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W.P.(MD) No.10198 of 2024

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

Reserved on	02.08.2024
Delivered on	23.08.2024

CORAM

THE HON'BLE MR.JUSTICE C.SARAVANAN

W.P.(MD) No.10198 of 2024

and

W.M.P.(MD) Nos.9200 & 9201 of 2024

M/s.Mahogany Logistics Services Private
Limited
Represented by its Director,
P.Venkatesh

... Petitioner

Vs.

The Income Tax Officer,
Corporate Ward 2,
No.2, V.P.Rathinasamy Nadar Road,
CR Building, Bibikulam,
Madurai 625 002.

... Respondent

Prayer: Writ Petition filed under Article 226 of Constitution of India for issuance of a Writ of Certiorari calling for the records of the respondent in Notice in PAN: AAFCD8781R dated 23.02.2024 in DIN & Letter No.ITBA/AST/F/148A(SCN)/2023-24/1061421763(1) issued under Section 148A(b) of the Income Tax Act, 1961 for the AY 2017-2018 and consequential Notice dated 11.03.2024, in DIN and Letter No.No.ITBA/AST/F/148A(SCN)/2023-24/1062349156(1) issued under



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Section 148A(b) of the Income Tax Act, 1961 for the AY 2017-18, Notice dated 26.03.2024 in DIN & Letter No: ITBA/AST/S/148-1/2023-24/1063380782/(1) issued under Section 148 of the Income Tax Act, 1961 for the AY 2017-18 and order in PAN: AAFC8781R dated 26.03.2024 in DIN & Letter No.ITBA/AST/F/148A/2023-24/1063378872(1) passed under Section 148A(d) of the Income Tax Act, 1961 for the AY 2017-18 and quash the same.

For Petitioner : Dr.S.Muralidhar
Senior Counsel
for Mr.P.M.N.Bhagavath Krishnan

For Respondent : Mr.N.Dilip Kumar
Senior Panel Counsel
Asst.by Mr.K.Prabhu
Junior Panel Counsel

ORDER

In this Writ Petition, the petitioner has challenged the impugned notice dated **23.02.2024** issued for the Assessment Year 2017-2018 under Section 148A(b) of the Income Tax Act, 1961 and the consequential impugned order dated **26.03.2024** passed under Section 148A(d) of the Income Tax Act, 1961 for the very same Assessment Year and the impugned notice dated **26.03.2024** issued under Section 148 of the Income Tax Act, 1961.



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2. Brief facts of the case are that the Petitioner Company was incorporated on **17.10.2016**. The petitioner had filed its Return of Income under Section 139 of the Income Tax Act, 1961 for the Assessment Year 2017-2018 on **13.10.2017**, declaring a loss of **Rs.7,27,25,946/-**. Ultimately, an assessment Order dated **27.12.2019** was passed under Section 143(3) of the Income Tax Act, 1961.

3. Earlier, the Return filed by the petitioner was selected for limited scrutiny after a notice dated **14.09.2018** issued under Section 143(2) of the Income Tax Act, 1961 under Computer Aided Scrutiny Selection (CASS) on 14.09.2018. Prior to the **Assessment Order** dated **27.12.2019**, the petitioner was also issued with two notices under Section 142(1) of the Income Tax Act, 1961 on **26.07.2019** and **18.10.2019**. In the notice dated **26.07.2019**, issued under Section 142(1) of the Income Tax Act, 1961, the petitioner was called upon to furnish the following documents/details:-

"(i) Expenses incurred for earning exempt income.

(ii) Details of investments (Current and Non current).

(iii) Details of advances / loans received during the Financial Year 2016-2017 (if any)."



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4. By second mentioned notice dated **18.10.2019** issued under Section 142(1) of the Income Tax Act, 1961, the petitioner was called upon to furnish the following documents:-

- "1. Memorandum of articles signed by the partners of the LLP at the time formation.*
- 2. Agreement, if any, between the assessee company (borrower) and loan creditors (lendor).*
- 3. Copy of partnership deed of LLPs (Dinram Logistics Services LLP and DRSR Advisory Services LLP).*
- 4. Produce the bank statements highlighting the transactions made with Dinram Logistics Services LLP and DRSR Advisory Services LLP.*
- 5. Ledger account copies of loan creditors.*
- 6. Provide Non Convertible Debenture pledge agreements."*

5.The aforesaid information were furnished by the petitioner, which ultimately, culminated in the aforesaid **Assessment Order** dated **27.12.2019** under Section 143(3) of the Income Tax Act, 1961. The operative portion of the Assessment Order dated 27.12.2019 reads as under:-

"M/s. DRSR Logistics Services P Ltd., a domestic



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*company filed its return of income for the A.Y. 2017-18 on 13.10.2017 admitting total income of **Rs.Nil**. The case was selected for limited scrutiny through CASS. A notice u/s 143(2) was issued to the assessee through e-proceedings on 14.09.2018. The case was transferred to this office from the office of the ITO, Non Corporate Ward-3(1), Madurai vide letter dated 26.09.2018 since the jurisdiction of the case vests with this office. Subsequently, a notice u/s 142(1) dated 26.07.2019 alongwith Questionnaire was sent to the assessee through ITBA requesting the assessee company to furnish the details called for through E-Proceeding. In response to notice u/s. 142(1), the assessee filed the necessary details.*

The CASS reasons are:

- 1. Expenses incurred for earning exempt income:*
- 2. Investments/advances/loans*

1. Expenses incurred for earning exempt income:

During the financial year relevant to assessment year 2017-18, the assessee company made investment of Rs.288,50,94,000/ in Dinram Logistics Services LLP & DRSR Advisory Services LLP. The assessee was asked to furnish the details of exempt income earned along with any expenditure incurred to earn the same. In this regard, the assessee submitted that the assessee had not earned any exempt income and also no expenses incurred towards earning Exempted income. Further, the assessee submitted cash flow statement for the relevant period showing the source for the investments.

2. Investments/advances/loans

During the financial year relevant to assessment year 2017-18, the assessee company raised money



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through issue of Debentures amounting to Rs. 294,00,00,000/-. The assessee furnished the break-up details of debenture holders and copy of ledger account of debentures. The payments were received through HDFC Bank. In this regard, the assessee furnished a copy of HDFC Bank statement. Notice u/s.133(6) was issued to the debenture holders requesting to furnish the details/confirmation relating to financial transactions with the assessee company. In response, the debenture holders furnished the above details and confirmation relating to financial transactions with the assessee company. The details furnished by the assessee were examined and the assessment is completed accepting the returned income."

6. The above assessment that was completed under Section 143(3) of the Income Tax Act, 1961 on **27.12.2019** was sought to be re-opened by issuance of a notice under Section 148A(b) of the Income Tax Act, 1961, on **23.02.2024**. The reasons stated for issuing the above notice are as under:-

"The following information are available in the records of this office:

- 1. Processing charges incurred **Rs.6,98,00,000/-***
- 2. Legal and Professional charges incurred **Rs. 35,73,645/-**.*
- 3. Borrowed funds amounting to **Rs.294,00,00,000/-** by way of issuing Non Convertible Debentures (NCDs)*



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4. Short term borrowing of **Rs.28,00,00,000/-** and

Rs.35,00,000/-

5. Made investments in listed equities amounting to **Rs.288,50,94,000/-**

1. The absence of any evidence to prove that these expenses (processing charges and legal & professional charges) are having nexus with the assessee's business and expended wholly for the business purpose.

