IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2000 OF 2022
WITH
WRIT PETITION NO.2011 OF 2022

Lehman Brothers Investments Pte.Ltd.]
(In Creditors' Voluntary Liquidation)]
C/o KPMG Advisory Services Pte Ltd.]
Hong Leong Bldg., 16 Raffles Quay#22-00,]
Singapore-999999.] .. Petitioner

v/s.

1) Assistant Commissioner of Income Tax]
(International Taxation), Circle-3(1)(2)]
Room no.1634, 16th floor]
Air India Building, Nariman Point]
Mumbai – 400 021.]

2) Commissioner of Income Tax,]
(International Taxation), Mumbai-3]
Room no.1601, 16th floor,]
Air India Building, Nariman Point]
Mumbai-400 021.]

3) Union of India]
Through the Joint Secretary &]
Legal Adviser,]
Branch Secretariat, Department of Legal]
Affairs, Ministry of Law and Justice,]
2nd floor, Aayakar Bhavan, M.K. Marg,]
New Marine Lines, Mumbai-400 020.] .. Respondents

...

Mr. J. D. Mistri, Senior Advocate, a/w Mr. Divesh Chawla i/b. Mr. Atul K. Jasani for the petitioner.

Mr. Akhileshwar Sharma a/w Ms. Shilpa Goel for the respondents.

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CORAM : DHIRAJ SINGH THAKUR AND KAMAL KHATA, JJ.
RESERVED ON : 31ST JANUARY 2023
PRONOUNCED ON : 8TH MARCH 2023.

JUDGMENT

[PER: KAMAL KHATA, J.]

. These two writ petitions are filed by the same petitioner for two Assessment Years (A.Y.) viz. 2014-15 and A.Y. 2015-16 and has a common issue. Consequently, we shall dispose them of with a common order. For brevity we refer to the facts in W.P. No. 2000 of 2022 for A.Y. 2015-16 as the same was preferred to be argued by the learned senior counsel for the petitioner.

2. The petition challenges the legality and validity of the impugned notice dated 31st March 2021 issued under Section 148 of the Income Tax Act, 1961 ("the Act"), whereby the Assessment Officer (AO) sought reopening of the assessment since he had *'reason to believe'* that the income chargeable to tax for A.Y. 2015-16 had escaped assessment

within the meaning of section 147 of the Act and the impugned reasons dated 9th January 2022 and the impugned order dated 9th March 2022 disposing of the objections raised by the petitioner.

FACTS

3. The petitioner is an investment holding company incorporated in Singapore. The ultimate holding company of the petitioner, Lehman Brothers Holdings Inc. ("LBHI") filed a petition under Chapter 11 of the U.S. Bankruptcy Code with the United States Bankruptcy Court for the Southern District of New York on 15th September 2008. After LBHI's filing for bankruptcy, the petitioner was placed into Creditors' Voluntary Liquidation from 24th October 2008. The petitioner did not conduct any business activity and laid off the entire staff. Hence, the petitioner had no business transaction during the A.Y. 2015-16.

4. The petitioner, *inter alia*, held 5,70,88,801 shares of Lehman Brothers Capital Private Limited ("LBCPL") a private limited company as on 31st March 2014. During the year under consideration, this Court by an order dated 5th September 2014, allowed the capital reduction of 4,87,80,488 equity shares held by the petitioner in LBCPL in accordance with Sections 100 to 103 of the Companies Act, 1956 on payment of 1,00,00,00,000 valued at Rs.20.5 per equity share.

5. The petitioner submitted the return of income which provided the details related to capital gain transactions filed under Schedule C.G. - Capital Gains. The Computation of income was submitted with detailed working method of arriving at the capital gain/loss including the details of dates of the purchase and sale of shares and the conversion of amounts in foreign currency as well as the provisions of Companies Act, the Income tax Act and the order of this Court. The petitioner claimed the capital gain in the sum of Rs.25,14,27,640/- u/s. 45 of the Act r.w. the first proviso to Section 48 of the Act after setting off loss for A.Y. 2014-15 in the sum of Rs.19,59,94,085/- and paid taxes at 20% u/s. 112(1)(i)(c)(ii) of the Act.

