S.B. Packagings Ltd vs Asstt./Dy. Commissioner Of Income Tax, ... on 18 March, 2024

Author: Yashwant Varma

Bench: Yashwant Varma, Purushaindra Kumar Kaurav

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* IN THE HIGH COURT OF DELHI AT NEW DELHI
\+ W.P.(C) 13743/2018
S.B. PACKAGINGS LTD.
Through:

Versus
ASSTT./DY. COMMISSIONER OF INCOME TAX, CIRCLE 22(2), NEW DELHI & ORS. ..... Respo
Through: Mr.Vipul Agrawal, Senior Standing Counsel with M Sakashi Shairwal and Mr Gibran Naushad, JCs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE PURUSHAINDRA KUMAR KAURAV

ORDER

% 18.03.2024 PER: PURUSHAINDRA KUMAR KAURAV, J.

1. The instant writ petition has been filed by the assessee under Articles 226 and 227 of the Constitution of India, praying for setting aside the impugned notice dated 31 March 2018 issued under Section 148 of the Income Tax Act, 1961 ["Act"] and a subsequent letter recording the reasons dated 22 November 2018, respectively.

2. The facts integral to the present dispute are that the petitioner is a company incorporated under the Companies Act, 1956, which is engaged in the business of manufacturing and sale of flexible packaging. The petitioner had filed its Income Tax Return ["ITR"] on 29 September 2011 for the Assessment Year ["AY"] 2011-12, declaring its income as nil. The ITR of the petitioner was selected for This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:19 scrutiny which consequently, led to the initiation of assessment proceedings.

3. On 8 January 2014, after considering the reply submitted by the petitioner in the letter dated 5

September 2013, an assessment order under Section 143(3) of the Act was passed, determining the total income of the petitioner to be Rs.1,34,74,370/- for the concerned AY. However, the said computation was subsequently amended vide order under Section 154 of the Act, assessing the total income of the petitioner to be nil.

4. Thereafter, a notice under Section 148 of the Act was issued to the petitioner for the reassessment of its income based on the information received from the office of CCIT(Central), New Delhi on the premise that during the concerned AY, the petitioner had made cash purchases from M/s Uflex Ltd. and M/s Montage Enterprises P. Ltd. amounting to Rs.1,88,23,448/-, attracting Section 40A(3) of the Act. However, upon examination of the books of account and replies submitted by the petitioner, an order under Section 147/143(3) was passed by the respondents on 10 December 2015, reassessing the income of the petitioner to be nil.

5. Contemporaneously, on account of becoming a sick company, the petitioner was also pursuing its case with the respondents for the grant of reliefs enshrined in the sanctioned scheme by the Board of Industrial and Financial Reconstruction ["BIFR"]. The said reliefs included inter alia, waiver of loans from banks, non-taxability of waiver of loans as income, and carry forward of losses beyond eight years. However, after a lapse of more than four years from the date of sanction of the scheme by the BIFR, vide letter dated 14 June 2017, the reliefs sought by the petitioner were denied. The petitioner had This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:19 challenged the said letter vide W.P.(C) No.10364/2017 before this Court.

6. Subsequently, another notice dated 31 March 2018, issued under Section 148 of the Act, was received by the petitioner on 3 April 2018, seeking reassessment of income pertaining to AY 2011-

12. In response to the said notice, the petitioner sent a letter dated 16 April 2018, while making three-fold submissions i.e., firstly, the original assessment for the concerned AY was already completed vide assessment order dated 8 January 2014; secondly, the impugned notice dated 31 March 2018 was issued beyond the time limit prescribed under Section 147/149 of the Act; and thirdly, reasons for the reopening of assessment be intimated to the petitioner.

7. On 19 September 2018, the petitioner received a reply from the respondents that the tracking report of the speed post, wherein the impugned notice was enclosed, shows that the said notice was issued well within the timeframe stipulated under the provisions of Section 149 of the Act. Further, on 22 November 2018, the reasons recorded for reopening the case for the concerned AY were communicated by the respondent to the petitioner. It was stated in the reasons that respondent no.1 was informed by the office of respondent no.3 that the waiver of Rs.25,67,80,638/- granted by the BIFR was disallowed by respondent no.4. It was also noted that the petitioner had failed to add back the remission of liability of Rs.25,16,10,598 and the same was not even remitted in the tax audit report i.e., Form 3CD. Thus, based on the ground of income escaping assessment for the concerned AY, the second round of proceedings under Section 148 of the Act have been initiated against the

petitioner.