2. The genuineness (Identity & credit worthiness of persons to whom NCDs issued and genuineness of transactions) of the long term borrowing (NCDs) & short term borrowing are not established.

3. The absence of admission of any income from the investments made in listed equities.

Rs.329,68,73,645/- has escaped assessment.

You are required to submit the detailed reply with evidence to the show cause notice u/s 148 A(b) of the Act on or before 08/03/2024"

7. The petitioner has replied to the same. The impugned order dated **26.03.2024** has been passed under Section 148A(d) of the Income Tax Act, 1961. The operative portion of the impugned order dated **26.03.2024** reads as under:-

"The following information available with this office viz.



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1. Processing charges incurred **Rs.6,98,00,000/-**
2. Legal and Professional charges incurred Rs. 35,73,645/-
3. Long term borrowings of **Rs.294,00,00,000/-** by way of issuing non convertible debentures (NCDs)
4. Short-term borrowing of **Rs.28,00,00,000/-** and Rs.35,00,000/-

In the absence of any evidence to prove that these expenses (processing charges and legal & professional charges) are having nexus with the assessee's business and expended wholly for the business purpose

In the absence of the genuineness (Identity & credit worthiness of persons of the long-term borrowing)

In the absence of the genuineness (Identity & credit worthiness of persons of the short-term borrowing)

In the absence of admission of any income from the investments made in listed equities suggests that income to the extent of Rs.329,68,73,645/- has escaped assessment

XIX. In view of the above detailed discussion and facts, the income chargeable to tax has escaped assessment to the tune of Rs.329,68,73,645/- in terms of section 147 of the Act.

XX. All the due procedures laid down u/s 148A of the Act have been duly complied with and after having perused the information available on record and the material evidence gathered, I am satisfied that all the conditions mentioned u/s 149(1) are fulfilled and it is a fit case to issue notice u/s 148 of the Income Tax Act, 1961 for the ??.2017-18.

XXI. This order is issued with the prior approval of



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the CCIT, Madurai as provided u/s 151 (ii) of the Income Tax Act, 1961."

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8.Challenging the impugned orders, the petitioner is before this Court.

9. The learned Senior Counsel for the petitioner submitted that the impugned proceedings are without jurisdiction. Specifically, it was submitted that the respondent while passing the impugned order dated 26.03.2024 under Section 148A(d) of the Income Tax Act, 1961, has misconstrued the said provisions.

10. It is submitted that the following observation of the respondent in the impugned order dated 26.03.2024 passed under Section 148A(d) of the Income Tax Act, 1961 is in correct.

"VI. The assessee has wrongly misinterpreted the 1st proviso to section 149 (1) of Act which stipulates the time limit to issue notice u/s 148 of the Act and whereas this office has issued only notice u/s 148 A(b) on 23.2.2024 which is well within time as per the Act, in other words notice u/s 148A(b) can be issued till 31.03.2024. This office duly followed the procedure as laid down in the sec 148 A of the Act before issue of notice u/s 148 of the Act (providing opportunity u/s 148 A of the Act before issue of notice u/s 148 of the Act)."



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11. That apart, it is submitted that the major chunk of the amount of **Rs.294,00,00,000/-** was a long term borrowings and **Rs.28,00,00,000/** and **Rs.35,00,000/-** were a short-term borrowings and were subject matter of Scrutiny Assessment dated **27.12.2019** under Section 143(3) of the Income Tax Act, 1961 and therefore, under the amended provisions of the Income Tax Act, 1961, no notice could be issued under Section 149 of the Income Tax Act, 1961.

12. The learned Senior Counsel would submit that with effect from **01.04.2021**, a notice under Section 148 of the Income Tax Act, 1961, could be issued only if such notice could have been validly issued under the old regime prior to **01.04.2021**. Specifically, the learned Senior Counsel would draw the attention to first Proviso to Section 149(1) of the Income Tax Act, as amended, with effect from 01.04.2021 which reads as under:-

"Time limit for notice.

149. (1) No notice under section 148 shall be issued for the relevant assessment year.-

....

Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if a notice under section 148 or



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section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-section (1) of this section or section 153A or section 153C, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021:"

13. The learned Senior Counsel also laboured hard to refer to the following decisions rendered under somewhat similar circumstances:-

- (i) ***Avinashilingam Institute for Home Science and Higher Education for Women vs. ACIT (Exemptions), (2023) 149 taxmann.com 458 (Madras) : (2023) 458 ITR 491 (Madras)***
- (ii) ***Shree Nagalinga Vilas Oil Mills vs. Income-tax Officer, (2023) 149 taxmann.com 249 (Madras) : (2023) 292 Taxman 533 (Madras)***
- (iii) ***Red Chilli International Sales vs. Income-tax Officer, (2023) 143 taxmann.com 224 (SC) : 452 ITR 222 (SC)***
- iv) ***Component source Company Ltd. vs. Assistant Commissioner of Income Tax, Circle INT Tax 1(2)(1), New Delhi [W.P.(C)7753/2024, dated 27.05.2024]***

14. It is submitted that the following decisions are to be construed as the *ratio* specific to the case:-



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- (i) **Azim Premji Trustee Co. (P.) Ltd. vs. Deputy Commissioner of Income-tax, (2023) 146 taxmann.com 58 (Karnataka)**
- (ii) **Siemens Financial Services (P.) Ltd. vs. Deputy Commissioner of Income-tax, (2023) 154 taxmann.com 159 (Bombay) : 457 ITR 647 (Bombay)**
- (iii) **Hexaware Technologies Ltd. vs. Assistant Commissioner of Income-tax, Circle 15(1)(2), (2024) 162 taxmann.com 225 (Bombay)**
- (iv) **Anshul Jain vs. Principal Commissioner of Income-tax, (2022) 143 taxmann.com 38 (SC) : 449 ITR 256 (SC) ”**

15. It is submitted that the law on the subject is very clear in terms of the decision of the Hon'ble Supreme Court in **CIT vs. Kelvinator of India Ltd., (2010) 187 Taxman 312 : 320 ITR 561 (SC)**. It is submitted that the machinery under Section 148 read with Sections 147 and 149 of the Income Tax Act, 1961, cannot be a review in disguise and therefore, the impugned order seeking to re-open the assessment for the Assessment Year 2017-2018 is liable to be interfered with, as there are no jurisdictional fact available for re-opening the assessment.

16. The learned Senior Counsel reiterated that in absence of new



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tangible materials to reopen the assessment made on **27.12.2019**, the impugned proceedings were liable to be declared as without jurisdiction.

It is submitted that all the materials were furnished to the Assessing Officer before the assessment was completed on **27.12.2019** under Section 143 (3) of the Income Tax Act, 1961.

17. In response to the objections of the respondent to the maintainability of the present Writ Petition, it is submitted that the respondent has relied on the Hon'ble Supreme Court's judgment on **Anshul Jain Vs. PCIT** [2022] 143 taxmann.com 38 (SC) during argument and is of the view that present Writ petition filed by the Petitioner is premature.

