<u>आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ,</u> सी, <u>मुंबई ।</u>

IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "C", MUMBAI

श्री जोगिन्दर सिंह, न्यायिक सदस्य **एवं**

श्री एन. के. प्रधान, लेखा सदस्य**,** के समक्ष

Before Shri Joginder Singh, Judicial Member, and
Shri N.K. Pradhan, Accountant Member

ITA NO.658/Mum/2014
Assessment Year: 2005-06

M/s Crescent Construction Co. 527, Arenja Corner, Sector-17, Vashi Navi Mumbai-400705	**<u>बनाम</u>**/ Vs.	ACIT-22(3), 3rd Floor, Tower No.6, Vashi Railway Station Complex, Vashi, Navi Mumbai-400703
(निर्धारिती /Assessee)		(राजस्व /Revenue)
P.A. No.**AACFC3931A**		

ITA NO.865/Mum/2014
Assessment Year: 2005-06

ACIT-22(3), 3rd Floor, Tower No.6, Vashi Railway Station Complex, Vashi, Navi Mumbai-400703	**<u>बनाम</u>**/ Vs.	M/s Crescent Construction Co. 527, Arenja Corner, Sector-17, Vashi Navi Mumbai-400705
(राजस्व /Revenue)		(निर्धारिती /Assessee)
		P.A. No.**AACFC3931A**

निर्धारिती **की ओर से /** Assessee by	Shri Prakash Jotwani
राजस्व **की ओर से** / Revenue by	Ms. Bharti Singh-DR

सुनवाई की तारीख **/ Date of Hearing :**	**02/05/2017**
घोषणा की तारीख/**Date of Pronouncement**	**26/05/2017**

आदेश / O R D E R

Per Joginder Singh (Judicial Member)

The assessee as well as the Revenue is in cross appeal against the impugned order dated 29/11/2013 of the First Appellate Authority, Mumbai. In the appeal of the assessee (ITA No.658/Mum/2014), the first ground raised pertains to confirming the reopening u/s 147 of the Income Tax Act, 1961 (hereinafter the Act), as valid and bona-fide though the reopening was made beyond four years and specifically when there was no failure on the part of the assessee to make full and true disclosure of the material facts.

2. During hearing, the ld. counsel for the assessee, Shri Prakash Jotwani, contended that return was filed by the assessee on 31/10/2005, the assessment order u/s 143(3) of the Act was passed on 31/12/2007 and reopening u/s 147 of the Act was made on 31/03/2012, therefore, it was beyond a period of four years. It was claimed by the ld. counsel for the assessee that the same addition was made by the Assessing Officer u/s 154 of the Act and the same was deleted by the Tribunal. Our attention was invited to page-32 of the paper book (relevant page-39, para-8). Our

attention was further invited to the order of the First Appellate Authority (page-27 of the paper book), para -3.2, page 29 and para 3.4 & 3.5 of the order of the Ld. Commissioner of Income Tax (Appeal) (page-30 of the paper book). The crux of the argument is that reopening u/s 147/148 of the Act cannot be made beyond a period of four years, more specifically, when the material facts were wholly and truly were disclosed by the assessee. The issue was claimed to be debatable issue, therefore, the Tribunal decided in favour of the assessee.

2.1. On the other hand, Ms. Bharti Singh, defended the reopening done by the Assessing Officer by contending that true disclosure of facts was not made by the assessee. The Ld. DR, contended that even if the issue is debatable, as held by the First Appellate Authority and this Tribunal still the assessment order was argued to be justified. It was contended that though the addition was deleted (on merit) by the Ld. Commissioner of Income Tax (Appeal) still the First Appellate Authority affirmed the reopening made by the Ld. Assessing Officer.

2.2. We have considered the rival submissions and perused the material available on record. The facts, in brief, are that the assessee is a partnership firm. The assessee is a basically civil contractor, builder/developer, declared income of Rs.34,96,990/- in its return filed on 31/10/2005, which was processed u/s 143(1) of the Act resulting into

refund to the assessee. Subsequently, the case of the assessee was selected for scrutiny, therefore, notice u/s 143(2), issued on 27/10/2006, and was served upon the assessee on 28/10/2006. Thereafter, further notices u/s143(2) and 142(1) along with annexure/questionnaire, calling upon details mentioned therein, were issued and served upon the assessee. In response to the aforesaid notices, the assessee attended the assessment proceeding (as is evident from assessment order dated 31/12/2007), from time to time and furnished the details called for. During hearing, before the Ld. Assessing Officer more details were filed. The assessee showed the contract receipt at Rs.11,55,95,760/- along with other income like interest (loans) amounting to Rs.18,17,347/-, interest (FDR), Rs.7,39,742/-, interest (IT refund 2002-03) Rs.92,896/- and interest (IT refund 2003-04) of Rs.1,09,306/- (Total Rs.27,59,291/-). On the aforesaid total receipts, the assessee showed profit of Rs.38,15,515/-, which includes remuneration/salary to partners, amounting to Rs.7,20,000/-. The profit of Rs.38,15,515/- was 3.30% of the contract receipt. In the assessment order (as is evident from para-4), the assessee in its profit & loss account claimed major expenses. The totality of facts clearly indicates that assessment was framed u/s 143(3) r.w.s 148 of the Act, vide order dated 01/03/2013 on consideration/examination of material facts, which were furnished by the assessee.

2.3. On appeal, before the Ld. Commissioner of Income Tax (Appeal), so far as, reopening is concerned, it was held to be valid, whereas, on merit, the disallowance made u/s 40(a)(ia) of the Act were decided in favour of the assessee by holding that no disallowance was called for.

2.4. Before this Tribunal, the assessee has challenged reopening of assessment, whereas, the Revenue is in appeal against deleting the disallowance/addition made u/s 40(a)(ia) of the Act, by the First Appellate Authority. The crux of the argument, so far as, reopening is concerned, is that reopening cannot be done beyond a period of four years, when the material facts were fully disclosed by the assessee.

2.5. We find that on the issue of reopening, the Ld. Commissioner of Income Tax (Appeal) considered the decision in 31 Infotech Ltd. vs ACIT (2010) 329 ITR 257 (Bom.), Imperial Chemical Industries Ltd. vs Income Tax Officer (1978) 111 ITR 614 (Cal.) and Rakesh Agarwal vs ACIT (1996) 221 ITR 492 and Income Tax Officer vs Bhanji Lav Ji (1971) 79 ITR 582 (Del.) held that reopening is correct. If the observation made in the assessment order, leading to addition made to the total income, conclusion drawn in the impugned order, material available on record, assertions made by the ld. respective counsel, if kept in juxtaposition and analyzed, we are expected to first analyze the provision of section 147 of the Act.

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (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 2.—For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely :—

(*a*) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax ;

(*b*) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return ;

(*ba*) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(*c*) where an assessment has been made, but—

(*i*) income chargeable to tax has been underassessed ; or

(*ii*) such income has been assessed at too low a rate ; or

(*iii*) such income has been made the subject of excessive relief under this Act ; or

(*iv*) excessive loss or depreciation allowance or any other allowance under this Act has been computed;

(*d*) where a person is found to have any asset (including financial interest in any entity) located outside India.

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.

Explanation 4.—For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

2.6. If the aforesaid provision of the Act is analyzed, proviso has been added, where an assessment under sub-section (3) of section 143 or the section that no action shall

be taken under the section after the expiry of four years from the end of the relevant assessment year due to the failure on the part of the assessee or material facts were not fully and truly disclosed which are necessary for making the assessment. In the present appeal, return was filed by the assessee on 31/10/2005, declaring total income of Rs.34,96,900/- order u/s 143(3) r.w.s. 148 of the Act was made on 01/03/2013 and reopening u/s 147 was made on 31/03/2012, thus, one fact is clearly oozing out that the required notice was issued beyond the limitation period of four years.

2.7. Now, we shall examine whether there is any failure on the part of the assessee in making the full and true disclosure for making an assessment. We find that firstly, the assessment was framed u/s 143(3) of the Act that too in response to statutory notices/questionnaire issued to the assessee u/s 143(2) and 142(1) of the Act. In support of the return (as is evident from assessment order itself), the assessee duly furnished the capital account of the firms, statement of affairs, income and expenditure account, statement of dividend and interest, bank statement and cash flow statement, etc. It is noted that the assessee made full disclosure of the material facts, for making the assessment, therefore, no new material came to the possession/knowledge of the Assessing Officer evidencing that income has escaped assessment. At page-2 of the assessment order (para-4), it has been clearly mentioned by

the Assessing Officer that the AR has furnished the details of TDS deduction on payment made to sub-contractors, transporters, machine hiring charges etc during the course of proceedings. On perusal of these details, it was found that the payments were made after due date prescribed in the Act but due date of filing the return of income. In view of this factual finding and the provisions of law, now it is a settled position if the details are furnished before due date of filing of return, therefore, it cannot be disallowed. The ratio laid down by the Tribunal in the case of M/s Selprint vs CIT (ITA No.3688/Mum/2012), order dated 21/10/2015, supports our view. The relevant portion of the aforesaid order is reproduced hereunder for ready reference:-

> "The present appeal has been preferred by the assessee against the order dated 22.03.2012 of the Commissioner of Income Tax (Appeals) [hereinafter referred to as the CIT(A)] relevant to assessment year 2008-09.
>
> 2. The assessee has taken the following grounds of appeal:
>
> "1. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the disallowance of payments in the nature of purchases from M/s M.R. Enterprises of Rs.13,51,484 u/s 40(a)(ia) on account of non-deduction of TDS on payments made to it ignoring the fact that M/s. M.R. Enterprises has already discharged the tax liability by duly filing the return of income the due date of filing of the return of income by the appellant. The disallowance being bad in law the same needs to be deleted.
> 2. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of rent of Rs.2,40,000/- u/s.4O(a)(ia) without appreciating the fact that the TDS of Rs.36,720 on the above amount had been deducted and deposited on 15.05.2008 i.e. within due date stipulated u/s 200(1).

