*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on: 18 October 2024**
Judgment pronounced on 21 February, 2025

\+ W.P.(C) 9786/2016

MARUTI SUZUKI INDIA LTD. .....Petitioner

Through: Mr. Ajay Vohra, Sr. Adv. with Mr. Vaibhav Kulkarni and Mr. Udit Naresh, Advs.

versus

DEPUTY COMMISSIONER OF INCOME TAX .....Respondent

Through: Mr. Shlok Chandra, SSC with Ms. Naincy Jain, Ms. Madhavi Shukla, JSCs and Mr. Sushant Pandey, Advs.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA
HON'BLE MR. JUSTICE RAVINDER DUDEJA

J U D G M E N T

YASHWANT VARMA, J.

1. The writ petitioner impugns the reassessment action initiated by the respondent under Sections 147/148 of the **Income Tax Act, 1961**[1] pertaining to **Assessment Year**[2] 2009-10. From the disclosures which are made in the writ petition, we find that although the petitioner is stated to have made appropriate disclosures along with the **Return of Income**[3] including the filing of an Audit Report, Form No. 3CEB and a Tax Audit Report, the original RoI was subsequently revised declaring income of INR 12,62,60,79,909/-. The RoI was duly examined under

[1] Act
[2] AY
[3] RoI

Section 143(3) read along with Section 144C of the Act and a final assessment order came to be passed on 02 January 2014 whereby the **Assessing Officer**[4] computed the total taxable income at INR 20,71,04,18,575/-.

2. Undisputedly, 31 March 2016 constituted the last date by which a reassessment action for AY 2009-10 could have been initiated in terms of the timelines provided in Section 149. It is the case of the writ petitioner that the notice under Section 148, however, came to be issued only on 01 April 2016. It is in the aforesaid backdrop that one of the principal grounds on which the reassessment exercise is assailed is of the same being barred by limitation as prescribed. According to the writ petitioner, the aforenoted challenge is no longer *res integra* and stands conclusively answered by this Court in **Suman Jeet Agarwal v. ITO**[5].

3. We are in the present case concerned with a reassessment exercise which was governed by the erstwhile statutory regime and the respondents thus appear to have followed the procedure as it existed prior to Finance Act, 2021. A copy of the reasons on the basis of which the AO had formed the opinion that income liable to tax had escaped assessment was thus provided separately on 18 April 2016.

4. The aforesaid reasons which form part of our record read as under:

> "Reason for issue of Notice n/s 148 for the A.Y. 2009-10 in the case of Maruti Suzuki India Ltd
>
> Background
>
> 1. The company electronically filed its return of income on 26.09.2009 for the assessment year 2009-10 declaring income of Rs.

[4] AO
[5] 2022 SCC OnLine Del 3141

1319,47,29,675/-. Revised return was filed on 29.03.2011 at an income of Rs. 1262,60,79,909/-. The case was selected for scrutiny for the A.Y. 2009-10 and assessed u/s 143(3) of the Income Tax Act, 1961 at Rs. 2071,04,18,575/- vide order dated 29.03.2014.

Directions to take remedial measures

2. A letter dated 22.04.2014 had been received from the office of Addl. CIT, Range 16, stating that four new issues have been identified in A.Y. 2010-11. These issues have not been examined by the AO during the course of assessments in the earlier assessment years. The issues cited in reference to this case are as under:

i) It has been held that the assessee company is a PE of M/s Suzuki Motor Corporation and thus it was liable to deduct TDS amounting to Rs. 11,29,40,00,000/- on purchase made from M/s Suzuki Motor Corporation, after conducting relevant inquiries and discussing all relevant issues.

ii) It has been held that the share transactions are business income, after conducting relevant inquiries. Short term Capital Gain is Rs, 40,69,32,818/- and Long Term Capital Gain is Rs. (-) 9,66,62,300/- on this issue,

iii) Claim of deduction u/s 35(2AB) amounting to Rs.125,89,81,154/- has-been disallowed after detailed discussion in the order.

iv) Claim of warrant provision amounting to Rs. 43.20 crore has been disallowed by treating it as contingent liability after detailed discussion.

