessee to make return under Section 139 or any response to a notice issued under 142(1) or Section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

9. Insofar as the present case is concerned, a notice under section 148 of the said Act was issued to the petitioner on 22.11.2017, admittedly after four years, proposing to reopen the assessment by stating that the Assessing Officer has reason to believe that the income of the assessee in respect of assessment year 2011-12 has escaped assessment within the meaning of Section 147 of the said Act. Thus, the petitioner was called upon to file the return in prescribed form of its income. The petitioner sent a reply on 27.11.2017 and sought for reason for reopening the assessment. On 19.12.2017, the revenue has assigned the reasons as follows:

Reasons for issue of notice under section 148 are reproduced below:

"It is noticed that an amount of Rs.3,65,452/- was debited to the Profit and Loss account under the head Asset Written Off. Also an amount of Rs.3,30,000/- was debited under the head Factory Land Development Charge.

During the course of assessment proceedings of A.Y.2014-15 assessee was also asked to clarify

admissibility of the above expenses. In response it was stated that value of obsolete assets were written off and that the land development charges was expenditure incurred for leveling the factory land.

Writing off cost of obsolete asset is a capital loss and therefore cannot be allowed as an expense. While disallowing this amount at the most assessee will be eligible for depreciation @ 15%. Thus, there is under assessment of income of atleast Rs.3,10,34/-.

With respect to land development expense, on perusal of the ledger account it is noticed that cash payment of Rs.1,50,.000/- was made on 12./10/10 and Rs.75,000/- on 17/2/11 i.e. assessee had violated the provisions of section 40A(3) and therefore expense to the tune of Rs.2,25,000/- was not allowable. The tax audit report too did not have any mention of this violation.

The above aspects remained to be examined while finalizing the assessment. I therefore, have reasons to believe that income of atleast Rs.5,35,634/- has escaped assessment."

10. On receipt of the above communication, assigning the reasons for reopening the assessment, the petitioner, through their communication dated 26.12.2017, objected to the reasons by specifically stating that at the time of original assessment itself all the details have been furnished with the Assessing Officer and that there was no escapement of income report, while the reassessment can be made only when there is a deliberate concealment. The said objection was rejected by the Revenue through impugned communication dated 04.01.2018. It is the case of the Revenue that the audit report has not reported the values of section 40(A)(3) and during the course of the original assessment proceedings, the assessee has not furnished the details of the entry representing the Asset Written Off and Factory Land Development charge.

11. Before we proceed further, it is better to understand the scope and ambit of Section 147 which deals with reopening of the assessment. Section 147 of the Income Tax Act reads 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 (hereinafter 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 sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year;

Provided further.....

12. The above provision of law is in force with effect from 01.04.1989 pursuant to the Direct Tax Laws (Amendment) Act, 1987, which substituted the above provision in the place of earlier provision as existed prior to 01.04.1989. In this case, we are concerned with the present provision under Section 147 as it stands with effect from 01.04.1989. The Hon'ble Full Bench of Delhi High Court in Kelvinator of India Limited case, reported in (2002) 256 ITR 1, considered the question in detail as to whether any change in law has been brought about on account of amendment of Section 147 with effect from 01.04.1989. In the above said decision, the Hon'ble Full Bench has observed as follows:

10. In Indian & Eastern Newspaper Society v. CIT MANU/SC/0328/1979 three-Judge Bench of the Apex Court held that although disclosure of a new facts therein may be an information within the meaning of the aforementioned provisions this opinion of law would not be as regard a contention on the part of the revenue that the expression information in section 147(b) refers to realization by the Income Tax Officer that he has committed an error while making original assessment. The Apex Court said :

"that he has committed an error when making the original assessment. It is said that, when upon receipt of the audit note the Income Tax Officer discovers or realizes that a mistake has been committed in the original assessment, the discovery of the mistake would be 'information' within the meaning of section 147(b). The submission appears to us

inconsistent with the terms of section 147 (b). Plainly, the statutory provision envisages that the Income Tax Officer must first have information in his possession, and then in consequence of such information he must have reason to believe that income has escaped assessment. The realization that income has escaped assessment is covered by the words 'reason to believe', and it follows from the "information" received by the Income Tax Officer. The information is not the realization, the information gives birth to the realization."

This has been the settled position in law although. However, the question which requires consideration is whether any change in law has been brought about on account of amendment of section 147 with effect from 1-4-1989.