M/s. Selprint The addition being bad in law the same needs to be deleted.

3. a) On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of commission of Rs.2,00,000/- u/s 4O(a)(ia) without appreciating the fact that the TDS was deducted on 31.03.2008 and deposited on 15.05.2008 i.e. within the due date stipulated under section 200(1).

b) Also, without prejudice to the above, the learned CIT(A) erred in ignoring the fact that the commission was already paid to Mr Hardik Kothari during the previous year ended 31 March 2008 and therefore, provisions of section 40(a)(ia) would not apply as section 40(a)(ia) provides for disallowance in relation to the amounts payable and not to amounts already paid during the previous year.

The addition being bad in law the same needs to be deleted.

4. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of Rs.1,50,000/- towards salary paid to Mr Hardik Kothari holding that no payment of salary has been reflected in the ledger account of Mr Hardik Kothari without appreciating the fact that the payment has been routed through Salary Account. The addition being bad in law and arbitrary in nature needs to be deleted.

5. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming disallowance of Rs.99,416/- being 1/3rd of the payments made to Mr. Vinit Kothari Rs.1,48,250/- towards purchase of software under section 37 of the Act holding that no sufficient details or bills for job charges were filed before the learned CIT(A).

Learned CIT(A) erred in not appreciating the fact all the details and explanations in relation to payment towards software charges including return of income of Mr Vinit Kothari were filed before the learned CIT(A). The addition being bad in law the same needs to be deleted.

6. On the facts and circumstances of the case and in law the learned CIT(A) erred in confirming the addition of unsecured loans of Rs.1,79,400/- under section 68 ignoring the fact that the said amount pertains to the commission of Rs.1,79,400 (net of TDS) that is already disallowed by the learned AO and confirmed

by the learned CIT(A). The addition leading to taxing the amount twice is bad in law and needs to be deleted.

7. The appellant craves leave to add to amend, alter, delete and/or modify the above grounds of appeal on or before the final date of hearing of this appeal petition."

M/s. Selprint

3. The Ld. A.R. of the assessee has invited our attention to ground No.1 vide which the disallowance has been made by the lower authorities under section 40(a)(ia) on account of non deduction of TDS on payments made to M/s. M.R. Enterprises. It is the contention of the Ld. A.R. that M/s. M.R. Enterprises has already discharged the tax liability by duly filing the return of income. He has contended that as per the new proviso inserted in section 40(a)(ia) vide Finance Act, 2012 w.e.f. 01.04.13 wherein it has been provided that if the assessee fails to deduct TDS in respect of any payment to which the TDS provisions apply but he is not deemed to be an assessee in default under section 201 of the Act, which provides that if the payee of the such amount computed the same into his income tax return and has paid the due taxes, then such an assessee will not be deemed to be an assessee in default and then no disallowance is attracted under section 40(a)(ia). He has further submitted that the said newly inserted proviso to section 40(a)(ia) is in fact clarificatory in nature and should be applied/retrospectively for the year under consideration and as such no disallowance is attracted on this issue.

4. On the other hand, the Ld. D.R. has contended that it has been specifically provided in the Act that the said proviso comes into operation w.e.f. 01.04.13 and that where the language of the section as well as the date of operation of such provisions has been mentioned specifically the courts cannot supply words to the provisions or amend the provisions to give it a different meaning and further that the newly inserted proviso under such circumstances is prospective in nature i.e. w.e.f. 01.04.13 and cannot be applied retrospectively.

5. The Ld. A.R. of the assessee has brought to our notice that the issue relating to operation of the newly inserted proviso whether prospective or retrospective in nature has already been considered and decided by the co-

M/s. Selprint ordinate Bangalore bench of the Tribunal in the case of "Shri S.M. Anand Vs. ACIT" in ITA No.183/Bang./13 for

A.Y. 2005-06 vide order dated 21.02.14. The relevant part of the findings of the Tribunal given in the said case, are reproduced as under:

"3.4.1 We have heard the rival submissions and perused and carefully considered the material on record. Admittedly, the assessee has not deducted tax at source on the payments made to Sri G.Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000. As pointed out by the learned Authorised Representative as far as the payments made to the aforesaid two persons is concerned the fact that the said payees / recipients have shown the said amounts in their respective books of account and profit and loss accounts and also that the same has been offered to tax in their returns of income is not controverted by the authorities below. In our considered opinion, since the payees / recipients i.e. G. Ramesh and Ramesh Kotian have already shown these amounts in their respective books of account audited under section 44AB of the Act; declared and offered the same to tax in their returns of income for the relevant period, thus by virtue of the amendment to the provisions of section 40(a)(ia) of the Act by insertion of the second proviso to section 40(a)(ia) of the Act w.e.f. ;1.4.2013, the provisions of section 40(a)(ia) of the Act would not be attracted to the payments made by the assessee i.e. Sri G. Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000. This view of ours, is in accordance with the decision of the co-ordinate bench of this Tribunal in the case of Ananda Markala (supra) wherein it was held that the insertion of the second proviso to section 40(a)(1a) of the Act should be read retrospectively from 1.4.2005 and not prospectively from 1.4.2013. In this view of the matter, the provisions of section 40(a)(ia) of the Act is not attracted to the payments made by the assessee to Sri G.Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotian of Rs.1,54,75,000 since the object of introduction of section 40(a)(ia) of the Act is achieved for the reason that the payees / recipients have declared and offered to tax the payments received from the assessee in their respective hands.

3.4.2 As regards the issue of non-furnishing of Form No.26A, we are of the view that since the second proviso to section 40(a)(ia) of the Act is held to be retrospective in operation w.e.f. 1.4.2005, similarly, Form 26A was to be filed for an assessee not to be held as an assessees in default as per proviso to section 201 of the Act. In all fairness, the assessee in the period under consideration i.e. Assessment Year 205-06 could not have contemplated that such a compliance was to be made and therefore in the interest of equity and justice we set aside the order of the learned CIT

(Appeals) and remit the matter to the file of the Assessing Officer directing the Assessing Officer to consider the allowance or otherwise of the expenditure claimed amounting to Rs.4,23,96,500; being the payments made by the assessee to Sri G. Shankar of Rs.2,69,21,500 and to Sri Ramesh Kotiar, of Rs.1,54,75,000 after affording the assessee adequate opportunity to file Form No.26A and only after due verification of whether the aforesaid two payees / recipients have reflected the same receipts in their books of account and have M/s. Selprint offered the some to tax. In these circumstances, we hereby set aside the order of the learned CIT (Appeals) to the file of the Assessing Officer only for the limited purpose as directed above."

6. Almost identical view has been taken by the Agra Bench of the Tribunal in the case of "Rajeev Kumar Agarwal vs. ACIT" (2014) 149 ITD 363 (Agra). The said view has been further upheld by the Hon'ble Delhi High Court in the case of "CIT vs. Ansal Land Mark Township Pvt. Ltd." in ITA No.160 of 2015 decided on 26.08.2015 (Del.-HC). Respectfully following the above cited decisions, we hold that disallowance under section 40(a)(ia) of the Act will not be attracted, if the respective payee has paid the required taxes in accordance with law. For verification of the actual position, we restore this issue to the file of the AO to verify whether the payee had paid the due taxes after computation of its income including the payments received from the assessee. This issue is accordingly allowed for statistical purposes."

2.8. If the factual matrix is analyzed even the Ld. Assessing Officer in para-4 of the assessment order has mentioned that the payments were made before due date of filing of return of income, which was even not contradicted by the Ld. DR, therefore, we find merit in the submissions of the assessee. So far as, the deemed income from house property, disallowance out of telephone expenses and site expenses are concerned, the same has been duly considered by the Ld. Assessing Officer and even not challenged by the Revenue. It clearly shows that material facts, for making the assessment, were duly furnished by the assessee before the Ld. Assessing Officer. Even in para-2.3 of the impugned

order, the Ld. Commissioner of Income Tax (Appeal) has observed that in the assessment u/s 143 (3) of the Act an addition of Rs.2,60,25,775/- was made u/s 40(a)(ia) was made for not paying the tax deducted as source within the time allowed under the statute. However, in view of the various judicial pronouncements, it is evidently clear that no disallowance is to be made when the payment is made for such deduction of tax at source before filing of return. Undisputedly, these payments were made by the assessee before filing of return, therefore, there was no new material with the Assessing Officer for reopening the assessment. It is not the case, something was hide by the assessee. It is also noted that Hon'ble Calcutta High Court in the case of Virgin Creations (ITA No.302 of 2011) order dated 23/11/2011 on the issue whether section 40(a)(ia) of the Act is having retrospective operation or not, by following the decision in the case of Allied motors and Allom Extrusion Ltd. held that it is retrospective in operation. The ratio laid down in Shri Piyush C. Mehta vs ACIT (ITA No.1321/Mum/ 2009) for Assessment Year 2005-06 order dated 11/04/2012 held that any payment of tax deducted at source during the previous year relevant to and from Assessment Year 2005-06 could be made to the government on or before the due date of filing of return u/s 139(1) of the Act. If the payments are made before filing of return then no disallowance can be made u/s 40(a)(ia) of the Act. Likewise, the Hon'ble Delhi High Court in the case of CIT vs Rajendra

Kumar (ITA No.65/2013) order dated 01/07/2013 on a question whether the Tribunal was right in deleting the addition of Rs.78,51,800/- u/s 40(a)(ia) of the Act, the Hon'ble High Court held as under:-

> Having heard learned counsel for the parties, we frame the following substantial question of law:
>
> "Whether the Income Tax Appellate Tribunal was right in deleting addition of Rs.78,51,800/- under Section 40(a)(ia) of the Income Tax Act, 1961?"
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> 2. With the consent of the counsel for the parties, we have heard arguments and proceed to dictate our decision on the aforesaid question.
>
> 3. The respondent-assessee is an individual and an architect by profession. It is an accepted position and it is recorded and noted in the assessment order itself that the assessee is following cash system of accounting.
>
> 4. The assessment year involved is 2007-2008.
>
> 5. The Assessing Officer referred to the TDS payable account for professional payments as on 31st March, 2007 and noticed that an amount of Rs.8,52,034/- had not been paid by 31st March, 2007. The assessee was asked to explain why disallowance should not be made under Section 40(a)(ia) as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005. The assessee filed written submissions that they had not claimed any expense on accrual basis and were following cash system of accounting. However, for better control and record maintenance, they were maintaining a memorandum in the books. This memorandum was of no consequence as the assessee was claiming expenses on cash system and there were no sundry creditors or liabilities at the end of the year. In the month of February, 2007, Rs.8,33,064/- was shown in the TDS account on account of professional charges amounting to Rs.1,48,49,500/-. Rs.69,92,000/- was paid in the month of February, 2007 and TDS of Rs.3,92,221/- thereon was deposited on 7th March, 2007. The balance amount of Rs.78,51,800/- was paid/released in the month of March, 2007 and TDS was deducted and was paid on the said amount before the due date in the month of April, 2007. Deduction, therefore, was due and made in the month of

March, 2007 and the TDS was deposited in the Government account in April, 2007, i.e., within the stipulated time.

