आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री विक्रम सिंह यादव, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI VIKRAM SINGH YADAV, AM

आयकर अपील सं./ITA No. 237/JP/2019
निर्धारण वर्ष/Assessment Year : 2013-14

The ITO, Ward-2(3), Alwar.	बनाम Vs.	M/s Krish Homes Private Limited 203, Caxton House, 2E, Jhandewalan Extension, New Delhi-110055.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AACCK 9397 D		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

CO No. 16/JP/2019
(Arising out of ITA No. 237/JP/2019)
निर्धारण वर्ष/Assessment Year : 2013-14

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राजस्व की ओर से/ Revenue by : Shri B.K. Gupta (CIT)
निर्धारिती की ओर से/ Assessee by : Shri Rohan Sogani (C.A.) &
Shri Rajeev Sogani (C.A.)

सुनवाई की तारीख/ Date of Hearing : 16/12/2019
उदघोषणा की तारीख/Date of Pronouncement: 23/12/2019

आदेश/ ORDER

PER: SHRI VIKRAM SINGH YADAV, A.M.

This is an appeal filed by the Revenue and the cross objection filed by the assessee against the order of the ld. CIT(A), Alwar dated 31.12.2018 for the assessment year 2013-14 wherein the respective grounds of appeal are as under:-

ITA No. 237/JP/2019 (Revenue's appeal)

"On the facts and circumstance of the case and in law, ld. CIT(A) erred in allowing the claim of the assessee in respect of deduction of Rs. 13,98,46,990/- on account of gain on sale of agriculture land (rural) out of "book profit", without appreciating the material facts of the case."

C.O No. 16/JP/2019 (Assessee's appeal)

"In the facts and circumstances of the case and in law, ld. CIT(A) has erred in upholding the action of ld. AO in reopening the case of the assessee company U/s 147 of the Income Tax Act, 1961. The action of the ld. CIT(A) is illegal, unjustified, arbitrary and against the facts of the case. Relief may please be granted quashing the entire order passed by the ld. AO, in the reassessment proceedings."

2. Briefly the facts of the case are that the assessee company filed its return of income on 28.09.2013 for A.Y. 2013-14. In its return of income, the assessee company declared NIL income under regular provisions of the Act as well as declared NIL book profits under the provisions of Section 115JB of the Act. The original assessment was completed U/s 143(3) of the Act vide order dated 29.02.2016 wherein

the returned income of the assessee was accepted. Thereafter, notice U/s 148 of the Act was issued on 28.02.2017 after seeking approval of the appropriate authority U/s 151 of the Act. In response, the assessee e-filed its return of income on 14.04.2017 declaring NIL income and also sought reasons for the reopening the assessment vide its letter dated 24.04.2017. Subsequently the case was transferred vide order dated 02.05.2017 by the Pr. CIT (Central) Jaipur. Thereafter notice U/s 143(2) of the Act along with U/s 142(1) was issued on 07.11.2017. Subsequently, the assessee filed its objection against the reopening the proceedings vide its letter dated 01.12.2017 which were disposed off by the Assessing officer through separate order dated 06.12.2017.

3. As per the Assessing Officer, the assessee has sold agriculture land which has resulted into gain of Rs. 13,98,46,990/-. As per the Assessing Officer, the said land being located in rural area though does not form the part of the capital asset within the meaning of Section 2(14)(iii) of the Act, at the same time, while computing book profits U/s 115JB of the Act, gain so derived on sale of agriculture land cannot be excluded while computing the book profits. For this reason, the assessment was re-opened and notice u/s 148 was issued. As per the Assessing Officer, such gain is not income derived from land but is the income derived from sale of the land which cannot be termed as agriculture income which can be claimed as exempt under section 10 and in support, reliance was placed on the decisions in case of CIT v/s R. Krishanarjunan 225 ITR 510 (Ker) and CIT v/s T.K. Sarla Devi 167 ITR 136 (Ker). Accordingly, the income received from sale of agricultural land amounting to Rs. 13,98,46,990/- was added back to

the book profits u/s 115JB and the assessment was completed U/s 147 r.w.s. 143(3) of the Act and tax on books profits being higher than the tax under the regular provision of the Act, tax was charged U/s 115JB of the Act on such book profits.

