

The Assessing Officer sent a Notice to the petitioner on 22.08.2013, under Section 143 (2) of the Act for the relevant Assessment Year selecting the said return filed for scrutiny assessment and calling upon the petitioner company to produce or cause to be produced on 16th September, 2013 any document, accounts and any other evidence on which the petitioner company might rely in support of the return filed by it.

The Assessing Officer sent a notice dated 22.08.2013 to the petitioner under Section 142 (1) of the Act relating to the relevant Assessment Year calling upon the petitioner company to produce or cause to be produced particulars of accounts and/or documents as mentioned in the said notice and in response to the said notice, petitioner company on 12.09.2013 submitted all detailed documents and information called for in the said notice dated 22nd August, 2013 under Section 142 (1) of the Act which inter alia included Hard copy of the e-filled return form, computation, audited accounts & Tax Audit Report and Form No. 3CD.

The Assessing Officer issued another notice on 05.08.2014 Notice under Section 142 (1) of the Act asking the petitioner to produce the documents as mentioned therein and the petitioner complied with the notice dated 5th August, 2014 by furnishing details to the Assessing Officer on 19.08.2014 and 23.12.2014.

Petitioner company on 21.01.2015 submitted various particulars/ documents with the Assessing Officer. In Annexure-4 of the said reply, a detailed note was filed as regards treatment of gain from sale of right to property in question as income under the head 'Capital Gains'. Further, all facts relating to entering into Memorandum of Understanding were duly furnished and on 04.02.2015 petitioner company filed with the respondent no. 1 various other documents and information. In Annexure-II, the ledger account for investment in right to properties was duly furnished to the Assessing Officer.

Petitioner from time to time and particularly on 09.02.2015, 25.02.2015, 27.02.2015 and 16.03.2015 submitted/furnished/provided all further information and/or documents for the purpose of scrutiny assessment relating to the relevant Assessment Year 2012-13.

On 18.03.2015 the then Assessing Officer passed the Assessment Order under Section 143 (3) of the Act for the Assessment Year 2012-13 with several disallowances/additions but accepted the contention of the petitioner as regards taxation of 'right to properties' under the head 'capital gains' and did not make any adjustment in relation thereto and according to the petitioner on 07.08.2018 the CIT (Appeals) -19, Kolkata passed order allowing substantial relief to the petitioner company against which the Revenue filed appeal before the Income Tax Appellate Tribunal and the petitioner company filed cross objection.

Respondent no. 1/Assessing Officer on 31.03.2019 issued a notice under Section 148 of the Act for escaped assessment in the Assessment Year 2012-13 within the meaning of Section 147 of the said Act proposing to assess/reassess the income /loss for the said Assessment Year requiring the petitioner company to file its return of income within 30 days from the date of service of the said notice.

Petitioner contends that on 03.04.2019, the notice under Section 148 dated 31st March, 2019 was received by the petitioner company after expiry of 4 years from the end of the Assessment Year in which income was assessed under Section 143 (3) of the Act by assessment order dated 18th March, 2015 and in response to the said notice petitioner company filed its return of income on 29.04.2019 through e-filing and also objected to the issuance of the reassessment notice and sought for the recorded reasons for issuing the said notice. Thereafter on 26.08.2019 petitioner received recorded reasons.

On 03.09.2019 the respondent no. 1 rejected the rebuttal contained in the petitioner's letter dated 26th August, 2019 and issued a notice under

Section 143 (2) of the Act on 03.09.2019 calling upon the petitioner company to attend his office on 9th September, 2019 and further issued a Notice under Section 142 (1) of the said Act calling for certain documents and/or information from the petitioner company to be produced before him on 9th September, 2019.

Petitioner submits that the impugned reassessment proceedings are without or in excess of jurisdiction because there can be no question of the assessee company not disclosing truly and fully all material particulars relating to its income in the Assessment year in question since the petitioner company had submitted all necessary details of the transactions at various stages in response to queries raised by the Assessing Officer from time to time, in course of scrutiny assessment proceedings. Petitioner further submits that it is settled law that when reassessment proceedings are sought to be initiated after expiry of 4 years from the end of the relevant Assessment Year, it has to be shown that there was failure on the part of the assessee to disclose truly and fully all materials necessary in course of regular assessment which the Assessing Officer failed. Hence, an essential pre-condition for assumption of jurisdiction under Section 147 of the Income Tax Act, 1961 has not been satisfied in the present case.