6. The Assessing Officer after noticing the submission did not deal with it but observed that there was violation of Section 40(a)(ia) as TDS should have been paid on or before 31st March, 2007 and as expenses of Rs.78,51,800/- had been debited to the professional charges account in February, 2007, i.e., prior to March, 2007.

7. The Commissioner of Income Tax (Appeals) upheld the said addition under Section 40(a)(ia) observing that Section 194J required deduction of tax at source either at the time of payment or at the time of credit of such sum to the account of the payee, whichever is earlier. It did not make any difference whether the assessee was following cash system or mercantile system. Reference was made to Explanation (c) to Section 194J which stipulates that credit to suspense account or account by any other name in the books of accounts required deduction of TDS.

8. On further appeal by the respondent-assessee, ITAT by their order dated 1st August, 2012 has deleted the said addition relying upon decision dated 23rd November, 2011 of the Calcutta High Court in ITA No. 302/2011 GA No. 3200/2011, Commissioner of Income Tax versus Virgin Creations. In the said decision, it has been held that the proviso to Section 40(a)(ia) of the Act amended by Finance Act, 2010 has retrospective effect.

9. Learned counsel for the appellant submits that the decision of the Calcutta High Court in the case of Virgin Creations (supra) should not be applied and the ratio laid down in the said decision is debatable. Amendments were made to the proviso to Section 40(a)(ia) of the Act by Finance Act, 2010 and these are not retrospective but applicable to and from assessment year 2010-11 onwards. He has referred to Full Bench decision of the tribunal in Bharati Shipyard Limited versus Deputy Commissioner of Income Tax, (2011) 11 ITR Tribunal 599 in support. Reference is also made to the decision of the Bombay High Court in Commissioner of Income Tax versus Shyam Narayan and Brothers, (2012) 349 ITR 145.

10. Respondent assessee, on the other hand, relies upon the decision of the Calcutta High Court in Virgin Creations (supra) and reference is also made to the decision of the Supreme Court in Allied Motors (P) Limited versus Commissioner of

Income Tax, (1997) 224 ITR 677 and Commissioner of Income Tax, Bombay and Others versus Podar Cement Private Limited and Others, (1997) 5 SCC 482.

11. At the outset, we notice and record that the decision of the Bombay High Court in Shyam Narayan and Brothers (supra) does not lay down or propound any ratio applicable to the question of law raised in the present case. The said decision does not examine or affirm the ratio by the Full Bench decision of the tribunal in Bharati Shipyard Limited (supra). Bombay High Court records that the earlier decision of the tribunal in the case of Bansal Parivahan (India) Private Limited versus ITO, (2011) 9 ITR Tribunal 565 stands overruled by Bharati Shipyard Limited (supra), which is a factual assertion. It did not examine on merits the ratio and reasoning of the tribunal in Bharati Shipyard Limited (supra) and/or affirm or disapprove the same. The order of the tribunal in the case of Shyam Narayan and Brothers (supra) was set aside for re-examination as the tribunal had followed the decision in the case of Bansal Parivahan (India) Private Limited (supra) which stood overruled by the Full Bench. Thus, the said decision does not deal with the legal question raised before us.

12. The decision of the Calcutta High Court in Virgin Creations (supra) is a short one and is as under:-

"The Court: We have heard Mr.Nizamuddin and gone through the impugned judgment and order. We have also examined the point formulated for which the present appeal is sought to be admitted. It is argued by Mr.Nizamuddin that this court needs to take decision as to whether section 40A(ia) is having retrospective operation or not.

The learned Tribunal on fact found that the assessee had deducted tax at source from the paid charges between the period April 1, 2005 and April 28, 2006 and the same were paid by the assessee in July and August 2006, i.e., well before the due date of filing of the return of income for the year under consideration. This factual position was undisputed. Moreover, the Supreme Court, as has been recorded by the learned Tribunal, in the case of Allied Motors Pvt. Ltd. And also in the case of Alom Extrusions Ltd., has already decided that the aforesaid provision has retrospective application. Again, in the case reported in 82 ITR 570, the Supreme Court held that the provision, which has inserted the remedy to make the provision workable, requires to be treated with retrospective operation

so that reasonable deduction can be given to the section as well. In view of the authoritative pronouncement of the Supreme Court, this court cannot decide otherwise. Hence we dismiss the appeal without any order as to costs."

13. Section 40(a)(ia) of the Act was introduced with effect from 1st April, 2005 by Finance (No. 2), 2004 Bill. Explaining the rationale behind insertion of the said Section, the Memorandum elucidated:-

"With a view to augment compliance of TDS provisions, it is proposed to extend the provisions of section 40(a)(i) to payments of interest, commission or brokerage, fees for professional services or fees for technical services to residents, and payments to a resident contractor or subcontractor for carrying out any work (including supply of labour for carrying out any work), on which tax has not been deducted or after deduction, has not been paid before the expiry of the time prescribed under sub-section (1) of section 200 and in accordance with the other provisions of Chapter XVII-B. It is also proposed to provide that where in respect of payment of any sum, tax has been deducted under Chapter XVII-B or paid in any subsequent year, the sum of payment shall be allowed in computing the income of the previous year in which such tax has been paid.

The proposed amendment will take effect from the 1st day of April, 2005 and will, accordingly, apply in relation to the assessment year 2005-06 and subsequent years. (clause 11)." (emphasis supplied)

14. Thereafter, by Finance Act, 2008 an amendment was made to Section 40(a)(ia) with retrospective effect from 1st April, 2005. Section 40(a)(ia) as amended by Finance Act, 2008 was as under:

"40. Notwithstanding anything to the contrary in Sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "profit and gains of business or profession"...

(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contactor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is

deductible at source under Chapter XVII-B and such tax has not been paid,-

(A) in a case where the tax was deductible and was so deducted during the last month of the previous year, on or before the due date specified in sub-section (1) of section 139; or

(B) in any other case, on or before the last day of the previous year;

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted-

(A) during the last month of the previous year but paid after the said due date; or

(B) during any other month of the previous year but paid after the end of the said previous year,

such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid."

(emphasis supplied)

15. Section 40(a)(ia) was further amended by Finance Act, 2010 with effect from 1st April, 2010 and the amended provision now reads as under:

"(ia) any interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resi-dent, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or; after deduction, has not been paid on or before the due date specified in sub-section (1) of Section 139:

Provided that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the previous year but paid after the due date specified in sub-section (1) of section 139, such sum shall be allowed as a deducted in computing the income of the previous year in which such tax has been paid."

(emphasis supplied)

16. The note on clauses and the memorandum explaining the amendments to Section 40(a)(ia) reproduced in (2010) 321 ITR Statutes 79 reads:

"Notes on Clauses:

Clause 12 of the Bill seeks to amend section 40 of the Income-tax Act relating to amounts not deductible.

Under the existing provisions contained in subclause (ia) of clause (a) of the aforesaid section, non-deduction of tax or non-payment of tax after deduction on payment of any sum by way of interest, commission or brokerage, rent, royalty, fees for professional services or fees for technical services payable to a resident or amounts payable to a contractor or sub-contractor, being resident, results in the disallowance of the said sum, in the computation of income of the payer, on which tax is required to be deducted under Chapter XVII-B.

It is proposed to amend sub-clause (ia) of clause (a) of the aforesaid section to provide that disallowance under the said sub-clause will be attracted, if, after deduction of tax during the previous year, the same has not been paid on or before the due date of filing of return of income specified in sub-section (1) of section 139.

The proviso to the said sub-clause provides that where in respect of any such sum, tax has been deducted in any subsequent year, or has been deducted during the last month of the previous year but paid after the due date of filing of return or deducted during any other month of the previous year but paid after the end of the said previous year, such sum shall be allowed as a deduction in computing the income of the previous year in which such tax has been paid.

This amendment will take effect retrospectively from 1st April, 2010, and will, accordingly, apply in relation to the assessment year 2010-11 and subsequent years."

17. We have noticed the facts of the present case. It is an accepted and admitted position that the assessee was following cash system and not mercantile system of accountancy. Neither the Assessing Officer nor the CIT (Appeals) have disputed the said factual position. The assessment order itself specifically records that the assessee was following cash system. It is not disputed in the assessment order or in the first appellate order that the assessee had paid a sum of Rs.78,51,800/- in the month of March, 2007 and had accordingly deducted TDS of Rs.4,40,843/- and the same was deposited within the due date from the date of said deduction in the month of April, 2007. Prior to that, the assessee had deducted TDS of Rs.3,92,221/- on professional charges of Rs.69,92,700/- in February, 2007. TDS on the said amount

which was deducted in the month of February was deposited on 7th March, 2007, within the due date.

