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

Date of Decision: 28.11.2019

\+ W.P.(C) 13803/2018

BPTP LIMITED ..... Petitioner

Through: Mr. Piyush Kaushik, Advocate.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL)-III & ANR. ..... Respondents

Through: Ms. Vibhooti Malhotra, Senior Standing Counsel with Mr. Shailendera Singh, Advocate.

\+ W.P.(C) 13812/2018

BPTP LIMITED ..... Petitioner

Through: Mr. Piyush Kaushik, Advocate.

versus

PRINCIPAL COMMISSIONER OF INCOME TAX (CENTRAL)-III, NEW DELHI & ANR. ..... Respondents

Through: Ms. Vibhooti Malhotra, Senior Standing Counsel with Mr. Shailendera Singh, Advocate.

CORAM:
HON'BLE MR. JUSTICE VIPIN SANGHI
HON'BLE MR. JUSTICE SANJEEV NARULA

SANJEEV NARULA, J. (Oral):

1. The above noted writ petitions under Article 226 of the Constitution of India are directed against the respective notices dated 02.11.2018 issued

under Section 148 of the Income Tax Act for reopening of assessment for assessment years (hereinafter 'AY') 2012-13 [WPC No. 13812/2018] and AY 2013-14 [WPC No. 13803/2018] and all consequential proceedings arising there from.

2. The facts giving rise to the aforenoted petitions are nearly identical and common grounds of challenge have been urged by the Petitioner. It is therefore considered expedient to dispose of the petitions by way of a common order.

Brief Facts:

WPC No. 13812/2018

3. Briefly stated, the facts of the case are that the Petitioner is engaged in the business of real estate and earns income from sale of plots, sale of residential/commercial properties and interest income on FDRs etc. Return of Income (ROI) for AY 2012-13, declaring a total income of Rs. 157.35 crores was filed on 29.09.2012. On the same date, the ROI was revised in order to correct certain inadvertent errors and the total income remained unchanged at Rs.157.35 crores. The ROI was selected for scrutiny assessment under Section 143(3) of the Act. A comprehensive questionnaire was issued to the Assessee seeking certain information/clarification. The Assessee was required to submit *inter alia* the audited accounts; computation of income; details of inventories; purchase and sales; details of Tax Deducted at source (TDS) under various heads.

4. On 03.11.2014, Assessee submitted part details before the Assessing Officer(AO) and clarified that the income from sale of properties is recognized on the basis of percentage of completion method of accounting. Thereafter, on various dates, the remaining details as required by the AO were furnished.

5. The details of the cost charged to profit and loss account project wise, included Government dues as a prominent line item of cost. It comprised of External Development Charges (EDC) and other concurrent dues payable for development of land and other real estate activities of the Assessee. Inventory details, including inventory ledger were also furnished and the same also included EDC as a part of cost item. Besides, details of tax deducted at source (TDS) and deposits under various heads were also provided to the AO.

6. Thereafter, on 30.03.2015, the AO issued scrutiny assessment order under Section 143(3) of the Act for AY 2012-2013 and assessed the total income at Rs. 157.73 crores, after making certain additions to the returned income. Now, after an expiry of four years from the end of the relevant AY, AO has issued the impugned notice under Section 148 of the Act for re-opening of the assessment for AY 2012-13. In response thereto, Assessee filed its return in accordance with the ROI filed initially. On 30.11.2018, the AO provided reasons for re-opening dated 05.07.2018 along with the satisfaction note. Since, it did not record the satisfaction of the concerned authorities i.e. Joint Commissioner of Income Tax and Principal Commissioner of Income Tax, it was replaced with fresh reasons recorded on 21.08.2018 and accompanying

satisfaction note. The reasons for re-opening the assessment are primarily premised on the ground that the EDC as paid to Haryana Urban Development Authority (HUDA) were subject to TDS under Section 194 of the Act and in absence of TDS, amount would be subject to disallowance under Section 40(a)(ia) of the Act and as a result, income has escaped assessment.

