



* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Judgment reserved on: 01 April 2024
Judgment pronounced on: 01 May 2024

+ **W.P.(C) 11908/2018**

**BDR BUILDERS AND DEVELOPERS
PRIVATE LIMITED**

.....Petitioner

Through: **Mr. Salil Aggarwal, Sr. Adv.**
with Mr.Mahir Aggarwal and
Mr.Umashankar,Advocates.

versus

ASSISTANT COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE -15, NEW DELHI Respondent

Through: **Mr. Shlok Chandra, Sr. Standing**
Counsel along with Ms. Priya
Sarkar, Ms. Madhavi Shukla, Jr.
Standing Counsels and Mr.
Ujjawal Jain, Adv.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR
KAURAV

J U D G M E N T

PURUSHAINDRA KUMAR KAURAV, J.

1. The present writ petition has been filed at the instance of the assessee challenging the notice dated 31 March 2018 issued under Section 148 and subsequent order dated 25 September 2018 under

Section 148A(d) of the Income Tax Act, 1961 ["Act"], disposing of the

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petitioner's objections against the impugned notice for Assessment Year ["AY"] 2011-12.

2. At the threshold, it appears from record that the petitioner is a private limited company engaged in real estate business. With effect from 01 April 2012 i.e., from AY 2012-13, various companies namely, Verma Buildtech and Promoters Private Limited, Rishi Promoters Private Limited, Renu Builders and Promoters Private Limited and Nishit Developers Private Limited along with eight other companies got amalgamated with the petitioner.

3. On 13 September 2011, the petitioner filed its original Income Tax Return ["ITR"] declaring an income of ₹6,23,974/-. Subsequently, a revised ITR was filed by the petitioner for the concerned AY on 5 June 2012 declaring the same income.

4. Thereafter, the case of the petitioner was selected for scrutiny and pursuant to the same, an assessment order was passed on 10 June 2013, assessing the income of the petitioner to the tune of ₹6,38,150/- under the normal provisions of the Act and ₹64,80,409/- under Section 115 JB of the Act. On 2/3 January 2014, a survey under Section 133A of the Act was conducted at the professional office of Mr. Rajesh Gupta, who happened to be one of the Directors of the petitioner. The said survey was converted into a search and a notice dated 22 April 2015 under Section 153A of the Act was issued to the petitioner for the concerned AY.

5. Consequently, another assessment order dated 30 March 2016 was passed under Section 153A read with Section 143(3) of the Act for

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the concerned AY, whereby, no addition was made to the earlier assessed income of the petitioner.

6. On 2 April 2018, the petitioner received the impugned notice under Section 148 of the Act to reassess the income. The petitioner filed a letter dated 4 April 2018 requesting the respondent to supply a copy of the reasons recorded along with material on the basis of which proceedings were initiated.

7. The respondent, thus, provided a copy of the reasons recorded stating that the reopening is sought on the basis of the information received from the Investigation Wing, Delhi pertaining to a person namely, Mr. Manoj Sethi, who had deposited an enormous amount of cash in his bank account but failed to furnish the source of such deposits. It is the case of the respondent that Mr. Manoj Sethi had various transactions with the petitioner but he was unable to furnish sufficient evidence in respect of the identification, creditworthiness and genuineness of the transactions.

8. It is stated that the petitioner had a total transaction of ₹9,50,00,000/- with Mr. Manoj Sethi, which according to the Assessing Officer ["AO"] had escaped assessment on account of failure on the part of the petitioner to fully and truly disclose all material facts in the assessment proceedings.

9. Mr. Salil Aggarwal, learned counsel appearing on behalf of the petitioner submitted that the respondent has erroneously assumed jurisdiction under Section 147 of the Act on the wrong premise that the petitioner had entered into any cash transaction with Mr. Manoj Sethi.