18. The aforesaid facts show that the assessee had made payment of Rs.78,51,800/- in the month of March, 2007 only and not in the month of February, 2007. The assessee has throughout stated and it is not disputed either in the assessment order or in the order passed by the first appellate authority that they were for convenience maintaining a Memorandum relating to pending bills but this Memorandum did not get reflected and was not shown in the annual accounts as sundry creditors or liabilities, which were specifically holds that the account of the payee was credited with Rs.78,51,800/- or with Rs.1,48,49,500/-. The first appellate order again does not specifically state so. In such circumstances, we feel a pragmatic and a practical approach has to be adopted. The respondent assessee had deducted tax at source when the payment was made in the month of March, 2007 and thereafter deposited the payment in the month of April, 2007. It is an accepted position that in case tax was deductible in the month of March, 2007 the due date of payment was in April, 2007 and before due date payment, Rs.4,40,843/- deducted as TDS in the month of March, 2007 was duly paid. It has to be accepted and it is logical that there would be some time gap between date of deduction of tax at source and when payment is deposited. Section 40(a)(ia) and the proviso as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005 notices and acknowledges the said position and, therefore, clause (A) states that where tax "was" deductible and was so deducted during the last month of the previous year but stands paid before the due date specified under sub-section (1) to Section 139, deduction shall be allowed in the said year.

19. Proviso applies when tax was deducted in a subsequent year; when TDS has been deducted during any month of the previous year but paid after the end of the previous year; or TDS was deducted during the last month of the previous year but paid after the said due payable. It was not booked as an expense or liability. The assessment order nowhere records or date. When proviso applies deduction is to be allowed in the year in which the payment is made. Clause A of the proviso has to be read with clause A of the main Section and not in isolation. Clause A of the main Section and clause A of the proviso will apply in different factual matrix or situations. Clause A of the main Section applies when the tax was

deductable and was so deducted during the last month of the assessment year and was paid on or before the due date for filing of the return under Section 139(1). The proviso applies when tax has been deducted in any subsequent year or has been deducted as per clause A thereto during last month of the previous year, but has been paid after the said due date. The expression "said due date" cannot mean the date on which TDS as per the Chapter XVIII B should have been paid. It refers to the due date for filing of the return under Section 139(1) of the Act. Any other interpretation would lead to difficulties, incongruities and conflict between clause A of the main Section and clause A of the proviso. Both would be applicable to the same factual matrix/situation with contradictory stipulations or consequences. Under clause A of the main Section, the TDS deductable and so deducted during the last month should be paid on or before the due date for filing of the return under Section 139(1) but as per the Revenue under the proviso clause A, TDS should be deducted during the last month of the previous year but paid before the "said due date" i.e. the date by which TDS is payable under the Act. This interpretation if accepted means that clause A of the proviso and clause A of the main Section would become irreconcilable and mutually contradictory. Clause A of the proviso does not postulate the obvious but seeks to relax the rigor when tax deducted stands paid. This is the reason why the proviso in clause A does not use the expression "tax was deductable and was so deducted" but uses the expression "tax has been deducted …… during the last month of the previous year". The expression "said due date" in the clause A to the proviso does not mean and refer to the date on which tax should have been deposited without interest or penalty under Chapter XVII-B. This is obvious. Clause A to the proviso applies when the deduction is post the period specified by law but in the last month of a previous year. In such cases under the proviso clause A, TDS should be paid before "the said due date" i.e. the date on which return under Section 139(1) of the Act is to be filed.

20. Therefore, when the respondent assesse deducted TDS in March 2007, i.e. last month of the previous year and paid the same before in April 2007 before the said due date i.e. the date on which return of Income U/s 139(1) of the Act is to be filed. Section 40(a)(ia) could not have been invoked.

21. Reference to Explanation clause (c) which states that credit to suspense account or any other account in book would be

deemed to be credit in account of the payee is inappropriate. The said clause in the explanation is meant to curtail possibility or chance of non-deduction if an assesse credits a third account/head, instead of crediting the account of the payee to await deduction of TDS. It would not be appropriate to apply clause (c) of Explanation to section 194J to factual matrix of the current case. The amount was credited to the account of the payee, payment was made and TDS was deducted in March, 2007 and paid/deposited in April, 2007.

22. Now, we refer to the amendments which have been made by the Finance Act, 2010 and the effect thereof. We have already quoted the decision of the Calcutta High Court in Virgin Creations (supra). The said decision refers to the earlier decision of the Supreme Court in the case of Allied Motors (P) Limited (supra) and Commissioner of Income Tax versus Alom Extrusions Limited, (2009) 319 ITR 306 (SC). In the case of Allied Motors (P) Limited (supra), the Supreme Court was examining the first proviso to Section 43B and whether it was retrospective. Section 43B was inserted in the Act with effect from 1st April 1984 for curbing claims of taxpayers who did not discharge or pay statutory liabilities but claimed deductions on the ground that the statutory liability had accrued. Section 43B states that the statutory liability would be allowed as a deduction or as an expense in the year in which the payment was made and would not be allowed, even in cases of mercantile system of accountancy, in the year of accrual. It was noticed that in some cases hardship would be caused to assessees, who paid the statutory dues within the prescribed period though the payments so made would not fall within the relevant previous year. Accordingly, a proviso was added by Finance Act, 1987 applicable with effect from 1st April, 1988. The proviso stipulated that when statutory dues covered by Section 43B were paid on or before the due date for furnishing of the return under Section 139(1), the deduction/expense, equal to the amount paid would be allowed. The Supreme Court noticed the purpose behind the proviso and the remedial nature of the insertion made. Of course, the Supreme Court also referred to Explanation 2 which was inserted by Finance Act, 1989 which was made retrospective and was to take effect from 1st April, 1984. Highlighting the object behind Section 43B, it was observed that the proviso makes the provision workable, gives it a reasonable interpretation. It was elucidated:

"12. In the case of Goodyear India Ltd. V. State of Haryana this Court said that the rule of reasonable construction must be applied while construing a statute. Literal construction should be avoided if it defeats the manifest object and purpose of the Act.

13. Therefore, in the well-known words of Judge Learned Hand, one cannot make a fortress out of the dictionary; and should remember that statutes have some purpose and object to accomplish whose sympathetic and imaginative discovery is the surest guide to their meaning. In the case of R.B. Judha Mal Kuthiala v. CIT, this Court said that one should apply the rule of reasonable interpretation. A proviso which is inserted to remedy unintended consequences and to make the provision workable, a proviso which supplies an obvious omission in the section and is required to be read into the section to give the section a reasonable interpretation, requires to be treated as retrospective in operation so that a reasonable interpretation can be given to the section as a whole.

14. This view has been accepted by a number of High Courts. In the case of CIT v. Chandulal Venichand, the Gujarat High Court has held that the first proviso to Section 43-B is retrospective and sales tax for the last quarter paid before the filing of the return for the assessment year is deductible. This decision deals with Assessment Year 1985-85. The Calcutta High Court in the case of CIT v. Sri Jagannath Steel Corpn. has taken a similar view holding that the statutory liability for sales tax actually discharged after the expiry of the accounting year in compliance with the relevant statute is entitled to deduction under Section 43-B. The High Court has held the amendment to be clarificatory and, therefore, retrospective. The Gujarat High court in the above case held the amendment to be curative and explanatory and hence retrospective. The Patna High court has also held the amendment inserting the first proviso to be explanatory in the case of Jamshedpur Motor Accessories Stores v. Union of India. The special leave petition from this decision of the Patna High Court was dismissed. The view of the Delhi High Court, therefore, that the first proviso to Section 43-B will be available only prospectively does not appear to be correct. As observed by G.P. Singh in his Principles of Statutory Interpretation, 4th Edn. At p. 291: "It is well settled that if a statute is curative or merely declaratory of the previous law retrospective operation is generally intended." In fact the amendment would not serve its object in such a situation unless it is construed as retrospective. The view, therefore, taken by the Delhi High Court cannot be sustained."

23. Section 43B deals with statutory dues and stipulates that the year in which the payment is made the same would be allowed as a deduction even if the assessee is following the mercantile system of accountancy. The proviso, however,

stipulates that deduction would be allowed where the statutory dues covered by Section 43B stand paid on or before the due date of filing of return of income. Section 40(a)(ia) is applicable to cases where an assessee is required to deduct tax at source and fails to deduct or does not make payment of the TDS before the due date, in such cases, notwithstanding Sections 30 to 38 of the Act, deduction is to be allowed as an expenditure in the year of payment unless a case is covered under the exceptions carved out. The amended proviso as inserted by Finance Act, 2010 states where an assessee has made payment of the TDS on or before the due date of filing of the return under Section 139(1), the sum shall be allowed as an expense in computing the income of the previous year. The two provisions are akin and the provisos to Sections 40(a)(ia) and 43B are to the same effect and for the same purpose.

24. In Podar Cement Private Limited (supra), the Supreme Court considered whether term „owner" would include unregistered owners who had paid sale consideration and were covered by Section 53A of the Transfer of Property Act. The contention of the assessees was that the amendments made to the definition of term „owner" by Finance Bill, 1987 should be given retrospective effect. It was held that the amendments were retrospective in nature as they rationalise and clear the existing ambiguities and doubts. Reference was made to Crawford: „Statutory Construction" and „the principle of Declaratory Statutes", Francis Bennion: „Statutory Interpretation", Justice G.P. Singh"s „Principles of Statutory Interpretation", it was observed that sometimes amendments are made to supply an obvious omission or to clear up doubts as to the meaning of the previous provision. The issue was accordingly decided holding that in such cases the amendments were retrospective though it was noticed that as per Transfer of Property Act, Registration Act, etc. a legal owner must have a registered document.

25. In view of the aforesaid discussion in paras 18,19 and 20, it is apparent that the respondent assesse did not violate the unamended section 40(a)(ia) of the act. We have noted the ambiguity and referred their contention of Revenue and rejected the interpretation placed by them. The amended provisions are clear and free from any ambiguity and doubt. They will help curtail litigation. The amended provision clearly support view taken in paragraphs 17 – 20 that the expression "said due date" used in clause A of proviso to unamended

section refers to time specified in Section 139(1) of the Act. The amended section 40(a)(ia) expands and further liberalises the statue when it stipulates that deductions made in the first eleven months of the previous year but paid before the due date of filing of the return, will constitute sufficient compliance.