4. Being aggrieved, the assessee carried the matter in appeal before the ld. CIT(A). The ld. CIT(A) followed the order ld. CIT(A)-IV, in assessee own case for A.Y. 2014-15 and held that gain on sale of agriculture land is eligible for exclusion from book profits U/s 115JB of the Act. However, the assessee's ground challenging the reopening of the assessment u/s 147 was decided against the assessee and in favour of the Revenue. Therefore, in the present set of appeals, the Revenue is in appeal against the exclusion of profits on sale of agriculture land while computing the book profits U/s 115JB of the Act and the assessee in its cross appeal is against the findings of the ld. CIT(A) where he has sustained the reopening of the assessment u/s 147 of the Act.

5. At the outset, the ld. CIT/DR submitted that as far as Revenue's appeal is concerned, the matter has been decided by the Coordinate Bench in favour of the Revenue for subsequent year i.e, A.Y. 2014-15 vide order in ITA No. 390/JP/2019 dated 13.12.2018. It was further submitted that the order of the Coordinate Bench has since been affirmed by the Hon'ble Rajasthan High Court in DB. Appeal No. 53/2019 dated 19.07.2019. It was accordingly submitted that on merits, the matter has been decided in favour of the Revenue and therefore, in absence of any change in the facts and circumstances of the case, order so passed by the Coordinate Bench for the A.Y 2014-15 as affirmed by

the Hon'ble Rajasthan High Court should be followed in the instant case.

6. The ld. AR fairly submitted that on merits, the matter is covered in favour of the Revenue and against the assessee by the earlier decision by the Coordinate Bench for A.Y 2014-15 which has also been affirmed by the Hon'ble Rajasthan High Court.

7. Having heard both the parties and going through the relevant material on record, we find that similar issue regarding exclusion of gains on sale of agriculture land for the purposes of computing the book profits u/s 115JB has been dealt with by the Coordinate Bench in assessee's own case for the subsequent assessment year i.e, A.Y. 2014-15 and after examining the matter at length, the matter has been decided in favour of the Revenue and against the assessee company. Further, as informed by the ld CIT DR, the said decision of the Coordinate Bench has since been affirmed by the Hon'ble Rajasthan High Court in DB Appeal No. 53/2019 dated 19.07.2019. Undisputedly, there are no changes in facts and circumstances of the case and therefore, following the decision of the Coordinate Bench as affirmed by the Hon'ble Rajasthan High Court, the matter is decided in favour of the Revenue and against the assessee company. Thus, the appeal of the Revenue is allowed.

8. Now coming to the Cross Objection filed by the assessee company wherein the assessee company has challenged the action of

ld. CIT(A) in upholding the action of the AO in reopening the assessment proceedings U/s 147 of the Income Tax Act, 1961.

9. At the outset, the ld AR submitted that the assessee company had filed a writ petition (S. B. Civil Writ petition No. 23569/2017) before the Hon'ble Rajasthan High Court against the issuance of notice u/s 148 of the Act. It was submitted that the assessee company doesn't wish to pursue the said matter before the Hon'ble Rajasthan High Court as the reassessment order u/s 147 r/w 143(3) has already been passed by the Assessing officer and the matter has now travelled upto the Tribunal. It was submitted that the assessee company shall shortly file a formal application before the Registrar, Hon'ble Rajasthan High Court withdrawing its writ petition. It was accordingly requested that the ground of appeal so taken by the assessee company challenging the assumption of jurisdiction may be allowed and arguments be heard. The ld CIT DR is heard. After hearing both the parties, we find that since the reassessment order has already been passed by the Assessing officer and the ld AR on behalf of the assessee company has stated at the Bar that it shall be withdrawing its writ petition filed before the Hon'ble Rajasthan High Court, both the parties were allowed to canvass their arguments. The assessee company was also directed to file a copy of formal application as soon as the same was filed before the Registrar, Hon'ble Rajasthan High Court withdrawing its writ petition and the Registry has since received a letter dated 19.12.2019 in this regard.

