IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH MUMBAI

BEFORE HON'BLE JUSTICE (RETD.) C V BHADANG, PRESIDENT
AND
SHRI GIRISH AGRAWAL, ACCOUNTANT MEMBER

ITA No. 7565/MUM/2025
Assessment Year: 2010-11

Lokhandwala Construction Industries Pvt. Ltd. Plot No. 48, Indranarayan Road, Santacruz West, Mumbai - 400054 (PAN: AAACP2037M)	Vs.	Deputy Commissioner of Income Tax, Circle-12(3)(2), Mumbai
(Appellant)		(Respondent)

Present for:

Assessee : Dr. K. Shivaram, Sr. Advocate
and Shri Rahul Hakani, Advocate
Revenue : Shri Surendra Mohan, Sr. DR

Date of Hearing : 18.03.2026
Date of Pronouncement : 28.04.2026

O R D E R

PER GIRISH AGRAWAL, ACCOUNTANT MEMBER:

This appeal filed by the assessee is against the order of National Faceless Appeal Centre (NFAC), Delhi, vide order no. ITBA/NFAC/S/250/2025-26/1080821527(1) dated 17.09.2025, passed against the assessment order by Deputy Commissioner of Income Tax- 12(3)(2), Mumbai, u/s. 147/143(3) of the Income-tax Act (hereinafter referred to as the "Act"), dated 25.12.2017, for Assessment Year 2010-11.

2. Grounds taken by assessee are reproduced as under:

"Reopening is Bad in Law - Beyond Four Years and Change of opinion.

1. *The Learned NFAC erred in confirming the reopening of assessment made for disallowance of expenses being Advertisement/sales promotion expenses and legal and professional fees which were allowed in the original assessment proceedings without appreciating that reopening was done after the expiry of four years from the end of the relevant Assessment Year and there was no failure on the part of the Assessee to truly and fully disclose all material facts and further reopening was nothing but change of opinion and hence reopening is bad in law.*

Reopening is bad in law-Reopening done on non-existing entity [Raised for the first time].

2. *The Learned NFAC erred in confirming the reopening of assessment without appreciating that reopening notice u/s 148 is issued and the consequent assessment order is passed against non-existing entity as said entity was merged with another entity prior to issuance of notice u/s 148 and hence reopening is bad in law.*

Reopening is bad in law.

3. *The Learned NFAC erred in confirming the reopening of assessment without appreciating that reassessment was commenced and order was passed within 4 weeks of disposing the objections to reopening and thereby Assessee was prevented from taking appropriate steps to challenge the reopening of assessment and such action was contrary to law and hence reopening is bad in law.*

On Merits-Disallowance of expenses of Rs 4,47,72,703/-

4. *The Learned NFAC erred in confirming the order of Assessing Officer making disallowance of expenses being Advertisement/sales promotion expenses and legal and professional fees of Rs 4,47,72,703/- by allowing expenses as a ratio of WIP [by wrongly relying on Assessment order for AY 2009-2010) instead of ratio of sales as adopted by the Assesssee without appreciating the method adopted by the assesseee was in-fact accepted in AY 2009-2010 and the WIP belongs to a different project and said expenses are allowable u/s 37 and hence the disallowance of Rs 4,47,72,703/-may be deleted."*

2.1. Ground nos. 1, 2 and 3 relate to jurisdictional issues raised by the assessee. Ground no. 4 is on the merits of the case. We first take up the jurisdictional issues raised by the assessee as they go to the root of the matter. Assessee has also raised an additional ground vide application dated 30.12.2025 raising another jurisdictional issue on the reopening of the case. According to the assessee, the additional ground is a legal ground and facts are already on record and therefore, the same may be permitted for admission for its adjudication. Nothing contrary was put forth by the Revenue on the admission of the said additional ground

and therefore, is admitted for its adjudication. The said additional ground is reproduced as under.