26. Before we close, we must deal with another contention raised by the counsel for the Revenue to the effect that Finance Bill, 2010 increases the rate of interest from 12% to 18% for failure to deposit TDS in time. This increase in rate of interest, it is submitted, is directly connected and associated with the concession or benefit which was extended to the assessee by amending the proviso. We do not find any merit in the said contention. Even prior to the amendment made by Finance Bill, 2010, Section 40(a)(ia) had stipulated that in case where the tax was deductable and so deducted during the last month of the previous year but was paid on or before the due date specified in Section 139(1) of the Act, deduction/expenditure will be allowed in the previous year notwithstanding the main Section. The section as well as the proviso before the amendment in 2010 had ambiguities and doubts. The proviso as amended by Finance Act, 2008 with retrospective effect from 1st April, 2005 was not free from interpretative difficulties and problems. This aspect is highlighted above. The intention behind Section 40(a)(ia) is to ensure that TDS is deducted and paid. The object of introduction of Section 40(a)(ia) is to ensure that TDS provisions are scrupulously implemented without default in order to augment recoveries. It is not to penalise an assessee when payment has been made within the time stated. Failure to deduct TDS or deposit TDS results in loss of revenue and may deprive the Government of the tax due and payable. The provision should be interpreted in a fair, just and equitable manner. It should not be interpreted in a manner which results in injustice and creates tax liabilities when TDS has been deposited/paid and the respondent who is following cash system of accountancy has made actual payment to the third party for services rendered. If the said object and purpose is kept in view, we do not think the Assessing Officer was justified in disallowing and in invoking Section 40(a)(ia) in the present case. The question of law is accordingly answered in negative, i.e., in favour of the respondent assessee and against the Revenue. The appeal is accordingly disposed of. No costs.

In the aforesaid case, the Hon'ble High Court has duly considered the decision of the Special Bench of the Tribunal in the case of M/s Bharti Shipyard vs DCIT 132 ITD 53; (2011) 11 ITR (Trib.) 599, which was relied upon by the Assessing Officer. The Hon'ble High Court also considered the decision in CIT vs Shyam Narayant & Brothers (2012) 349 ITR 145, Calcutta High Court in Virgin Creations (supra) and also the decision from Hon'ble Apex Court in Allied Motors Pvt. Ltd. (224 ITR 677), Poddar Cement Pvt. Ltd. (1997) 5 SCC 482 (SC) along with various other decisions including introduction of section 40(a)(ia) w.e.f. 01/04/2005 (by the Finance (No.2) 2004 bill explaining the rationale behind insertion of the section and held that the expression 'said due date' cannot mean the date of TDS as per chapter XVIIIB should have been paid rather it refers to the due date of filing of return u/s 139(1) of the Act. Any other interpretation would lead to difficulties and conflict between clause-A of the main section and Clause-A of the proviso. Admittedly, failure to deduct TDS or deposit TDS results in loss of Revenue and may deprive the government of the tax due and payable. But, the provision should be interpreted in fair, just and equitable manner. Finally, the issue was decided in favour of the assessee by holding that the Assessing Officer was not justified in disallowing and invoking section 40(a)(ia) of the Act.

2.9. In a later decision in CIT vs Naresh Kumar (ITA No.24/2013) order dated 06/09/2013 identically an

elaborate discussion was made by Hon'ble High Court of Delhi and decided in favour of the assessee by dismissing the appeal of the Revenue. In the light of the foregoing discussions and following the aforesaid decisions from Hon'ble High Court, we are of the considered opinion that there was no justification for invoking section 40(a)(ia) of the Act as the assessee deposited the TDS amount before filing of return.

2.10. Now, question arises whether the Ld Assessing Officer was justified in reopening the assessment u/s 147/148 of the Act and the Ld. Commissioner of Income Tax (Appeal) in affirming the same. We find that the assessee filed the return on 30/10/2005 and the case was, subsequently, on scrutiny assessment, completed u/s 143(3) r.w.s 148 of the Act on 01/03/2013, thus, reopening is beyond a period of four years, more specifically when the material facts were fully and truly disclosed by the assessee. Before adverting further it is noted that the Assessing Officer while disposing off the application made u/s 154 of the Act, due to enhancement of disallowance u/s 40(a)(ia) of the Act, the matter travelled upto the Tribunal, wherein, it was held that while passing order u/s 154 of the Act, no enquiry can be made as no debatable issue dealt with and thus the Tribunal dismissed on same lines. Even otherwise, the assessee vide letter dated 09/11/2012 pointed out that 154 notice, issued earlier was still alive and proceedings initiated u/s 148 was bad in law. In the aforesaid order, we find that

no disallowance was held to be justified u/s 40(a)(ia) of the Act as the assessee had already deposited the TDS before the due date of filing of return u/s 139(1) of the Act, therefore, we find no justification to reopen the assessment beyond four years.

2.11. However, in the present appeal undisputedly, the assessment was framed u/s 143(3) r.w.s. 148 of the Act, meaning thereby, a opinion was formed by the Assessing Officer. In such situation, we observe that there is change of opinion by the Assessing Officer. Reassessment proceedings will be invalid in a case where assessment order itself records that the issue was raised, facts were examined, necessary details were filed by the assessee and the Assessing Officer decides in favour of the assessee, thus, reassessment proceedings in such cases will be hit by the principle of "change of opinion" as in the assessment order an opinion was formed by the Assessing Officer. The expression "change of opinion" postulates formation of opinion and then a change thereof. In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. A distinction must be drawn between erroneous application/ interpretation/ understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. The

reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression "material facts" means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have a remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. There is a difference between "change of opinion" and "failure or omission" of the Assessing Officer to form an opinion on a subject-matter, entry, claim, deduction, etc. When the Assessing Officer fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion. Whether or not the Assessing Officer

had applied his mind and examined the subject-matter, claim, etc., depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject-matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing-Officer did not examine a particular subject-matter, claim, etc. The stand and stance of the assessee and the Assessing Officer in such cases are relevant.

2.12. Section 114 of the Evidence Act, 1872, is permissive and not a mandatory provision. Nine situations by way of illustrations are stated, which are by way of example or guidelines. As a permissive provision it enables to judge to support his judgment but there is no scope of presumption when facts are known. Presumption of facts under section 114 is rebuttable. The presumption raised under illustration (e) to section 114 of the Act means that when an official act is proved to have been done, it will be presumed to have been regularly done but it does not raise any presumption that an act was done for which there is no evidence or proof.

(i) Section 114(e) of the Act can be applied to an assessment order framed under section 143(3) of the Act, provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter

covered by the disclosure, it would amount to change of opinion. The following cases are worth mentioning:

A. L. A. Firm v. CIT [1976] 102 ITR 622 (Mad) (para 9)
A. L. A. Firm v. CIT [1991] 189 ITR 285 (SC) (paras 32, 60, 61)
Anandji Haridas and Co. P. Ltd. v. Kushare (S. P.), STO [1968] 21 STC 326 (SC) (para 35)
Bankipur Club Ltd. v. CIT [1971] 82 ITR 831 (SC) (para 34)
Barium Chemicals Ltd. v. CLB [1966] 36 Comp Cas 639 (SC) (para 56)
BLB Ltd. v. Asst. CIT [2012] 343 ITR 129 (Delhi) (para 14)
Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (SC) (para 45)
CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) (paras 9, 34)
CIT v. Chase Bright Steel Ltd. (No. 1) [1989] 177 ITR 124 (Bom) (para 21)
CIT v. DLF Power Ltd. [2012] 345 ITR 446 (Delhi) (para 14)
CIT v. Eicher Ltd. [2007] 294 ITR 310 (Delhi) (paras 10, 28)
CIT v. Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] (paras 2, 12, 20, 48)
CIT v. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) (paras 2, 28)
CIT v. Khemchand Ramdas [1938] 6 ITR 414 (PC) (para 50)
CIT v. P. V. S. Beedies P. Ltd. [1999] 237 ITR 13 (SC) (para 18)
CIT (Asst.) v. Rajesh Jhaveri Stock Brokers P. Ltd. [2007] 291 ITR 500 (SC) (paras 4, 12)
CIT v. Sharma (H. P.) [1980] 122 ITR 675 (Delhi) (para 9)
Consolidated Photo and Finvest Ltd. v. Asst.CIT [2006] 281 ITR 394 (Delhi) (paras 9, 11)
Dalmia P. Ltd. v. CIT [2012] 348 ITR 469 (Delhi) (para 17)
G. R. Ramachari and Co. v. CIT [1961] 41 ITR 142 (Mad) (paras 38, 61)
Hari Iron Trading Co. v. CIT [2003] 263 ITR 437 (P&H) (para 10)
ITO v. Habibullah (S. K.) [1962] 44 ITR 809 (SC) (para 50)
Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC) (paras 34, 35)
Indian Hume Pipe Co. Ltd. v. Asst. CIT [2012] 348 ITR 439 (Bom) (para 17)
3i Infotech Ltd. v. Asst. CIT [2010] 329 ITR 257 (Bom) (para 26)
International Woollen Mills v. Standard Wool (U. K.) Ltd. [2001] 5 SCC 265 (para 30)
Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) (paras 9, 33, 34, 35)
KLM Royal Dutch Airlines v. Asst. Director of I. T. [2007] 292 ITR 49 (Delhi) (para 12)
Kunhayammed v. State of Kerala [2000] 245 ITR 360 (SC) (para 31)
Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC) (para 34)
Muthukrishna Reddiar v. CIT [1973] 90 ITR 503 (Ker) (para 9)
New Light Trading Co. v. CIT [2002] 256 ITR 391 (Delhi) (para 18)

Praful Chunilal Patel v. Makwana (M. J.)/Asst. CIT [1999] 236 ITR 832 (Guj) (para 21)
Snowcem India Ltd. v. Deputy CIT [2009] 313 ITR 170 (Bom) (para 31)
Sri Krishna P. Ltd. v. ITO [1996] 221 ITR 538 (SC) (paras 56, 58)
Suresh Budharmal Kalani v. State of Maharashtra [1998] 7 SCC 337 (para 29)
Union of India v. Suresh C. Baskey [1996] AIR 1996 SC 849 (para 20)
United Mercantile Co. Ltd. v. CIT [1967] 64 ITR 218 (Ker) (para 9)

2.13. For reopening an assessment made under section 143(3) of the Act, the following conditions are required to be satisfied:

> *(i) the Assessing Officer must form a tentative or prima facie opinion on the basis of material that there is underassessment or escapement of income ;*
>
> *(ii) he must record the prima facie opinion into writing ;*
>
> *(iii) the opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.*
>
> *(iv) reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.*
>
> *(v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. The Explanation to the section stipulates that mere production of books of account or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to "full and true disclosure of material facts" (the proviso is not applicable where reasons to believe for issue of notice are recorded and notice is issued within four years from the end of assessment year).*

2.14. The term and facets of the term "change of opinion". The expression "change of opinion" postulates formation of opinion and then a change thereof. In the

context of section 147 of the Act it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.