7. On 04.12.2018, Assessee filed detailed objections before the AO *inter alia* stating that there has been no failure on its part to deduct TDS, since EDC charges are in the nature of statutory levy/ licence fee that are compulsorily required to be paid to HUDA for the purpose of land development and not require deduction of tax.

8. On 07.12.2018, the AO rejected Assessee's objections by way of a speaking order, impugned in the present petition.

WPC No. 13803/2018

9. Likewise, in respect of AY 2013-14, ROI was filed on 29.11.2013 declaring a total income of Rs. 85.31 crores under Section 115 JB (MAT) provisions of the Act. Assessee's ROI was selected for scrutiny assessment under Section 143(3). A questionnaire dated 18.06.2015 was issued seeking certain information/clarification. The Assessee responded to the same and furnished the requisite information. Revenue then issued another questionnaire on 27.10.2015 followed by yet another questionnaire on 15.01.2016. These were also responded by way of submissions dated

22.02.2016, endorsing project wise cost charged to profit and loss account, including Government dues as a prominent line item of cost, comprising of EDC and other Government dues in connection with development of land and other real estate activities of Assessee.

10. On 16.03.2016, the AO passed the scrutiny assessment order under Section 143(3) of the Act, and assessed the total income at profit, declared under MAT and a loss under normal provisions after making certain additions. Even in this case, after an expiry of four years from the end of relevant assessment year, the AO has issued notice under Section 148 for re-opening of the assessment year. Reasons recorded for re-opening the assessment along with satisfaction note, as provided to the aseesee are postulated on the same ground that the EDC paid to HUDA was subject to TDS under Section 194 of the Act. Assessee's detailed objections to the reopening have been rejected vide order dated 07.12.2018.

Submissions of the parties:

11. Mr. Piyush Kaushik, learned counsel appearing on behalf of the Petitioner argues that the reasons recorded for re-opening of the assessment are unsustainable in law as the assumption of jurisdiction is misconceived, which is apparent from the reasons so recorded. He argues that it is manifest from the reasons that the AO has proceeded on an erroneous basis, holding that EDC paid to HUDA were subject to TDS under Section 194 of the Act, a provision that is applicable to 'dividends'. The EDC cannot be treated at par with dividends and has been completely misunderstood by the AO. The

EDC charges are in the nature of statutory and compulsory levy, being a licence fee required to be paid to HUDA for the purposes of land development and is not subject to TDS under any provision of Income Tax Act much less Section 194, invoked by the AO.

12. He further argued that the incurring of EDC charges was disclosed as a part of inventory evaluation and cost in the audited accounts and was subjected to scrutiny assessment under Section 143(3) of the Act. Voluminous details with respect to TDS deduction and deposits were furnished during the course of original assessment proceedings under Section 143(3) of the Act and thus the assumption of jurisdiction after 4 years is wholly unsustainable, as it is founded on a change of opinion.

13. Ms. Vibhooti Malhotra and Mr. Shailendra Singh, learned senior standing counsels for the Revenue, on the other hand, have vehemently opposed the petition and have argued that the Court should not exercise its jurisdiction under Article 226 of the Constitution of India at the stage of initiation of action under Section 147 of the Act. It is argued that at this preliminary stage, only question that is relevant is whether there is any relevant material which is sufficient for a reasonable person to form a requisite belief that there is escapement of income by reason of failure on the part of the Assessee to make return of income under Section 139 of the Act or failure on the part of the Assessee to disclose material information truly and fully. There is efficacious statutory remedy under the Act available to the Assessee, in case it is aggrieved by the reassessment proceedings. In such an event Assessee would be free to pursue its remedy by filing an

appeal before the appellate authority, raising all issues relating to merits of the matter and the Court should refrain from exercising its writ jurisdiction. On merits, she argued that HUDA is not a local/statutory authority and the payments made towards EDC are towards 'rent', which income is subject to deduction of TDS. In support of her submissions, she relied upon the judgment of the Apex Court in the case of ***M/s New Okhla Industrial Development Authority Vs. CIT,*** **(2018) 406 ITR 209 SC** and also the judgment of High Court of Punjab and Haryana in ***Greater Mohali Area vs. Deputy Commissioner of Income Tax,*** **2018 SCC Online P&H 426.**