> *"1. The Learned NFAC erred in confirming the reopening of assessment made for disallowance of expenses being Advertisement/ sales promotion expenses and legal and professional fees which were allowed in the original assessment proceedings without appreciating that reopening is based on Audit objections and thus reopening is nothing but change of opinion and hence reopening is bad in law."*

3. Brief facts of the case are that assessee is engaged in the business of real estate development. It had an ongoing project in Kandivali, which was completed in Assessment Year 2009-10. Assessee filed its return of income on 28.09.2010, reporting total income at Rs. 92,06,37,843/-. Return was revised on 09.03.2012, reporting the revised total income at Rs. 83,28,48,230/-. Originally, case of the assessee was selected for scrutiny assessment for which assessment order under section 143(3) was passed on 06.03.2013 whereby total income was assessed at Rs.84,07,89,400/-. Subsequently, case of the assessee was taken up for reassessment by reopening it under the provisions of section 147 read with section 148 by recording reasons to believe wherein the crux of the matter recorded was that allowance of entire 28% of expenses amounting to Rs. 8,77,89,613/- was incorrect. These expenses included expenses in the nature of advertisement, sales promotion expenses, interest expenses, legal and professional fees.

3.1. According to the ld. AO, only 49% of these expenses i.e., Rs.4,30,16,910/- is required to be allowed since assessee still had closing WIP of Rs. 70.73 crores and closing stock of Rs. 1.63 crores. In view of these facts, there was an under assessment of income to the extent of Rs. 4,30,16,910/-. By recording these reasons to believe, notice under section 148 was issued on 31.03.2017. Explanations were called for which were replied by the assessee exhaustively. After considering the same, ld. AO disallowed the excess expense of

Rs.4,47,72,703/- and added the same to the total income. Aggrieved, assessee went in appeal before the ld. CIT(A), who confirmed the disallowance so made, against which assessee is in appeal before the Tribunal.

4. We have heard both the parties and perused the material on record, including paper books in three volumes and written submission filed by the assessee. We have also given our thoughtful consideration to the observations and findings of authorities below in their respective orders. Assessee had revised its return for the year under consideration since in the preceding assessment years, namely AY 2006-07, 2007-08 and 2008-09, expenses towards administrative charges, finance charges, advertisement expenses, legal and professional fees pertaining to Kandivali project were disallowed for one reason or the other and were held to be considered as part of work in progress to be allowed as and when the project is completed. In this respect, assessee has furnished the details of expenses and work in progress, tabulated below, which were subsequently claimed by the assessee as deduction in AY 2009-10 and 2010-11:

Particulars	2006-07	2007-08	2008-09	2009-10	2010-11
Administrative Expenses	73,226,617	50,859,1617	--	--	--
Finance Charges	1,617,708	1,635,956	--	--	--
Advertisement Sale Promotion Exp.	--	35,447,542	16,561,486	--	--
Legal & Professional Fees	--	--	4,581,517	--	--
Opening W.I.P. (Crores)	68.81	116.11	157.38	249.43	88.55
Closing W.I.P. (Crores)	116.11	157.38	249.43	75.73	75.73

4.1. From the tabulation above of the disallowances made in the preceding assessment years, assessee claimed the same in proportion to sales made in AY 2009-10 and AY 2010-11. In AY 2009-10, assessee claimed 72% of these expenses. In the assessment made for this year by order dated 14.12.2011, claim of the assessee was accepted which was in proportion to sales made in the said year by holding the same to be correctly claimed to the extent of 72%. Assessee has placed on record, copy of the said assessment order passed under section 143(3) for AY 2009-10, forming part of the paper book. We have perused the said assessment order and take note of the findings arrived at by the ld. AO in this respect. The same is extracted below:

> *"On a perusal of the details as explained during the hearing by the assessee regarding sales made during the year, cost of sales incurred and work -in-progress it is evident that the assessee has completed the said project during the year under assessment namely Whispering Palms-Wing A,B,C,D,E & F which commenced in the year 2006 and which is also evident from year wise W-I-P as it has substantially reduced in current year which suggest that project has been completed corresponding sales has also been recognized, The contention of the assessee is accepted and accordingly the expenses which were not allowed as revenue expenses and treated as capital expenses forming part of capital work-in-progress in earlier years are allowed since the related project is completed and sales recognized. The same is also supported by bills documentary evidences etc. of earlier years from AY 2006-07 to 2008-09 which were related to project of Whispering Palm building which had been completed during the year and sales recognized. The assessee has claimed to the extent of 72% of such expenses and stated that balance expenses will be claimed on sale of unsold stock in subsequent years and hence the contention of the assessee is found to be correct."*

4.2. On the above premise, assessee claimed the balance 28% of these expenses in the year under consideration, i.e., AY 2010-11 which were also accepted and allowed by the ld. AO while completing the original assessment under section 143(3). In the assessment order for AY 2010-11, ld. AO has recapitulated the observations and findings recorded in the assessment for AY 2009-10 whereby 72% of these expenses were allowed and it was held that balance 28% is to be allowed in the

assessment year 2010-11, which was found to be correct. The observations and findings of ld. AO recorded in the assessment order under section 143(3) in para 4.7 are extracted below, whereby he records that the contention of the assessee is accepted after examining that the facts involved in the preceding year are identical to the year under consideration. He further noted that these expenses are allowed since the related project is completed and sales recognized in the current year. According to him, the contention of the assessee was found to be correct and the claim of balance 28% of these expenses was allowed.