Petitioner submits that the income alleged to have escaped assessment have been duly accounted and disclosed and assessed to tax in the Assessment Year 2015-16 when such income can be said to have accrued to the petitioner company upon registration of the properties in question forming the subject matter of the reassessment proceedings and hence, there can be no question of escapement of any income in course of assessment in the Assessment Year 2012-13.

Petitioner submits that the impugned reassessment proceedings for the Assessment Year 2012-13 has been initiated after expiry of four years from the end of the Assessment Year in question, it is incumbent upon the respondent

Assessing Officer to show and establish that condition precedent for initiation of proceedings that there has been a failure on the part of the assessee company in disclosing truly and fully all material facts for the purpose of assessment and that as a result of such non-disclosure, income chargeable to tax has escaped assessment in the assessment year in question has been fulfilled.

Petitioner submitted that neither the recorded reasons nor the impugned order dated 3rd September, 2019 discloses any new material fact to establish that the petitioner company has failed to disclose truly and fully any material fact or that any income has escaped assessment in the assessment year in question in course of scrutiny assessment.

Petitioner submitted that the income in question which is alleged to have been escaped assessment as per the recorded reasons furnished in support of the notice dated 31st March, 2019, arises from the sale of 15 numbers of flats which form a part of the 37 number of flats, income in respect of sale whereof has been shown in the return for the Assessment Year 2015-16 and already assessed to tax in the said Assessment Year which would be evident from the return for the Assessment Year 2015-16 and the order of scrutiny assessment passed in respect of the said Assessment Year 2015-16 dated 23rd October, 2017 read with the order of the Commissioner of Income Tax (Appeals) -1, Kolkata dated 4th March, 2019 relating to the Assessment Year 2015-16. Thus there can no question of the income in question having escaped assessment.

Petitioner submitted that the transfer of the immovable properties in question being a capital asset was completed in the year of its transaction which attained on registration on those properties in favour of the transferees and as such, the income from such transfer of capital asset becomes taxable in the year of its transfer. The registration of 15 numbers of flats which form the subject matter of the notice dated 31st March, 2019 forming a part of 37 flats assessed and referred to in the Assessment Order for the Assessment Year

2015-16 read with the Appellate Order was completed in the financial year 2014-15 and as such, the question of same escaping assessment in the Assessment Year 2012-13 cannot and does not arise.

Petitioner submitted that it is mater of record which would appear from Annexure-IV of its letter dated 21st January, 2015 filed during the course of the scrutiny assessment proceedings that the petitioner assessee company filed a detailed note on advance towards sale of Right to Property wherein the assessee very clearly explained that 'right to properties' is a capital asset and the gain arising on transfer therefrom is a capital asset taxable in the year of 'transfer'.

Petitioner submitted that the letter dated 21st January, 2015, while referring to another transaction of similar nature wherein the petitioner assessee entered into Agreements of Sale with respect to 77 flats, it was categorically submitted in detail that the transaction resulted into capital gains taxable in the hands of the assessee company in the year of transfer i.e. in the succeeding year, namely Assessment Year 2013-14. The assessee also disclosed that income of Rs. 2,75,55,030/- has been duly offered to tax as 'short term capital gain' in the Assessment Year 2013-14. By its letter dated 4th February, 2015 the assessee company filed with the Assessing Officer, the ledger account related to its investment in Right to Property at Annexure – II thereof.

Petitioner submitted that in the instant case there cannot be any iota of doubt that in course of scrutiny assessment proceeding the Assessing Officer took a clear view that the subject income from sale of right to property in question is taxable under the head 'capital gains' and is taxable in the year of its transfer. It is apparent that the impugned reassessment proceeding has been initiated on a mere change of opinion and on same set of facts and not on the basis of any new material which is legally not permissible and hence cannot be proceeded with in such circumstances and as such the impugned

notice issued under Section 148 of the said Act is bad in law and void ab initio being devoid of jurisdiction.

Petitioner submitted that impugned notice under Section 148 of the Income Tax Act has been issued long after passing of the appellate order for the Assessment Year 2015-16 by the learned CIT (Appeals)-1, Kolkata on 4th March, 2019.