14. With respect to Petitioner's contention that reasons for reopening refer to a provision which is in applicable, it was argued that quoting of the wrong provision is immaterial, as long as the source of power exercised exists in law, and the action could be traced to the source available in law. By referring to the reasons for reopening, it was thoughtfully urged that the EDC payment would qualify as payment towards rent and as long as such a position is correct in law, notwithstanding the wrong provision quoted in the reasons, it would not *ipso facto* render the notice to be invalid. In support of this submission, reliance was placed upon the judgment of the Supreme Court in ***N. Mani vs Sangeetha Theatre and Ors*****.,2004 (12 SCC) 278**.

<u>Analysis and Conclusion:</u>

15. The recorded reasons and the manner in which the objections thereto, have been dealt with by the Revenue, forms the crux of the matter. It would therefore be apposite to reproduce the same in entirety. The recorded

reasons for AY 2012-13 are extracted hereunder:

"1. Reasons for reopening of the assessment

Assessment u/s 143(3) of the I. T. Act, 1961 was completed in this case on 30/03/2015-at total income of Rs. 157,73,04,000/-. Subsequently, it came to notice that EDC (External Development Charges) were paid to HUDA by the assessee without TDS. **EDC is received for use of urban development infrastructure known as EDW (External Development Work) done by HUDA on its own land. Since, EDC has income character, therefore, it should have been subjected to TDS by assesse.**

The provisions of non-deduction of tax u/ s 196 of the Income Tax Act, 1961 is applicable to the Government and to other authorities mentioned under the Section. Haryana Urban Development Authority (HUDA) is a development authority of State Government of Haryana and is a taxable entity under the Income Tax Act, 1961. The assesse has made the payments in the nature External Development Charges (EDC) to the HUDA and not to the Government. Hence, TDS provisions would be applicable on EDC payable by the assesse to HUDA.

2. Brief details of information collected/received by the AO

In case of assessee an enquiry was conducted by ADIT, Unit-IV, New Delhi and summons were issued on 29.07.2016 directing assesse to file details of EDC charges collected from customers and paid to the HUDA. In response, vide letter dated 21.01.2017, details of EDC charges collected and paid were filed by the assessee, for A.Y. 2012-13 (F.Y. 2011-12) as below:

Details of EDC/IDC paid for year 173,52,21,186/-

Details of Collection from Customers for EDC/IDC :35,69,51,865/-

EDC is covered by the provisions of section 194 of the Income Tax Act, 1961. The assesse has failed to deduct TDS on the payments made to the HUDA.

As per the provisions of section 40a(ia) of the Income Tax Act, 1961, any sum payable on which tax is deductible at source under chapter XVII-B but the same has not been deducted, is not deductible *while* computing the income chargeable to tax under the head profit and gains of business and profession. In this case tax has not been deducted on Rs. 173,52,21,186/- and therefore the same was wrongly claimed and allowed as expenses. In view of these facts the income to the tune of Rs. 173,52,21,186/- has been under assessed as per the provisions of sub-clause (i) to clause (c) to explanation-2 of section 147 of the Act.

3. Analysis of information collected/received

Assessee has paid of Rs.l73,52,21 ,186/- to HUDA without deducting TDS.

4. **Enquiries made by the AO as sequel to information collected or received.**

The information was gathered during enquiry by the office of the Asstt. Director of Income Tax (Inv.), Unit-IV, New Delhi and the file has been transferred to this office. The information regarding payment of EDC charges amounting to Rs. 173,52,21,186 *I*- was filed by the assesse during course of enquiry. Hence, the authenticity of the information cannot be doubted.