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8. Mr. S. Vasudevan, learned counsel appearing on behalf of the petitioner submitted that the reassessment proceedings initiated by the respondents are completely without jurisdiction inasmuch as the impugned notice under Section 148 of the Act and the subsequent letter have been issued beyond the statutorily prescribed period of four years from the end of relevant AY. He submitted that the ground on which the assessment proceedings are being reopened i.e., the fact of the waiver of the loan amount, was already disclosed by the petitioner during the course of proceedings, which is also evident from the letter dated 5 September 2013, sent by the petitioner to the respondents.

9. While drawing our attention to the balance sheet which has also been reproduced by respondent no.1 in the reasons to believe, he submitted that the issue in consideration was specifically examined by respondent no.1 and based upon the same, an opinion was formed. According to him, the fact of waiver of loan as per the BIFR scheme also finds mention in the assessment order passed by the AO. He, therefore, contends that since the petitioner has already disclosed fully and truly all the material facts for the assessment, the present proceedings for reopening assessment are dehors the provisions of law and are unsustainable.

10. He also submitted that the Explanation to Section 147 of the Act is not applicable in the present facts and circumstances as the issue on which the proceedings are being reopened was very much disclosed in the balance sheet of the petitioner and consequently, reproduced in the reasons recorded therein and thus, it cannot be said that the present case is one where merely the books of account has been produced without any full and true disclosure.

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11. He further submitted that there is no fresh material available on record which would warrant issuance of notice, rather the proceedings for the assessment which already stands concluded is purely due to the change of opinion and not on the basis of any new information. He, thus, contended that as per the settled principles of law, the assessments cannot be reopened only on account of change of opinion.

12. He placed reliance on paragraph no.13 of the decision in the case of CIT v. Usha International Ltd. [2012 SCC OnLine Del 4995] to substantiate his arguments.

13. On the other hand, Mr. Vipul Agrawal, learned counsel for the respondents vehemently opposed the submissions advanced by the learned counsel for the petitioner and submitted that there are sufficient reasons to reopen the assessment in the present case. He submitted that at the time of the original assessment, the AO did not form any opinion qua the issue in question and thus, he is entitled in law to reopen the same as per the mandate of Section 147 of the Act. He further submitted that neither the petitioner had disclosed the remission of liability in the ITR nor the same was added back in its balance sheet. He additionally submitted that the Auditor of the petitioner had also failed to include the said remission amounting to Rs.25,16,10,598/- in the Form 3CD. He, therefore, contended that there were sufficient reasons to believe that the income chargeable to tax had escaped assessment as the petitioner had failed to fully disclose the materials for the relevant AY.

14. Learned counsel further submitted that the forming of opinion is a condition precedent to the change of opinion and in the absence of any opinion being formed by the AO qua the issue at hand, at the time of original assessment, the reassessment proceedings cannot be This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:20 construed to be initiated merely on the basis of change of opinion. According to him, the income escaping assessment due to the failure on the part of the petitioner to add back the remission of liability is a new fact which paves the way for exercising powers under Section 147 of the Act.

15. He placed reliance on paragraph nos.24 and 25 of the decision in the case of Usha International Ltd. (supra) to submit that the principle of change of opinion shall not apply where the opinion itself has not been formed.

16. We have heard the learned counsels appearing on behalf of the parties and perused the record.

17. It is the scope and extent of the authority of reassessment under Section 147 of the Act, vested in the AO, which forms the subject matter of the present lis and thus, requires our consideration to determine whether the initiation of reassessment proceedings would sustain in the given facts and circumstances.

18. Before adverting to the merits of the case, we find it appropriate to briefly traverse through Section 147 of the Act to understand the nature, scope and intent behind the enactment of the said provision. For the sake of clarity, the relevant portion of Section 147 of the Act, as it stood prior to substitution by Act No.13 of 2021, is culled out as under:-

> "147. Income escaping assessment.-- If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under

this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:20 and in Sections 148 to 153 referred to as the relevant assessment year):

Provided that where an assessment under sub-section (3) of Section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under sub-section (1) of Section 142 or Section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year:

Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

Explanation 1.--Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.

*** Explanation 3.--For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148.

***"

19. It is seen that the aforesaid provision i.e., Section 147 of the Act empowers the AO to assess or reassess any income which has escaped assessment. However, the said authority is circumscribed with a predominant condition that the AO must be in possession of reasons to believe that any

income chargeable to tax has escaped assessment for This is a digitally signed order.

 the relevant AY. Further, the first proviso to Section 147 of the Act stipulates that where the assessment has been done under Section 143(3) or Section 147 of the Act, no action shall be taken after the expiry of four years unless there exists inter alia, a failure of the assessee to fully and truly disclose all the necessary facts necessary for assessment of the concerned AY.