Petitioner relies on a decision of the Hon'ble Supreme Court in the case of DIT –Vs- Atomstroyexport reported in 95 Taxmann.com 260 wherein it has been held that where Assessment Order of earlier year, based on which reassessment notice of succeeding year was issued, was set aside by Commissioner (Appeals) before the date of issue of the reassessment notice, the impugned notice was to be set aside. The ratio of the said decision applies mutatis mutandis to the facts of this case inasmuch that before issuance of the impugned notice under Section 148 of the Act, the learned CIT (Appeals) has decided the involved issue in favour of the petitioner assessee company in the other year. In other words, at the time of issuing the reassessment notice and recording of the purported reasons for issuing the same, the order relating to Assessment Year 2015-16 based on which the Notice was issued did not survive and was merged with the appellate order dated 4th March, 2019 passed by the learned Commissioner (Appeals) and as such, there cannot be any escapement of income on the ground alleged.

Petitioner submitted that none of the agreements for sale in question was registered within the year under consideration and the conveyance in favour of the ultimate purchasers were only registered within the period relevant to the Assessment Year 2015-16 in which the income from transfer of 'right to properties' have been duly considered in its return of income by the assessee company and which has been also found to be correct by the learned CIT (Appeals). Thus, once the related income has been already assessed to tax in one year i.e. Assessment Year 2015-16, the impugned assessment proceeding

seeking to reassess the same income again in another year cannot be sustained either legally or on facts.

Petitioner submitted that the allegation in the alleged reasoned order dated 3rd September, 2019 to the effect that the petitioner company was beneficiary of Rs.6,48,00,000/- from Hi-tech Traders Pvt. Ltd./ during the Financial year is incorrect, perverse, perfunctory and malicious since no such amount or any amount at all was received by the petitioner company during the Financial Year 2011-12. The petitioner company had no dealing with Hi-tech Traders Pvt. Ltd. at any point of time. On enquiry, the petitioner company came to learn that Hi-tech Traders had paid the said amount of Rs. 6.48 crore to another concern with which the petitioner company or any company in its group has no connection whatsoever.

Petitioner submitted that the impugned order dated 3rd September, 2019 rejecting petitioner's objection is not a 'speaking order' per se as the respondent no. 1 has not been able to negate or controvert the contention of the petitioner made while rebutting to the reasons recorded for issuing the impugned notice under Section 148 of the Act and moreover the action of the Assessing Officer referring to the amount of Rs. 6.48 crore allegedly received by petitioner from Hi-tech Traders Pvt. Ltd. and thereby expanding his jurisdiction under Section 147 and 148 of the Act is illegal, perverse and void ab initio being clearly without the authority of law.

Learned Advocate appearing for the petitioner has relied on the following several decisions in support of his contention that the initiation of impugned proceeding under Section 147 and issuance of notice under Section 148 of the Income Tax Act, 1961 and all subsequent proceedings, after the expiry of 4 years from the end of relevant Assessment Year after making the scrutiny assessment under Section 143 (3) of the Act Assessment Year, relating to 2012-13, are on the self-same material which were already available to the Assessing Officer at the time of scrutiny assessment and reopening of the

assessment on the very same issues which were already accepted by the Assessing Officer in favour of the assessee petitioner in his order under Section 143 (3) of the Act, are not sustainable in law and are liable to be quashed.

Relevant portion of the judgment in the case of Calcutta Club Ltd. –vs- Income Tax Officer and Ors reported in [2020] 426 ITR 157 (Cal) is quoted hereunder:

“Considering the submission of the parties, relevant records, Provisions of law and the decisions relied upon by the parties, in my considered view the impugned notices under Section 148 of the Income Tax Act, 1961 and the proceedings under Section 147 of the Act are not sustainable in law and should be quashed for the reason that admittedly impugned proceeding initiated under Section 147 and notices issued under Section 148 of the Income Tax Act, 1961, which were issued after the expiry of four years from the end of the relevant assessment year and in view of the fact that there is no whispering in the recorded reason that there was any omission or failure on the part of the assessee in disclosing fully and truly material facts for assessment and in view of the fact that the Assessing Officer could not establish that the information of alleged escaped income was not within his knowledge and was not considered at the time of passing of the assessment order under Section 143 (3) of the Income Tax Act, 1961 and it came to his knowledge subsequent to the assessment order passed under Section 143 (3) of the Income Tax Act, 1961 and that subsequent decision of the Hon’ble Supreme Court reversing the legal position prevailing at the time of regular assessment cannot be called an omission or failure on the part of the assessee in disclosing fully and truly the material facts necessary for relevant assessment.”