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According to him, Mr. Manoj Sethi has no relation with the petitioner as he is neither a Director nor a shareholder of the petitioner and thus, there is no reason to draw any adverse inference regarding such cash deposits in the bank account of Mr. Manoj Sethi. He also submitted that the transactions pertaining to the loans advanced by the petitioner and four other merged companies to Mr. Manoj Sethi were carried out through account payee cheques and the same has already been repaid by him.

10. Learned counsel further submitted that the petitioner had duly supplied copies of bank account statements during the assessment proceedings and therefore, there is no reason to conclude that the petitioner had failed to disclose truly and fully all material facts necessary for assessment. It is, therefore, urged by the respondents that the instant reassessment proceedings are only based upon the change of opinion of the AO as the assessment *qua* the petitioner had already been carried out on at least two occasions at an earlier point in time.

11. While drawing our attention to the reasons recorded for reopening the assessment, he contended that the respondent had mistakenly stated that there exists no assessment under Section 143(3) of the Act.

12. He has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Calcutta Discount Co.Ltd. v. ITO** [1960 SCC OnLine SC 10] to submit that the law does not put the onus on the assessee to state the conclusion which can be reasonably drawn from

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the primary facts, rather it is the AO who has to conduct such an exercise and apply the law determining the liability of the assessee.

13. *Per contra*, Mr. Shlok Chandra, learned counsel for the respondent vehemently opposed the submissions advanced by the learned counsel for the petitioner. He submitted that the petitioner had failed to make a true and full disclosure regarding impugned entries of ₹9,50,00,000/- with Mr. Manoj Sethi in the earlier assessment proceedings and therefore, the present proceedings of reassessment does not suffer from any infirmity. According to him, the assertion made by the petitioner that the said transaction was disclosed in the earlier proceedings lacks merit inasmuch as earlier there was no reference to the cash transaction with the concerned person.

14. Learned counsel for the respondent contended that as per the mandate of Section 147 of the Act, the AO is only required to mention the reasons for the existence of tangible material which could lead to an inference of escapement of income. While placing reliance on the decision of the Hon'ble Supreme Court in **Raymond Woolen Mills Limited v. ITO** [(2008) 14 SCC 218], he submitted that the sufficiency or correctness of the material is not a consideration at the stage of reopening the assessment, rather what needs to be determined is whether there was a *prima facie* case on which the AO could have reopened the assessment.

15. He further contended that in the absence of any specific query being raised by the AO and also non-disclosure by the petitioner with respect to cash transactions pertaining to Mr. Manoj Sethi, there was no

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occasion for the AO to form an opinion. He, therefore, submitted that the instant reopening of the assessment cannot be said to be merely based upon the change of opinion.

16. Learned counsel also submitted that since the AO had initiated proceedings on the basis of fresh and tangible material received from Investigation Wing, Delhi, it has strictly acted in accordance with the tests laid down by the Hon'ble Supreme Court in the case of **CIT v. Kelvinator of India Ltd.** [2010 SCC OnLine SC 195].

17. We have heard the learned counsels appearing on behalf of the parties and perused the record.

18. The primary issue which arises in the present petition pertains to whether the AO has correctly assumed jurisdiction under Section 147 of the Act on the ground of lack of full and true disclosure on the part of the assessee during the original proceedings. It is, therefore, beneficial to first take a glance at the mandate of Section 147 of the Act, which we had an occasion to deal with in our order dated 18 March 2024 in the case titled as **S.B. Packagings Ltd v. Asstt./Dy. Commissioner of Income Tax, Circle 22(2), New Delhi & Ors.** [W.P.(C) 13743/2018]. The relevant paragraphs of the said decision read as under:-

“18. Before advertng to the merits of the case, we find it appropriate to briefly traverse through Section 147 of the Act to understand the nature, scope and intent behind the enactment of the said provision. For the sake of clarity, the relevant portion of Section 147 of the Act, as it stood prior to substitution by Act No.13 of 2021, is culled out as under:-

“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

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

Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

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

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

Explanation 3.—For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148.