20. Thus, the respondents have laid down their challenge to the relief sought by the petitioner on the ground of lack of true and full disclosure, more specifically on the latter part, during the original assessment proceedings. In order to ascertain the meaning of full disclosure in the context of Section 147 of the Act, it is noteworthy to refer to Explanation 1 to the said provision which indicates that the production of books and accounts before the AO would not necessarily amount to disclosure within the meaning of the first proviso.

21. It is useful to place reliance on a recent decision of the Hon ble Supreme Court in the case of M/S Mangalam Publications, Kottayam v. CIT, Kottayam [2024 SCC OnLine SC 62], wherein, the import of the phrase „true and full disclosure has been discussed in the following words:-

> "31. At this stage, we deem it necessary to expound on the meaning of disclosure. As per the P. Ramanatha Aiyar, Advanced Law Lexicon, Volume 2, Edition 6, „to disclose is to expose to view or knowledge, anything which before was secret, hidden or concealed. The word „disclosure means to disclose, reveal, unravel or bring to notice, vide CIT Vs. Bimal Kumar Damani, (2003) 261 ITR 87 (Cal). The word „true qualifies a fact or averment as correct, exact, actual, genuine or honest. The word „full means complete. True disclosure of concealed income must relate to the assessee concerned. Full disclosure, in the context of financial documents, means that all material or significant information should be disclosed. Therefore, the meaning of „full and true disclosure is the voluntary filing of a return of income This is a digitally signed order.

 that the assessee earnestly believes to be true. Production of books of accounts or other material evidence that could ordinarily be discovered by the assessing officer does not amount to a true and full disclosure."

[Emphasis supplied]

22. The meaning of the expression "disclose fully and truly all material facts" can also be referenced from the decision of this Court in Honda Siel Power Products Ltd. v. Deputy CIT [2011 SCC OnLine Del 804], wherein, it was held as under:-

> "12. The law postulates a duty on every assessee to disclose fully and truly all material facts for its assessment. The disclosure must be full and true. Material facts are those facts which if taken into accounts they would have an adverse effect on assessee by the higher assessment of income than the one actually made. They should be proximate and not have any remote bearing on the assessment. Omission to disclose may be deliberate or inadvertent. This is not relevant, provided there is omission or failure on the part of the assessee. The latter confers jurisdiction to reopen the assessment."

23. Therefore, what needs to be examined in the given facts and circumstances is whether there was a mere production of books and accounts by the petitioner before the AO during the original assessment or the same was supplemented with certain other efforts which would lead to a sequitur that there existed a sufficient opportunity with the AO to form an opinion on the concerned subject matter.

24. It is pertinent to take note of the assessment order dated 8 January 2014, which unequivocally records that during the course of assessment proceedings, the petitioner had submitted that waiver of loan of Rs 25.16 crore taken from various banks is capital in nature and is not liable to be added back. The AO had further commented upon the said submission by asserting that the petitioner had taken a dual stand with respect to waiver of loans and in fact, concluded that This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 the said stand does not support the legal view on the issue. The relevant extract of the assessment order reads as under:-

> "4.3. The assessee has also relied on some other judicial decisions. The submission of the assessee were duly considered but not found acceptable. The judicial precedents relied by the assessee are on different footing hence and some are not relevant for these issue. During the course of assessment proceedings assessee has submitted that waiver of loan Rs.25.16 Cr. taken from various banks is capital in nature and the reversal of the loan is capital in nature and not liable to be added back. The assessee has taken dual stand to deal with the issue as on one side the assessee is accepting that waiver of loan is capital in nature and other side settlement charges to bank are revenue in nature and liable for allowances. The contention of the assessee does not support legal view on the issue. The settlement charges paid to various bank are capital in nature pertaining to waiver of loan, being capital assets and accordingly liable to disallowed."

25. Therefore, it would be erroneous to conclude that the AO did not take into consideration the issue of addition of remission at all. Rather, the recording of the aforesaid submission in the assessment order and the resultant comment would support the view that the AO had apparently formed an opinion and chosen not to bring the said amount in the category of taxable income. It is,

thus, seen that the reassessment proceedings in the instant case can, at best, be said to have been based upon a change of opinion of the AO and not precisely on the fulfilment of any reason encapsulated in Section 147 of the Act.