5. Findings of the AO.

In view of the detailed information received from Asstt. Director of Income Tax (Inv.), Unit-IV, New Delhi, the provisions of section 40a(ia) of the Income Tax Act, non-deduction of ·TDS on the amount paid to the HUDA has resulted in escapement of income to the tune of Rs. 173,52,21,186/- and therefore total income of the assessee needs be reassessed u/ s 14 7 of the Act.

6. Basis of forming reasons to believe and details of escapement of income.

Since the amount of Rs. 173,52,21,186/- paid to the HUDA without TDS is related to the assessee therefore, in view of the above facts, the assessee committed a default u/s 40(a)(ia) of the

Income Tax Act,1961 for the assessment year under consideration relevant to F.Y. 2011-12.

7. Escapement of income chargable to tax in relation to any assets including financial interest in any entity located outside India.

NA

8. Findings of AO on true and full dis,c:losure of the materials facts necessary for assessment under proviso to section 147.

The assessee had failed to disclose fully and truly all material facts including non-deduction of TDS on the amount paid to the HUDA during the F.Y. 2011 12 which were necessary for correct assessment of its income.

9. Applicability of the provisions of section 147*I*151 to the facts of the case:

In this case a return of income was filed for the year under consideration and assessment order u/ s 143(3) of the I. T. Act, 1961 was passed on 30/03/2015 and total income of the assessee was assessed at Rs. 157,73,04,000/- Since 4 years from the end of the relevant year have expired in this case, the requirements to initiate proceedings u/s 147 of the Act are reason to believe that income for the year Linder consideration has· escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for its 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. 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 its 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 thereby necessitating reopening u/ s 147 of the Act.

In this case more than four years have elapsed from the end of assessment year under consideration. Hence, necessary sanction to issue notice u/s 148 has to be obtained from Principal Commissioner of Income Tax as per the provisions of section 151 of the Act."

[Emphasis Supplied]

16. The reasons for re-opening with respect to AY 2013-14 are nearly identical and therefore the same are not being reproduced separately.

17. The Petitioner filed objections to the aforesaid reasons, which have been disposed of by way of a speaking order, rejecting the same. The order reads as under:-

"Sub: Your Scrutiny assessment proceedings of AY 2012-13 -Reg.

Refer to your letter dated 04.12.2018 received in this office on 05.12.2018.

I. You are asking copy of Assistant Director of Income Tax, Investigation, Unit-IV, New Delhi. Here report means transfer of file from ADIT(Inv), Unit-IV to this charge. Your reply is part of the file and on basis your reply reason to believe that TDS has not been deducted in respect of EDC charges has been framed.

2. Copy of satisfaction enclosed with this office letter dated 30.11.2018 may be treated as withdrawn same was sent inadvertently. Copy of satisfaction along with comments of the PCIT, Central-3. New Delhi is enclosed with this letter.

3. Assessing officer is a fact finding authority. In your reply you have accepted that EDC charges have been paid. You have not provided any proof that TDS has been deducted on the EDC charges. This is more than enough for reason to believe that income have escaped assessment for the year under consideration.

4. You your self is saying that HUDA was created somewhere in 1977. Since then HUDA is filing Income Tax Return and various entities are deducting TDS. Same can be verified from website of HUDA. It clearly shows HUDA was not created under an Act of "Central Government".

Your objection to re-open of assessment vide notice u/s 148 of the Act for A.Y. 2012-13 is not found satisfactory and same is rejected and disposed of accordingly.

Yours faithfully
(Sd/-)
Kailash V Gautam"

18. With respect to both the years in question, the notice under Section 147/148 has been issued after a period of four years from the end of the relevant assessment years. Thus, the case would be covered by the first proviso to Section 147 of the Act which requires the satisfaction of other pre-conditions for assuming jurisdiction to reopen the case viz (i) the income chargeable to tax has escaped assessment by reason of a failure on the part of the Assessee to make a return under section 139 or in response to a notice under Section 142(1) or Section 148; *or* (ii) by way of reason of failure to disclose fully and truly all material facts necessary for his assessment for that assessment year.