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19. It is seen that the aforesaid provision i.e., Section 147 of the Act empowers the AO to assess or reassess any income which has escaped assessment. However, the said authority is circumscribed with a predominant condition that the AO must be in possession of reasons to believe that any income chargeable to tax has escaped assessment for the relevant AY. Further, the first proviso to Section 147 of the Act stipulates that where the assessment has been done under Section 143(3) or Section 147 of the Act, no action shall be taken after the expiry of four years unless there exists inter alia, a failure of the assessee to fully and truly disclose all the necessary facts necessary for assessment of the concerned AY."

20. Thus, the respondents have laid down their challenge to the relief sought by the petitioner on the ground of lack of true and full disclosure, more specifically on the latter part, during the original assessment proceedings. **In order to ascertain the meaning of full disclosure in the context of Section 147 of the Act, it is noteworthy to refer to Explanation 1 to the said provision which indicates that the production of books and accounts before the AO would not necessarily amount to disclosure within the meaning of the first proviso.**

[Emphasis supplied]

19. The meaning of the phrase 'true and full disclosure' is succinctly encapsulated by the Hon'ble Supreme Court in the decision rendered in the case of **M/S Mangalam Publications, Kottayam v. CIT, Kottayam** [2024 SCC OnLine SC 62], wherein, the Court took a view that mere production of books of accounts or other material evidence that could ordinarily be discovered by the AO cannot be said to be a true and full disclosure. The relevant paragraph of the said decision is reproduced as under:-

"31. At this stage, we deem it necessary to expound on the meaning of disclosure. As per the P. Ramanatha Aiyar, Advanced Law Lexicon, Volume 2, Edition 6, 'to disclose' is to expose to view or knowledge, anything which before was secret, hidden or concealed. The word 'disclosure' means to disclose, reveal, unravel or bring to

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notice, vide *CIT Vs. Bimal Kumar Damani*, (2003) 261 ITR 87 (Cal). The word 'true' qualifies a fact or averment as correct, exact, actual, genuine or honest. The word 'full' means complete. True disclosure of concealed income must relate to the assessee concerned. Full disclosure, in the context of financial documents, means that all material or significant information should be disclosed. Therefore, the meaning of 'full and true disclosure' is the voluntary filing of a return of income that the assessee earnestly believes to be true. Production of books of accounts or other material evidence that could ordinarily be discovered by the assessing officer does not amount to a true and full disclosure."

[Emphasis supplied]

20. While recognizing the duty cast upon the assessee to disclose fully and truly all material facts for its assessment, this Court in the case of **Honda Siel Power Products Ltd. v. Deputy CIT** [2011 SCC OnLine Del 804] has held as under:-

"12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse effect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of the assessee. The latter confers jurisdiction to reopen the assessment."

[Emphasis supplied]

21. The decision relied upon by the petitioner in *Calcutta Discount Company Ltd. (supra)* also explicitly burdens the assessee with a responsibility to disclose fully and truly all the material facts. Thus, the ancillary question which arises at this juncture is what would constitute material facts for exercising jurisdiction under Section 147 of the Act.

To answer this pertinent query, reference can be made to the decision in



Honda Siel Power Products Ltd. (supra), as discussed above, which underscores that the material facts are those facts which if taken into account would adversely impact the assessee by assessing a higher income as compared to the original disclosure.

22. Having examined the scope and extent of true and full disclosure as per Section 147 of the Act, we shall now proceed to examine the factual scenario in the present petition. The reasons recorded by the respondent to reopen the assessment proceedings are reproduced as under:-

“1. Reasons for reopening of the assessment in case of M/s BDR Builders and Developers Pvt. Ltd:- The assessee company filed its return of income u/s 139 on 13.09.2011 declaring a total income of Rs.6,23,974/- and the same was processed u/s 143(1) of the I.T. Act, 1961 on 21.02.2012. As per ITD, there is no 143(3) assessment recorded.