26. Additionally, the fact regarding the remission of liability of a sum of Rs.25.16 crores had also been brought into the notice of the AO vide reply submitted by the petitioner dated 23 December 2013. Interestingly, the said letter also finds mention in the original assessment order under the heading -- addition on account of financial charges incurred being capital in nature. The relevant extract of the original assessment order is reproduced hereunder as:-

> "4.2. Vide reply dated 23.12.2013 assessee has submitted as under:-
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 "The assessee company had debited in its Profit & Loss account a sum of Rs. 1,13,74,379/- under the head 'Finance Charges'. This amount of Rs. 1,13,74,379/- includes charges paid by the assessee company to its various bankers from whom it had taken credit facilities in the past. As the assessee company is a recognized sick company as approved by BIFR, all the loans which were taken by it from various bank were categorized Non Performing Assets (NPA) by the banks in the years 2003-04 & 2004-05. No interest was being provided by the assessee company in its books of accounts on the loans from the year 2003-04 & 2005-
>
> 05. To revive the company and save its business from closing down, the assessee was actively pursuing with its bankers for waiver of its loan liability. Total loan of Rs. 32.31 crores of State Bank of India was settled at Rs. 7.15 crores which was taken over by Asset Care and Reconstruction Enterprises thereby getting a remission of liability in a sum of Rs. 25.16 crores. Total one time settlement charges/finance charges/processing charges in a sum of Rs.40,63,613/- was paid to State Bank of India for settlement of its Loan. Total amount of Rs. 8,70,150/- was paid to Asset Care as processing charges consequent on their agreeing to take over the loan from SBI. Likewise one time loan settlement charges / processing charges in a total sum of Rs. 24,50,000/- were paid to IDBI for settlement of their loans. Total finance charges of Rs. 1,13,74,379/- also includes a sum of Rs. 39,83,079/- paid to ING Vysya Bank towards interest and bank charges on its loan. We are enclosing alongwith the Chart showing the complete details of different charges paid to various banks on different dates during the year. Your goodself will appreciate that all the payments made to various banks were to save the business of the assessee company and to take the benefit in the form of waiver of its loan liability, are very much revenue in nature are clearly allowable u/s 37(1) of the Income Tax Act, 1961."

27. Further, much reliance has been placed by the respondents on the following two paragraphs of the decision in the case of Usha International Ltd. (supra) to strike a distinction between the change of opinion and failure or omission of the AO to form an opinion and to also contend that since the AO has not examined the concerned issue, he cannot be attributed a facet suggesting a mere change in opinion:-

> "24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true disclosure of material facts is a precondition which should This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 be satisfied if the reopening is after four years of the end of the assessment year. The Explanation stipulates that mere production of books of account and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus, in cases of reopening after four years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when reassessment proceedings are initiated within four years of the end of the assessment year. The sequitur is that when the proviso does not apply, the reassessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, reassessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this ; when the proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.
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> 25. Thus, if a subject-matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and, therefore, it is the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, the principle of "change of opinion" cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject-matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion."

28. However, a deeper analysis of the decision in Usha International Ltd. (supra) would signify that the aforesaid two paragraphs cannot be treated as a standalone enunciation of the law, rather, the

same must be understood in the context of the caveat set out in paragraph no.39 of the said decision. The said decision also holds that the AO would be said to have formed an opinion if any issue is raised and answered by the assessee in original assessment proceedings, but it had chosen to not make any addition in that respect This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 in the assessment order. The relevant paragraphs of the decision in Usha International Ltd. (supra) are, hereby, reproduced 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.
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> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by the principle of "change of opinion".

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion.

The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

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27. The aforesaid observations in paragraphs 23 to 26 have not to be read in isolation but are to be read with caveat set out in paragraph 39 below. Whether or not the Assessing Officer had applied his mind and examined the subject-matter, claim, etc., depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject-matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing Officer did not examine a particular subject-matter, claim, etc. The stand and stance of the assessee and the Assessing Officer in such cases are relevant.

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39. In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the

first round/original proceedings may have examined the subject-matter, claim, etc., because the aspect or question may be too apparent and obvious. To hold that the Assessing Officer in the first round did not examine the question or subject-matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction, etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case."