10. During the course of hearing, the ld. AR submitted that the assessee company, while filing its return of income, disclosed Rs. 13,98,46,990, as income earned from sale of Agriculture Land. Also, for the purpose of calculating MAT, such income being exempt, was reduced from the Book Profits. The above factual aspects clearly emerged from the following documents, also submitted to the ld. AO, during the course of original assessment proceedings:-

I. Audited Financials of the assessee company for the relevant previous year.

II. Form 29B furnished by the assessee company duly signed by its Chartered Accountant.

III. Income Tax Return Form consisting of the schedules pertaining to Profit and Loss Account and Calculation of Book Profits in accordance with 115JB, for the purpose of MAT.

11. The ld. AR further submitted that the AO vide notice issued u/s 142(1) dated 04.01.2016 raised queries with respect to the income of Rs. 13,98,46,990 earned by the assessee company from sale of Agriculture Land. In this regard, detailed submissions highlighting the above factual aspects and also the resultant tax treatment adopted by the assessee company were made to the AO during the course of original assessment proceedings. It was submitted that the AO based on the above factual position formed an opinion that income of Rs. 13,98,46,990 earned by the assessee company as part of the Agriculture Income would be outside the purview of MAT in accordance

with section 115JB. The AO passed order u/s 143(3), on 29.02.2016 accepting the returned income filed by the assessee company. Thereafter the AO reopened the case of the assessee company on the premise that the assessee company should have offered such income, derived from sale of Agriculture Land, for the purpose of calculating MAT. In the reasons recorded itself, the AO accepted the fact that details, as mentioned herein before, were disclosed by the assessee company and on the basis of which claim of the assessee company was initially allowed by AO. The AO, in such reasons recorded, citing various judicial pronouncements, stated that income of the assessee company escaped assessment, to the extent that the agriculture income should have been offered for MAT. In this regard, it was submitted that following factual position is undisputed, after taking cognizance of the material available with the ld. AO, during the original assessment proceedings and also the reasons recorded subsequently for reopening the case of the assessee company:-

I. The AO raised queries w.r.t the income earned by the assessee company through sale of agriculture land.

II. The assessee company had fully and truly disclosed the agriculture income while filing the return of income and also during the original assessment proceedings.

III. The AO, based on the above details, formed an opinion of allowing such claim of the assessee company, during the original assessment proceedings.

IV. The AO, in the reassessment proceedings, based on the same set of facts and documents on record changed his earlier opinion. For reassessment, the AO was of the view that the sale of agriculture land is not agriculture income and thus should not have been reduced from the calculation of Book Profits, for the purpose of MAT. This opinion was contrary to his earlier stand taken in the original assessment proceedings.

V. No new tangible material was available with ld. AO while reopening the case of assessee company.

12. It was accordingly submitted that the reasons were based on the documents which were already furnished along with return of income or during the course of assessment proceedings u/s 143(3). There was no new tangible material before the AO as there is no reference to any undisclosed fact or any fresh material or evidence. Thus, the entire reopening was based on change of opinion and, therefore is illegal and void.

13. It was further submitted that even in the order passed by the AO, disposing off the objections raised by the assessee company, against the reasons recorded, the AO has confused himself with the revisionary power provide u/s 263 *vis-à-vis* power to re-assess the case of the assessee u/s 148. The AO has power to re-open the case of the assessee company u/s 148 and re-assess the income based on new tangible material brought on the record subsequent to the original assessment proceedings. The AO u/s 148 has no power to review or revise his own order originally passed u/s 143(3) of the Act. The power

of revision enshrined under section 263 are different and not available to ld. AO himself.

14. It was further submitted that even ld. CIT(A) has not given any finding that the present reassessment proceedings is based on any new tangible material, having come in the possession of the AO, subsequent to the original assessment proceedings, under section 143(3).