19. The aforesaid proviso has been subject matter of several decisions of this Court where the scope and effect thereof has been discussed elaborately. A Division Bench of this Court in ***M/s Harayana Acrylic Manufacture Company v. CIT,*** **W.P.(C) 4074/2007**, decided on 03.11.2008, held as under:

"19. Examining the proviso [set out above], we find that no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:

(a) an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year; and

(b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee:

(i) 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

(ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out 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.*"*

[Emphasis Supplied]

20. Similarly, this court in ***Coperion Pvt. Ltd. v. CIT*****, (2015) 378 ITR 525 (Del)**, held as under:

"The effect of the change brought about to Section 147 by way of amendment with effect from 1st April 1989 requires to be examined. Prior to 1st April 1989, in order to reopen an assessment the AO ought to have had reason to believe that the income of the Assessee has escaped assessment on account of the

omission or failure by the Assessee to file a return or to disclose fully and truly all material facts necessary for assessment for that year. ***After the amendment the only requirement as far as Section 147(1) is concerned is that the AO should have reason to believe that the income of the Assessee has escaped assessment. However the proviso to Section 147(1) as amended kicks in where the reopening is sought to be done after four years after the end of the relevant assessment year for which the original assessment was made. This brings in the requirement of the AO satisfying himself of the existence of either jurisdictional fact. The escapement of income should be occasioned "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."***

[Emphasis Supplied]

21. In ***Commissioner of Income Tax-III v. Suren International Pvt. Ltd.,*** **2013 SCC OnLine Del 1832 : ILR (2013) 3 Del 2321,** the Court held as under:

15. *Having stated the above, we are also unable to accept the contention that there has been failure on the part of the assessee to disclose all material facts in his return as, first of all, there is no such allegation in the reasons as furnished to the assesse; secondly, we cannot ignore the fact that the enquiry into the share application money had been conducted in detail by the Assessing Officer in the first round of assessment. Having framed his assessment after enquiry into the identity, genuineness and the creditworthiness of the share applicants, it would not be open for the Assessing Officer to re-examine the same without there being any material allegation of failure, on the part of the assesse, to make a full and true disclosure.* ***It is well-settled that in order to invoke the provisions of Section 147 of the Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that***

any income has escaped assessment, it must also be established that the income has escaped assessment on account of the assessee failing to make returns under Section 139 or on account of failure on the part of the assessee to disclose, fully and truly, the necessary material facts. This Court in the case of Wel Intertrade P. Ltd. v. ITO, (2009) 308 ITR 22 (Del) and Haryana Acrylic Manufacturing Company v. CIT &Anr., (2009) 308 ITR 38 (Del) held that it would not be open for the Assessing Officer to reopen the assessment already done beyond the period of four years unless the income has escaped assessment on account of failure, on the part of the assesse, to disclose all the material facts. In the case of Wel Intertrade P. Ltd. (supra) it has been held as under:

> ***"A plain reading of the said proviso makes it more than clear that where the provisions of section 147 are being invoked after the period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income chargeable to tax has escaped assessment, it must also be established as a fact that such escapement of assessment has been occasioned by either the assessee failing to make a return under section 139, etc., or by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, for that assessment year. In the present case, the question of making of a return is not in issue and the only question is with regard to the second portion of the proviso, which relates to failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. Insofar as this precondition is concerned, there is not a whisper of it in the reasons recorded by the Assessing Officer****. In fact, as indicated above, the Assessing Officer could not have made this a ground because the Assessing Officer had required the petitioner to furnish details with regard to loss occasioned by foreign exchange fluctuation which the petitioner did by virtue of the reply dated*

February 5, 2002. Since the petitioner had fully and truly disclosed all the material facts necessary for the assessment, the pre-condition for invoking the proviso to section 147 of the said Act had not been satisfied.