Relevant portion of the judgment in the case of Peerless Hospitex Hospital and Research Center Ltd. –vs- Principal Commissioner of Income Tax -1, Kolkata & Ors. reported in [2022] 137 taxmann.com 359 (Calcutta) which quoted hereunder:

“The second issue is about the legality and validity of initiation of impugned proceeding for reopening of assessment under Section 147 and issuance of notices under Section 148 of the Income Tax Act, 1961, admittedly after expiry of four years from the end of

relevant assessment year on the self-same material facts which were already available before the assessing officer at the time of regular assessment and without recording of any omission or failure on the part of the petitioner to disclose fully and truly any material fact necessary for assessment before the assessing officer in course of regular assessment proceeding. I am of the considered opinion that in the facts and circumstances of the case initiation of the impugned proceeding under Section 147 of the Income Tax Act, 1961, is bad and not sustainable in law and is liable to be quashed for the following reasons:

(i) It is admitted position as substantiated by record that the impugned notices under Section 148 of the Act were issued after the expiry of four years from the end of the relevant assessment years.

(ii) Nowhere the assessing officer has recorded either in the impugned notices under Section 148 of the Act or in the recorded reason for reopening of assessment in question that in course of regular assessment there was any omission or failure on the part of the assessee/petitioner in disclosing fully and truly all material facts necessary for its assessment relating to the relevant assessment years or that any new material/information other than those which were already available at the time of regular assessment has come to his knowledge. In view of these admitted factual position I am of the considered opinion that criteria for reopening of assessment under Section 147 of the Income Tax Act, 1961, has not been fulfilled in this case.

(iii) It appears from the recorded reason itself that the payment on account of 'referral to doctors' was already considered and allowed under Section 37 (1) of the Income Tax Act, 1961 by the predecessor of the present Assessing Officer at the time of passing regular assessment order under Section 143 (3) of the Act, dated 28th February, 2014 and the present Assessing Officer himself has recorded in its recorded reason that those materials upon which he has formed his opinion after the expiry of four years from the end of relevant assessment year were already available at the time of regular assessment yet on the self-same material he has formed an opinion that the same should not have been allowed in view of Circular No. 5/2012 dated 1st August, 2012 and Indian Medical Council (Professional Conduct, Etiquette and Ethics) Regulation, 2002 which is nothing but mere change of opinion.

Considering the facts and circumstances of the case as appears from record and discussion made herein, I am inclined to hold that since condition precedent for invoking Section 147 of the Income

Tax Act, 1961, for reopening of assessments after expiry of four years from the end of relevant assessment years has not been fulfilled and the impugned reopening of assessment is on mere change of opinion, the impugned notices dated 27th July, 2018 under Section 148 of the Income Tax Act, 1961 in both the Writ Petitions relating to assessment year 2011-12 and 2012-13 are held as bad and not sustainable in law and the said impugned notices under Section 148 of the Income Tax Act, 1961 and all subsequent proceedings on the basis of the aforesaid impugned notices under Section 148 of the Income Tax Act, 1961, are quashed.”

Relevant portion of an unreported judgment of Calcutta High Court in the case of The Tinplate Company Of India Ltd. –vs- Deputy Commissioner of Income Tax, Circle 3 (1), Kolkata & Ors. (WPO 575 of 2017 dated 15th June, 2022) which quoted hereunder:

“Learned counsel appearing for the respondent Income Tax Authority submits that this Court should not interfere with the reassessment proceeding under Section 147 of the Act since no procedural irregularity has been committed by the assessing officer and there was escapement of income due to wrong claim made by the assessee/petitioner. Such submission is not convincing and after perusing original assessment order under Section 143(3) of the Act as well as recorded reason for impugned reopening of the assessment and considering the submissions of the parties, relevant records available and judgments relied upon by the petitioner I am of the considered view that the impugned notice under Section 148 of the Income Tax Act, 1961 and the proceeding under Section 147 of the Act are not sustainable in law and are liable to be quashed for the reason that the respondent assessing officer has been failed to make out any case that the alleged escapement of income was due to any omission or failure on the part of the assessee/petitioner in disclosing fully and truly the material facts necessary in course of regular assessment. In the facts and circumstances of the case in my considered view it is a clear case of change of opinion since the materials which were already available at the time of regular assessment and which were already considered by the assessing officer at the time of regular assessment, on the basis of very same material and not on any another new material assessing officer wants to take a different view which is not permissible for reopening of an assessment particularly proceedings after regular assessment and

after expiry of four years from the end of the relevant assessment year.”