The AO has been directed to examine the assessment orders of earlier years and to take remedial measures if deemed fit.

Analysis of information received and material on record

3. I have perused the return of the assessee and the assessment order for the A.Y. 2009-10 and observed that the above mentioned issues have not been examined in the assessment order for A.Y. 2009-10.

4. Summary of Findings

4.1 The assessee filed its return of income on 26.09.2009.

4.2 The return was assessed u/s 143(3) of the Income Tax Act, 1961 at Rs. 2071,04,18,575/- vide order dated 02.01.2004.

4.3 Directions from office of Addl. C1T has been received to examine the assessment orders of earlier years in view of the following new issues raised in the assessment order for AY 2010-11 and to take remedial measures if deemed fit.

(i) Non deduction of tax at source amounting to Rs. 195 crore on payments to M/s Suzuki Motor Corporation

(ii) Taxation of share transactions as business income amounting to Rs. 129 crore

(iii) Disallowance of claim u/s 35(2AB) amounting to Rs. 247 crore

(iv) Disallowance of provision for warranty amounting to Rs. 21 crore.

4.4 The above mentioned issues have not been examined in the assessment order for A.Y. 2009-10.

Reason for belief

5. In view of the above, 1 have reasons to believe that the above mentioned issues have not been examined in the assessment order of A.Y. 2009-10.

Sd/-
(Sanyam Joshi)
Deputy Commissioner of Income Tax
Circle 16(1), Delhi"

5. As is manifest from the above, the respondent had essentially flagged four issues which had been identified in the course of the assessment undertaken for AY 2010-11. The four principal issues which were cited were the following:

a. The petitioner constituted a **Permanent Establishment**[6] of **Suzuki Motor Corporation**[7] and thus being liable to deduct tax at source **[Tax Deducted at Source**[8]**]** amounting to INR 11,29,40,00,000/- in respect of purchases made from SMC.

b. Share transactions are stated to have given rise to a Short Term and Long-Term Capital Gains.

c. Deductions under Section 35(2AB) were liable to be disallowed; and

d. Claim of warrant provision liable to be disallowed treating

[6] PE
[7] SMC
[8] TDS

them as a contingent liability.

6. As is apparent from a perusal of the reasons extracted hereinabove, the aforesaid issues which were decided against the petitioner in the assessment pertaining to AY 2010-11 are stated to have been communicated to the AO in terms of a letter dated 22 April 2014 issued by the **Additional Commissioner of Income-Tax**[9], Range-16. The reasons to believe in unequivocal terms allude to these aspects as *"four new issues"* which had been identified in the course of assessment for AY 2010-11. The AO further records that the communication of the ACIT requires it to examine the assessment orders of the earlier period and to take remedial measures if deemed fit. It is this directive which is then reiterated in Para 4.3 of the reasons to believe. It thus becomes evident that it was the communication of the ACIT that prompted the issuance of the notice under Section 148 for AY 2009-10.

7. Appearing for the writ petitioner, Mr. Vohra, learned senior counsel, at the outset submitted that from the material placed on the record, it is manifest that the notice under Section 148 was dispatched only on 01 April 2016. According to Mr. Vohra, this would establish that the reassessment action would not sustain bearing in mind the following exposition of the law which appears in *Suman Jeet Agarwal*:

> "**25.** Question No. (I) : Whether the jurisdictional Assessing Officer's act of generating notice in the Income Tax Business Application portal on March 31, 2021, without despatching the notice meets the test of the expression "shall be issued" in section 149 of the Act of 1961, and saves the notices from being time barred ?
>
> - The court has answered this in the negative in favour of the assessee.

[9] ACIT

25.1. It has emerged as an admitted position on facts, that the e-mails attaching the impugned notices dated March 31, 2021, were despatched by the Income Tax Business Application servers on April 1, 2021, or thereafter.