11. In Jindal Photo Films Ltd. (supra) R.C. Lahoti, J. (as His Lordship then was) observed :

"The power to reopen an assessment was conferred by the legislature not with the intention to enable the Income Tax Officer to reopen the final decision made against the revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their changing moods." It was further held by the Bench that:

"Reverting back to the case at hand, it is clear from the reasons placed by the assessing officer on record as also from the statement made in the counter-affidavit that all that the Income Tax Officer has said is that he was not right in allowing deduction under section 80-I because he had allowed the deductions wrongly and, Therefore, he was of the opinion that the income had escaped assessment. Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income Tax Officer nothing new has happened. There is no change of law, No new material has come on record. No

information has been received. It is merely a fresh application of mind by the same assessing officer to the same set of facts. While passing the original orders of assessment the order dated 28-2-1994, passed by the Commissioner (Appeals) was before the assessing officer. That order stands till today. What the assessing officer has said about the order of the Commissioner (Appeals) while recording reasons under section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the assessing officer to initiate proceedings under section 147 of the Act.

It is also equally well settled that if a notice under section 148 has been issued without the jurisdictional foundation under section 147 being available to the assessing officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the assessing officer to initiate the proceedings under section 147/148 of the Act."

Thus, the court held that even under the newly substituted section 147, with effect from 1-4-89, an assessment could not be reopened on a mere change of opinion.

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14. It is well settled principle of interpretation of statute that entire statute should be read as a whole and the same has to be considered thereafter chapter by chapter and then section by section and ultimately word by word. It is not in dispute that the assessing officer does not have any jurisdiction to review its own order. His jurisdiction is confined only to rectification of mistake as contained in section 154 of the Act. The power of

rectification of mistake conferred upon the Income Tax Officer is circumscribed by the provisions of section 154 of the Act. The said power can be exercised when mistake is apparent. Even mistake cannot be rectified where it may be a mere possible view or where the issues are debatable. Even the Tribunal has limited jurisdiction under section 254(2) of the Act. Thus, when the assessing officer or Tribunal has considered the matter in detail and the view taken is a possible view the order cannot be changed by way of exercising the jurisdiction of rectification of mistake.

15. It is a well settled principle of law that what cannot be done directly cannot be done indirectly. If the Income Tax Officer does not possess the power of review, he cannot be permitted to achieve the said object by taking recourse to initiating a proceeding of reassessment or by way of rectification of mistake. In a case of this nature the revenue is not without remedy. Section 263 of the Act empowers the Commissioner to review an order which is prejudicial to the revenue.

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21. Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra vires article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favored.

In the event it is held that by reason of section 147 if Income Tax Officer exercises its jurisdiction for initiating a proceeding for reassessment only upon mere change of opinion, the same may be held to be unconstitutional. We are, Therefore, of the opinion that section 147 of the Act does not postulate conferment of power upon the assessing officer to initiate reassessment proceeding upon his mere change of opinion.

We, however, may hasten to add that if "reason to believe" of the assessing officer is founded on an information which might have been received by the assessing officer after

the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act.

22.

23. We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the assessing officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the assessing officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong.

13. The above decision was challenged before the Hon'ble Apex Court, which in turn, in a decision reported in 2010(320) ITR 561 (SC) (Commissioner of Income Tax, Delhi vs. Kelvinator of India Ltd.), while affirming the decision of the Delhi High Court, has observed at paragraph No.4 as follows:

4. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under 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 re-open the

assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a 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 re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No. 549 dated 31st October, 1989, which reads as follows:

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 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.

14. From the perusal of the above decision made in Kelvinator's case, it is evident that the Assessing Officer has power to reopen only when there is a tangible material which has come to light so as to believe that there is escapement of income from assessment. On the other hand, if the Assessing Officer seems to form a different opinion or change of opinion on the materials already available at the time of assessment, such change of opinion cannot be the reason for reopening under Section 147. Therefore, in this case, it is to be seen as to whether the reopening is sought to be done based on any tangible material which has come to the notice of the Assessing Officer later, for him to believe that there is escapement of income from the assessment or as to whether the Assessing Officer is simply proceeding to reopen based on mere change of opinion on the materials already available on record at the time of original assessment itself.