In this connection, it may be relevant to note one decision, although there are several others. The said decision is that of the Punjab and Haryana High Court in the case of Duli Chand Singhania v. Asstt. CIT, (2004) 269 ITR 192. In the said decision, the High Court of Punjab and Haryana was faced with a similar situation. The court noted that there was not even a whisper of an allegation that the escapement in income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. The court observed that absence of this finding, which is the sine qua non for assuming jurisdiction under section 147 of the Act in a case falling under the proviso thereto, makes the action taken, by the Assessing Officer wholly without jurisdiction. We agree with these observations of the Punjab and Haryana High Court and are of the view that in the present case also, the Assessing Officer has acted wholly without jurisdiction. The invocation of section 147, the issuance of the notice under section 148 and the subsequent order on the objections are all without jurisdiction. The impugned notice as well as the proceedings pursuant thereto are quashed."

[Emphasis Supplied]

22. Reading of the proviso to Section 147 and the decisions of this Court discussed above makes it amply clear that after a period of four years from the end of the Assessment Year, for the AO to assume jurisdiction, it becomes necessary that 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, or to disclose all material facts necessary for that assessment year.

23. We find force in the submissions advanced by Mr. Kaushik that in the present case, the test for reopening the assessment as per proviso to Section 147 has not been met. The questionnaire raised by the AO during the course of assessment proceedings categorically adverted to the question of withholding tax. The details of the TDS paid and EDC charges were available with the AO. Revenue has sought to contend that even if the AO could have, with due diligence, discovered material from the tax audit report, it does not necessarily mean that the petitioner had made a full and true disclosure of material facts. The mere production of evidence before AO is not enough and there may be a failure to make full and true disclosure, if some material for the assessment lies embedded in that evidence which the AO could uncover, but did not do so. The aforesaid submissions may be correct proposition in law; however, each case has to turn on its own facts. In the present case, the details of the TDS and EDC charges paid to HUDA were brought to the notice of the AO. On this question, it would be sufficient to refer to the decision of this Court in ***Donaldson India Filters Systems Pvt. Ltd. vs. DCIT*, (2015) 371 ITR 87 (Del**. In the said case, the Court held that the explanation clarifies the general refrain by the words *"not necessarily*". Burden is equally placed on the AO to exercise due diligence in examining the record (account books or evidence) produced before him in light of the declarations made in the return or responses to the notices or questionnaires. This is necessary as the AO

has to gather *"tangible*" material which is a pre-requisite for reopening the matter under Section 147 of the Act. In ***CIT v. Central Warehousing Corporation*, (2015) 371 ITR 81 (Del.),** the Court held that the expression "*reason to believe*" on which a re-assessment under Section 147 of the Act can be validly ordered should necessarily be based on "*tangible material*" which an AO comes by after original assessment.

24. It would also be profitable to refer to the decision of ***Central Warehousing Corporation (supra)*** and ***CIT vs Kelvinator of India Ltd***., **(2002) 256 ITR 1**and ***CIT vs. Usha International Ltd***., **348 ITR 485 (Del.)** and several other decisions wherein it has been repeatedly held that reopening initiated without any failure on the part of the Assessee in fully and truly disclosing all material facts without any fresh tangible material deserves to be quashed. In view of the aforesaid test laid down by this Court for re-opening of the assessment in cases where proviso to Section 147 of the Act is attracted, we find that in the present case, the test is not met. It is well settled proposition under the Income Tax Act that merely a change of opinion would not give the AO the jurisdiction to reopen the assessment under Section 147/148, as the same would amount to reviewing the earlier decision. There has to be some relevant tangible material for the AO to come to the conclusion that there is escapement of income from assessment, and there must be a live link with such material for the formation of the belief. The reasons should also disclose due application of mind as reopening of the assessment proceeding is not an empty formality. On a perusal of the recorded reasons, we are not able to discern as to how the AO has come to a conclusion that there is a failure on the part of the Assessee in

fully and truly disclosing all material facts for the purpose of the assessment. Though, the recorded reasons allude to an ostensible failure on the part of the Assessee to disclose fully and truly all material facts, however, the recorded reasons except for using the expression *"failure on the part of the Assessee to disclose fully and truly all material facts",* do not specify as to what is the nature of default or failure on the part of the Assessee. The reasons also do not explain or specify as to what is the rationale connection between the reasons to believe and the material on record. The Supreme Court in ***Income Tax Officer v. Techspan Pvt. Ltd And Ors.*** (2018) 6 SCC 685 has held that *"The use of the words "reason to believe" in Section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of some facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature."* The said judgment further held that *"Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review."*