15. In support of his aforesaid contentions, reliance was placed by the ld AR on the decisions in case of ACIT vs Mangalam Cement Ltd. [2017] 78 taxmann.com 334 (Jaipur) as affirmed by the Hon'ble Rajasthan High Court in case of PCIT vs Managlam Cement Ltd. (DB Income Tax Appeal No. 211/2017 dated 4.09.2017), CIT vs Vaishali Avenue [2014] 48 taxmann.com 289 (Raj), CIT vs Hindustan Zinc Ltd. [2016] 70 taxmann.com 262 (Raj), IHHR Hospitality (P). Ltd. vs ACIT [2019] 109 taxmann.com 256 (Delhi), Pawan Sood vs ITO [2019] 111 taxmann.com 241 (All), PCIT vs Atul Ltd. (Appeal No. 7 of 2019 dated 10.06.2019) passed by Hon'ble Gujarat High Court and decision of the Hon'ble Supreme Court in case of Kelvinator of India Ltd [2010] 187 Taxman 312 (SC).

16. It was further submitted that the case laws relied upon ld. CIT (A) of his order are completely different and are not applicable to the facts of the case at hand. In the case of Javeri Stock Brokers (P). Ltd, [2007] 291 ITR 500 (SC), the assessee company received intimation u/s 143(1) and, thereafter, case of the assessee was re-opened u/s 147. However, in the case at hand, original proceedings were carried out u/s 143(3) and thereafter re-opening was done u/s 148. In the case of

Yuvraj vs. Union of India [2009] 315 ITR 84 (Bom), there was an explicit finding of the Hon'ble High Court that there was no application of mind by AO wherein even the nature of income earned by assessee was not considered by the concerned officer. However, in the present case, all the relevant documents as stated hereinbefore, were submitted before the ld. AO in the original assessment proceedings. Ld. AO even issued a detailed query letter (letter dated 04.01.2016), wherein, the required details were sought by the assessee company. To this effect, detailed submissions were made by the assessee company only after which order was passed by ld. AO in the original assessment proceedings, under section 143(3). In view of the above, it was submitted that the entire re-assessment proceedings are illegal, bad in law and deserves to be quashed *ab-initio.*

17. Per contra, the ld. CIT DR referring to the original assessment order passed U/s 143(3) of the Act submitted that the Assessing Officer has computed the income under the normal provisions of the Act and as far as the computation of book profit U/s 115JB of the Act is concerned, the same is not discernable from the order of the Assessing Officer. It was submitted that where the Assessing Officer has not examined the matter relating to computation of book profits U/s 115JB of the Act at first place and there is no question of change of opinion by the Assessing Officer. Further, referring to the notice U/s 142(1) dated 04.11.2016 which has been relied upon by the ld. AR, the ld. CIT DR submitted that in the said notice also, the information which has been called for by the Assessing Officer is referring the Girdawari report and the distance of the agricultural land from the outside of any municipal

corporation in context of normal provisions and not in the context of exclusion of income on sale agricultural land from the computation of book profit for the purposes of levy of MAT. It was accordingly submitted where the Assessing Officer has not examined the matter relating to exemption of income on sale of agricultural land from the computation of book profit U/s 115JB, there is no question of change of opinion. It was further submitted that the contention of the ld. AR regarding disclosure of full and true disclosure does not help the case of the assessee as in the instance case, the reassessment proceedings have been initiated within the period of 4 years from the end of the assessment year and the proviso to section 147 doesn't apply. Further, reliance was placed on the decisions in case of A.L.A Firm vs. CIT (1991) 55 taxman 497 (SC), Dolphin Drilling Ltd. vs. ACIT (2017) 88 taxmann.com 91 (Uttrakand), Greater Mohali Area Dev. Authority Vs. DCIT (2018) 93 taxman.com 441(Punjab & Haryana), Gee City Builders P. Ltd. vs. DCIT 106 taxman.com 69 (Chd), Chetan Sabharwal vs. ACIT 110 taxman.com 57 (Del), Hemjay Construction Co. Ltd. vs. ITO (2019) 109 taxman.com 59 (Guj) and Sonia Gandhi vs. ACIT (2018) 97 taxman.com 150.