5. The moot point under contest by the assessee is that the reopening made by the ld. AO in respect of the reasons to believe recorded for issuing notice under section 148 are nothing but change of opinion on the issue which has already been examined and verified by the ld. AO who has taken a justifiable view and is in consistency with the view already taken in AY 2009-10, where part of the total expenses that is, 72% were allowed, having attained finality. Only the part of these total expenses that is 28% were claimed in this year which are now being held by way of reassessment to be not allowable and a different basis has been adopted whereby only 49% of the claim was allowed by the ld. AO and the balance was added in the total income. According to the ld. Counsel of the assessee, the issue of allowance of expenses disallowed in earlier years has already been dealt by the ld. AO in original assessment order and therefore, reopening is nothing but change of opinion which is not permissible under the provisions of the Act.

5.1. The present reopening is beyond the period of four years as the notice issued under section 148 is dated 31.03.2017 for which first

proviso to section 147 gets attracted. According to the first proviso to section 147, where reopening is done beyond the period of four years then, same is valid only if assessee has not truly and fully disclosed all material facts at the time of assessment. It was submitted before us that the reasons recorded clearly note that the reopening is done on the basis of same material which were verified by the ld. AO during the original assessment proceedings. In this regard, from the reasons to believe it is noted that it states "*verification of assessment order of AY 2009-10 revealed that the assessee was allowed such disallowed expenses at 72%*". In the same reasons to believe, it is also recorded that "*on verification of records it is observed that 72% expenses amounting to Rs. 9,58,10,995/- were allowed in AY 2009-10 while completed the scrutiny assessment for 2009-10*". Thus, it was submitted that the reasons recorded do not point out any new tangible material on the basis of which reopening is done. Also, the said reasons do not state which material facts were not disclosed by the assessee.

6. From the perusal of the order of ld. CIT(A), we note the observations made by him while dismissing the appeal filed by the assessee both on jurisdictional issues and merits of the case. We note that ld. CIT(A) has observed in para 5.3 that the fact that assessee's claim was accepted in the original assessment does not preclude a reopening if the Assessing Officer upon further verification has reason to believe that income has escaped assessment due to misrepresentation of facts or a flawed basis for the claim. With these observations, he further notes while dealing with the merits of the case that the original allowance of the full amount of Rs. 8,77,89,613/- was an error that has now been rectified. He further observes that ld. AO has identified the discrepancy in the original calculation and the disparity has led the ld. AO to believe that expenses related to other

projects might have been included and hence, a new finding of fact. He also notes that the tangible material for reopening is the assessment order for AY 2009-10 and assessee's own financial statements for the current year. According to him, the substantive recalculation made by ld. AO by allowing expenses to the extent of 49% of the total WIP instead of 28% of the expense claimed by the assessee are based on a re-evaluation of the facts on record.

6.1. From all these observations and findings of ld. CIT(A), to our utter dismay, we find that how these would justify the impugned reopening of the assessment already completed by the ld. Assessing Officer after detailed examination and verification of the issue. Ld. CIT(A) notes that ld. Assessing Officer has rectified the error committed in the original assessment which certainly cannot be permitted under the provisions of section 147 r.w.s. 148. Such an act by the ld. Assessing Officer tantamount to change of opinion without there being any new tangible material brought on record to evidently demonstrate that income has escaped assessment which has been exhaustively examined in the original assessment proceeding for the year under consideration as well as in the immediately preceding assessment year when the order was passed under section 143(3). Affirmation by the ld. CIT(A) on such an act of ld. Assessing Officer is negated with all force. What ld. CIT(A) has noted is the correction of errors which were committed by the ld. Assessing Officer, now being rectified by way of reassessment proceedings. According to him, the disparity has been identified which has been corrected by the ld. AO and has held that it does not amount to change of opinion, which is in stark contradiction to the findings given by the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) wherein it held that 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 reopen assessments on the basis of “mere change of opinion”, which cannot be *per se* reason to reopen.