6. The petitioner filed written submissions on 24th August 2016 against the notice issued under Section 143(2) of the Act dated 4th August 2016 along with the computation of income and Form 3CEB. The petitioner also submitted a response dated 5th September 2017 to the notice issued under Section 142(1) of the Act dated 8th August 2017. In its response, the petitioner categorically mentioned that it had not carried on any business activity since the liquidation/bankruptcy application and also mentioned about the capital reduction. The said submission further highlighted as under:

> *"During A.Y. 2015-16, the proceeds received by the company pursuant to capital reduction by LBCPL includes deemed dividend under Section 2(22)(d) of Rs.26,599,305. The Company has considered entire proceeds received from capital reduction as sale consideration for the purpose of computing capital gains."*

7. Thereafter on 22nd November 2018, a notice under Section 142(1) of the Act was issued requesting the petitioner to provide the High Court order granting capital reduction and financial statements highlighting the capital reduction in the balance sheet. In response thereto, on 7th December 2018, the petitioner provided the High Court order passed under Section 100 of the Companies Act, 1956 granting LBCPL to cancel the shares and consequently reduced capital. On 28th March 2018, the Transfer Pricing Officer ("TPO") to whom the capital reduction transaction was referred on account of it being with an associated enterprises, the capital reduction transaction was accepted at arm's length. On 24th December 2018, the respondent passed an Assessment Order under Section 143(3) of the Act whereby it noted that the petitioner has no business operations/permanent establishment in India. It also noted that there was a capital reduction and the capital gain/loss had been computed as per the provisions of the Act.

8. Mr. Mistri, the learned Senior Counsel for the petitioners

submitted that the respondent had not complied with the jurisdictional condition which is a condition precedent for conducting the reassessment inasmuch as the respondent must show a failure on the part of the petitioner to disclose truly and fully all material facts necessary for the completion of his assessments, since their reassessment was conducted beyond a period of four years. According to him, all the facts on the capital reduction and the computation of capital gain /loss under Section 45 r.w.s. 48 of the Act were disclosed and there was no failure to make a full and true disclosure. The details of capital reduction along with the method of computing capital gain/ loss under Section 45 r.w.s. 48 of the Act were submitted during the original assessment proceedings along with the return of income and computation of income. Moreover, specific queries were asked on the capital reduction which was the only transaction during the years under consideration to which specific reply had been provided by the petitioner. He submitted that the order of the High Court on capital reduction was also submitted and the petitioner had responded to all the queries raised by the respondent in response to the notice issued under Sections 143(2) / 142(1) of the Act.

9. The learned counsel for the petitioner submitted that the TPO had noted the transaction of capital reduction due to cancellation of shares

and held the same at Arm's Length Price. He submitted that the Assessment Order under Section 143(3) of the Act explicitly mentioned the capital reduction on cancellation of LBCPL and the capital gains/loss has been computed as per the provisions of the Act. The learned counsel submitted that the petitioner had disclosed all primary facts required for the purposes of assessment and consequently there was no failure to disclose fully and truly any material fact necessary for reassessment after four years. He submitted that neither the reasons for reopening nor the order disposing of the objections alleged failure to disclose any material facts.