Relevant portion of the judgment in the case of Commissioner of Income Tax-VI, New Delhi –vs- Usha International Ltd. reported in [2012] 25 taxmann.com 200 (Delhi) (FB), Paragraph Nos. 9-24 are quoted hereunder:

9. It was argued on behalf of the Revenue that for determining whether or not it is not a case of change of opinion, reference can and should be made only to the assessment order and the discussion or the reasons stated therein. Reliance was placed on the decision of this Court in Commissioner of Income Tax versus H.P. Sharma, 1980 (122) ITR 675 (Del.) and Consolidated Photo and Finvest Limited versus Assistant Commissioner of Income Tax, (2006) 281 ITR 394(Del.). The relevant portion of the judgment in H.P. Sharma (supra) reads as under:-

—Adverting to the next question as to whether the resorts to reassessments under ss. 147(b) and 148 of the Act were justified or not, it is noteworthy that both the ITO and the AAC have clearly observed that the assessee had not disclosed at the original assessment stage that the rents realised exceeded those mentioned in the municipal records. The Tribunal has not controverted this finding, perhaps it did not consider it appropriate to go into the same after having held that the municipal valuation should have a sway over the rent realised. My learned brother has on this score sent the matter back to the Tribunal for giving a finding on this aspect. I will only like to observe in this connection that the Second Explanation to s. 147 itself makes it clear that the production before the ITO of account books or other evidence from which material evidence could with due diligence have been discovered by the ITO will not necessarily amount to disclosure within the meaning of this section. The Supreme Court too has, in the decision Kalyanji Mavji & Co. v. CIT [1976] 102 ITR 287 and CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC), observed that information in order to justify reassessment may be obtained even from the record of original assessment from an investigation of the material on record or the facts disclosed thereby or from other enquiry or research into facts or law. " To inform " means to " to impart knowledge " and the detail available to the ITO in the papers filed before him does not by its mere availability become an item of information. It is transmuted into an item of information in his possession only if, and only when, its existence is realised and its

implications are recognised. Where the ITO had not in the original assessment proceedings applied his mind, the reassessment proceedings are valid. (See in this respect the decisions of the Kerala and Madras High Courts in United Mercantile Co. Ltd. v. CIT [1967] 64 ITR 218 (Ker) and Muthukrishna Reddiar v. CIT [1973] 90 ITR 503 (Ker) and A.L.A. Firm v. CIT [1976] 102 ITR 622 (Mad)).

It need hardly be said that change of opinion presupposes that there was earlier a formation of an opinion. When no such opinion was formed, it will be too far-fetched to assume that a change in that opinion was being effected. Further, the safest and surest guide for ascertaining whether any such opinion was formed at the original assessment stage is to look to the assessment order itself. When it, of its own, does not reveal that the matters and controversies now sought to be raised by way of reassessment were at all before the ITO or considered by him, it would be entirely surmiseful and, therefore, not permissible to still import their existence and consideration. This can, however, be permissible only where the assessment record of that stage overwhelmingly brings out that the matter did come for due consideration and was in fact considered. Mere silence on a matter or absence of discussion in the original order does not imply that the ITO adjudicated upon the same one way or the other. (Emphasis supplied)

10. We may note that the said decision was not dealing with Section 147 of the Act as amended with effect from 1 st April, 1989, but was with reference to Section 147(b) of the Act under which an Assessing Officer could reopen assessment on the basis of —information. The term —to inform^{||} it was observed means to impart knowledge and it does not mean mere availability. It gets transmuted into an item of information only when its existence is realized and its implications are recognized. However, it is not possible to agree with the observations made in paragraph 16, which have been underlined.

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 Vs. 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.

11. Accordingly, we hold that the following observations in Consolidated Photo and Finvest Limited (supra) do not reflect the correct legal position:

—In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the

assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion.

12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in Kelvinator of India Limited (supra) in Eicher Limited (supra). The said decision in Eicher Limited (supra) makes reference to the decision of KLM Royal Dutch Airlines vs. Assistant Commissioner of Income Tax [2007] 292 ITR 49 (Delhi). KLM Royal case (supra) deals with some other issues on which we do not express or make any observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. (supra).