25.2. Faced with the aforesaid factual position, it has been contended by the Department that since generation of impugned notices on the Income Tax Business Application portal on March 31, 2021, is undisputed, the singular act of generation of notice by the jurisdictional Assessing Officer satisfies the requirement of "issued" for the purpose of section 149 of the Act of 1961 and despatch of the notice on March 31, 2021 is not a mandatory requirement.

25.3. The Department contends that since each of the impugned notices bear a document identification number, its generation as on March 31, 2021, is beyond doubt. It is further contended that since, on the Income Tax Business Application portal, after generation of notice the jurisdictional Assessing Officer is left with no power to amend, alter, cancel or ante-date the notice, the said act of generation conclusively establishes that the notice has been issued.

25.4. The petitioners as noted above have opposed this contention of the Department as being contrary to settled law interpreting the expression "issued", "shall be issued" and the dictionary meaning of the phrase "issue". It is contended that under the Act of 1961, a notice is held to be "issued" on the date of its due despatch and not on the date the notice is drawn up.

25.5. It would be useful to refer to the judgments relied upon by the petitioners, which clearly bring out that for an authority to contend that a notice has been issued, the same must be duly despatched by the issuing authority. The first instructive judgment on this point is Delhi Development Authority (supra) at paragraphs 5, 13 and 15, which reads as under :

> ".. . 5. The substituted clause (ii) in para 2, in O. M. dated September 14, 1992, is as under :
>
> '(ii) Government servants in respect of whom a charge-sheet has been issued and the disciplinary proceedings are pending ; and'
>
> 13. The context in which the word 'issued' has been used, merely means that the decision to initiate disciplinary proceedings is taken and translated into action by despatch of the charge-sheet leaving no doubt that the decision had been taken. The contrary view would defeat the object by enabling the Government servant, if so inclined, to evade service and thereby frustrate the decision and get promotion in spite of that decision. Obviously, the contrary view cannot be taken.. .

> 15. The meaning of the word 'issued', on which considerable stress was laid by learned counsel for the respondent, has to be gathered from the context in which it is used. Meanings of the word 'issue' given in the Shorter Oxford English Dictionary include : 'to give exit to ; to send forth, or allow to pass out ; to let out ;. .. to give or send out authoritatively or officially ; to send forth or deal out formally or publicly ; to emit, put into circulation'. The issue of a charge-sheet, therefore, means its despatch to the Government servant, and this act is complete the moment steps are taken for the purpose, by framing the chargesheet and despatching it to the Government servant, the further fact of its actual service on the Government servant not being a necessary part of its requirement." (emphasis supplied)

In the aforesaid judgment the Supreme Court emphatically laid down that despatch is an essential condition to complete the act of issuance. The court clarified that service on the recipient was not a condition precedent for satisfying the act of issuance.

25.6. It would also be useful to refer to the judgment of the Supreme Court in the case of R. K. Upadhyaya (supra). In the said case, the Supreme Court was concerned with the controversy of the validity of a notice with reference to sections 148 and 149 of the Act of 1961. In the said case, the notice under section 148 of the Act of 1961, was despatched by registered post on March 31, 1970, but the same was received by the assessee on April 3, 1970 ; and therefore, the Gujarat High Court after observing that the expression "issued" and "served" in sections 148 and 149 have the same meaning, held that the notice was time barred. In appeal, the Supreme Court after taking note that the notice was despatched by registered post on March 31, 1970, set aside the judgment of the High Court. The Supreme Court held that the service of notice is not a condition precedent for satisfying the condition of "issued". The date of despatch of the notice was taken into consideration by the Supreme Court as the relevant date for determining that the notice has been validly issued for the purpose of section 149 of the Act of 1961. The date of notice is discernible from the judgment of High Court.

25.7. The contention of the Department that since the impugned notices were generated and digitally signed on March 31, 2021, the same should be considered as the date of issue, notwithstanding the fact that the same had not been despatched, was categorically rejected by the Madras High Court in Smt. Parveen Amin Bhathara (supra) following the judgment of Gujarat High Court in Kanubhai M. Patel (supra). The Gujarat High Court, dealing with a notice issued in paper form, at paragraphs 13 and 16 observed as under (page 31 of 334 ITR) :

"Whereas, on behalf of the Revenue, it has been contended that the notices were actually signed on March 31, 2010, hence, the said date would be the date of issue and as such, the impugned notices have been issued within the time limit prescribed under section 149 of the Act.. ..