[Emphasis supplied]

29. Recently, this Court in the case of PMC Fincorp Ltd. v. CIT [2023 SCC OnLine Del 8437], while referring to paragraph no.13(3) of Usha International Ltd. (supra) has held that notwithstanding the absence of reasons recorded in the assessment order, if a query has been raised and answered, it would be construed that the AO has formed the opinion. The relevant paragraphs of the said decision read as under:-

> "41. It is well-established that an AO need not write a detailed order, as long as the assessment record is indicative of the fact that a query was raised and it was answered; if such an exercise has been undertaken, it would not be open to the AO to reopen the same, unless fresh material comes to light which was not available when the matter was examined in the first instance.
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> 42. We may note that Mr. Maratha, in support of this plea, had relied upon the judgment of a coordinate bench rendered in Commissioner of Income Tax-Vi, New Delhi v. Usha International Ltd., 2012 VII AD (Delhi) 673.
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> 43. The court in paragraph 13 of the said judgment has made the following apposite observations with regard to when would a case be hit by the principle of change of opinion:
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> "13. It is, therefore, clear from the aforesaid position that:
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> This is a digitally signed order.

> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 (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;
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> (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."

[Emphasis is ours]

44. The observations made in paragraph 13(3) clearly establish the principle that once a query is raised and answered, the AO would have formed an opinion, notwithstanding the fact that no reasons are recorded in the assessment order. In such circumstances, the reassessment proceedings, if initiated, would be construed as being invalid in law. This principle is founded on the rationale that the assessee has no control over the manner in which the AO chooses to frame the assessment order. One needs to remember that the AO wears two hats, that of an inquisitor and adjudicator."

[Emphasis supplied]

30. Applying the principles laid down in Usha International Ltd. (supra) in the instant case, it is clearly seen that not only the aspects relating to the issue at hand had been fully disclosed by the petitioner before the AO but by recording the submissions and comments in the assessment order, it can be reasonably inferred that the AO has formed an opinion on the said issues. Thus, allowing the reassessment This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 proceedings to continue in the present case would be contrary to the mandate expounded in Usha International Ltd. (supra).

31. In the case of Calcutta Discount Co. Ltd. v. ITO [1960 SCC OnLine SC 10], while analysing Section 34 of the erstwhile Income Tax Act, 1922, which is in pari materia to Section 147 of the Act, a

Constitution Bench of the Hon ble Supreme Court took a view that once the primary facts have been made available before the assessing authority, the assessee cannot be burdened with the responsibility to tell the assessing authority as to what inferences of facts or law should be drawn by the said authority. The relevant paragraph of the said decision reads as under:-

> "10. Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else -- far less the assessee -- to tell the assessing authority what inferences whether of facts or -- law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences -- whether of facts or law he would draw from the primary facts."

[Emphasis supplied]

32. The decision of the Hon ble Supreme Court in ITO v. Lakhmani Mewal Das [(1976) 3 SCC 757] further elucidates the scope and extent of the duty cast upon the assessee with regard to a full and true disclosure of the facts at the time of the original assessment. The relevant paragraph of the said decision reads as under:-

> "7. It would appear from the perusal of the provisions reproduced above that two conditions have to be satisfied before an Income Tax Officer acquires jurisdiction to issue notice under Section 148 in This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 respect of an assessment beyond the period of four years but within a period of eight years from the end of the relevant year viz. (1) the Income Tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return under Section 139 for the assessment year to the Income Tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must coexist in order to confer jurisdiction on the Income Tax Officer. It is also imperative for the Income Tax Officer to record his reasons before initiating proceedings as required by Section 148(2). Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment.

> Production before the Income Tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income Tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income Tax Officer with regard to the inference which he should draw from the primary facts. If an Income Tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment."

[Emphasis supplied]

33. The view taken in Calcutta Discount Co. Ltd. (supra) has been recently followed by the Hon ble Supreme Court in the case of M/S Mangalam Publications, Kottayam (supra), which also postulates the stand that once the primary facts are disclosed by the assessee, the burden shifts on the AO. Paragraph no.41 of the said decision reads as under:-

> 41. It is true that Section 139 places an obligation upon every person to furnish voluntarily a return of his total income if such This is a digitally signed order.

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> submitted by the assessee before the South Indian Bank for obtaining credit which was discarded by the CIT(A) in an earlier appellate proceeding of the assessee itself, the assessing officer upon a comparison of the same with a subsequent balance sheet of the assessee for the assessment year 1993-94 which was filed by the assessee and was on record, erroneously concluded that there was escapement of income and initiated reassessment proceedings.
>
> [Emphasis supplied]

34. It is, thus, seen that the courts have taken a consistent view that once the assessee has disclosed all the material and primary facts, truly and fully before the AO, it is for the AO to draw the requisite

inferences from those primary facts. The onus on the assessee cannot be extended beyond the true and full disclosure of such facts.