18. It is submitted that the Hon'ble Supreme Court in the said case has held that merits of a case cannot be dealt in a Writ Petition. However, in the Petitioner's case, arguments raised in the present writ petition is on the jurisdictional validity of the proceedings. The judgment relied by the Respondent itself supports the validity of the subject writ petition since it is on jurisdictional grounds. The relevant extract of the judgment has been



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reproduced below:-

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" Moreover it is not a case where from bare reading of notice it can be axiomatically held that the authority has clutched upon the jurisdiction not vested in it. The correctness of order under section 148A(d) is being challenged on the factual premise contending that jurisdiction though vested has been wrongly exercised. By now it is well settled that there is vexed distinction between jurisdictional error and error of law/fact within jurisdiction." (emphasis supplied)

19. It is submitted that the aforesaid case has also been distinguished by this Court in the case of **Avinashilingam Institute for Home Science and Higher Education for Women Vs ACIT (Exemptions)** in Writ Petition No.11083 of 2022 dated 21.02.2023 and in the case of **Shree Nagalinga Vilas Oil Mills Vs Income-tax Officer** in Writ Petition (MD)No.2630 of 2022 vide order dated 07.02.2023.

20. It is submitted that this Court has held that where the Assessing Officer has rejected the objection raised by the assessee without application of mind to the relevant facts of the case, then a writ petition is maintainable. Further, it is submitted that the Hon'ble Supreme Court in the case of **Red Chilli International Sales Vs ITO** [2023] 146 taxmann.com 224 (SC), has observed that writ courts are required to examine in depth the jurisdiction



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pre-condition for issuance of notice under section 148 of the Act.

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21. Thus, it is submitted that the Writ Petition is maintainable as the aforesaid case relied by the Respondent does not apply to the instant case, as the Petitioner has raised grounds challenging the validity of the reassessment proceedings based on the jurisdictional grounds as mentioned below and not on the merits of the case.

22. As far as the subject reassessment proceeding being barred by limitation of time as per section 149 of the Act is concerned, it is submitted that the statute has specifically inserted first proviso to section 149 of the Act to restrict the department to initiate re-assessment proceedings under the new re-assessment regime if such proceedings cannot be initiated under the old re-assessment regime. The relevant extract of the proviso is reproduced below:-

"Provided that no notice under section 148 shall be issued at any time in a case for the relevant assessment year beginning on or before 1st day of April, 2021, if a notice under section 148 or section 153A or section 153C could not have been issued at that time on account of being beyond the time limit specified under the provisions of clause (b) of sub-



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section (1) of this section or section 153A or section 153C, as the case may be], as they stood immediately before the commencement of the Finance Act, 2021" (emphasis supplied)

23. It is submitted that it is important to note that the wordings viz., **"at that time"** and **"as they stood immediately before commencement of the Finance Act, 2021"** in the first proviso to Section 149 of the Income Tax Act, 1961, indicates that, upto A.Y. 2021-22, if the department could not issue a notice for re-assessment under old-reassessment regime, it cannot issue a notice under the new reassessment regime.

24. It is submitted that under the old-reassessment regime, the provisions of Section 149(1)(b) of the Act was always curtailed by the limitation under first proviso to Section 147 of the Act, which provides that, where a scrutiny assessment has taken place, no re-assessment proceedings can be initiated **after the expiry of four years** from the end of the relevant assessment year, unless any income chargeable to tax has



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escaped assessment for such assessment year by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

25. In the context of new-reassessment regime, the above principle has also been upheld by the Hon'ble Karnataka High Court in the case of **Azim Premji Trustee Co Ltd.** [2023] 146 taxmann.com 58 (Karnataka).

26. Further, it is submitted that the respondent argued that the assessment was a "Limited Scrutiny" under Computer Aided Scrutiny Selection ('CASS') and accordingly the period of four years as per *first proviso* to erstwhile Section 147 of the Act is not applicable in the instant case. The Petitioner submits that the A.O. on completion of the assessment had passed an order under section 143(3) of the Act. It is submitted that it is pertinent to note that the *first proviso* to erstwhile Section 147 of the Act covers all the order passed under Section 143(3) of the Act and does not differentiate between a "limited scrutiny" or "full scrutiny".

27. It is submitted that since the petitioner has disclosed truly and



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fully all material facts during assessment under Section 143(3) of the Act and since this fact has not been disputed by the Department, the Petitioner submits that the time limit for initiating the reassessment proceedings shall expire on 31st March 2022. Accordingly, the Impugned Order and Impugned Notice No.3 issued on 26th March 2024 is barred by limitation of time.

28. It is submitted that **the subject reassessment proceeding is based on mere 'change of opinion' without any new material on record.** It is submitted that it is a well settled principle that an Assessing Officer cannot initiate reassessment proceedings to have a review the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment and re-assessment should only be on account of a "new material on record". Reliance in this regard is placed on the decision of Hon'ble Supreme Court in the case of **Commissioner of Income-Tax, Delhi Vs. Kelvinator of India Ltd**, [2010] 320 ITR 561 (Hon'ble Supreme Court). The above principle has already been upheld in the context of new re-assessment regime in the following decisions:-

(i) **Siemens Financial Services (P.) Ltd. Vs. DCIT**



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[2023] 154 taxmann.com 159 (Hon'ble Bombay High Court); and

(ii) **Hexaware technologies Ltd. Vs. ACIT** [2024] 162 taxmann.com 225 (Hon'ble Bombay High Court).

29. With respect to long-term borrowings of INR 294 Crores, it is submitted that the Assessment Order specifies that the same was evaluated and accepted by the Assessing Officer during the Original Assessment Proceedings since a notice under Section 133(6) of the Act was sent to the lenders and, upon receiving confirmation from the lenders and satisfying the genuineness of the transaction, the JCIT passed the Assessment Order without any variations on **27.12.2019**. The relevant extract of the Assessment Order is reproduced below:-

2. Investments/ advances/loans

During the financial year relevant to assessment year 2017-18, the assessee company raised money through issue of Debentures amounting to Rs. 294,00,00,000/-. The assessee furnished the break-up details of debenture holders and copy of ledger account of debentures. The payments were received through HDFC Bank. In this regard, the assessee furnished a copy of HDFC Bank statement. Notice u/s. 133(6) was issued to the debenture holders requesting to furnish the details/ confirmation relating to financial transactions with the assessee company. In response, the debenture holders



furnished the above details and confirmation relating to financial transactions with the assessee company.

30. Countering the argument of the respondent with respect to the short-term borrowings of INR 28.35 Crores, it is submitted that the learned Counsel for the Respondent is of the view that the same have not been assessed since the Assessment Order under Section 143(3) of the Act does not specifically captures the same. It is pertinent to note that vide notice dated **26.07.2019**, the JCIT during the Original Assessment Proceedings had called for details on all the borrowings made by the Petitioner, which included the short-term borrowings, which the Petitioner had duly submitted and the same had been accepted by the Respondent. Thus, all the borrowings made by the Petitioner has been verified by the Respondent during the Original Assessment Proceedings.

31. It is further submitted that out of 28.35 Crores, INR 28 Crores was borrowed from the same lender (KKR India Financial Services Private Limited) who was categorized under "Long term borrowings" and the Respondent had sent a notice under Section 133(6) to all the lenders and confirmed the same.



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32. With respect to Processing charges of **Rs.6,58,00.000** and Legal and Professional charges of **Rs.35,73,845**, it is submitted that the perception of the respondent that the same have not been assessed since the **Assessment Order** dated **27.12.2019** passed under section 143(3) of the Act does not specifically capture the opinion framed by the JCIT and it is only a limited scrutiny cannot be countenanced.

33. It is submitted that during the course of regular assessment, the petitioner had provided books of accounts, cash flow statement and financial statements for the subject A.Y. which dearly discloses the details of Processing Charges of **Rs.6,58,00,000** and Legal and Professional Charges of **Rs.35,73, 845/**. Further, it is submitted that the Petitioner had called for details of expenses incurred to earn exempt income.