Thus, the expression 'to issue' in the context of issuance of notices, writs and process, has been attributed the meaning, to send out ; to place in the hands of the proper officer for service. The expression 'shall be issued' as used in section 149 would therefore have to be read in the aforesaid context. In the present case, the impugned notices have been signed on March 31, 2010, whereas the same were sent to the speed post centre for booking only on April 7, 2010. Considering the definition of the word 'issue', it is apparent that merely signing the notices on March 31, 2010, cannot be equated with issuance of notice as contemplated under section 149 of the Act. The date of issue would be the date on which the same were handed over for service to the proper officer, which in the facts of the present case would be the date on which the said notices were actually handed over to the post office for the purpose of booking for the purpose of effecting service on the petitioners. Till the point of time the envelopes are properly stamped with adequate value of postal stamps, it cannot be stated that the process of issue is complete. In the facts of the present case, the impugned notices having been sent for booking to the speed post centre only on April 7, 2010, the date of issue of the said notices would be April 7, 2010 and not March 31, 2010, as contended on behalf of the Revenue. In the circumstances, the impugned notices under section 148 in relation to assessment year 2003-04, having been issued on April 7, 2010 which is clearly beyond the period of six years from the end of the relevant assessment year, are clearly barred by limitation and as such, cannot be sustained.. ." (emphasis supplied)

The Gujarat High Court categorically held that it is on the date of despatch of the section 148 notice that the same will be held to be issued for the purpose of section 149 of the Act of 1961.

25.8. The Madras High Court in Smt. Parveen Amin Bhathara (supra), after approving the dicta of Kanubhai M. Patel (supra) and considering section 282 of the Act of 1961 and rule 127 of the Income-tax Rules, held as under (page 205 of 446 ITR) :

"In the present case, the respondent reopened the assessment of the appellant for the assessment year 2011-12, through notice dated March 31, 2018 under section 148

> of the Act. Admittedly, the limitation period of six years for reopening the assessment, came to an end on March 31, 2018. The main plank of contention of the learned counsel for the appellant is that the notice under section 148 of the Act dated March 31, 2018 has been received by the appellant through e-mail only on April 18, 2018, i. e., after the expiry of six years from the end of the assessment year under consideration and hence, the same is clearly barred by limitation, whereas the Department contended that mere signing of notice by the respondent on March 31, 2018 amounts to issuance of notice under section 149 of the Act and therefore, the same is within the limitation period....
>
> In Kanubhai M. Patel v. Hiren Bhatt or his successors to office [2011] 334 ITR 25 (Guj), it was held by the Gujarat High Court that 'date of issuance of notice under section 148 of the Income-tax Act has to be reckoned not from the date when it was issued, but on the date when it was actually delivered on the assessee'.. .
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> Thus, it is apparent from the aforesaid decisions that the issuance of notice under section 149 is complete only when the same is issued in the manner as prescribed under section 282 read with rule 127 of the Income-tax Rules prescribing the mode of service of notice under the Act. The signing of notice would not amount to issuance of notice as contemplated under section 149 of the Act. In other words, the requirement of issuance of notice under section 149 is not mere signing of the notice under section 148, but is sent to the proper person within the end of the relevant assessment year.. ." (emphasis supplied)

In the said judgment the Division Bench of the Madras High Court categorically rejected the submission of the Department that signing of notice, without despatch, would amount to issuance of notice as contemplated under section 149 of the Act of 1961.

25.9. The Madhya Pradesh High Court in Yuvraj (supra) similarly dealt with a case of a section 148 notice dated March 31, 2021, which was sent by e-mail to the assessee on April 16, 2021.The High Court held that the notice was issued on April 16, 2021 and quashed the same reserving liberty to the Department to issue a fresh notice under section 148A of the Act of 1961, in accordance with law. The grounds for challenging the impugned notice in the said case were the same as have been raised herein for challenging the impugned notices falling under categories "A" and "B".