15. Perusal of the facts and circumstances of the present case would show that notice under Section 148 was admittedly issued after a period of four years from the end of the relevant assessment year, namely 2011-12 and therefore, it is for the revenue to satisfy that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. Only when the revenue succeeds in establishing such failure, the reopening can be sustained, as it has been made beyond the period of four years.

16. The reason for reopening the assessment is in respect of two issues which are as follows:

i) The amount of Rs.3,65,452/- was debited to the profit and loss account under the head of asset written off.

ii) The amount of Rs.3,30,000/- was debited under the head factory land development charges and out of such sum, a sum of Rs.2,25,000/- spent on that account was in violation of Section 40A(3) of the said Act.

17. First of all, it is to be seen as to whether these two figures are shown in the return filed by the assessee. Perusal of the copy of the return filed would show that the profit and loss account for the year ended 31.03.2011 clearly reflected the Asset Written Off as Rs.3,65,452/- and Factory Land Development Charges as Rs.3,30,000/-. It is claimed by the revenue that the

land development expense to the tune of Rs.2,25,000/- was made in violation of provision of section 40A(3) of the said Act and therefore, the same is not allowable. So, on that ground also the reopening is sought to be done. I do not think that the above reason is based on a new material which has come to light subsequently, warranting reopening. On the other hand, the Auditor Report submitted in Form No.3CD with the return filed by the assessee, clearly indicates at Serial No.17(h)(B) therein that it was not possible for the Auditor to verify whether the payment exceeding Rs.20,000/- have been made otherwise than by account payee cheque or bank draft as the necessary evidence is not in the possession of the assessee. The above statement was made by the Auditor while answering column "amount inadmissible under section 40A(3)". Therefore, it is evident that even in respect of the above issue raised by the revenue for reopening, the above statement of the auditor is already available on record and therefore, if at all the Assessing Officer wants to reopen on such issue, he should have exercised such power within the period of four years as contemplated under section 147 but he has not done so. Therefore, it is evident that these details were very much available before the Assessing Officer, even at the time of original assessment. Based on such return filed by the petitioner, an order of assessment was passed under section 143(3) of the Income Tax Act. Now, the Assessing Officer wants to reopen the assessment based on the amount of Rs.3,65,452/- debited to the profit and loss account under the head, Asset Written Off and the amount of Rs.3,30,000/- debited under the head, Factory Land Development Charges. It is the claim of the Assessing Officer that during the course of assessment proceedings of the assessment year 2014-15, the assessee was asked to clarify the admissibility of the above expenses and that the assessee stated that the value of obsolete assets were written off and that the land development charges were expenditure incurred for leveling land. Thus, it is claimed by the Assessing Officer that the Written off cost of obsolete asset is a capital loss and cannot be allowed as expenses. It is further claimed by the revenue that in respect of development expenses, on perusal of ledger account, it was noticed that cash payments made were in violation of Section 40A(3) and thus the same is not allowable. I have already discussed supra that even in respect of the issue raised in relation to the alleged violation of Section 40A(3), the materials were already available on record. Therefore, the above reasons of the Revenue would undoubtedly indicate that the Assessing Officer has changed his opinion in respect of the relevant entries under Profit and Loss Account, namely Asset Written Off and Factory Land Development Charges, which cannot be the basis for reopening the assessment. When the assessee had shown those two heads under the Profit and Loss account filed along with the return, it cannot be said that there is failure on the part of

the assessee to disclose fully and truly all material facts. Nothing prevented the assessing officer to seek for clarification, if any, in respect of the above said two heads before making the assessment under Section 143(3), if he has any doubt on those two heads.

18. On the other hand, the Assessing Officer has accepted the return filed by the petitioner even in respect of those two heads and passed the order of assessment. Consequently, he is not entitled to reopen the assessment based on such mere change of opinion. At this juncture, it is relevant to note that no fresh material, tangible in nature, has come to light before the Assessing Officer. On the other hand, he wants to change his conclusion in relation to those two heads based on the materials already available. Undoubtedly, such attempt is only a change of opinion and nothing else. In this connection, the recent decision of the Apex Court reported in 2018(6) SCC 685 (CIT vs. Techspan India Private Limited & another) is relevant to be quoted, wherein at paragraph Nos. 14 to 17, it has been observed as follows:

14. The language of Section 147 makes it clear that the assessing officer certainly has the power to re-assess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

15. Section 147 of the IT Act does not allow the re-assessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the

effect of giving the assessing officer the power of review and Section 147 confers the power to re-assess and not the power to review.