25. It becomes evident on perusal of the Scrutiny questionnaires issued by the AO and the information furnished in response thereto by the Assessee

that there has been no failure on the part of the Assessee in furnishing the information. On the other hand, there appears to be non application of mind on such material on the part of the AO to make an appropriate determination in accordance with law. Thus, the AO cannot now review its decision, having failed to perform its statutory duty and therefore the impugned action of reopening is nothing but a change of opinion.

26. The AO in paragraph 2 of the recorded reasons quotes that *"EDC is covered by the provisions of Section 194 of the Income Tax Act,1961. The Assessee has failed to deduct TDS on the payments made to the HUDA"*. There is no explanation or rationale for the aforesaid observation made by the AO. We, therefore, cannot understand as to how the payment of EDC- being in the nature of statutory fees, could be subject to withholding tax under Section 194 of the Act, a provision that is applicable to dividends. The nature of dividend payment is intrinsically different from EDC and, therefore, the apparent reason for reopening seems to be erroneous, irrational and fallacious. The subsequent observation in paragraph 2 *"as per the provisions of Section 40(a)(ia) of the Income Tax Act, any sum payable on which tax is deductable at source under Chapter XVII B but the same has not been deducted"* appears to be based on the understanding that the provisions of Section 194 are attracted to EDC and, therefore, it is subject to withholding tax and consequently the provisions of Section 40 (a) (ia) of the Act would be attracted. Even if one were to ignore the provision of law quoted and relied upon by the AO, and we were to agree with the contention of Revenue that while exercising the power, the source may not be specifically referred to or if wrongly mentioned to, it would not render the

exercise of such power to be invalid, yet, we are unable to fathom as to how the AO has arrived at the conclusion that EDC payment was subject to tax deduction at source. Revenue in its counter affidavit has sought to elaborate on the aforesaid reasons by contending that the EDC payment is akin to rent. However, we are not impressed with this submission. Firstly, such an understanding is not borne out from the recorded reasons and, secondly, the department cannot by way of a counter affidavit supplement the recorded reasons by introducing such legal submissions. The source of the power in this case, as sought to be argued, is not discernible.

27. If the AO harboured a reason to believe that the payment of EDC requires TDS under the provisions of the Income Tax Act, it ought to have disclosed the basis for such a view. The entire reasoning disclosed in the recorded reasons, for initiating the proceedings is completely silent on this aspect. It merely states that "*Since, EDC has Income Character, therefore it should have been subjected to TDS by Assessee.*" The AO has further proceeded to observe since the Assessee is a development authority of State of Government of Haryana and is a taxable entity, TDS provisions could be applicable on EDC payable by the Assessee through HUDA. Apart from making aforenoted observations and referring to Section 194 and Section 40 (a) (ia), there is no apparent rationale for assumption of jurisdiction by the AO. The judgment in ***Greater Mohali Area (supra)*** is of no assistance to the Revenue as the same is distinguishable on facts. In the said case, the Petitioner who was recipient of EDC had approached the Court seeking quashing of the order disposing of its objections to the reasons recorded for reopening the assessment under Section 147 and 148 of the Act. In the

assessment under Section 143 (3) of the Act, the effect of EDC upon Petitioner's income was not referred to, the AO sought to reopen the assessment on the basis of reason to believe that income on account of EDC had escaped assessment. In these circumstances, since, the assessment order, did not deal with the character of the income of EDC or its effect on Petitioner's income, the Court upheld the action of reopening on the ground that the issue had not been considered at the time of the assessment. Likewise, the other judgment relied upon by the Revenue in the case of ***M/s New Okhla Industrial Development Authority (supra)*** is also distinct on facts. In the said case, the Court was examining as to whether Greater Noida and Noida Authorities were local authorities within the meaning of Section 10(20) of the Income Tax Act and whether their income was exempt from income tax. Deciding this question, the Court held that the Noida and Greater Noida are not local authorities for the purpose of the Act. Therefore, the aforesaid decision has no relevance to the facts of the present case.