25.10. The judgment of the Allahabad High Court in Daujee Abhusan Bhandar (supra), was the earliest to hold that drawing up a notice on March 31, 2021, and digitally signing the same, in the

absence of despatch, does not amount to issuance of notice within the meaning of section 149 of the Act of 1961. The High Court after elaborately discussing the provisions of sections 282 and 282A of the Act of 1961, and the provisions of section 13 of the Act of 2000, held that, since the impugned notice therein though dated March 31, 2021, was issued through e-mail on April 6, 2021, the same was time barred and therefore liable to be quashed. The court at paragraphs 29 and 30 held as under (page 54 of 444 ITR) :

> "Thus, considering the provisions of sections 282 and 282A of the Act, 1961 and the provisions of section 13 of the Act, 2000 and meaning of the word 'issue" we find that firstly notice shall be signed by the assessing authority and then it has to be issued either in paper form or be communicated in electronic form by delivering or transmitting the copy thereof to the person therein named by modes provided in section 282 which includes transmitting in the form of electronic record. Section 13(1) of the Act, 2000 provides that unless otherwise agreed, the despatch of an electronic record occurs when it enters into computer resources outside the control of the originator. Thus, the point of time when a digitally signed notice in the form of electronic record is entered in computer resources outside the control of the originator, i. e., the assessing authority that shall be the date and time of issuance of notice under section 148 read with section 149 of the Act, 1961.
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> In view of the discussion made above, we hold that mere digitally signing the notice is not the issuance of notice. Since the impugned notice under section 148 of the Act, 1961 was issued to the petitioner on April 6, 2021 through e-mail, therefore, we hold that the impugned notice under section 148 of the Act, 1961 is time barred. Consequently, the impugned notice is quashed." (emphasis supplied)

25.11. In the subsequent judgments of the Allahabad High Court in the case of Santosh Krishna (supra) and Mohan Lal Santwani (supra) the High Court summoned the details of date and time of triggering of e-mail by the Income Tax Business Application e-mail software system to determine the date of issuance of the e-mail attaching the notice. The High Court held the said date of triggering of e-mail to be the date of issue of section 148 notice for the purpose of section 149 of the Act of 1961.

25.12. The review of the aforesaid judgments of the Supreme Court and the several High Courts shows that all courts have consistently held that the expression "issue" in its common parlance and its legal interpretation means that the issuer of the notice must after drawing up the notice and signing the notice, make an overt act to ensure due

despatch of the notice to the addressee. It is only upon due despatch, that the notice can be said to have been "issued".

25.13. Further, a perusal of the compliance affidavit reveals that while the function of generation of notice on Income Tax Business Application portal and digital signing of the notice is executed by the jurisdictional Assessing Officer, the function of drafting of the e-mail to which the notice is attached and triggering the e-mail to the assessee is performed by the Income Tax Business Application e-mail software system. Thus, mere generation of notice on the Income Tax Business Application screen cannot in fact or in law constitute issue of notice, whether the notice is issued in paper form or electronic form. In case of paper form, the notice must be despatched by post on or before March 31, 2021 and for communication in electronic form the e-mail should have been despatched on or before March 31, 2021. In the present writ petitions, the despatch by post and e- mail was carried out on or after April 1, 2021 and therefore, we hold that, the impugned notices were not issued on March 31, 2021.

25.14. The Department has not disputed the correctness of the law settled by the Supreme Court in the case of R. K. Upadhyaya (supra) in which the court was concerned with issuance of the section 148 notice in paper form and concluded that, since the date of despatch was within the prescribed period of limitation, the notice was validly issued for the purpose of section 149 of the Act of 1961, and held that the date of service of notice was not relevant. In fact, the Department has relied upon the said judgment. The said judgment squarely applies to the notice classified as category "E". The amendments to the Act of 1961 including section 282A was to enable the Income-tax authority to issue notice either in paper form or electronic form and were made to provide an adequate legal framework for paperless assessment. Similarly, setting up of the digital platform of Income Tax Business Application portal and the e-filing portal is for facilitating assessment proceedings electronically. The said amendments or the use of Income Tax Business Application portal by the Department for issuing notice in no manner mitigates against or dispense with the legal requirement of the Department to ensure due despatch of the section 148 notice to satisfy the test of section 149 of the Act of 1961. The contention of the Department that upon generation of the notice on the Income Tax Business Application screen simplicitor (even before its despatch) is to be held to be issued does not persuade the court and is contrary to the judgment relied upon by the said party.