34. In this regard, the learned Senior Counsel for the petitioner submits that since the every query is raised by the department and relevant details as required by the Assessing Officer were provided, the issue is deemed to have been considered and the explanation is deemed to be accepted by the Assessing Officer, even Assessment Order does not contain reference or a discussion to disclose the satisfaction of the



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Assessing Officer in respect of the query raised. Reliance in this regard was placed on the decision of Bombay High Court in the case of **Aroni Commercials Ltd Vs. Dy.CIT**, 362 ITR 463.

35. It is submitted that the assessment that was completed on **27.12.2023** under Section 143 (3) of the Income Tax Act, 1961, was confined only to the expenses incurred for earning exempted income and investment amounts / advances and loans, content of which has already been extracted above.

36. In support of his submission, the learned Senior Standing Counsel for the respondent has relied upon a judgment of a Full Bench of the Delhi High Court rendered in **Commissioner of Income-tax-VI, New Delhi vs. Usha International Ltd.**, (2012) 25 taxmann.com 200 (Delhi) : 348 ITR 485 (Delhi).

37. As regards the first plea of Limitation, it is submitted that the petitioner admits that the income contemplated in the proceedings under



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the challenge is in excess of **Rs.50 lakhs**. It is submitted that the petitioner also admit that the case will therefore fall under Section 149 (1) (b) of the Act which prescribes 10 years period. However, the petitioner contends that since the proposed reopening is with reference to Assessment Year 2017-18, which is beginning before 01/04/2021, the first proviso to Section 149 (1) stands attracted.

38. The revenue accedes to this position that the first proviso to Section 149 (1) stands attracted to the present case. It is submitted that the statute is clear and unambiguous in stating that the time limit mentioned in the first proviso **relates only to the time limit specified under the old 149 (1) (b) or 153A or 153C**. In this case, Section 153A or 153C are not relevant. Old Section 149 prescribes three different time limits.

39. It is submitted that the general time limit provided was four years from the end of the relevant Assessment Year. The second time limit was up to 6 years from the end of the relevant Assessment Year when the escaped assessment amount was likely to be 1 lakh or more for that year. The third time limit was up to 16 years from the end of the relevant Assessment Year if income in relation to any asset located outside India,



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chargeable to tax, has escaped assessment.

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40. Therefore, even under the old Section 149, the time limit was six years from the end of the relevant Assessment Year if the escaped assessment amount was likely to be 1 lakh or more for that year.

41. It is submitted that the subject case relates to the Assessment Year 2017-2018. The income that has escaped assessment according to respondent is **Rs.329,68,73,645/-**. Hence even under the old Section 149, the time limit of six years from the end of the relevant Assessment Year would have lapsed only on **31.03.2024**. It is submitted that the impugned order under Section 148A (d) and the notice under Section 148 is dated **26.03.2024**. Therefore, it is submitted it is well within time.

42. It is submitted that the falsity in the plea of limitation is raised by the petitioner stems from an attempt made by the writ petitioner to import the first proviso to the old Section 147. It is submitted that there is no legislative mandate or intent to read the first proviso to old Section 147 into the new Section 149. It is an ingenious and mischievous attempt, without any substance. Section 149 provides a time limit for issuance of a



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notice under Section 148, which is a precursor for determining the income that has escaped assessment under Section 147. Section 147 has also been completely substituted under the Finance Act, 2021 with effect from 01.04.2021.

43. It is submitted that the time limits/restrictions imposed under the first proviso of old Section 147 prescribed four years and six years in respect of cases where an assessment under Section 143 (3) or Section 147 was made has been done away with under the new Section 147.

44. It is submitted that therefore, the attempt of the petitioner to contend that the present notice under Section 148 was barred by limitation or was devoid of any merit is liable to be rejected.

45. In so far as "change of opinion", while re-opening the assessment, it is submitted that the petitioner was duty bound to demonstrate that under the earlier CASS limited scrutiny assessment under Section 143 (3) dated 27.12.2019, there was a "formation of opinion" regarding the issues which are basis for reopening the assessment.



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46. It is submitted that the earlier assessment order u/s. 143(3) on 27.12.2019 is confined to expenses incurred for earning exempt income, and investments/advances/loans, as mentioned in the notice issued u/s. 142(1) . It was case of limited scrutiny.

47. Learned counsel submits that as per the circular F.No. 225/402/2018/ITA.II, dated 28.11.2018, the cases selected for limited scrutiny under CASS for the A.Y. 2017- 2018, the scope of enquiry was limited only to the issue for which the case has been selected and this has been strictly laid down in order to curb the arbitrary exercise of powers of the Assessing Officers to prevent harassment of the assessee.

48. Even in the Assessment Order findings have been provided only in respect of the issue of Debentures and no findings have been provided in respect of other items for which the assessment is sought to be reopened.

49. Thus, it is submitted that when no opinion was formed in respect of the issues which are the basis for reopening of the assessment, there cannot be any allegation of change of opinion.



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50. In the case of **Shrikant Phulchand Bhakkad (HUF) Vs. JCIT** (137 taxmann.com 445) where the original assessment was completed under CASS for limited purpose to examine the Genuineness of share capital and there was no consideration of documents produced by petitioner with respect to derivative transaction, reopening notice issued by the Assessing Officer on ground that petitioner entered into bogus derivative transactions to obtain loss for purpose to reduce his taxable income was held to not amount to review of earlier order on same facts and it was decided to be a valid notice.'

51. The contention of the assessee that there is an implied formation of opinion on all the issues as it had been subjected to a scrutiny assessment is without any substance at all.

52. It is submitted on a demurrer that though circulars are not binding on the assessee, in a plethora of cases the Apex Court has laid down that circulars issued by the Central Board of Direct Taxes are legally binding on the Assessing Officers and they ought to follow the stipulations in the circular. Reference can be made to **Navnitlal C. Jhaveri Vs. KK, Sen**, [1965] 56 ITR 198 (SC), **Ellerman Lines Ltd. Vs. Commissioner of Income-tax, West Bengal**, [1971] 82 ITR 913 (SC)



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and **K.P.Varghese Vs. ITO**, [1981] 131 ITR 597 (SC).

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53. It is submitted that the order dated 27.12.2019 under Section 143 (3) records that the Assessing Officer had accepted the submission of the writ petitioner/assessee that it had not earned any exempt income and no expenses were incurred towards earning exempted income. Thus, it could be seen that one of the reasons assigned in the present impugned notice under Section 148 to reopen the assessment regarding the processing charges of Rs.6,98,00,000/- and legal and professional charges of Rs.35,73,645/- were not at all the subject matter of the previous limited scrutiny assessment and no opinion had been formed in this regard, in order for the reassessment proceedings to be taken as a mere change of opinion.

54. It is submitted that the genuineness (identity and creditworthiness) of the persons from whom the petitioner has made a short-term borrowing of Rs.2,83,500,000/- had also not been the subject matter of the earlier concluded scrutiny assessment proceeding dated 27.12.2019, and thus no opinion had been formed on the same as well.

55. It is submitted that in the absence of any formation of opinion in



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the earlier Scrutiny Assessment Order regarding the issues raised in the present reopening proceedings, the allegation of "change of opinion" is devoid of any merit and is liable to be rejected.