2.15. The word "opinion" is derived from the latin word "opinari" which means "to believe", "to think". The word "opinion" as per the Black's Law Dictionary means a statement by a judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. Ramanatha Aiyar (third edition) explains the term "opinion" to mean "something more than mere retaining of gossip or hearsay ; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question . . . An opinion is a conviction based on testimony . . . they are as a result of reading, experience and reflection".

In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection to use the words in Law Lexicon by P. Ramanatha Aiyar. The question of change of opinion arise when an Assessing Officer forms an opinion and decides not to make an addition or holds that the

assessee is correct and accepts his position or stand. In Hari Iron Trading Co. v. CIT [2003] 263 ITR 437 (P&H), a Division Bench of the Hon'ble Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. Applying the principles laid down by the Full Bench of this court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applies his mind to that material and accepted the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.

2.16. The Hon'ble Delhi High Court in Consolidated Photo and Finvest Ltd. [2006] 281 ITR 394 (Delhi) held as under:

"In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot be assailed on the ground that the same is based only on a change of opinion."

2.18. From the foregoing discussion, the clear position emerges as under:

> *(1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.*
>
> *(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".*
>
> *(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.*

2.19. Thus, where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion. Here a distinction has to be drawn between erroneous application/interpretation /understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of

opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression "material facts" means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. A decision from Hon'ble Delhi High Court dated September 26, 2011 in Dalmia P. Ltd. v. CIT [2012] 348 ITR 469 (Delhi) and another decision from Hon'ble jurisdictional High Court dated November 8, 2011, in Indian Hume Pipe Co. Ltd. v.

Asst. CIT [2012] 348 ITR 439 (Bom) are two such cases, which throws light on the issue. In the first case, the Assessing Officer in the original assessment had made addition of Rs. 19,86,551 under section 40(1) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details, etc., were not furnished, were to the extent of Rs. 52,84,058 and not Rs. 19,86,551. In Indian Hume Pipe Co. Ltd. (supra), after verification the claim under section 54EC was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/ facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not appreciate the implications or did not apply the correct law. The second category will be a case of "change of opinion" and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interests of the Revenue, can be made subject-matter of adjudication under section 263 of the Act.

2.20. A division Bench of Hon'ble Delhi High Court in New Light Trading Co. v. CIT [2002] 256 ITR 391 (Delhi), referred to the decision of the Hon'ble Apex Court in CIT v.

P. V. S. Beedies P. Ltd. [1999] 237 ITR 13 (SC) and made following observations. (page 392) :

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

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

This brings us to the observations of the Delhi High Court in Kelvinator of India Ltd. [2002] 256 ITR 1 (Delhi) [FB] which read as under (page 18):

"The Board in exercise of its jurisdiction under the aforementioned provisions had issued the circular on October 31, 1989. The said circular admittedly is binding on the Revenue. The authority, therefore, could not have taken a view, which would run counter to the mandate of the said circular."

From a perusal of clause 7.2 of the said circular it would appear that in no uncertain terms it was stated as to

under what circumstances the amendments had been carried out, i.e., only with a view to allay the fears that the omission of the expression 'reason to believe' from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion. It is, therefore, evident that even according to the CBDT a mere change of opinion cannot form the basis for reopening a completed assessment.

2.21. Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra virus article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favoured. In the event it is held that by reason of section 147 if the Income-tax Officer exercises its jurisdiction for initiating proceeding for re-assessment only upon mere change of opinion, the same may be held to be unconstitutional. We are, therefore, of the opinion that section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate reassessment proceeding upon his mere change of opinion. The Hon'ble Apex Court thereafter referred to the subsequent decision in Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC) wherein it was observed that some of the observations made in Kalyanji Mavji (supra) were far too wide and the statute did not permit reappraisal of material considered by the Assessing Officer during the original assessment. The observations in

Kalyanji Maviji (supra) that reopening would cover a case "where income has escaped assessment due to the oversight, inadvertence or mistake" was too broadly expressed and did not lay down the correct law. It was clarified and observed at page 1004 in Indian and Eastern Newspaper Society [1979] 119 ITR 996 (SC) as under :

> *"Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC), where a Bench of two learned judges of this court observed that a case where income had escaped assessment due to the 'oversight, inadvertence or mistake' of the Income-tax Officer must fall within section 34(1)(b) of the Indian Income-tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income-tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this court in Maharaj Kumar Kamal Singh v. CIT [1959] 35 ITR 1 (SC), CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC) and Bankipur Club Ltd. v. CIT [1971] 82 ITR 831 (SC), and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC) suggesting the contrary do not, we say with respect, lay down the correct law."*

2.22. In A. L. A. Firm (supra), the Hon'ble Apex Court explained that there was no difference between the observations of the Supreme Court in Kalyanji Maviji [1976] 102 ITR 287 (SC) and Indian and Eastern Newspaper Society case [1979] 119 ITR 996 (SC), as far as proposition (4) is concerned. It was held that (page 297 of 189 ITR) :

"We have pointed out earlier that Kalyanji Maviji's case [1976] 102 ITR 287 (SC) outlines four situations in which action under section 34(1)(b) can be validly initiated. The Indian Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has only indicated that propo sition (2) outlined in this case and extracted earlier may have been somewhat widely stated ; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji's case. The facts of the present case squarely fall within the scope of propositions 2 and 4 enunciated in Kalyanji Maviji's case [1976] 102 ITR 287 (SC). Proposition (2) may be briefly summarized as permitting action even on a 'mere change of opinion'. This is what has been doubted in the Indian and Eastern Newspaper Society case [1979] 119 ITR 996 (SC) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Maviji's case [1976] 102 ITR 287 (SC). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on 'information' in the shape of some light thrown on aspects of facts or law which the Income-tax Officer had not earlier been conscious of. To give a couple of illustrations ; suppose an Income-tax Officer, in the original assessment, which is a voluminous one involving several contentions, accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently, he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the Income-tax Officer derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose the Income-tax Officer accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under section 147(b) by virtue of proposition (4) of Kalyanji Mavji. The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.

What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Maviji's case [1976] 102 ITR 287 (SC). The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the Income-tax Officer initiates reassessment proceedings in the light of 'information' obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed

earlier, for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the Income-tax Officer, having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC), it also ropes in cases of a 'bare or mere change of opinion' where the Income-tax Officer (very often a successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor Income- tax Officer) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and the Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji [1976] 102 ITR 287 (SC). The second paragraph from the judgment in the Indian and Eastern Newspaper Society's case [1979] 119 ITR 996 (SC) earlier extracted has also reference only to this situation and insists upon the necessity of some information which make the Income-tax Officer realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas 21 STC 326. Even making allowances for this limitation placed on the observations in Kalyanji Mavji, the position as summarised by the High Court in the following words represents, in our view, the correct position in law (at page 629 of 102 ITR) :

The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently came by the material from the record itself, then such a case would fall within the scope of section 147(b) of the Act'." (emphasis supplied)

The aforesaid observations are a complete answer to the issue that if a particular subject-matter, item, deduction or claim is not examined by the Assessing Officer, it will

nevertheless be a case of “change of opinion” and the reassessment proceedings will be barred.

2.23. We are conscious of the fact that the aforesaid observations have been made in the context of section 147(b) with reference to the term "information" and conceptually there is difference in scope and ambit of reopening provisions incorporated with effect from April 1, 1989. However, it was observed by the Hon’ble Apex Court in Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) that the amended provisions are wider. What is important and relevant is that the principle of "change of opinion" was equally applicable under the un-amended provisions. The Supreme Court was, therefore, conscious of the said principle, when the observations mentioned above in A. L. A. Firm [1991] 189 ITR 285 were made.