10. In support of his submissions, he relied upon the following judgments;

1) *Aventis Pharma Ltd. v/s. Assistant Commissioner of Income-tax 8(1), Mumbai.*[1]

2) *Hindustan Lever Ltd. v/s. R. B. Wadkar, Asstt. CIT*[2]

He submitted that the impugned reasons did not disclose any new material facts or information based on which the assessment was sought to be reopened. He further submitted that the impugned reasons merely

1 (2014) 368 ITR 498 (Bombay)
2 (2004) 268 ITR 332 (Bombay)

relied upon the details which were already a part of the system / portal submitted during the original assessment, on account of their being no other transaction except the capital gain that the petitioner derived on distinguishing the rights in the shares of LBPCL pursuant to the capital reduction. In support of his contention that there was no new tangible material, he placed reliance on the following decisions:

1) ***Clear Media (India) Private Limited v/s. Deputy Commissioner of Income Tax 6(1)(2) Mumbai & Ors.***[3]

2) Jindal Photo Films Ltd. v/s. Deputy Commissioner of Income Tax[4]

11. The learned counsel urged that applying a different provision of the Act for the purposes of reopening the assessment, would tantamount to a change of opinion and relied upon the decision in support of his contentions in the case of ***Commissioner of Income Tax, Delhi v/s. Kelvinator of India Ltd.***[5]

12. It would be worthwhile to consider Sections 45 & 48 of the Act which provides the mechanism of computing the capital gain the relevant extracts of which are as under:

3 Writ Petition no.2031 of 2022 (Bombay)
4 (1998) 234 ITR 170 (Delhi)
5 (2010) 320 ITR 561 (S.C.)

"Section 45: of the Act provides that any profits or gains arising from the transfer of a capital asset effected in the previous year will be chargeable to income tax under the head 'Capital Gains'.

*"Section 48: The income chargeable under the heard "Capital Gains" **shall** be computed, by deducting from the full value of the consideration received or accruing as a result of the transfer of the capital asset the following amount, namely:-*

(i) expenditure incurred wholly and exclusively in connection with such transfer;

(ii) the cost of acquisition of the asset and the cost of any improvement thereto;

Provided that in the case of an assess, who is a non-resident, capital gains arising from the transfer of a capital asset being shares in, or debentures of an Indian company shall be computed by converting the cost of acquisition, expenditure incurred wholly and exclusively in connection with such transfer and the full value of the consideration received or accruing as a result of the transfer of the capital asset into the same foreign currency as was initially utilized in the purchase of the shares or debentures, and the capital gains so computed in such foreign currency shall be reconverted into Indian currency, so, however, that the aforesaid manner of computation of capital gains shall be applicable in respect of capital gains accruing or arising from every reinvestment thereafter in, and sale of, share in, or debentures of, an Indian company;

Provided further that where long-term capital gain arises from the transfer of a long-term capital asset, other than capital gain arising to a non-resident from the transfer of shares in, or debentures of, an Indian company referred to in the first proviso, the provisions of clause (ii) shall have effect as if for

the words "cost of acquisition" and "cost of any improvement:" the words "indexed cost of acquisition" and "indexed cost of any improvement" had respectively been substituted:

[Provided also that nothing contained in the first and second provisos shall apply to the capital gains arising from the transfer of a long-term capital asset being an equity share in a company or a unit of an equity oriented fund or a unit of business trust referred to in section 112A.]

[Provided also that nothing contained in the second proviso shall apply to the long-term capital gain arising from the transfer of a long-term capital asset, being a bond or debenture other than-

(a) capital indexed bonds issued by the Government; or

(b) Sovereign Gold Bond issued by the Reserve Bank of India under the Sovereign Gold Bond Scheme, 2015

Provided also that in case of an assessee being a non-resident, any gains arising on account of appreciation of rupee against a foreign currency at the time of redemption of rupee denominated bond of an Indian company [held] by him, shall be ignored for the purposes of computation of full value of consideration under this section:]

[Provided also that where shares. Debentures or warrants referred to in the proviso to clause (iii) of section 47 are transferred under a gift or in irrevocable trust, the market value on the date of such transfer shall be deemed to be the full value of consideration received or accruing as a result of transfer for the purposes of this section:]

[Provided also that no deduction shall be allowed in computing the income chargeable under the head "Capital gains' in respect of any sum paid on account of securities transaction tax under Chapter VII of the Finance (No.2) Act, 2004 (23 of 2004).]