56. The contention of the petitioner that no new information was available for reopening assessment is denied as false, and it is submitted that the reassessment proceedings are not initiated on the basis of the financial record already available but the tangible information on the basis of which the reassessment was proposed to be initiated in the instant case as per clause (ii) of Explanation 1 of Section 148 of the Act which was conveyed to the petitioner in the notice dated 23.02.2024 under Section 148A(b) of the Income Tax Act for following heads under:-

- i) Processing charges incurred **Rs.6,98,00,000/-**
- ii) Legal and Professional charges incurred **Rs.35,73,645/-**
- iii) Borrowed funds amounting to **Rs.294,00,00,000/-** by way of issuing Non-Convertible Debentures (NCDs)
- iv) Short-term borrowing of **Rs.28,00,00,000/-** and **Rs.35,00,000/-**
- v) Made investments in listed equities amounting to **Rs.288,50,94,000/-**

57. It is submitted that the petitioner did not produce any evidence



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to prove that:-

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- (i) the expenses on legal & professional charges have a nexus with the petitioner's business and are expended wholly for the business purposes.
- (ii) The genuineness (Identity & credit worthiness of persons to whom NCDs were issued and genuineness of transactions) of the long term borrowing (NCDs) & short term borrowing are not established.
- (iii) The absence of admission of any income from the investments made in listed equities. Hence the above three information suggest that income to the extent of Rs.329,68,73,645/- has escaped assessment.

58. It is further submitted that even assuming that every aspect relating to long-term borrowings (Non-convertible Debentures) has been subjected to perusal during the course of the limited scrutiny assessment, only by virtue of it being one of the items of reassessment, the entire reassessment proceedings and notice under Section 148 of the Act, also containing other items requiring reopening of assessment and not having been subjected to scrutiny assessment i.e., legal and professional charges and the genuineness (identity and creditworthiness) of the persons from whom the petitioner has made a short-term borrowing, cannot be quashed in toto.



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59. In the case of **Income Tax Officer, Azamgarh & Anr Vs Mewalal Dwarka Prasad**, 1989 (2) SCC 279, in Para 7 it was held as follows: "Accepting the legal position indicated in these cases we come to the conclusion that it was not for the High Court to examine the validity of the notice under Section. 148 in regard to the two items if the High Court came to the conclusion that the notice was valid at least in respect of the remaining item. Whether the Income Tax Officer while making his reassessment would take into account the other two items should have been left to be considered by the Income Tax Officer in the fresh assessment proceeding."

60. Therefore, the attempt of the petitioner to contend that the present notice under Section 148 of the Act is issued because of a "change of opinion," on the basis of which it is sought to quash the notice under Section 148 in toto, is devoid of any merit and is liable to be rejected.

61. It is further submitted that the present writ petition has been



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filed at a premature stage of the proceedings given the fact that no Assessment Order has been passed yet. The contentions raised herein by the petitioner can very well be taken up before the Assessing Officer during the course of proceedings under Section 147 of the Act.

62. Therefore, on the premise of the submissions made on behalf of the respondent, it is prayed that the present writ petition be dismissed as the same is devoid of any merits and premature.

63. I have considered the arguments advanced by the learned Senior Counsel for the petitioner and the learned Senior Standing Counsel for the respondent. I have also perused documents that have been filed before this Court. I have also considered the decisions cited and provisions of law.

64. The Hon'ble Supreme Court in **Anshul Jain Vs. PCIT(2022)** 143 taxmann.com 38, while dealing with an identical situation had held as under:

“Thus, the consistent view is that where the proceedings have not even been concluded by the



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*statutory authority, the writ Court should not interfere at such a pre-mature stage. **Moreover it is not a case where from bare reading of notice it can be axiomatically held that the authority has clutched upon the jurisdiction not vested in it.** The correctness of order under [Section 148A\(d\)](#) is being challenged on the factual premise contending that jurisdiction though vested has been wrongly exercised. **By now it is well settled that there is vexed distinction between jurisdictional error and error of law/fact within jurisdiction.** For rectification of errors statutory remedy has been provided.”*

65. The Hon'ble Supreme Court in **Red Chilli International Sales Vs. Income Tax Officer**(2023) 452 ITR 222 (SC) under similar circumstances had interfered and set aside the adverse order passed by the High Court against the Revenue with the following observation:

*“We with the petitioner that the impugned judgment rejecting the writ petition on the ground of alternative remedy does not take into consideration several judgments of this Court, on the jurisdiction of High Court, as writ petitions have been entertained to be examined whether the jurisdiction preconditions for issue of notice under Section 148 of the Income Tax Act, 1961 is satisfied. **The provisions of reopening under the Income Tax Act, 1961 have undergone an amendment by the Finance Act, 2021, and consequently the matter would require a deeper and in depth consideration keeping in view the earlier case law. Accordingly, we set aside the***



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observations made by the High Court in the impugned judgment observing that the writ petition would not be maintainable in view of the alternative remedy, clarify that this issue would be examined in depth by the High Court if and when it arise for consideration. We do deem it open to examine this issue in the present case after having examined the notice under Section 148A (b) including the annexure thereto, the reply filed by the petitioner and the order under Section 148A (d) of the Income Tax Act, 1961."

66. In **Commissioner of Income Tax Vs P.V.S. Beedies Pvt. Ltd.,** (1998) 9 SCC 272, the Hon'ble Supreme Court in Para 3 held that "*there can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law. In view of that we hold that reopening of the case under Section 147(b) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law.*"

67. In the case of **Income Tax Officer, Azamgarh &Anr Vs Mewalal Dwarka Prasad,** 1989 (2) SCC 279, in Para 7, the Hon'ble Supreme Court held as follows:-



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"Accepting the legal position indicated in these cases we come to the conclusion that it was not for the High Court to examine the validity of the notice under Section 148 of the Income Tax Act, 1961 in regard to the two items if the High Court came to the conclusion that the notice was valid at least in respect of the remaining item. Whether the Income Tax Officer while making his reassessment would take into account the other two items should have been left to be considered by the Income Tax Officer in the fresh assessment proceeding."

68. The two decisions of the Division Bench of the High Court of Bombay in ***Siemens Financial Services (P). Ltd., Vs. Deputy Commissioner of Income Tax*** reported in ***(2023) 457 ITR 647 (Bombay)*** and in ***Hexaware Technologies Ltd., Vs. Assistant Commissioner of Income Tax*** reported in ***(2024) 162 taxmann.com 225 (Bombay)*** ought to be applied cautiously.

69. They have substantially watered down the amendment made the provisions of the Income Tax Act, 1961 in 2021 which was not intended by the Parliament when it amended the provision of the Income Tax Act, 1961 vide Finance Act, 2021. I shall refer to these two decisions later after discussing the facts.



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70. The petitioner appears to have borrowed **Rs.294,00,00,000/-** from the following four entities, namely:-

Sl. No.	Name of the debenture holder	PAN	NCD (Rs. in crore)
1.	KKR India Financial Services Private Limited ('KKR India Ltd')	AAACM7774Q	172.60
2.	KKR India Debt Opportunities Fund II ('KKR India Fund')	AACTK8338D	25.70
3.	BOI AXA Mutual Fund	AABTB3493R	25.70
4.	Aditya Birla Finance Limited	AABCB5769M	70.00
	Total		294.00

71. The borrowings from these companies were against issuance of Non-Convertible Debentures by the petitioner to them. These amounts were treated as long term borrowings by the petitioner in its Books of Accounts.