16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

17. It is well settled and held by this Court in a catena of judgments and it would be sufficient to refer Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd. MANU/SC/0047/2010 : (2010) 320 ITR 561 (SC) wherein this Court has held as under:

"5....where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe".....

Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open.

6. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place.

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.

19. Further, in an unreported decision of this Court made in

W.P.No.1589/2017 etc. dated 13.11.2017, the learned single Judge has observed at paragraph Nos.15 and 16 as follows:

15. Having steered clear of the legal position, we need to apply the same to the facts of the present case. Two conditions are required to be satisfied before the respondent could issue notice under Section 148 of the Act, namely, (1) he must have reason to believe that income chargeable to tax has escaped assessment and (2) such income has escaped assessment by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for assessment for the year. The settled legal position is that both these conditions must co-exist in order to confer jurisdiction on the respondent. Further, the respondent should record his reasons before initiating proceedings under Section 148(2) of the Act; before issuing the notice after the expiry of four years from the end of the relevant assessment year. The assessee is expected to make a true and full disclosure of the primary facts. It is thereafter for the respondent to draw an inference from those primary facts. If on a further examination either by the same officer or by a successor, the inference arrived at appears to be erroneous, mere change of opinion would not be a justification to reopen the assessment.

16. In the instant case, the petitioner's assessment for the subject assessment year was taken up for scrutiny. All primary facts were available with the Assessing Officer. The Assessing Officer completed the scrutiny assessment vide order dated 30.12.2011. After the expiry of four years, the impugned notice dated 31.03.2016 was issued. The petitioner requested for the copy of the reasons for reopening vide representation dated 13.04.2016. The respondent by communication dated 19.04.2016 furnished the reasons for reopening. On a perusal of the reasons, I find that the respondent on verification of the assessment records and the order sheet entries inferred that the Assessing Officer on scrutiny had failed to examine and deliberate on the

correctness of the income reported under the head agricultural income. Further, the respondent would state that even though the assessee had derived the predominant portion of the agricultural income from sale of coffee seeds, the aspect as to whether the income so derived is completely exempt or is it a case falling under Rule 7B was also omitted to be verified. Added to this, the Assessing Officer was inspired by a direction issued by the ITAT in the case of one TC Abraham. Thus, on a mere reading on the reasons for reopening clearly show that there is no allegation against the petitioner that there has been omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that year. The so called reason to believe that income chargeable to tax has escaped assessment is on the ground that the Assessing Officer at the time of scrutiny assessment did not examine as to whether the entire agricultural income was completely exempted or not. This can hardly be a reason to believe that income chargeable to tax has escaped assessment as it is a clear case of change of opinion by the respondent. As pointed out in the case of Calcutta Discount Company Limited, the obligation on the part of the assessee does not extend beyond fully and truly disclosing all primary facts. It is for the Assessing Officer to take an inference on facts and law based on such disclosure. If according to the respondent, his predecessor did not come to a proper inference on the facts disclosed, it is no ground to reopen the assessment, as if permitted and it would amount to a clear case of change of opinion. In the light of the above discussion, the first issue framed for consideration is answered in favour of the petitioner and against the revenue.

20. In this case, it is relevant to note that neither the notice issued under section 148 nor the proceedings stating the reasons for reopening the assessment, has alleged anywhere that the assessee has failed to disclose fully and truly any material facts necessary for assessment. On the other hand, perusal of the reasons stated for reopening would only show that

the Assessing Officer wanted to change his opinion already arrived on the materials available on record. The decisions relied on by the learned standing counsel for the respondent which were rendered prior to 1989 Amendment, in my considered view, neither can be applied to the facts and circumstances of the present case nor would help the revenue in any manner, in view of the fact that in the subsequent decision rendered in Kelvinator's case (CIT v. Kelvinator of India Ltd.) reported in 2010(320) ITR 561, the law is now well settled by the Apex Court. The recent decision of the Apex Court referred to supra reported in 2018(6) SCC 685 (CIT vs. Techspan India Private Limited & another) also referred to the decision made in Kelvinator's case. Therefore, the law laid down by the Apex Court in Kelvinator's case is squarely applicable to the facts and circumstances of the present case and thus, the reopening is bad as the same is not permissible, based on change of opinion. Consequently, the revenue cannot escape from the clutches of limitation. Such being the position, the reopening notice issued after the period of four years is undoubtedly, barred by limitation.