28. We would also like to reflect on Section 194-I and its explanation which deals with rent and has been relied upon by the Revenue to contend that the definition of 'rent' is broad and would also envisage the payment of EDC and is subject to withholding tax. In support of this provision, Revenue has relied upon the observations of the Supreme Court in ***M/s New Okhla Industrial Development Authority (supra)***, the relevant portion whereof is reproduced herein below:-

> *"The definition of rent as contained in the Explanation is a very wide definition. Explanation states that "rent" means any*

payment, by whatever name called, under any lease, sub-lease, tenancy or any other agreement or arrangement for the use of any land. The High Court has read the relevant clauses of the lease deed and has rightly come to the conclusion that payment which is to be made as annual rent is rent within the meaning of Section 194-I, we do not find any infirmity in the aforesaid conclusion of the High Court. The High Court has rightly held that TDS shall be deducted on the payment of the lease rent to the Greater Noida Authority as per Section 194-I. Reliance on the Circular dated 30-1-1995 has been placed by the Noida/Greater Noida Authority. A perusal of the Circular dated 30-1-1995 indicate that the query which has been answered in the above circular is "Whether requirement of deduction of income tax at source under Section 194-I applies in case of payment by way of rent to Government, statutory authorities referred to in Section 10(20-A) and local authorities whose income under the head "Income from house property" or "Income from other sources" is exempt from income tax."

29. We are unable to see as to how the above provision and decision is of any assistance to the Revenue. It can be seen from the quoted portion of the said judgment that in the said case, the payment of annual rent was considered to be falling within the ambit of Section 194-I, a conclusion drawn by the Court on a reading of the relevant clauses of the lease deed. In the present case, the EDC charges, on the aforesaid rationality, cannot be subjected to Section 194-I of the Act. Moreover, if such was the understanding of the Revenue, it should have been well founded and disclosed in the reasons recorder by the AO. Deduction at source is dealt under Chapter XVII of the Income Tax Act. The provisions enumerated thereunder, stipulate requirement of deduction of tax at source. Revenue is unable to point out any specific provision which deals with EDC payment except for alluding to Section 194-I. We need not delve into this question

any further as we do not find this to be a ground spelt out in the reasons for reopening the assessment under Section 147 of the Act. The statutory orders containing reasons have to be judged on the basis of what is apparent and not what is explained later. Revenue cannot be permitted to improve the same by offering better explanation during the course of the proceedings. On this issue we would like to refer the view of the Supreme Court in ***Mohinder Singh Gill and Another vs Chief Election Commissioner, New Delhi and Ors,*** **(1978) 1 SCC 405** where it has been held *"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise..."*.

30. On this aspect, Mr. Kaushik's another submission also merits consideration. He argues that the AO has not cared to analyse the applicability of the proviso to Section 40 (a) (ia) on the facts and circumstances of the case. The assessee shall be deemed to have deducted and deposited tax, if the recipient of income pays tax on payments received, even though the Assessee has not deducted TDS for such payment. In such a situation, there can be no disallowance under Section 40 (a) (ia) in the hands of the Assessee. This ignorance cannot escape our judicial notice, as the assessment is sought to be reopened after a period of four years from the end of the relevant assessment year. The notice does not state that the EDC charges collected by HUDA have not been subjected to tax as income in the hands of HUDA. This also shows non-application of mind that warrants our interference.

31. In view of the foregoing reasons, the writ petitions are allowed. Both the notices dated 02.11.2018 in respect of the AY 2012-13 and 2013-14 and the proceedings emanating thereof are quashed.

SANJEEV NARULA, J

VIPIN SANGHI, J

NOVEMBER 28, 2019
SS/Pallavi