72. The petitioner had also borrowed a further sum of **Rs. 28,00,00,000/-** and **Rs.35,00,000/-** as a short term borrowings. In the Assessment order, dated **27.12.2019** that was passed earlier under Section



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143(3) of the Income Tax Act, 1961, there is no discussion on these aspects. There was no discussion and no formation of opinion by the Assessing Officer.

73. The amounts that were borrowed from these above mentioned four entities and others were invested in the following two entities, which are closely associated with the petitioner and are petitioner's sister concerns. Details of the investment are as below:-

Particulars	Opening Balance	Amount invested(Rs.)	Amount withdrawn	Closing Balance(Rs.)
M/s.Dinram Logistics Services LLP	-	2,48,00,47,000	-	2,48,00,47,000
M/s.DRSR Advisory Services	-	40,50,47,000	-	40,50,47,000
Total		2,88,50,94,000		2,88,50,94,000

74. In the books of accounts, there are indication that the petitioner has also received certain amounts from these two entities. From **M/s.Dinram Logistics Services LLP**, the petitioner has received a sum of **Rs.2,30,000/-** and from **M/s.DRSR Advisory Services**, the petitioner has



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received a sum of **Rs.1,15,000/-**.

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75. The petitioner has apparently incurred a whopping sum of **Rs.6,98,00,000/-** towards processing charges and a further sum of **Rs.35,73,645/-** towards legal expenses in connection with the issuance of the aforesaid Non-Convertible Debentures the four entities. Thus, in all a sum of **Rs.7,33,73,645/- (Rs.6,98,00,000/- + Rs.35,73,645/-)** was written off as expenses incurred and by the petitioner in its book of account and thereby reduced the profit.

76. In the Profit and Loss Account filed by the petitioner, the petitioner has declared a total loss of **Rs.7,27,25,946/-** and loss after tax for the period (VI-VII) as **Rs.49,526,369/-**.

77. In the return filed by the petitioner, the petitioner has declared a loss of **Rs.4,95,26,396/-**, though in the returns that was filed by the petitioner under Section 139 of the Income Tax Act, 1961 on 13.10.2017,



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the petitioner has declared a loss of **Rs.7,27,25,946/-**.

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78. The reading of the profit and loss account filed by the petitioner indicates the following:

Borrowings (long term) (short term)	Rs.322,35,00,000 *
Deployment + Expenses +Legal Expenses	Rs.314,85,31,645 #
Balance	Rs.08,29,68,355
Current liability	Rs. 6,28,11,914

a. [***Rs.3,22,35,00,000**=294,00,00,000+ Rs.28,00,00,000 +
35,00,000]

b. [**#Rs.3,14,85,31,645**=Rs.6,98,00,000 + 35,73,645 +
2,88,50,94,000]

79. The Department has sought to reopen the assessment on the ground that the amounts that were given as loan to **M/s.Dinram Logistics Services LLP, M/s.DRSR Advisory Services** and the expenses incurred for a sum of Rs.3,29,68,73,645/- are to be taxed, which had escaped assessment at the time of Assessment made on **27.12.2019** under Section



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143(3) of the Income Tax Act, 1961.

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80. The above Assessment was completed after a limited scrutiny under Computer Aided Scrutiny Selection (CASS) on **27.12.2019** although all the information's called for were furnished by the petitioner. However, with effect from **01.04.2021**, the ecosphere for re-assessment under the provisions of the Income Tax Act, 1961 has changed drastically. There is a paradigm shift for reopening the assessment. Section 147 of the Income Tax Act, 1961, is the statutory mechanism for bringing "**income escaping assessment**" of an assessee. It is different from how it read before 01.04.2021.

81. Section 147 of the Income Tax Act, 1961, has been made short and crisp. It read as under :-

1 [147. Income escaping assessment.—If the 2
[Assessing Officer] 3 [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



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allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

82. The phrase “***an assessing officer has reason to believe that***” as in un-amended Section 147, has been deleted in the amended Section 147 of the Income Tax Act, 1961 with effect from 01.04.2021. The pronoun “***he***” in un-amended Section 147 has been replaced with proper noun, “***Assessing Officer***” in the amended Section.

83. Similarly, the expression “***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***” has also been deleted in the amended Section 147 of the Income Tax Act, 1961. However, this deletion has been compensated and in the included in Explanation to amended Section 147 of the Income Tax Act, 1961. Thus, if Section 148A is validly invoked, any income which “has escaped assessment” subsequent to issue of notice under Section 148A(b) of the Income Tax Act, 1961 can be assessed to tax subsequent to issue of notice under Section 148A(b) of the Income Tax Act, 1961



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84. Similarly, the phrase starting from “*as the case may be, for the assessable year concerned*” as in old Section 147 has been deleted in the amended Section.

85. With effect from **01.04.2021**, a sea change has been made under amended Section 149(1) of the Income Tax Act, 1961. A notice for re-assessment can be issued within three years from the end of the relevant Assessment Year under Section 148 of the Income Tax Act, 1961, unless the situation contemplated in sub-clause (b) to Section 149(1) of the Income Tax Act, 1961, are attracted.

86. As per the first proviso to Section 149(1) of the Income Tax Act, 1961, as amended with effect from **01.04.2021** makes it clear that whether under the situation contemplated under sub-clause (a) or sub-clause (b) to Section 149(1) of the Income Tax Act, 1961, a notice under Section 148 of the Income Tax Act, 1961 cannot be issued for the relevant Assessment Year beginning **on or before 1st day of April, 2021**, if such a notice could not have been issued at that time under Section 148 or



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Section 153A or 153C of the Income Tax Act, 1961, on account of being it being beyond the time limit specified under the provisions of sub-clause (b) to Section 149(1) or Section 153A or Section 153C of the Income Tax Act, as the case may be, as they stood immediately before the commencement of the Finance Act, 2021.

87. Therefore, in the light of the above facts and law, the issue for consideration is whether the respondent was justified in issuing notice dated **23.02.2024** and a second notice dated **11.03.2024** under Section 148A(b) of the Income Tax Act, 1961, for re-opening the assessment for the **Assessment Year 2017-2018**, which has culminated and the Impugned Order dated **26.03.2024** under Section 148A(d) of the Income Tax Act, 1961 and in the impugned notice dated **26.03.2024** under Section 148 of the Income Tax Act, 1961?

88. The petitioner has relied on the decisions of the Courts rendered in the context of Section 148 of the Income Tax Act, 1961, as it stood prior to **01.04.2021**. Under the old regime, the law was well settled. Re-opening of the assessment under the amended Section 148 of the Income Tax Act, 1961 was circumscribed and could not issued for change



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of opinion or where there was true and full disclosure of information for the period beyond four years notwithstanding Explanation 1 to Section 147 of the Income Tax Act, 1961, as it stood prior to 01.04.2021.

89. However, Section 148 of the Income Tax Act, 1961, has also been amended with effect from **01.04.2021**. Amendment to Section 148 of the Income Tax Act, 1961, accompanied insertion of Section 148A and amendments to Sections 147, 149 and 151 of the Income Tax Act, 1961.