13. 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.

14. 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. This aspect and position has been highlighted in CIT vs. DLF Powers Limited, ITA 973/2011 decided on 29th November, 2011 and BLB Limited vs. ACIT Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. In the last decision it has been observed:

–13. Revenue had the option, but did not take recourse to Section 263 of the Act, in spite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudice can be correct, when jurisdiction under Section 263 is invoked.

15. Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.

16. Here we must draw a distinction between erroneous application/ interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of –change of

opinion will not apply. The reason is that —*opinion* is formed on facts. —*Opinion* formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of —change of opinion. Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.

17. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. Decision of this Court in Writ Petition (Civil) No. 6205/2010, *Dalmia Private Limited versus Commissioner of Income Tax Delhi 10 and Another*, dated 26th September, 2011 and decision of Bombay High Court in Writ Petition No. 1017/2011, *The Indian Hume Pipe Company Limited versus The Assistant Commissioner of Income Tax*, dated 8th November, 2011 are two such cases. In the first case, the Assessing Officer in the original assessment had made additions of Rs.19,86,551/- under Section 40(1) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details etc. were not furnished, were to the extent of Rs.52,84,058/- and not Rs.19,86,551/-. In *Indian Hume Pipe Company Limited (supra)*, after verification the claim under Section 54-EC was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not appreciate the

implications or did not apply the correct law. The second category will be a case of —change of opinion^{||} and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interest of the Revenue, can be made subject matter of adjudication under Section 263 of the Act.

18. In New Light Trading Co. vs. Commissioner of Income Tax (2002) 256 ITR 391 (Del), a Division Bench of this Court had referred to decision of the Supreme Court in CIT vs. P.V.S. Beedies Pvt. Ltd. (1999) 237 ITR 13 (SC) and the following observations were made:-

—In the case of P. V. S. Beedies Pvt. Ltd. [1999] 237 ITR 13, the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee.^{||}

19. As recorded above, the reasons recorded or the documents available must show nexus that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income. At the same time, it is not the requirement that the Assessing Officer should have finally ascertained escapement of income by recording conclusive findings. The final ascertainment takes place when the final or reassessment order is passed. It is enough if the Assessing Officer can show tentatively or prima facie on the basis of the reasons recorded and with reference to the documents available on record that income has escaped assessment.

20. This brings us to the observations of Delhi High Court in Kelvinator of India Ltd. (supra) which read as under:-

—The Board in exercise of its jurisdiction under the aforementioned provisions had issued the Circular on 31st October 1989. The said Circular admittedly is binding on the Revenue. The Authority, Therefore, could not have taken a view, which would run counter to the mandate of the said Circular. Clause 7.2 as referred to hereinbefore is important.

From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out i.e. only with a view to allay the fears that the omission of the expression "reason to believe" from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion. It is, Therefore, evident that even according to the CBDT a mere change of opinion cannot form the basis for re- opening a completed assessment.

The submission of Mr. Jolly to the effect that the said Circular cannot be construed in such a manner whereby the jurisdiction of the statutory authority would be taken away is not apposite for the purpose of this case. In Union of India and Others (supra), whereupon Mr. Jolly had placed strong reliance, the Apex Court was dealing with an administrative instructions whereby no right was conferred upon the respondents to have the house rent amount included in their emoluments for the purpose of computing overtime allowance. The Apex Court held that otherwise also the Government's instruction have to be read in conformity with the provisions of the Act. Therein the Apex Court was not concerned with the statutory powers of a statutory authority to issue binding circulars. Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra virus 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 ITO exercises its jurisdiction for initiating a proceeding for re- assessment 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 re- assessment proceeding upon his mere change of opinion. We, however, may hasten to add that if "reason to believe" of the assessing Officer if 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.

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.