35. Also, the power of the AO to reassess an income chargeable to tax which has escaped assessment is strikingly different from the authority to review the decision taken during the original proceedings. While the former is permissible in light of the pith and substance enshrined in Section 147 of the Act, allowing the latter would be a violence with the mandate of the said Section. Reliance can be placed upon the decision in the case of CIT v. Kelvinator of India Ltd. [2010 SCC OnLine SC 195], paragraph no.6 of which reads as under:-

> "6. 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. But reassessment has to be based on fulfilment of certain precondition and if the concept This is a digitally signed order.
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> The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place."

36. A similar view was taken by this Court in the case of CIT v. Techspan India (P) Ltd. [2018 SCC OnLine SC 435], wherein, it was held as under:-

> "15. Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review."

37. However, while referring to the rule of law laid down in the aforesaid decisions, we are also mindful of the note of caution as articulated in the case of Techspan India P. Ltd. v. Income-tax Officer [2006 SCC OnLine Del 1754], whereby, this Court, while relying upon Gruh Finance Ltd. v. Joint CIT (Assessment) [(2000) 243 ITR 482], has held that every attempt to bring to tax income that has escaped assessment cannot be aborted by judicial intervention on an assumed change of opinion. The relevant paragraph of the said decision reads as under:-

> "24. The other aspect regarding which I wish to strike a note of caution is that before interfering with the proposed reopening of the assessment on the ground that the same is based only on a change in opinion, the court ought to verify whether the assessment earlier concluded has either expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. If the assessment order is non-speaking, cryptic or

perfunctory in nature, it may be difficult to attribute to the Assessing Officer any opinion on the questions that are raised in the proposed reassessment proceedings. Every attempt to bring to tax income that has escaped assessment cannot be aborted by judicial intervention on an assumed change of opinion even in cases This is a digitally signed order.

The authenticity of the order can be re-verified from Delhi High Court Order Portal by scanning the QR code shown above. The Order is downloaded from the DHC Server on 05/04/2024 at 21:24:21 where the order of assessment does not address itself to a given aspect sought to be examined in the reassessment proceedings. There may be cases where the material is available with the Assessing Officer but the same is either ignored or escapes his attention while making the assessment. There can be no legal impediment in the reopening of assessment in such cases, nor can it be said that the reassessment is based only on a change of opinion. A Division Bench of this court of which I was a member had in Consolidated Photo and Finvest Ltd. v. Asst. CIT disposed of on January 17, 2006 [2006] 281 ITR 394, an occasion to deal with a somewhat similar situation. Relying upon the decisions of the Supreme Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 ; Kantamani Venkata Narayana and Sons v. First Addl. ITO [1967] 63 ITR 638 ; Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466 and ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 and the decisions of the High Court of Gujarat in Praful Chunilal Patel v. M. J. Makwana, Asst. CIT [1999] 236 ITR 832 and Gruh Finance Ltd. v. Joint CIT (Assessment) [2000] 243 ITR 482, this court observed (page 406) :

"The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening

completed assessments would be This is a digitally signed order.

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[Emphasis supplied]

38. Therefore, examining the exposition of law in Techspan India P. Ltd. v. Income-tax Officer (supra) on the edifice of the facts of the present case, we come to the conclusion that the said decision would not hold any relevance in the instant case. The assessment order is neither cryptic nor non-speaking with respect to the issue in consideration. Put otherwise, the original assessment order succinctly makes a detailed reference to the alleged escapement of income and a bare reading of the same makes it discernible that the AO had duly applied its mind to form an opinion, leaving thereby the alleged income to be not falling in the category of taxable income. Also, unlike as held in Techspan India P. Ltd. v. Income-tax Officer (supra), it cannot be said that the material available with the AO was either ignored or escaped its attention, particularly when the specific findings have been ex facie recorded in the assessment order qua the issue in consideration.

39. An upshot of the above discussion would indicate that the non- disclosure of full material cannot be attributed to the petitioner in the instant case. Rather, the AO had omitted to make any addition qua the issue at hand, despite noting the submissions and forming an opinion on the same.

40. In view of the aforesaid, the impugned notice dated 31 March 2018 and letter dated and 22 November 2018 are, hereby, quashed.

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YASHWANT VARMA, J.

PURUSHAINDRA KUMAR KAURAV, J.

MARCH 18, 2024 p'ma This is a digitally signed order.