90. A notice under Section 148 of the Income Tax Act, 1961 is subject to the provisions of Section 148A.

91. Section 148 of the Income Tax Act, 1961 before and after amendment reads as under:-

<i>Section extracts from old law (prior to Finance Act 2021)</i>	<i>Section extracts from New law (Post Finance Act, 2021)</i>
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<i>148. Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year in the prescribed form and verified in the presented manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall so far as may be apply accordingly as if such return were a return required to be furnished under Section 139.</i>	<i>148. Before making the assessment, reassessment or recomputation under section 147 and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required under clause (d) of Section 148A requiring him to furnish within a period of three months from the end of the month in which such notice is issued, or such further period as may be allowed by the Assessing Officer on the basis of an application made in this regard by the assessee, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall so far as may be apply accordingly as if such return were a return required to be furnished under Section 139.</i>
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92. There are further restrictions in these provisions to Section 148 of the Income Tax Act, 1961 as amended with effect from 01.04.2021. It reads as under:-



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<i>Provided that no notice under this section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped section assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice;</i>	<i>Provided further that no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of section 148A to the effect that it is a fit case to issue a notice under this section</i>	<i>Provided also that any return of income, required to be furnished by an assessee under this section and furnished beyond the period allowed shall not be deemed to be a return under section 139.</i>
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93. Explanation which interplay with amended Section 148 of the Income Tax Act, 1961 read as under:-



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Explanation-1	Explanation-2	Explanation-3
For the purposes of this section and section 148A, the information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment means,- (i) any information in the case of the assessee for the relevant assessment year in accordance with the risk management strategy formulated by the Board from time to time; or (ii) any audit objection to the effect that the assessment in the case of the assessee for the relevant assessment year has not been made in accordance with the provisions of this Act; or (iii) any information received under an agreement referred to in section 90 or section 90A of the Act;	For the purposes of this section, where,- (i) a search is initiated under section 132 or books of account, other documents or any assets are requisitioned under section 132A, on or after the 1st day of April, 2021, in the case of the assessee; or (ii) a survey is conducted under section 133A, other than under sub-section (2A) of that section, on or after the 1st day of April, 2021, in the case of the assessee, or (iii) the Assessing Officer is satisfied, with the prior approval of the Principal Commissioner or Commissioner, that any money, bullion, jewellery or other valuable article or thing, seized or requisitioned under section 132 or section 132A in case of any other person on or after the 1st day of April,	Explanation 3. For the purposes of this section, specified authority means the specified authority referred to in section 151.



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94. Under the new regime with effect from **01.04.2021**, before making an assessment, reassessment or re-computation under Section 147 the Assessing Officer has to serve on the assessee a notice, along with a copy of the order passed, if required under clause (d) of Section 148A requiring him to furnish within a period of three months from the end of the month in which such notice is issued, or such further period as may be allowed by the Assessing Officer on the basis of an application made in this regard by the assessee, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed and the provisions of this Act shall so far as may be apply accordingly as if such return were a return required to be furnished under Section 139.

95. The impugned notice dated **26.03.2024** issued under Section 148 of the Income Tax Act, 1961, could have been issued only for the



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purpose of bringing income escaping assessment as per Section 147 of the Income Tax Act, 1961.

96. As per the amended Section 148 of the Income Tax Act, 1961, before making the assessment, reassessment or re-computation under section 147, and subject to the provisions of section 148A, the Assessing Officer shall serve on the assessee a notice, along with a copy of the order passed, if required, under clause (d) of Section 148A, requiring him to furnish within a period of three months from the end of the month in which such notice is issued, or such further period as may be allowed by the Assessing Officer on the basis of an application made in this regard by the assessee, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139.



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97. As per first proviso to Section 148 of the Income Tax Act, 1961 as amended, no notice under this Section shall be issued unless there is information with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment in the case of the assessee for the relevant assessment year and the Assessing Officer has obtained prior approval of the specified authority to issue such notice. Thus, if information is available with the Assessing Officer which suggests that the income chargeable to tax has escaped assessment after obtaining obtained prior approval of the specified authority to issue such notice.

98. As per second proviso, no such approval shall be required where the Assessing Officer, with the prior approval of the specified authority, has passed an order under clause (d) of Section 148A to the effect that it is a fit case to issue a notice under this Section.

99. Thus, if an order under clause (d) of Section 148A of the Income Tax Act, 1961 has been passed with the prior approval of the specified authority also no such approval under the first proviso shall be required for issuing notice under Section 148 of the Income Tax Act,



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100. As per third proviso, any return of income, required to be furnished by an assessee under this section and furnished beyond the period allowed shall not be deemed to be a return under Section 139.

101. Thus, a notice issued under Section 148 of the Income Tax Act, 1961, has to precede an enquiry after an opportunity of being heard and an opportunity of reply under Section 148A of the Income Tax Act, 1961. The notice under Section 148 also has to satisfy the time limit under Section 149 of the Income Tax Act, 1961.

102. As per Section 151 of the Income Tax Act, 1961, before issuing the notice both under Sections 148 and 148A of the Income Tax Act, 1961, sanction of the specified authority also has to be obtained. Section 151 of the Income Tax Act, 1961, as amended contemplates sanction of the specified authority . It reads as under: -

“Sanction for issue of notice:-.

151. Specified authority for the purposes of section 148 and section 148A shall be,-



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(i) <i>Principal Commissioner or Principal Director or Commissioner or Director, if three years or less than three years have elapsed from the end of the relevant assessment year;</i>	(ii) <i>Principal Chief Commissioner or Principal Director General, if more than three years have elapsed from the end of the relevant assessment year:</i>
<i>Provided that the period of three years for the purposes of clause (1) shall be computed after taking into account the period of limitation as excluded by the third or fourth or fifth provisos or extended by the sixth proviso to sub-section (1) of section 149.”</i>	

103. In ***Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited*** reported in **(2010) 320 ITR 561**, the Hon'ble Supreme Court after examining the changes to Section 147 of the Income Tax Act, 1961 observed as under:

*“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 fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in [section 147](#) of the Act [with effect from 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*



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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 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. 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 hereinbelow 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



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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."

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

104. The law that was settled by the Courts Hon'ble Supreme Court in the context of old Section 147, in ***Commissioner of Income Tax, Delhi Vs. Kelvinator of India Limited*** reported in ***(2010) 320 ITR 561*** was in the context of old Section 147 prior to **01.04.1989**. After the amending Act, it reads as under:-

After enactment of Direct Tax Laws (Amendment) Act, 1987 ie., prior to 01.04.1989	After amending the act, 1989
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"147. Income escaping assessment.-- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in Sections 148 to 153 referred to as the relevant assessment year)."	147. Income escaping assessment.-- If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year)."
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105. The decision of the Division Bench of the Bombay High Court in ***Shrikant Phulchand Bhakkad Vs. Joint Commissioner of Income Tax*** reported in ***(2022) 446 ITR 250 (Bombay)***, has dealt with the scrutiny assessment under CASS for limited purpose.



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106. In para 60 of the said decision, it has been observed as under:

“60. In the facts of that case, this Court found that the petitioner had filed detailed information asked for by the assessing officer U/Sec. 142(1) and 143(2) of the [I. T. Act](#) and had participated in the assessment proceedings. This having been done, it was not open for the assessee to now contend that this Court should exercise its extra-ordinary jurisdiction and prohibit the authorities from proceeding further with the impugned notice. This Court accordingly did not interfere with the notice U/ [Sec. 148](#) of the I. T. Act while exercising extra-ordinary jurisdiction under [Article 226](#) of the Constitution of India and to 34 wp 14336.21 prohibit the authorities from proceeding further in the matter. In our view principles [laid down by](#) this Court in a case of [Chhagan Chandrakant Bhujbal Vs. Income Tax Officer](#) (supra) apply to the facts of this case.”