2. Brief details of information collected/received by the AO:- Information received from investigation wing, Delhi vide letter F.No. DDIT (Inv.)/Unit- 1 (1) Manoj Sethi 12017-1 8/8071793/797/8001802 received on 23.03.2018 & 27.03.2018 stating that Mr. Manoj Sethi having bank account no.9100 10032209647 maintained with Axis Bank Lajpat Nagar-11, New Delhi, deposited large amount of cash in the bank account and has not furnished the source of such cash deposits Mr. Manoj Sethi had various transactions with the above assessee.

3. Analysis of information collected/received:- On perusal of the debit and credit entries of Mr. Manoj Sethi account, the name of the assessee M/s BDR Builders and Developers Pvt. Ltd. is also mentioned. The details of transactions are stated as under:-

SI NO.	Entity name	Received	Paid
1.	M/s BDR Builders and Developers Pvt. Ltd.	25,00,000	25,00,000

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2.	M/s Verma Buildtech Pvt. Ltd.	1,00,00,000	
3.	M/s Rishi Promoters Pvt. Ltd.	1,00,00,000	1,00,00,000
4.	M/s Renu Builders and Promoters Pvt. Ltd.	4,00,00,000	
5.	M/s Nishit Developers Pvt. Ltd.	75,00,000	1,25,00,000

4. Enquiries made by the AO as sequel to information collected/received: Shri Manoj Sethi during the course of investigation proceedings could not explain the source of deposits, purpose of transfer of funds, nature of transactions and identity of the persons, genuineness of the transaction and credit worthiness of persons from whom fund received.

5. Findings of the AO: M/s Verma Buildtech Pvt Ltd., M/s Rishi Promoters Pvt. Ltd. M/s Renu Builders and Promoters Pvt. Ltd. and M/s Nishit Developers Pvt. Ltd. has merged with MIS BDR Builders and Developers Pvt. Ltd. pursuant to Delhi High Court order dated 20.02.2018 (copy enclosed).

6. Basis of forming reason to believe and details of escapement of income: Shri Manoj Sethi could not furnish evidences in respect of identification creditworthiness and genuineness of the transactions in respect of entries in bank account. The assessee had total transaction of Rs.9,50,00,000/- which has escaped assessment of income.

7. Findings of the AO on true and full disclosure of the material facts necessary for assessment under Proviso to Section 147: Based on above, I have reason to believe that assessee has failed to make true and full disclosure of the material facts and income amounting to Rs.9,50,00,000/- has escaped assessment.

8. Applicability of the provisions of section 147/151 of the facts of the case:

In this case a return of income was filed u/s 139 for the year under consideration and was processed u/s 143(1) 21.02.2012, Since, 4 year from the end of the relevant year has expired in this case, the requirements to initiate proceeding u/s 147 of the Act are reason to believe that income for the year under consideration has escaped

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assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above (refer paragraphs 1-7), I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment/re-assessment proceedings and have noted that the assessee has not fully and truly disclosed the material facts necessary for his assessment for the year under consideration.

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for his assessment for the year under consideration hereby necessitating reopening u/s 147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P&L A/c and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above it is pertinent to mention here that even though the assessee has produced book of accounts, annual report, audited P&L A/c and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence accordingly attractive provisions of Explanation 1 of section 147 of the Act.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/re-assessment. This fact is corroborated from the contents of notices issued by the AO and order sheet entries recorded during the proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceedings and the same may be embedded in annual report, audited P&L A/c balance sheet and books of account in such a manner that it would require due diligence by the AO to extract this information. For aforesaid reasons, it is not a case of change of opinion by the AO. In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue u/s 148 has to be obtained from Principal Commissioner of Income Tax as per the provisions of section 151 of the Act which is being sent for approval.”