25.15. This court in the case of Court on its Own Motion v. CIT [2013] 352 ITR 273 (Delhi), while dealing with section 143(1) of the Act of 1961, has held that the law requires that, the intimation under section 143(1) should be communicated to the assessee. The

uncommunicated orders or intimations cannot be enforced and are not valid. The relevant extract of the aforesaid decision is reproduced herein under (page 295 of 352 ITR) :

> "The second grievance of the assessee is with regard to the uncommunicated intimations under section 143(1) which remained on paper/file or the computer of the Assessing Officer. This is serious challenge and a matter of grave concern. The law requires intimation under section 143(1) should be communicated to the assessee, if there is an adjustment made in the return resulting either in demand or reduction in refund. The uncommunicated orders/intimations cannot be enforced and are not valid. .. But when there is failure to despatch or send communication/intimation to the assessee consequences must follow. Such intimation/order prior to March 31, 2010, will be treated as non est or invalid for want of communication/service within a reasonable time. This exercise, it is desirable should be undertaken expeditiously by the Assessing Officers. The Central Board of Direct Taxes will issue instructions to the Assessing Officers. . ." (emphasis supplied)

25.16. The Department sought to contend that the Madras High Court in Malavika Enterprises (supra) has struck a discordant chord with the judgment in the Daujee Abhusan Bhandar (supra). However, on a perusal of the judgment in Malavika Enterprises (supra), we find that in the said case the notice had been despatched on March 31, 2021, at 6.42 p. m. by the Income Tax Business Application server, though served on the assessee on April 1, 2021, at 2.00 am and therefore, the Madras High Court concluded that the notice has been validly issued on March 31, 2021. The relevant portion of paragraph 8 of this judgment reads as follows (page 653 of 445 ITR) :

> "Coming to the facts of the case, it is stated that notice under section 148 of the Act of 1961 is said to have been issued on March 31, 2021 for the assessment year 2013-14, followed by consequential notices. It is the case of the petitioner that the notice is said to have been issued vide e-mail at 6.42 p. m., but was served on April 1, 2021 at 2 am and, therefore, the unamended provisions of section 148 of the Act of 1961 would not be applicable to the case. . ."

We do not find that this judgment takes the case of the Department any further as the section 148 notice in the case was duly despatched on March 31, 2021.

25.17. The Department has not cited any judgment which would support its contention that mere drawing up of notice and signing it

(pending despatch) amounts to issuance. The counsel for the respondent placed heavy reliance on the judgment of the Supreme Court in M. M. Rubber and Co. (supra). In the said case as well, the apex court was concerned with the issue of limitation while determining if the impugned order therein had been passed within time. However, the provision under consideration was section 35E(3) of the Central Excises and Salt Act, 1944 ("Act of 1944"), which reads as under :

> ".. . Sub-section (3) of section 35E of the Act which deals with the limitation for exercise of the powers under sub-sections (1) and (2) of the Act and which is the relevant provision for consideration in this appeal reads as follows :
>
> 'No order shall be made under sub-section (1) or sub-section (2) after the expiry of one year from the date of the decision or order of the adjudicating authority.'. . ."

The court in the aforesaid judgment deliberated with reference to the phrase "no order shall be made" in section 35E(3) of the Act of 1944 and concluded that the date on which the order was made by the adjudicatory authority by signing it is a relevant date for determining if it was passed within limitation. As is evident, the expression used in section 35E(3) of the Act of 1944, is "no order shall be made" which is distinct from the expression used in section 149 of the Act of 1961 which reads as "no notice under section 148 shall be issued". The two statutory provisions are materially different and the ratio of the said judgment can have no bearing in interpreting section 149 of the Act of 1961.