21. No doubt, it is contended by the learned counsel for the Revenue that the issue raised for the reopening was not discussed in the original assessment order and therefore, it cannot be said that the reopening is made based on change of opinion. I am unable to appreciate the above contention for the following reasons:

There is no dispute to the fact that the reasons for reopening were based on two heads namely, "Asset Written Off and Factory Land Development Charges". It is not the case of the Revenue that the amount referable to those two heads were not at all shown in the profit and loss account. On the other hand, as already stated supra, the assessee along with the return enclosed trading profit and loss account wherein the above two heads were specifically shown with the referable quantum of amount. Therefore, it is evident that the materials relevant to subject matter in issue for reopening, are already on record before the Assessing Officer. After perusing the return filed along with its enclosures, the Assessing Officer completed the assessment. Therefore, there is every reasonable presumption that the Assessing Officer has accepted the materials filed with returns except to the extent where he differed and stated so in his assessment order. If the issue is not specifically raised in the assessment order, it cannot be automatically presumed that such issue was not at all considered in the original assessment order. Consequently, if the Assessing Officer chooses to reopen the assessment based on such available materials, it would certainly amount to change of opinion only and cannot be called as an issue not raised or discussed, as contended by the learned counsel for the Revenue.

22. At this juncture, it is to be noted that the question as to whether the reasons for reopening the assessment would amount to change of opinion or not is to be considered and decided on the facts and circumstances of each case and therefore, the view expressed in one case based on the facts and circumstances of that particular case cannot be applied to another case to contend in either way, unless the facts and circumstances of both cases are one and the same. In other words, the question of change of opinion has to be considered and decided on case to case basis.

23. Learned counsel for the Revenue relied on (2016) 75 taxmann.com 172 (SC) (Girilal & Co. Vs. ITO) to contend that if the assessee has not correctly disclosed the actual material details, the Assessing Officer is entitled to reopen the assessment. Perusal of the said case would show that the same is factually distinguishable. In that case, the assessee was not correct in disclosing the actual size of the plot and hence, he was not entitled for deduction. It was also noticed therein that the information regarding the actual size of plot used for construction therein was not available in the return of income. The facts of the present case would show that the assessee has specifically referred specific amount under the above two heads namely "asset written off and factory land development charges" in the return filed by them. Therefore, I am of the view that the Revenue is not right in contending that the assessee had not correctly disclosed the material details. Even otherwise, as I pointed out earlier, neither the show cause notice nor the proceedings stating reasons for reopening indicate anywhere that the assessee failed to disclose truly and fully material details. Therefore, the learned counsel for the Revenue is not justified in relying the above decision of the Apex Court.

24. The other decisions relied on by the Revenue reported in 2018 409 ITR 502 (A.Sridevi Vs. Income-tax Officer) is in support of the contention that when no opinion was formed during the assessment proceedings, it cannot be termed now as change of opinion. It is true that the Division Bench of this Court at paragraph No.21 has observed that the reopening of the assessment therein is just and proper and no opinion was formed during the assessment proceedings in which to be termed as 'change of opinion' more so, when the assessee has failed to disclose fully and truly all the materials necessary for its assessment. However, it is to be noted that in order to arrive at such conclusion, the Division Bench has made an observation at paragraph No.20 that the assessee therein has not filed the balance sheet or statement of affairs as noted by the Assessing Officer. Therefore, it is evident that the facts and circumstances of the case in hand and the case before the

Division Bench are totally different and distinguishable. Hence, the Revenue is not correct in relying upon the above decision as well. In any event, when admittedly, the assessee has placed on record before the Assessing Officer through their return with enclosures about the Asset Written Off and Factory Land Development charges, it cannot be said that there is a failure to disclose the material facts fully and truly.

25. In view of the facts and circumstances of the present case and the findings rendered supra, this Court is of the view that the impugned reopening of the assessment is bad in law as the same does not meet and satisfy the statutory requirement contemplated under Section 147 of the Income Tax Act. Accordingly, the Writ Petition is allowed and the impugned orders are set aside. No costs. Consequently, connected miscellaneous petitions is closed.

vsi

Sd/-
Assistant Registrar(CS III)

//True Copy//

Sub Assistant Registrar

To

The Assistant Commissioner of Income Tax,
Central Circle-I,
Gandhiji Road,
Erode - 638 001.

W.P.No.3648 of 2018

Kak(04/11/2019)