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23. It is thus seen that the debit and credit entries reflected in the form of a table above are the primary basis for proceeding with re-assessment. During the course of the hearing, the petitioner has undisputedly conceded that the said transactions have been carried out between the concerned parties mentioned therein. However, the petitioner contends that the said transactions are a part of the loan transactions between the petitioner including amalgamated companies and Mr. Manoj Sethi, which have been done *via* cheque/RTGS method of banking.

24. Further, the relevant extract of the letter dated 09 August 2018 sent by the petitioner to the respondent raising objections against the impugned notice and assumption of jurisdiction under Section 147 of the Act, particularly with respect to the cash transactions read as under:-

“iv) That there is no justification for drawing adverse inference against the assessee company and in reopening the case of the assessee company on the allegation of information received from Investigation Wing, Delhi in the case of Manoj Sethi who is alleged to have deposited large amount of cash in his own bank account is also alleged to have not furnished the source of such cash deposits. It is respectfully submitted, that it is an undisputed fact that Manoj Sethi has no relation to the assessee company as he is neither a director nor a shareholder of the assessee company and is also not related in any manner to the directors/shareholders of the assessee company. It is respectfully submitted that even if Manoj Sethi has made deposits of cash in his bank accounts, still no adverse inference regarding such cash deposits in the bank account of Manoj Sethi can be drawn against the assessee company.”

25. However, at this stage, we are not required to render definite findings regarding the alleged cash transactions which form the basis

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for reopening assessment and its correlation with the table provided by the petitioner at *Annexure-22*, which manifests transactions carried out through cheque/RTGS methods. However, the action of the Revenue cannot be said to be completely erroneous or without jurisdiction. In any case, we find it apposite to place reliance on the decision of this Court in **Techspan India P. Ltd. v. Income-tax Officer** [2006 SCC OnLine Del 1754], whereby, it was held that every attempt to bring to tax income that has escaped assessment cannot be thwarted by judicial intervention on an assumed change of opinion. The relevant paragraph of the said decision reads as under:-

“24. The other aspect regarding which I wish to strike a note of caution is that before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier concluded has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or perfunctory in nature, it may be difficult to attribute to the Assessing Officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax income that has escaped assessment cannot be aborted by judicial intervention on an assumed change of opinion even in cases where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings. There may be cases where the material is available with the Assessing Officer but the same is either ignored or escapes his attention while making the assessment. There can be no legal impediment in the reopening of assessment in such cases, nor can it be said that the reassessment is based only on a change of opinion. A Division Bench of this court of which I was a member had in Consolidated Photo and Finvest Ltd. v. Asst. CIT disposed of on January 17, 2006 [2006] 281 ITR 394, an occasion to deal with a somewhat similar situation. Relying upon the decisions of the Supreme Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 ; Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638 ; Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466 and ITO v. Lakhmani Mewal Das [1976] 103

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ITR 437 and the decisions of the High Court of Gujarat in Praful Chunilal Patel v. M. J. Makwana, Asst. CIT [1999] 236 ITR 832 and Gruh Finance Ltd. v. Joint CIT (Assessment) [2000] 243 ITR 482, this court observed (page 406) :

“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.”

[Emphasis supplied]

26. In the instant case, the petitioner has not been able to allude to any enquiry either expressly or indirectly conducted by the respondent in the earlier assessment proceedings *qua* the issue under consideration,

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which could suggest that the present proceedings are merely based upon a change of opinion. Thus, the AO cannot be said to have traversed beyond its mandate to assume jurisdiction under Section 147 of the Act.

27. In view of the foregoing, we do not find any merit in the arguments put forth by the petitioner and consequently, the petition stands dismissed.

28. These observations have been made only for the purpose of deciding the challenge which stands raised before us; they should not be construed to be an expression on the merits of the case or otherwise.

29. The parties are free to take all pleas and contentions in accordance with the law before the concerned authorities which shall be dealt with without being influenced by any of the observations made hereinabove.

30. Pending applications, if any, are also disposed of.

PURUSHAINDR KUMAR KAURAV, J.

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