21. In order to appreciate and understand the said observation, it is necessary to examine the facts of the said case. The assessment year in reference was 1987-88 but the reopening notice was issued on 20th April, 1990 after the amended Section 147 was applicable. Original return filed on 29th June, 1987 was revised on 5th October, 1989, along with a letter explaining why the return was being revised. In the letter the assessee had explained and submitted that rent of Rs.1,76,000/- and depreciation of Rs.66,441/- should be allowed in terms of Section 30 and 32 of the Act. This was the reason for revising the return and these facts were specifically brought to the notice of the Assessing Officer who did not, in the original assessment order, make any disallowance or addition on the said account except Rs.91,485/- which was disallowed as submitted in the revised computation. The assessee in support of the revised computation had relied on judgment of Bombay High Court in CIT vs. Chase Bright Steel Ltd. (No. 1) [1989] 177 ITR 124 (Bom.). On behalf of Revenue, it was contended and submitted that the assessment order did not contain or have any discussion on the issue and therefore, there same was rendered without application of mind. It was submitted, relying upon the decision of Gujarat High Court in Prafful Chunni Lal Patel vs. Makwana (M.J.) CIT (ASST.) [1999] 236 ITR 832 (Guj.), that reassessment was permissible as the assessment order itself was silent and an erroneous order was passed.

22. In the last paragraph quoted above, the Full Bench rejected the submission that reassessment proceedings would be justified if the assessment order is silent or does not record reasons or analysis of material on record. This, the Revenue had propounded, would show non application of mind by the assessing officer. It was held that the said submission was fallacious. Full Bench explained that when an assessment order was passed under Section 143(3), a presumption could be raised that the order was passed after application of mind. Reference was made to clause (e) to Section 114 of the Indian Evidence Act, 1872. The contention if accepted would give premium to the authority exercising quasi-judicial function to take benefit of its own wrong i.e. failure to discuss or record reasons in the assessment order. The aforesaid observations have been made in the context and for explaining the principle of —change of opinion. The said principle would apply even when there is no discussion in the assessment order but where the Assessing Officer had applied his mind. A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. Assessee is required to disclose full and true material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under Section 263 of the Act.

23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined.

24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which

the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

Relevant portion of the judgment in the case of Rubix Trading Pvt. Ltd. – vs- Commissioner of Income Tax reported in [2019] 108 taxmann.com 177 (SC) which quoted hereunder:

“It is true that in the final order of assessment, the Assessing Officer had not elaborated this aspect but had not made any disallowance or addition in the hands of the assessee. Merely because the order of assessment was silent on a particular claim of the assessee, would not by itself mean that the same was not scrutinized or that the Assessing Officer had not formed an opinion with respect to the same. If after detailed scrutiny during the assessment, the Assessing Officer examines a claim but does not reject the claim of the assessee which had come up for scrutiny, would not enable the Revenue to argue that the Assessing Officer had not formed any opinion on such issue and, therefore, reopening of the assessment would be permissible without there being any new or additional material available to the Assessing Office. We may refer to decision of the Gujarat High Court in the case of Gujarat Power Corporation Ltd. Vs. Asst. CIT, (2013) 350 ITR 266, in which following observations were made :-

"41. The powers under section 147 of the Act are special powers and peculiar in nature where a quasi-judicial order previously

passed after full hearing and which has otherwise become final is subject to reopening on certain grounds. Ordinarily, a judicial or quasi-judicial order is subject to appeal, revision or even review if statute so permits but not liable to be reopened by the same authority. Such powers are vested by the Legislature presumably in view of the highly complex nature of assessment proceedings involving a large number of assesseees concerning multiple questions of claims, deductions and exemptions, which assessments have to be completed in a time frame. To protect the interests of the Revenue, therefore, such special provisions are made under section 147 of the Act. However, it must be appreciated that an assessment previously framed after scrutiny when reopened, results into considerable hardship to the assessee. The assessment gets reopened not only qua those grounds which are recorded in the reasons, but also with respect to the entire original assessment, of course at the hands of the Revenue. This obviously would lead to considerable hardship and uncertainty. It is precisely for this reason that even while recognizing such powers, in special requirements of the statute, certain safeguards are provided by the statute which are zealously guarded by the courts. Interpreting such statutory provisions courts upon courts have held that an assessment previously framed cannot be reopened on a mere change of opinion. It is stated that the power to reopening cannot be equated with review.