13. The learned counsel submitted that the word "shall" has been used and accordingly, for the purpose of calculating capital gain, one has to apply Section 48 and calculate capital gain by applying the first or second proviso to Section 48 of the Act.

14. The learned counsel relied on the provisions of Section 112(1)(c)(iii) of the Act prevailing during A.Y. 2015-16. Relevant extract of Section 112(1) of the Act, is reproduced below;

> "*(1) Where the total income of an assessee includes any income, arising from the transfer of a long-term capital asset, which is chargeable under the head "Capital Gains", the tax payable by the assessee on the total income shall be the aggregate of, –*
> *(a) ……..*
> *(b) ……*
> *(c) in the case of a non-resident (not being a company) or a foreign company, –*
> *(i) ……*
> *(ii) the amount of income-tax calculated on long term capital gains [except where such gain arises from transfer of capital asset referred to in sub-clause (iii)] at the rate of twenty percent; and*
> *(iii) the amount of income-tax on long term capital gains arising from the transfer of a capital asset, being unlisted securities, as calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48."*

15. As per explanation to Section 112 of the Act, the expression 'securities' shall have the same meaning as assigned to it in Section 2(h) of the Securities Contracts (Regulation) Act, 1956 ('SCRA'). As per Section 2(h) of SCRA, the term "securities" is defined as follows;

> *"securities" include –*
>
> *(i) shares, scrips, stocks, bonds, debentures, debenture stock or other marketable securities of a like nature in or of any incorporated company or other body corporate;*
>
> *(ia) derivative;*
>
> *(ib) units or any other instrument issued by any collective investment scheme to the investors in such schemes;*
>
> *(ic) security receipt as defined in clause (zg) of Section 2 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002;*
>
> *(id) units or any other such instrument issued to the investors under any mutual fund scheme;*
>
> *(ii) Government securities;*
>
> *(iia) such other instruments as may be declared by the Central Government to be securities; and*
>
> *(iii) rights or interest in securities."*

16. As noted above, for the shares of the company to qualify as "securities" as defined in Section 2(h) of SCRA, it should be marketable. Given that the shares of the private companies are not marketable in nature, shares of private companies do not qualify as 'securities' as per Section 2(h) of the SCRA and consequently, does not get covered by

Section 112(1)(c)(iii) of the Act. In this regard, reliance can be placed on the decision of the Bombay High Court in the case of ***Dahiben Umedbhai Patel and others v/s. Norman James Hamilton and Ors***.[6] wherein it was held that,

> *"It is thus clear that the shares of a private company do not possess the character of liquidity, which means that the purchaser of shares cannot be guaranteed that he will be registered as a member of the company. Such shares cannot be sold in the market or, in other words, they cannot be said to be marketable and cannot, therefore, be said to fall within the definition of securities as a marketable security."*

17. In view of the above, the share of a private limited company is not covered by the definition of securities, and thereby provision of Section 112(1)(c)(iii) was not applicable. As the petitioner was not covered under Section 112(1)(c)(iii) of the Act, it filed a return of income showing a capital gain of Rs.25,14,27,640/- and after setting off the loss for the A.Y. 2014-15 (Rs.19,59,94,085), paid taxes at 20% under Section 112(1)(c)(ii) of the Act. The petitioner has paid a higher rate of tax under sub-clause (ii) at 20% compared to sub-clause (iii) at 10%. This results in a gain for the Income Tax Department.

18. The learned counsel for the petitioner further submitted that the Finance Act 2016 amended the provisions of Section 112(1)(c)(iii) to

6 (1983) 85 Bom. L.R. 275: (1985) 57 Comp Cas 700 (Bom.)

include the words *"shares of a company not being a company in which the public are substantially interested"* with effect from A.Y. 2017-18. The relevant extract of Section 112(1) pursuant to the amendment is reproduced as under:

> *"(1) Where the total income of an assessee includes any income, arising from the transfer of a long term capital asset, which is chargeable under the heard "Capital Gains", the tax payable by the assessee on the total income shall be the aggregate of, –*
>
> *(a) …….*
>
> *(b)…….*
>
> *(c) in the case of a non-resident (not being a company) or a foreign company, –*
>
> *(i) ……*
>
> *(ii) the amount of income-tax calculated on long term capital gains [except where such gain arises from transfer of capital asset referred to in sub-clause (iii)] at the rate of twenty percent; and*
>
> *(iii) the amount of income-tax on long term capital gains arising from the transfer of a capital asset, being unlisted securities for shares of a company not being a company in which the public are substantially interested, calculated at the rate of ten percent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48."*

19. The learned counsel for the petitioner submitted that the Finance Act 2017 amended the provisions of Section 112(1)(c)(iii) to make the

amendment made vide Finance Act 2016 (i.e. insertion of the words *"shares of a company not being a company in which the public are substantially interested"*) effective retrospectively from 1st April 2013. The amendment was a beneficial amendment passed on to the assessee. The said amendments to Section 112(1)(c)(iii) of the Act are simplified in table below:-

Provisions of Section 112(1)(c)(iii) of the Act prevailing during the A.Y. 2015-16	**Subsequent amendment to Section 112(1)(c)(iii) of the Act vide Finance Act 2016**	**Subsequent amendment to Section 112(1)(c)(iii) of the Act vide Finance Act 2017**
the amount of income-tax on long term capital gains arising from the transfer of a capital asset, being **unlisted securities**, calculated at the rate of ten percent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48.	the amount of income-tax on long term capital gains arising from the transfer of a capital asset, being **unlisted securities [or shares of a company not being a company in which the public are substantially interested]**, calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48.	the amount of income-tax on long term capital gains arising from the transfer of a capital asset, being unlisted securities **[or shares of a company not being a company in which the public are substantially interested],** calculated at the rate of ten per cent on the capital gains in respect of such asset as computed without giving effect to the first and second proviso to Section 48.
	Applicable with effect from A.Y. 2017-18	Applicable with **retrospective** effect

	onwards.	from A.Y. 2013-14 onwards.

20. From the above, it can be noted that at the time of filing the return of income for the A.Y. 2015-16, the petitioner was not covered by Section 112(1)(c)(iii) as it had transferred the shares of the private limited company. Accordingly, in the instant case, the assessment is being sought to be reopened in contravention of the law as it stood during the previous year 2014-15 and A.Y. 2015-16 in which the petitioner filed its tax return. In this regard, the learned counsel for the petitioner placed reliance on the decision in case of ***Godrej Industries Ltd. v/s. B. S. Singh, Deputy Commissioner of Income-tax, Range 10(2)***[7] which confirms that a retrospective amendment cannot be the basis for reopening of assessment. In any case, it may be noted that for the A.Y. 2015-16, the four years period has expired on 31st March 2020, and absence any failure to disclose facts by the assessee or any tangible new material, the reopening of assessment proceedings by the respondent is bad in law.

21. Mr. Akhileshwar Sharma, the learned counsel for the respondents submitted that the notice under Section 148 was issued after the Assessing Officer had satisfied himself that there was an escapement of

7 (2015) 377 ITR 1 (Bombay)

income and recorded the same in the reasons to believe and also obtained required approval from the Competent Authorities. He submitted that the Assessing Officer had received information from Income Tax Officer (IT)-3(1)(2), Mumbai which was finalized in the light of available material on record and the Assessing Officer came to a conclusion that the capital gain have been computed incorrectly inasmuch as there was an erroneous brought forward and set off of capital loss. On this basis, he was satisfied that there was an escapement of income. He submitted that the Transfer Pricing Proceedings could not be considered in view of the fact that it merely looks into the pricing of the international transaction and not the taxation under the relevant provision of the Act. He further submitted that the issue of applicability of Section 112(1)(c) was not considered nor was it a part of any queries or submission. He submitted that the petitioner had incorrectly characterized the transaction and consequently contended that it was not covered under Section 112(1)(c)(iii) and claimed the benefit of computation under Section 48.