2.24. Under the new provisions of section 147, an assessment can be reopened if the Assessing Officer has "reason to believe" that income chargeable to tax has escaped assessment; but if he wants to do so after a period of four years from the end of the assessment year, he can do so only if the assessee has fallen short of his duty to disclose fully and truly all material facts necessary for his assessment. It does not follow that he cannot reopen the assessment even within the period of four years as aforesaid if he has reason to believe that the assessee has failed to make the requisite disclosure. All that the section says is

that in a case where the assessment is sought to be reopened after the period of four years, the only reason available to the Assessing Officer is the non-disclosure of material facts on the part of the assessee. The Act places a general duty on every assessee to furnish full and true particulars along with the return of income or in the course of the assessment proceedings so that the Assessing Officer is enabled to compute the correct amount of income on which the assessee shall pay tax. The position has been further clarified by the proviso itself in a case where assessment under sub-section (3) of section 144 of the Act or this section has been made for the relevant assessment year, no action shall be taken 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 year by the reason of failure on the part of the assessee to make a return u/s 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose truly and fully all material facts necessary for his assessment for that assessment year. It is also noted that the scope of newly substituted (w.e.f. 01/04/1989) section 147 has been elaborated in department circular number 549 dated 31st October, 1989, meaning thereby, on or after 01/04/1989, initiation of reassessment proceedings has to be governed by the provisions of section 147 to 151 as substituted (amended) w.e.f. 01/04/1989. Still, power u/s 147 of the Act, though very wide but no plenary. We are

aware that Hon'ble Gujarat High Court in Praful Chunilal Patel: Vasant Chunilal Patel vs ACIT (1999) 236 ITR 82, 840 (Guj.) even went to the extent that action under main section 147 is possible in spite of complete disclosure of material facts. The primary condition of reasonable belief having nexus with the material on record is still operative. However, we are of the view, that mere fresh application of mind to the same set of facts or mere change of opinion does not confer jurisdiction to the Assessing Officer even under the post 1989 section 147 of the Act. Our view find support from following decisions:-

a. Jindal Photo Films Ltd. vs DCIT (1998) 234 ITR 170 (Del.),
b. Garden Silk Mills Pvt. Ltd. vs DCIT (1999) 151 CTR (Guj.) 533,
c. Govind Chhapabhai Patel vs DCIT 240 ITR 628, 630 (Guj.),
d. Foramer vs CIT (2001) 247 ITR 436 (All.), affirmed in CIT vs Foramer Finance (2003) 264 ITR 566, 567 (SC),
e. Ipca Laboratories vs DCIT (2001) 251 ITR 416 (Bom.),
f. Ritu Investment Pvt. Ltd.(2012) 345 ITR 214 (Del.),
g. Ketan B. Mehta vs ACIT (2012) 346 ITR 254 (Guj.),
h. Ms. Praveen P. Bharucha vs DCIT (2012) 348 ITR 325 (Bom.),
i. CIT vs Usha International Ltd. 348 ITR 485 (Del.),
j. Agricultural Produce Market Committee vs ITO (2013) 355 ITR 348 (Guj.),

k. B.B.C. World News Ltd. vs Asst. DIT (2014) 362 ITR 577 (Del.).

2.25. Identical ratio was laid down in CIT vs Malayala Manorma Company Ltd. (2002) 253 ITR 378 (Ker.) We think this thread runs through the various provisions of the Act. But Explanation 1 to the section confines the duty to the disclosure of all primary and material facts necessary for the assessment, fully and truly. As to what are material or primary facts would depend upon the facts and circumstances of each case and no universal formula may be attempted. The legal or factual inferences from those primary or material facts are for the Assessing Officer to draw in order to complete the assessment and it is not for the assessee to advise him, for obvious reasons. The Explanation, however, cautions the assessee that he cannot remain smug with the belief that since he has produced the books of account before the Assessing Officer from which material or evidence could have been with due diligence gathered by him, he has discharged his duty. It is for him to point out the relevant entries which are material, without leaving that exercise to the Assessing Officer. The caveat, however, is that such production of books of account may, in the light of the facts and circumstances, amount to full and true disclosure ; this is clear from the use of the expression "not necessarily" in the Explanation. Thus, the question of full and true disclosure of primary or material facts is a pure question of fact, to be determined on the facts

and circumstances of each case. No general principle can be laid down. It was observed by the Hon'ble Apex Court, in various cases that there should be some "tangible material" coming into the possession of the Assessing Officer in such cases to enable him to resort to section 147 of the Act. Despite being a case of full and true disclosure, tangible material coming to the possession of the Assessing Officer after he made the original assessment under section 143(3), would influence the opinion, formed or presumed to have been formed earlier, by the assessing authority; he can with justification change it, but that would not be a case of a "mere change of opinion" unguided by new facts or change in the legal position. It will be a case of the assessing authority having "reason to believe", notwithstanding that full and true particulars were furnished by the assessee which were examined, or presumed to be examined, by him. There was a divergence of opinion amongst various High Courts as to what constitute "Information" for the purposes of section 34(1)(b) of the 1922 Act (which corresponds to section 147(b) of the 1961 Act) the Hon'ble Apex Court in CWT vs Imperial Tobacco Company Ltd. (1966) 61 ITR 461 has noted such divergence of opinion on the point. Hon'ble jurisdictional High Court in CIT vs Sir Mohammad Yusuf Ismail (1944) 12 ITR 8 (Bom.) held that mere change of opinion on the same facts are on question of law or mere discovery of mistake of law is not sufficient information and that in order to sustained action u/s 34 by further holding

that reassessment is not permissible. The Hon'ble Apex Court in Simon Carves Ltd. (1976) 105 ITR 212 held that errorless legally correct order cannot be reopened, therefore, it is settled law that without any new information and on the basis of mere change of opinion, reopening of assessment is not permissible. As was held in CIT vs TTK Prestige ltd. (2010) 322 ITR 390 (Karn.) SLP dismissed in 2010 322 ITR (St.) 14 (SC). Reference also made to Asian Paints ltd. vs DCIT (2009) 308 ITR 195 (Bom.), Andhra Bank Ltd. vs CIT (1997) 225 ITR 447 (SC). The observations of the Supreme Court are a protection against the abuse of power; they also protect the Revenue which can, in the light of subsequent coming into light of facts or law, reopen the assessment. In the light of the aforesaid discussion, since, there was no new tangible material available with the Assessing Officer while resorting to section 147/148 of the Act, more specifically, while framing original assessment u/s 143(3) of the Act, there was full disclosure of material facts by the assessee and on the basis of those facts, assessment was completed u/s 143(3) of the Act. Even otherwise, it is noted by the ld. Assessing Officer issued statutory notices u/s 143(2) and 142(1) to which the assessee furnished the necessary details as is evident from page-1 of the assessment order itself, therefore, in our humble opinion, the reassessment is unjustified as the reopening was done by the Assessing Officer beyond the prescribed period of four years, therefore, on this legal issue, the appeal of the assessee deserves to be

allowed. Our view find support from Hon'ble jurisdictional High Court in Mistry Lalji Narsi Development Corporation vs ACIT (2010) 323 ITR 194 (Bom.), Anil Radha Krishnawani vs ITO (2010) 323 ITR 564 (Bom.), Sadbhav Engineering Ltd. vs DCIT (2011) 333 ITR 483 (Guj.), Aayojan Developers vs ITO 335 ITR 234 (Guj.), CIT vs PI & IC Corporation of UP Ltd. (2011) 332 ITR 324 (All.), SLP dismissed by Hon'ble Apex Court, Kimplas Trenton Fittings Ltd. vs ACIT (2012) 340 ITR 299 (Bom.). The whole case in the present appeal pertains to disallowance u/s 40(A)(ia) of the Act, which pertains to alleged non-payment of tax deducted at source within the time prescribed limit. The totality of facts and the judicial pronouncements, clearly says that the tax so deducted can be deposited in the state exchequer within the time prescribed under the Act before filing of return, which has been done by the assessee. The Hon'ble Andhra Pradesh and Telangana High Court in a latest decision dated 13/02/2017 in the case of Rajendra Gaud Chepur vs Income Tax Officer, Nijamabad (Writ Petition Nos.36483, 37209, 37213, 37270, 37469, 37478, 37479, 37524 and 37555 of 2016) held as under:-

> "The petitioners in all these writ petitions are engaged in the business of retail vending of Indian-made foreign liquors purchased by them from the Andhra Pradesh State Beverages Corporation. The petitioners are aggrieved by the reopening of assessment sought to be made by the Assessing Officers under Section 147 of the Income Tax Act, 1961.

2. Heard Mr. K.Vasantkumar, learned counsel for the petitioners and Mr. B.Narasimha Sarma, learned Standing Counsel appearing for the respondents.

3. The petitioners in these writ petitions were issued with notices under Section 148 of the Act on various dates. In the notices which were in the printed form, it was stated that the Assessing Officers had reason to believe that there was income chargeable to tax relating to the relevant assessment years which had escaped assessment within the meaning of Section 147 of the Act and that therefore the petitioners should file a return in the prescribed form.

4. In response to the said notices, the petitioners sent individual replies indicating that they had already filed their returns of income electronically admitting income to a particular extent. In the replies, the petitioners also sought the reason for issuance of the notice.

5. Thereafter, the Assessing Officers sent a rejoinder indicating the reasons for reopening. Except the figures indicated therein, the reasons stated in all the notices were identical and hence the reasons stated in respect of one case alone is extracted as follows as a model:

"It is observed that your gross receipt was Rs.2,28,48,838/- for the AY 2013-14 and you have admitted total income amounting to Rs.4,16,840/- which is 2.10% of your total receipt, and the income admitted is also very less compared to others who are in the same line of business."

6. The petitioners filed objections to the reasons indicated by the Assessing Officers contending that the cases would not fall under Section 147(1), as everything turned upon presumptions and surmises without any factual basis. The objections were rejected by the Assessing Officers by the orders impugned in these writ petitions forcing the petitioners to come up with the above writ petitions.

7. The orders rejecting the objections, are also identically worded and hence the relevant portion of one of those orders is extracted for easy appreciation as follows:

"3(ii) It may be specifically mentioned here that there is nothing in Section 147 of the I T Act, 1961 to suggest that an AO cannot reopen an assessment where he had failed to investigate and find out fact of the case truth at initial stage. Reliance is placed on the decision of Hon'ble High Court in the case of Ramprasad vs. AO (1995) 82 Taxman 199 (Allahabad). The Hon'ble Supreme Court in the case of ACIT Vs Rajesh Jhaveri Stock Brokers Pvt. Ltd. (2007) 291 ITR 500 has clearly held that intimation u/s 143(1) is not 'assessment', so there is no question of treating the re-assessment in such cases as based on change of opinion. Here in the instant case of assessee, the case is covered by the main provision and not by 1st proviso to section 147. The assessee has ignored the substantial changes made to 143(1) w.e.f. 01.06.1999. Further Hon'ble Supreme Court has held in the cited case that w.e.f. 1.6.1999, the acknowledgement of return is deemed to be an intimation except as provided in 1st proviso. Therefore, there being no "assessment" u/s 143(1), in this case for A.Y. 2012-13, the question of change of opinion as contended by assessee does not arise. (iii) In the above context, attention is also drawn to the provisions of section 147 in general, and explanation- 2(b) as under: Explanation 2 "For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax escaped assessment, namely (a)------- (b) where a ROI has been furnished by the assessee but no assessment has been made and it is noticed by the AO that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the FOI.