42. Bearing in mind these conflicting interests, if we revert back to central issue in debate, it can hardly be disputed that once the Assessing Officer notices a certain claim made by the assessee in the return filed, has some doubt about eligibility of such a claim and, therefore, raises queries, extracts response from the assessee, thereafter in what manner such claim should be treated in the final order of assessment, is an issue on which the assessee would have no control whatsoever. Whether the Assessing Officer allows such a claim, rejects such a claim or partially allows and partially rejects the claim, are all options available with the Assessing Officer, over which the assessee beyond trying to persuade the Assessing Officer, would have no control whatsoever. Therefore, while framing the assessment, allowing the claim fully or partially, in what manner the assessment order should be framed, is totally beyond the control of the assessee. If the Assessing Officer, therefore, after scrutinizing the claim minutely during the assessment proceedings, does not reject such a claim, but chooses not to give any reasons for such a course of action that he adopts, it can hardly be stated that he did not form an opinion on such a

claim. It is not unknown that assessments of larger corporations in the modern day, involve a large number of complex claims, voluminous material, numerous exemptions and deductions. If the Assessing Officer is burdened with the responsibility of giving reasons for Several claims so made and accepted by him, it would even otherwise cast an unreasonable expectation which within the short frame of time available under law would be too much to expect him to carry. Irrespective of this, in a given case, if the Assessing Officer on his own for reasons best known to him, chooses not to assign reasons for not rejecting the claim of an assessee after thorough scrutiny, it can hardly be stated by the Revenue that the Assessing Officer cannot be seen to have formed any opinion on such a claim. Such a contention, in our opinion, would be devoid of merits. If a claim made by the assessee in the return is not rejected, it stands allowed. If such a claim is scrutinized by the Assessing Officer during assessment, it means he was convinced about the validity of the claim. His formation of opinion is thus complete. Merely because he chooses not to assign his reasons in the assessment order would not alter this position. It may be a non-reasoned order but not of acceptance of a claim without formation of opinion. Any other view would give arbitrary powers to the Assessing Officer.

43. We are, therefore, of the opinion that in a situation where the Assessing Officer during scrutiny assessment, notices a claim of exemption, deduction or such like made by the assessee, having some prima facie doubt raises queries, asking the assessee to satisfy him with respect to such a claim and thereafter, does not make any addition in the final order of assessment, he can be stated to have formed an opinion whether or not in the final order he gives his reasons for not making the addition."

(i) Learned Advocate appearing for the respondents could not deny the admitted factual and legal position that the impugned reassessment proceeding has been initiated and notice under Section 148 of the Act has been issued after the expiry of 4 years from the end of relevant Assessment Year to reopen scrutiny assessment under Section 143 (3) of the Income Tax Act, 1961.

(ii) That the assessment sought to be reopened by the Assessing Officer is against the scrutiny assessment on the issue which was already considered and accepted by the then Assessing Officer after being satisfied with the replies

by the assessee petitioner on the quarries raised by the Assessing Officer from time to time in the course of scrutiny assessment.

(iii) That materials on which Assessing Officer sought to reopen the assessment are not new and are the same which were already available before the then Assessing Officer at the time of scrutiny assessment and the predecessor of the present Assessing Officer had already formed an opinion on the said material and allowed relief to the assessee petitioner on the said issue in course of scrutiny assessment.

(iv) Respondent revenue could not establish in course of hearing that there was any omission or failure on the part of the assessee petitioner in disclosing truly and fully any material fact necessary for the assessment before the Assessing Officer in course of scrutiny assessment.

Considering the facts and circumstances of the case as appears from record, submission of the parties and judgments relied upon by the petitioner and in view of discussion made above I am inclined to allow this Writ Petition by quashing the impugned notice dated 31st March, 2019 under Section 148 of the Income Tax Act, 1961 relating to Assessment Year 2012-13 and all subsequent proceedings on the basis of the aforesaid impugned notice under Section 148 of the Act by holding that the initiation of impugned reassessment proceeding under Section 147 and issuance of notice under Section 148 of the Income Tax Act, 1961 are based on the self-same material which were already available before the Assessing Officer in course of regular assessment and upon which the predecessor of the present Assessing Officer had already formed an opinion and there is no new material which came to the notice and knowledge of the present Assessing Officer which could be called to have been not disclosed truly and fully in course of scrutiny assessment due to any omission or failure on the part of the assessee petitioner to disclose the same truly and fully in course of scrutiny assessment proceeding and further on perusal of

materials available on record I am of the view that the impugned reassessment proceeding is on a mere change of opinion.

Accordingly this Writ Petition being WPO No. 477 of 2019 is disposed of by allowing the same. No order as to costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities.

(MD. NIZAMUDDIN, J.)