22. It is further submitted that the purpose of notice under Section 142(i) is to gather information and response thereon from the assessee on specific issues and is not meant to provide a reference for initiation of reopening proceedings. It is submitted that since the notice under

Section 142(1) dated 22nd October 2021 was issued in the course of reopening proceedings initiated under Section 148 dated 31st March 2021, whilst the reopening proceedings were in progress, the said notice under Section 142(1) was not bad in law. He submitted that the information received from the ITO (IT)-3(1)(2), Mumbai for A.Y. 2014-15, was tangible material inasmuch as it related to the computation of capital gain/loss on account of capital reduction. It is submitted that such information had bearing on the case of the assessee for A.Y. 15-16 not only in terms of the brought forward losses but also on the method of computation of capital gain/loss.

23. The learned counsel submitted that the Assessment Order under Section 143(3) dated 24th December 2018 had no discussion with regard to the income taxable under Section 112(1) (c)(iii) of the Act and consequently for want of any query or submission on the said subject, no opinion could be formed in the assessment proceedings under Section 143(3) of the Act. He consequently submitted since the applicability of Section 112(1)(c)(iii) of the IT Act was not raised, there was absence of full and true disclosure of facts by the petitioner. It was discovered that the losses brought forward from the earlier years were also claimed incorrectly by the petitioner. The learned counsel placed reliance on the full bench judgment of the Delhi High Court in the case

of ***Commissioner of Income-tax-VI, New Delhi v/s. Usha International Ltd***[8] in support of his contention. He also placed reliance on the judgment in the case of ***Commissioner of Income-tax v/s. H.P. Sharma***[9] and the decision of Kerala and Madras High Courts in the case of ***United Mercantile Co. Ltd. v/s. CIT***[10] and ***Muthukrishna Reddiar v/s. CIT***[11] and the decision of the Delhi High Court in the case of ***Nawabganj Sugar Mills Co. Ltd. v/s. CIT***[12]. The reliance is also placed on the decision of the Apex Court in the case of ***Calcutta Discount Co. Ltd. v/s. ITO***[13] wherein it is held that:

> *"The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year." It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion."*

24. The learned counsel for the respondents also placed reliance on the judgment of the Apex Court in the case of ***Sri Krishna (P.) Ltd. v/s.***

8 (2012) 25 taxmann.com 200 Delhi
9 (1980) 122 ITR 675 Delhi
10 (1967) 64 ITR 218 (Kerala)
11 (1973) 90 ITR 503 (Kerala)
12 (1980) 123 ITR 287 (Delhi)
13 41 ITR 191

ITO[14] wherein it is held that,

> *"every disclosure is not and cannot be treated to be a true and full disclosure. A disclosure may be a false one or true one. It may be a full disclosure or it may not be. A partial disclosure may very often be a misleading one. Full and true disclosure of all material facts necessary for making assessment for that year are required."*

25. The learned counsel for the respondents submitted that no return was filed in response to the notice within one month of its issuance. It is submitted that submitting the earlier return does not fulfill the procedural requirements as the notice under Section 143(2) cannot be generated on the return filed earlier. He submitted that the sanction obtained by the Commissioner is an internal administrative procedure of the department and sharing a copy thereof, is not required. He submitted that Section 112(1)(c)(iii) is a special provision which will override the general provisions provided under Section 48. Consequently the capital gains will be chargeable at the rate of 10% of the unlisted equities with retrospective effect from 1st April 2013 without giving effect to the first and second proviso of Section 48. It is submitted that the general provisions must yield to the special provisions and in that regard reliance was placed on the judgment in the case of ***State of Gujarat v/s. Patel Ramjibhai***[15]. The learned counsel

14 (1996) 87 Taxman 315
15 AIR 1979 SC 1098

submitted that multiple remedies are available under the provisions of the Income Tax Act to the petitioner and that even if the addition is proposed, a draft order will be required to be passed and that could be a matter of appeal before the Dispute Resolution Panel before a demand gets finalized in the case. He accordingly submitted that the petition deserves to be dismissed.