18. We have heard the rival contentions and perused the material available on record. For assumption of jurisdiction u/s 147, the Assessing Officer must form a prima facie opinion on the basis of material that there is an escapement of income, the opinion formed may be subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion, the reasons recorded and/or the documents available on record must show

a nexus and relevancy to the opinion formed by the Assessing Officer regarding escapement of income and the reasons are required to be read as they were recorded by the Assessing officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn on the basis of reasons not recorded. It is for the Assessing officer to disclose and open his mind through the reasons recorded by him and he has to speak through the reasons. In the present case, the reasons recorded by the Assessing officer before issuance of notice u/s 148 read as under:

"1. Reasons for the belief that income has escaped assessment:

(a) The assessee filed its return of income declaring total income of NIL which was assessed at NIL vide order u/s 143(3) dated 29.02.2016.

(b) during the period under consideration, the assessee has earned agricultural income of Rs. 25,500/-, dividend income of Rs. 3,42,988/- and profit on sale of agricultural land of Rs. 13,98,46,990/-. No other business activities were carried out.

(c) ***While computing 'book profit' u/s 115JB, the assessee has reduced the amount of Rs. 13,98,46,990/-, which was credited in P&L account as "Capital Gain from sale of Agricultural Land". The claim of the assessee was allowed by the AO.***

(d) In case of certain companies, tax is reduced to be paid on "book Profit" as per provisions of Section 115JB. In such cases

"book profits" is required to be computed strictly in accordance to the provisions of Section 115JB . The "book profit" is defined under Explanation -1 below sub-section (2) of Section 115JB. Accordingly, "book profit" computed under sub-section (2) is increased by certain items debited in P&L account and reduced by certain items credited in P&L account. These items are enlisted under the said Explanation. The assessee has reduced an amount of Rs. 13,98,46,990/- credited in P&L account as "capital gain from sale of agricultural land" claiming that it is agricultural income and provision of section 10(1) applied to it. The term 'agricultural income' is defined u/s 2(1A) as under:-

> *2(1A) agricultural income means-*
>
> > *(a) any rent or revenue derived from land which is satiated in India and is used for agricultural purposes.*

In view of the definition of "agricultural income" given u/s 2(1A), the amount of Rs. 13,98,46,990/- credited in P&L account as "capital gain from sale of agricultural land" is not an "agricultural income" deductable from the "book profit" u/s 115JB.

(e) In support of the above view, reliance is placed on the following judicial pronouncement:

(i) The Hon'ble Kerala High Court in the case of CIT v/s R. Krishnarjunan (1997) 225 ITR 510 (Ker.) held that:-

"A receipt relatable to the disposal or sale of agricultural land, whether urban or rural, would be a capital receipt, from which capital gains would arise. Such a receipt cannot be considered as agricultural income."

(ii) The Hon'ble Kerla High Court in another case of CIT v/s T.K. Sarala Devi (1987) 167 ITR 136 Ker) held that:-

"The profits or gains arising from 'the sale of land constituted income because section 2(24)includes as 'income' capital gains chargeable under section 45 of the Act. Such gain is, nevertheless, not income derived from land ; it is income derived by the sale of land. Although land is the source of the income, income is derived not by the use of the land, but by the sale of the land, that is, by conversion of the land into cash. If income results from the sale of agricultural land, it is not 'agricultural income' within the meaning of section 2(1).

When capital asset is sold, what is realised is capital receipt and not revenue receipt. If profit or gain results from such a sale, it is chargeable, not because it is revenue, but because the statute specifically charges the capital gain by including it as income."

(f) the assessee has failed to include above receipts of Rs. 13,98,46,990/-in its "book profit" computed u/s 115JB and also failed to disclose fully and truly all material facts necessary for its assessment. Therefore, I have the reasons to believe that, the above income of Rs. 13,98,46,990/-, which is chargeable to tax, has escaped assessment.