5. The notice was issued after obtaining approval from the competent Authority. The Joint Commissioner of Income Tax, Nizamabad Range has given approval vide F.No.51/JCIT/ NZB/u/s 148/2015-16 dated 12.02.2016.

6. In view of the above the objections of the assessee fail and there is no reason for dropping the case. Hence, the proceedings shall continue."

8. Though the learned counsel for the petitioners as well as the learned Standing Counsel for the respondents raised several contentions, we are of the considered view that one contention of the petitioners is sufficient for the disposal of all these writ petitions. Admittedly, the notices under Section 148 was issued on the sole ground that the total income admitted by each of these petitioners, constituted a very small percentage of their gross receipts for the relevant assessment year and that therefore there was income that escaped assessment. The Assessing

Officers had drawn presumably a comparison to others in the same line of business, as indicated in the reason for reopening.

9. But the reasons for reopening owefully fall short of the reasons that could form the basis for reopening of assessments. There is no indication in the reasons as to who are the assessees with whom any comparison was made. If the Assessing Officers had compared the gross receipts of yet another assessee in the same line of business and pointed out as to how the income returned by such assessee was at a consistently higher rate of the total receipts, the petitioners could have been in a position to point out how the admitted total income in their cases fell for short. Without making an actual comparison with named assessees in the same line of business, the Assessing Officers cannot leave it to presumptions and surmises.

10. The learned Standing Counsel for the respondents/ Department took us through various decisions of the Tribunal where the similar reopening of assessments made on the same line of reasons were upheld, wherever books of accounts were not maintained, estimating the income to be 5% of the gross receipts. But it appears that in those cases, the very rationale for reopening of assessment and the very jurisdiction of the Assessing Officer to reopen assessments on the basis of such flimsy reasons, was not considered. Therefore, we cannot make a comparison of the cases on hand with cases of persons who reconciled themselves to the estimation of income at 5% of either the gross receipts or the stock available on trade.

11. Under Section 147(1), the Assessing Officer is entitled to reopen assessment, if he has reason to believe that any income chargeable to tax has escaped assessment for the assessment year. Two conditions ought to be satisfied for the invocation of the power under Section 147. They are: (1) the existence of a reason to believe and (2) the escapement of any income chargeable to tax from assessment. The reason to believe on the part of the

Assessing Officer, should arise out of concrete facts which could at least form the foundation for reopening. Without any concrete facts, reopening cannot be ordered merely on the presumption that the returned income is very shockingly lower than the total gross receipts. Therefore, we are of the considered view that the Assessing Officers completely erred in reopening assessments on the basis of either a suspicion that there is suppression of income or on the basis that persons in the same line of business are returning a higher income. Without even mentioning the comparables, no initiation of proceedings under Section 147 can be made.

12. In the order rejecting the objections, the Assessing Officer has relied upon Clause (b) under Explanation 2 to Section 147. Clause (b) under Explanation 2 to Section 147 deals with cases where a return of income has been furnished by the assessee but no assessment has been made and the Assessing Officer notices that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return. Admittedly, the cases of none of these petitioners fall under the category of claiming excessive loss or deduction or allowance or relief in the return. The cases of the assessees are attempted by the Assessing Officers to be brought within the category of "understatement of income", so as to invoke Clause (b) under Explanation 2.

13. But to come to the conclusion that there was understatement of income, it is not sufficient for the Assessing Officers to just arrive at the percentage of gross receipts that were declared as income, without even referring to other assessees whose admitted income was at a better percentage of the gross receipts than the petitioners. Therefore, the invocation of the jurisdiction under Section 147 on the basis of suspicions and presumptions cannot be sustained. Therefore, the writ petitions are allowed. The miscellaneous petitions, if any, pending in these writ petitions shall stand closed. No costs."

In the aforesaid order, the Hon'ble High Court has observed/held that though Explanation 2 of s. 147 authorizes the Assessing Officer to reopen an assessment wherever there is an "understatement of income", the AO is not entitled to assume that there is "understatement of income" merely because the assessee's income is "shockingly low" and others in the same line of business are returning a higher income. The invocation of the jurisdiction u/s 147 on the basis of suspicions and presumptions cannot be sustained. In the present appeal also, the Ld. Assessing Officer first tried to took the shelter of section 154 of the Act, which travelled up to the Tribunal and ultimately, the Ld. Commissioner of Income Tax (Appeal) as well as this Tribunal decided in favour of the assessee. Thereafter, before one day of completion of six years, the assessee took another route to reopen the assessment u/s 147 and issued the notice u/s 148 of the Act, as mentioned earlier, before the extended dead line of six years. However, since, the material facts were fully and truly disclosed by the assessee and the tax deducted at source was deposited in the state exchequer before the date of filing of return, we are of the view that the Ld. Assessing Officer was not justified to reopen the assessment beyond a period of four years for making fishing and rowing enquiries. Thus, considering the totality of facts and the ratio laid down in the aforementioned judicial decisions, we are of the view that no action can be initiated under section 147 after the expiry of 4 years from the end of

the relevant assessment year unless the income chargeable to tax has escaped assessment by reason for the failure on the part of the taxpayer to disclose fully and truly all material facts necessary for his assessment. Recently, the Hon'ble Bombay High Court in the case of Bayer Material Science Pvt. Ltd. v. DCIT(2016) 382 ITR 333 (Bom.)(HC) held that non-disposal of objections and providing the assessee with the recorded reasons towards the end of the limitation period and passing a reassessment order without dealing with the objections results in gross harassment to the assessee which the Pr. CIT should note and take remedial action. In the present appeal also, the Assessing Officer issued notice u/s 148 of the Act, one day before, expiry of extended period of six years. Thus, considering the ratio laid down in the aforementioned judicial pronouncement and the material facts, we allow the appeal of the assessee by holding that reopening of assessment was not valid, beyond four years, when the material facts were duly disclosed by the assessee and the tax deducted at source was deposited in the state exchequer before due date of filing of return.

3. Now, we shall take up the appeal of the Revenue (ITA No.865/Mum/2014). The Department had raised additional ground as under:-

> *"On the facts and in the circumstances of the case and in law, the Ld. Commissioner of Income Tax (Appeal) is not justified as the assessee has been allowed relief of Rs.3,97,76,005/- in Assessment Year 2006-07 on account of disallowance made u/s*

40(a)(ia) of the Act in Assessment Year 2005-06, resultantly, the deduction has been allowed twice."

3.1. In the original ground, the Revenue has challenged the order of the Ld. Commissioner of Income Tax (Appeal), wherein, it was held that no disallowance is called for u/s 40(a)(ia) of the Act, thereby, deleting the addition of Rs.5,30,91,745/-, made by Assessing Officer, without appreciating the fact that the amendment to section 40(a)(ia) and its first proviso by the Finance Act, 2010 w.e.f. 01/04/2010.

3.2. The crux of the argument advanced by Ld. DR is that the assessee deducted tax at source and did not paid in time, therefore, wrongly followed the decision of Hon'ble Calcutta High Court in Virgin Creation (supra). On the other hand, the ld. counsel for the assessee explained that the tax was deducted at source and was deposited before filing of return. It was also pleaded that this amount was not claimed in Assessment Year 2006-07 and claimed in Assessment Year 2005-06, meaning thereby, the grievance is Assessment Year 2006-07 and not in 2005-06, therefore, the Department cannot file appeal before the Tribunal, by way of additional ground without the leave of the Court. It was also contended that even otherwise, the additional ground/grievance is for Assessment Year 2006-07 and not for Assessment Year 2005-06, therefore, for the grievance of Assessment Year 2006-07, the Department has come in appeal in Assessment Year 2005-06. It was also contended

that even if erroneously allowed that appeal can be filed for Assessment Year 2006-07 and eleven years have passed, which cannot be permitted. It was also contended that no application for condonation of delay has been filed.

3.3. We have considered the rival submissions and perused the material available on record. So far as, the deposit of tax deducted at source and invoking section 40(a)(ia) of the Act is concerned, we have made an elaborate discussion in the earlier paras of this order while disposing off the appeal of the for Assessment Year 2005-06 (ITA No.685/Mum/2014) in favour of the assessee by holding that the amendment is retrospective in effect w.e.f. 01/04/2005. The Hon'ble Calcutta High Court in the case of Virgin Creations (supra) dated 23/11/2011 held that the payment of TDS can be deposited in the state exchequer on or before the last date of filing of return u/s 139(1) of the Act for the relevant Assessment Year and the such deduction has to be allowed. In the earlier Assessment Year, we have already discussed in the case of Shri Piyush C. Mehta (52 SOT 27) in which the Bench duly considered the decision from Hon'ble Bombay High Court in the case of CIT vs Godawari Devi Shroff 113 ITR 589 (Bom.) and various other decisions including from Hon'ble Delhi High Court in the case of Rajendra Kumar (supra) and CIT vs Naresh Kumar (supra). No contrary facts were brought to our notice by the Revenue establishing that the deduction has been granted twice to the assessee. Mere claim/allegation is not

enough and it has to be substantiated with facts. Therefore, respectfully, following the decisions from Hon'ble Apex Court, Hon'ble High Courts and various Co-ordinate Benches of the Tribunal, we find no infirmity in the conclusion of the Ld. Commissioner of Income Tax (Appeal), resultantly, the appeal of the Revenue is having no merit, therefore, dismissed.

Finally, the appeal of the assessee is allowed and of the Revenue is dismissed.

Order pronounced in the open court on 26/05/ 2017.

Sd/-	**Sd/-**
(N.K. Pradhan)	(Joginder Singh)
लेखा सदस्य / ACCOUNTANT MEMBER	**न्यायिक सदस्य** / JUDICIAL MEMBER

मुंबई Mumbai; दिनांक Dated : 26/05/2017
*Shekhar, P.S/*नि.स./

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to</u> :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त,(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A)- , Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई **/ ITAT, Mumbai**