CONCLUSION:

26. We have heard the learned counsel at length. We are of the view that it is a clear cut case of change of opinion inasmuch as there is no new material which is discovered by the concerned officer. The application of another section of the IT Act on the facts and circumstances of a case would only constitute a change of opinion and can by no stretch of imagination be construed as new material by the Revenue. The entire emphasis on the petitioner not truly and fully disclosing facts is baseless inasmuch as in the present case, there is only one transaction which was under consideration for the respondents. The entire transaction has been considered by the Assessing Officer and has culminated into the order under Section 143(3) of the Income Tax Act dated 24th December 2018. As apparent from the reasons there were no new tangible material in the hands of the Assessing Officer.

Once the assessment is concluded, it is deemed to have been concluded with application of mind by the Assessing Officer from all perspectives legal and factual. In this regard it would be fruitful to rely upon the Full Bench decision of the Delhi High Court in the case of ***CIT v/s. Kevinator of India Ltd.***[16] which held that:

> *" ....We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of Section 143 or Sub-section (3) of Section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind."*

The reopening of the assessment based on a different method of computation or application of the section is nothing else but a change of opinion, which is impermissible in law. A similar situation was dealt with in the case of ***Jindal Photo Films Ltd. Vs. Deputy Commissioner of Income Tax***[17], where the Court, in the background of section 147 of the Act, observed:

> *".....all that the Income-tax Officer has said is that he was not right in allowing deduction under Section 80I because he had allowed the deductions wrongly and, therefore, he was of the opinion that the income had escaped assessment.*

16 [2002] 256 ITR 1.
17 [1998] 234

Though he has used the phrase "reason to believe" in his order, admittedly, between the date of the orders of assessment sought to be reopened and the date of forming of opinion by the Income-tax Officer nothing new has happened. There is no change of law. No new material has come on record. No information has been received. It is merely a fresh application of mind by the same Assessing Officer to the same set of facts. While passing the original orders of assessment the order dated February 28, 1994, passed by the Commissioner of Income-tax (Appeals) was before the Assessing Officer. That order stands till today. What the Assessing Office has said about the order of the Commissioner of Income-tax (Appeals) while recording reasons under Section 147 he could have said even in the original orders of assessment. Thus, it is a case of mere change of opinion which does not provide jurisdiction to the Assessing Officer to initiate proceedings under Section 147 of the Act.

It is also equally well settled that if a notice under Section 148 has been issued without the jurisdictional foundation under Section 147 being available to the Assessing Officer, the notice and the subsequent proceedings will be without jurisdiction, liable to be struck down in exercise of writ jurisdiction of this court. If "reason to believe" be available, the writ court will not exercise its power of judicial review to go into the sufficiency or adequacy of the material available. However, the present one is not a case of testing the sufficiency of material available. It is a case of absence of material and hence the absence of jurisdiction in the Assessing Officer to initiate the proceedings under Section 147/148 of the Act."

27. In our view, the defense is misdirected and misconstrued and unsubstantiated. In our view, appropriate application of the law and correct advise to the concerned officer can save a lot of litigation and burden on the court as well as agony to the citizens. The case law

referred by the respondents also is totally meaningless and out of context and by no stretch of imagination applicable to the facts of this case and therefore, we do not propose to deal with each one of them. Suffice it to say that, it is misconstrued and misapplied, on the other hand, the judgments relied upon by the petitioner are relevant and support the contentions' so raised by the petitioner.

28. Be that as it may, we allow the petition and set aside the impugned notice dated 31st March 2021, the reasons dated 9th January 2022 and the impugned order dated 9th March 2022 and all consequential actions/steps taken by the respondents in furtherance thereto.

29. Petition is disposed of. No orders as to costs.

(KAMAL KHATA, J.) **(DHIRAJ SINGH THAKUR, J.)**