107. The said decision was rendered in the context of notice issued on 31.03.2021 under Section 148 of the Income Tax Act, 1961. Therefore, the said decision is of no relevance.

108. Similarly, the decision of the Full Bench of the Delhi High Court in ***Commissioner of Income Tax – VI, New Delhi Vs. Usha International Limited*** reported in ***(2012) 348 ITR 485(Delhi)*** is also relevant for the decision under the old regime.



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109. The decisions cited by the learned Senior Counsel for the petitioner rendered in the context of old regime are still relevant and therefore, they cannot be ignored as there has to be reasoned to believe that any tax has escaped assessment for any assessment year.

110. Unless, fresh and tangible materials were available with the Assessing Officer as is contemplated under Explanations 1, 2 & 3 to Section 148 of the Income Tax Act, 1961 reopening of the complete assessment cannot be allowed for the period which would have been covered by the old provisions, if there was no amendment. The test in **Kelvinator of India Ltd** *supra* cannot be ignored as the language used is still the same in the amended in the first proviso to Section 149(1) of the Income Tax Act, 1961, the test in **Kelvinator of India Ltd** *supra* is both pristine and still contemporary in the context of amended provisions of Income Tax Act, 1961 with effect from 01.04.2021.

111. The Division Bench of the Bombay High Court, in **Siemens Financial Services (P). Ltd., Vs. Deputy Commissioner of Income Tax** reported in **(2023) 457 ITR 647 (Bombay)**, reiterated the principles of law



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that were applicable to the provisions of the Income Tax Act, 1961 after

1989 amendment and for the period immediately prior to 01.04.2021. Para

36 to 39 and 41 from the said decision reads as under:

36. *We would agree with the submissions of Mr. Pardiwalla that if change of opinion concept is given a go by, that would result in giving arbitrary powers to the Assessing Officer to reopen the assessments. It would in effect be giving power to review which he does not possess. The Assessing Officer has only power to reassess not to review. If the concept of change of opinion is removed as contended on behalf of the Revenue, then in the garb of re-opening the assessment, review would take place. The concept of change of opinion is an in-built test to check abuse of power by the Assessing Officer. As held in Dr. Mathew Cherian (Supra), whether under old or new regime of reassessment, it is settled position that the issues decided categorically should not be revisited in the guise of reassessment. That would include issues where query have been raised during the assessment and query have been answered and accepted by the Assessing Officer while passing the assessment order. As held in Aroni Commercial (supra) even if assessment order has not specifically dealt with that issue, once the query is raised it is deemed to have been considered and the explanation accepted by the Assessing officer. It is not necessary that an assessment order should contain reference and/or discussion to disclose his satisfaction in respect of the query raised.*

The Division Bench of this court in Aroni Commercial Ltd. (supra) held it is not necessary that the assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. Paragraph 14 of Aroni Commercial Ltd. (supra) read as under:



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"14. We are of the view that once a query is raised during the assessment proceedings and the assessee has replied to it, it follows that the query raised was a subject of consideration of the Assessing Officer while completing the assessment. It is not necessary that an assessment order should contain reference and/or discussion to disclose its satisfaction in respect of the query raised. If an Assessing Officer has to record the consideration bestowed by him on all issues raised by him during the assessment proceeding even where he is satisfied then it would be impossible for the Assessing Officer to complete all the assessments which are required to be scrutinized by him under Section 143(3) of the Act. Moreover, one must not forget that the manner in which an assessment order is to be drafted is the sole domain of the Assessing Officer and it is not open to an assessee to insist that the assessment order must record all the questions raised and the satisfaction in respect thereof of the Assessing Officer. The only requirement is that the Assessing Officer ought to have considered the objection now raised in the grounds for issuing notice under Section 148 of the Act, during the original assessment proceedings. There can be no doubt in the present facts as evidenced by a letter dated 8 September 2012 the very issue of taxability of sale of shares under the head capital gain or the head profits and gains from business was a subject matter of consideration by the Assessing Officer during the original



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assessment proceedings leading to an order dated 12 October 2010. It would therefore, follow that the reopening of the assessment by impugned notice dated 28 March 2013 is merely on the basis of change of opinion of the Assessing Officer from that held earlier during the course of assessment proceeding leading to the order dated 12 October 2010. This change of opinion does not constitute justification and/or reasons to believe that income chargeable to tax has escaped assessment."

37. *The Assessing Officer does not have any power to review his own assessment when during the original assessment petitioner provided all the relevant information which was considered by him before passing the assessment order under section 143(3) of the Act dated 23rd December 2018. Petitioner had debited an amount of Rs. 6,41,87,931/- on account of software consumables in the profit and loss account and a detailed breakup of the said expenses were submitted before the Assessing Officer during the course of assessment proceedings vide a letter dated 6th December 2018. It is settled law that proceedings under section 148 cannot be initiated to review the earlier stand adopted by the Assessing Officer. The Assessing Officer cannot initiate reassessment proceedings to have a relook at the documents that were filed and considered by him in the original assessment proceedings as the power to reassess cannot be exercised to review an assessment. In petitioner's case the Assessing Officer having allowed the amount of software consumables as a revenue expenditure now seeks to treat the same as capital expenditure which is a clear change of opinion. Various judicial precedents have held that reassessment proceedings initiated on the basis of*



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a mere change of opinion are invalid and without jurisdiction.

38. *The Apex Court in Kelvinator of India Ltd.(Supra) emphasised on the difference between a power to review and the power to reassess. The Apex Court held that the Assessing Officer has no power to review but has only the power to reassess. The concept of 'change of opinion' must be treated as an in-built test to check abuse of power by the Assessing Officer. The relevant extract of the judgement is reproduced as under:-*

".....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 reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on 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 1-4-1989, Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted



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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....."

39.The Delhi High Court in Seema Gupta v. ITO MANU/DE/4145/2022 : (2022) 288 Taxman 519 (Del) held that the order under section 148A(d) and notice under section 148 of the Act should be set aside when the reassessment was initiated on a change of opinion where the same was discussed and verified by the Assessing Officer at the time of original assessment proceedings.

.....

41.In the circumstances, we make the Rule absolute and allow the petition for the following reasons:

(a) that approval for issuance of notice under Section 148A(d) of the Act has not been properly obtained and hence the order passed thereunder and consequent notice issued under Section 148 of the Act have to be quashed and set aside. The sanction ought to have been granted under Section 151(ii) and not under Section 151(i) of the Act.

(b) The notice to reopen has also been issued on the basis of change of opinion which is not permissible.

42. Since we have disposed the petition on these grounds, we have not considered the other grounds which can be considered in some other matter at the appropriate stage."



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112. This view has been reiterated in ***Hexaware Technologies Ltd.,***

Vs. Assistant Commissioner of Income Tax reported in ***(2024) 162 taxmann.com 225 (Bombay).***

113. Since there are no fresh and tangible material were available for the Assessing Officer to form an opinion that income escaped assessment, it has to be held attempt is to review the assessment completed under Section 143(3) of the Income Tax Act, 1961. Therefore, the impugned proceedings are held without jurisdiction and are liable to be quashed as prayed.

114. This writ petition stands allowed with the above observation.

No costs. Consequently, connected miscellaneous petitions are closed.

23.08.2024

Index: Yes / No

Neutral Citation: Yes / No

Speaking Order / Non-Speaking Order

mm/kkd

To:

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C.SARAVANAN, J.

mm/kkd

Pre-Delivery order made in
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23.08.2024