6.2. Hon'ble Court further held that “*we must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess”.* According to the Hon'ble Court, after 01.04.1989, 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.

6.3. From the extracts of the observations and finding of ld. AO from the original assessment made under section 143(3) for the year under consideration as well as for the immediately preceding assessment year, it is very well brought out that the issue has been examined and analysed whereafter the claim of the assessee has been allowed. All the facts and material relating to this were on record which has been duly considered while accepting the claim of the assessee. Ld. AO has allowed part of the expense claimed by the assessee in the year under consideration and has failed to point out the year in which the balance of the set expenses is allowable.

6.4. The factual position is that the project has been completed and there are no further sales in future and hence there will be no occasion for allowing the remaining portion of the expense in the future which has been disallowed by the ld. Assessing Officer who has proceeded on assumption of incorrect facts. In the reasons recorded, it is stated that as per the assessment order for Assessment Year 2009-10, these

expenses are allowed in the proportion of WIP debited to profit and loss account relevant to sale of property income whereas the assessment order records that impugned expenses are debited in proportion to sales of the property.

7. From the conspectus of the above narration what transpires is that the reasons to believe recorded by the ld. AO and the reassessment undertaken are nothing but change of opinion which cannot be a ground for reassessment. There is nothing tangible which has been brought on record, not considered while completing the assessment originally under section 143(3). Accordingly, we hold that the impugned reassessment proceedings and the reassessment order passed thereupon are not in accordance with the provisions contained in section 147 and is held to be bad in law. Ground no.1 raised by the assessing is allowed.

8. In ground no.2, assessee has contested that notice under section 148 issued and the consequent reassessment order passed are against non-existing entity which was merged with another entity prior to the issuance of said notice and hence, the entire reopening proceedings are bad in law. Ld. Counsel for the assessee has placed on record, a letter dated 10.09.2015 addressed to DCIT, Circle-13(1)(2), Mumbai with a dated stamp of 11.09.2015 informing the amalgamation of Lokhandwala Construction Industries Private Limited and Picasso Properties Private Limited under the scheme of amalgamation approved by the Hon'ble High Court of Bombay, vide its order dated 05.05.2015 with the appointed date of 01.10.2014 that under the said scheme of amalgamation, assessee company got merged into Picasso Properties Private Limited which was followed by the dissolution of the assessing company without winding up as per the amalgamation scheme.

Further, pursuant to the said scheme, name of Picasso Properties Private Limited was changed to Lokhandwala Construction Industries Private Limited for which a certificate of incorporation was issued by Registrar of Companies dated 28.07.2015. All these documents were placed on record along with this letter before the concerned officer.

8.1. Admittedly, it is a fact on record that notice under section 148 is dated 31.03.2017 which has been issued subsequent to the amalgamation proceedings as stated above. The impugned reassessment order passed under section 147 read with 143(3) is in the name of the erstwhile amalgamated company, despite all the material relevant to the scheme of amalgamation was placed on record before the concerned officer. The said notice under section 148 and the reassessment order are issued/passed on the amalgamating non-existing company, fact of which remains uncontroverted. Hence, the entire proceedings are bad in law.

8.2. On these set of facts, drawing force from the decision of the Hon'ble Supreme Court in the case of PCIT vs. Maruti Suzuki India Limited [2019] 107 taxmann.com 375 (SC), we unhesitatingly hold that the notice issued under section 148 and reassessment order passed subsequently in the name of non-existing entity is without jurisdiction and is liable to be quashed *ab initio*. Thus, the same is not a defect which can be cured under section 292B as held by the Hon'ble Supreme Court in the said decision. Accordingly, ground no. 2 raised by the assessee is allowed.

9. Since the impugned reassessment proceedings and the reassessment order have been held to be void *ab initio* in terms of our observations and finding while adjudicating on ground no. 1 and 2, all

other grounds raised by the assessee are rendered academic and therefore not adjudicated upon.

10. In the result, appeal of the assessee is allowed.

Order is pronounced in the open court on 28 April, 2026

Sd/-	Sd/-
(Justice (Retd.) C V Bhadang)	(Girish Agrawal)
PRESIDENT	ACCOUNTANT MEMBER

Dated: 28 April, 2026

MP, Sr.P.S.

Copy to:

1 The Appellant
2 The Respondent
3 DR, ITAT, Mumbai
4 Guard File
5 CIT

BY ORDER,

(Dy./Asstt.Registrar)
ITAT, Mumbai