19. On perusal of the reasons so recorded by the Assessing officer, it is noted that original assessment proceedings were completed u/s 143(3) vide order dated 29.02.2016 wherein the returned income

declaring total income at NIL was accepted. Further, in point no. (c) of the reasons so recorded, the Assessing officer has stated that *"While computing 'book profit' u/s 115JB, the assessee has reduced the amount of Rs. 13,98,46,990/-, which was credited in P&L account as "Capital Gain from sale of Agricultural Land". The claim of the assessee was allowed by the AO." Therefore,* the fact that there was gain on sale of agriculture land amounting to Rs 13,98,46,990, the fact that the such gains were credited by the assessee company in its profit/loss account and the fact that the assessee company has reduced such gains on sale of agricultural land so credited in the profit/loss account while computing 'book profit' u/s 115JB were available on record at the time of original assessment proceedings and the Assessing officer was duly ceased of such factual position and claim of the assessee company and basis examination thereof, the claim of the assessee company was allowed by the Assessing officer while completing the original assessment proceedings under section 143(3) of the Act. This is a factual position which is clearly emerging from the reasons so recorded by the Assessing officer and we therefore donot have to go any further to establish the fact that there is no new material brought on record by the Assessing subsequent to completion of original proceedings u/s 143(3) and the matter was duly examined during the original assessment proceedings and it is therefore clearly a case of change of opinion where on the same facts and material on record, the Assessing officer wishes to take a different view than the view taken earlier and a mere change of opinion cannot *per se* be a reason for reopening as held by the **Hon'ble Supreme Court** in case of **Kelvinator of India**

ltd (supra) where affirming the full Bench decision of the Hon'ble Delhi High Court, it was held as under:

> ***"4.*** *On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987 , re- opening could be done under above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1-4-1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post 1-4-1989 , power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1-4-1989 , Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987 , Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 , dated 31-10-1989, which reads as follows :*

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147. — A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989 , has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same."

20. In such a situation, the question that arises for consideration is where there is no new material brought on record by the Assessing subsequent to completion of original proceedings u/s 143(3) and where the matter was duly examined during the original assessment proceedings, whether the Assessing officer can still acquire jurisdiction by exercising powers u/s 147 of the Act.

21. In this regard, we again refer to point no. (d) of the reasons so recorded by the Assessing officer where it has been stated that the assessee has reduced an amount of Rs. 13,98,46,990/- credited in P&L account as "capital gain from sale of agricultural land" claiming that it is agricultural income and provision of section 10(1) applied to it. However, the term 'agricultural income' is defined u/s 2(1A) to mean any rent or revenue derived from land which is situated in India and is used for agricultural purposes and in view of the said definition of "agricultural income" given u/s 2(1A), the amount of Rs. 13,98,46,990/-

credited in P&L account as "capital gain from sale of agricultural land" is not an "agricultural income" deductible form the "book profit" u/s 115JB of the Act. In support, reliance has also been placed on two decisions of the Hon'ble Kerala High Court reported in the year 1997 and 1987 respectively. These provisions were very much on the statue books at the time of original assessment proceedings and even the judicial pronouncements were available very much at time of completion of original proceedings and the Assessing officer had taken a view in the matter and the Assessing officer through the reasons so recorded is basically saying that such a view was erroneous and wrong interpretation of provisions of law. The issue therefore involves erroneous application/interpretation of provisions of section 10(1) and section 2(1A) of the Act for the purposes of computation of book profits u/s 115JB of the Act by the Assessing officer while completing the original assessment proceedings. In such a situation, where the Assessing officer has incorrectly or erroneously applied law and income chargeable to tax has escaped assessment, the Revenue is not without remedy and resort to provisions of section 263 could have been made by the ld CIT. In fact, the revisionary jurisdiction u/s 263 is meant to deal with such type of cases where the ld CIT can step-in and correct the Assessing officer. In the instant case, the original assessment proceedings were completed vide order u/s 143(3) dated 29.02.2016 and therefore, the provisions of section 263 could have been invoked by the ld CIT by 31.03.2018. However, instead of invoking the revisionary jurisdiction u/s 263 by ld. CIT, the Assessing officer has assumed the jurisdiction u/s 147 of the Act by issuance of notice dated 28.02.2017. Interestingly, for such assumption of jurisdiction, the ld CIT has

accorded the approval u/s 151 of the Act. It is therefore a case where matter was referred to the ld CIT for seeking his approval and the ld CIT instead of holding that the matter falls under section 263 and not under section 148 has given the approval u/s 151 of the Act which shows non-application of mind and mechanical grant of approval. Therefore, in the instant case, the assumption of jurisdiction u/s 147 by issuance of notice u/s 148 cannot be sustained and held as invalid in eyes of law. We therefore find force in the contention of the ld AR that there is a distinction between power to review and power to reassess and the AO doesn't have power to review his own order and such power is enshrined under section 263 of the Act and bestowed on the ld CIT which cannot be ceded to the Assessing officer. In this regard, we draw support from the Full Bench decision of the **Hon'ble Delhi High Court** in case of **CIT vs Usha International Ltd** [2012] 348 ITR 485 wherein it was held as under:

*"**13.** It is, therefore, clear from the aforesaid position that:*

(1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assesse. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but

the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

14. *In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in CIT v. DLF Power Ltd. [2012] 17 taxmann.com 269 (Delhi) and BLB Ltd. v. Asstt. CIT [2012] 206 Taxman 37/ 19 taxmann.com 115 (Delhi) (Mag.). In the last decision it has been observed:*

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

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

16. *Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment*

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

Further, referring to the earlier Full Bench decision in case of Kelvinator India, it was held as under:

***22.** In the last paragraph quoted above, the Full Bench rejected the submission that reassessment proceedings would be justified if the assessment order is silent or does not record reasons or analysis of material on record. This, the Revenue had propounded, would show non application of mind by the assessing officer. It was held that the said submission was fallacious. Full Bench explained that when an assessment order was passed under Section 143(3), a presumption could be raised that the order was passed after application of mind. Reference was made to clause (e) to Section 114 of the Indian Evidence Act, 1872. The contention if accepted would give premium to the*

authority exercising quasi-judicial function to take benefit of its own wrong i.e. failure to discuss or record reasons in the assessment order. The aforesaid observations have been made in the context and for explaining the principle of "change of opinion". The said principle would apply even when there is no discussion in the assessment order but where the Assessing Officer had applied his mind. A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. Assessee is required to disclose full and true material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under Section 263 of the Act."

22. Further, for assumption of jurisdiction, in the reasons so recorded, the Assessing officer has also stated that assessee has failed to fully and truly disclose all material facts necessary for the assessment. What material facts have not been disclosed by the assessee company have not been spelt out by the Assessing officer and as we have noted above, the Assessing officer has himself stated that the assessee has credited capital gain on sale of agricultural land in its profit/loss account and the same have been reduced while working out book profits u/s 115JB of the Act. Therefore, we find that all primary facts have been duly disclosed by the assessee company and it is for the Assessing officer to draw correct legal inference therefrom. Further, we find that while alleging such failure on the part of the assessee

company, the Assessing officer has apparently drawn reference to the proviso to section 147 of the Act which is not applicable in the instant case as the notice u/s 148 dated 28.02.2017 has been issued within four years from the end of impugned assessment year A.Y 2013-14. Thus, the proviso to section 147 and the condition so specified therein cannot be invoked to assume jurisdiction u/s 147 of the Act.

23. In light of above discussions and in the entirety of facts and circumstances of the case, we are of the considered view that basic requirement for assumption of jurisdiction u/s 147 is not satisfied in the instant case and consequent reassessment proceedings deserve to be set-aside and the ground so taken by the assessee company in its cross-objection is thus decided in favour of the assessee company and against the Revenue.

24. In the result, the appeal of the Revenue and cross objection of the assessee is disposed off in light of above directions.

Order pronounced in the open Court on 23/12/2019.

Sd/-	Sd/-
(विजय पाल राव)	(विक्रम सिंह यादव)
(Vijay Pal Rao)	(Vikram Singh Yadav)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:-23/12/2019.
*Santosh.
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:
1. अपीलार्थी/The Appellant- ITO, Ward-2(3), Alwar.

2. प्रत्यर्थी / The Respondent- M/s Krish Homes Private Limited, New Delhi.
3. आयकर आयुक्त / CIT
4. आयकर आयुक्त / CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur.
6. गार्ड फाईल / Guard File {ITA No. ITA No. 237/JP/2019 & CO No. 16/JP/2019}

आदेशानुसार / By order,

सहायक पंजीकार / Asst. Registrar