25.18. Additionally, the contention of the counsel for the Department that generation of section 148 notice on the Income Tax Business Application screen amounts to "issued" within the meaning of section 149 of the Act of 1961 is not borne out from the instructions issued by the Directorate of Income-tax (Systems). On the contrary, the said circulars duly recognize that after generation of notice the concerned Income-tax authority is required to take overt steps for issuing the said notice to the assessee. The circulars use the words "generation" and "issuance" distinctively. In this regard reference may be made illustratively to the following instructions :

> (a) The Income Tax Business Application Assessment Instruction No. 2 (F. No. System/Income Tax Business Application/ Instruction/Assessment/ 16-17/177, dated August 1, 2016) issued by the Directorate of Income-tax (System) mentions that :
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> "the Assessing Officer Staff/Assessing Officer Inspector will not be able to generate the notice but will be able to view the notices already generated by the Assessing Officer for taking a printout of the same, for issue to the assessee."

(b) The Income Tax Business Application Assessment Instruction No. 3 (F No. System/Income Tax Business Application/Instruction/ Assessment/ 177/16-17/), dated February 3, 2017, also illustrates the same distinction :

> "Details of the Authority/party from whom information is requisitioned can be entered along with date for compliance and the notice can then be generated and issued."

25.19. The counsel for the Department have also sought to argue that generation of a notice with document identification number on Income Tax Business Application screen conclusively indicates that the notice has been irrevocably issued. The submission of the respondent is not borne out from the applicable circular regarding document identification number issued by Central Board of Direct Taxes and is therefore a mere ipse dixit of the counsel.

25.20. As per Circular No. 19 of 2019 (F. No. 225/95/2019-ITA.II), dated August 14, 2019 ([2019] 416 ITR (St.) 140) issued by the Central Board of Direct Taxes, the document identification number was introduced to maintain a proper audit of trail of communications issued by the Income-tax authority. The said circular does not state that the generation of document identification number would automatically constitute issuance of the notice. Relevant extract from the aforementioned circular is reproduced as under (page 140 of 416 ITR (St.) :

> ".. . However, it has been brought to the notice of the Central Board of Direct Taxes (the Board) that there have been some instances in which the notice, order, summons, letter and any correspondence (hereinafter referred to as 'communication') were found to have been issued manually, without maintaining a proper audit trail of such communication.
>
> 2. In order to prevent such instances and to maintain proper audit trail of all communication, the Board in exercise of power under section 119 of the Income-tax Act, 1961 (hereinafter referred to as 'the Act'), has decided that no communication shall be issued by any Income-tax authority relating to assessment, appeals, orders, statutory or otherwise, exemptions, enquiry, investigation, verification of information, penalty, prosecution, rectification, approval etc. to the assessee or any other person, on or after October 1, 2019 unless a computer-generated document identification number (DIN) has been allotted and is duly quoted in the body of' such communication." (emphasis supplied)

In fact, in several cases, we take judicial notice that even as on date

the jurisdictional Assessing Officers issue notices which do not have document identification number and in those cases the Department contends that the absence of the document identification number does not make those notices invalid.

25.21. The contention of the counsel for the Department that since the date of the issuance of the notices is a disputed issue of fact the same should not be entertained in the writ petitions is also without merit. There is no dispute in the present cases and it has been conceded during rejoinder arguments that the notices have been despatched on or after April 1, 2021, unlike in the case of Rajesh Sunderdas Vaswani (supra) where the date of despatch was seriously disputed. This court has only been called upon to determine the legal effect of the despatch of April 1, 2021 and thereafter, on the validity of the notices dated March 31, 2021.

25.22. In this regard, it would be useful to note that, the impugned notice in W. P. (C) No. 5316 of 2022 was classified in category "C". However, during the pendency of the proceedings, the jurisdictional Assessing Officer on July 30, 2022 determined that the said notice though generated and signed on March 31, 2021 was issued through e-mail by the Income Tax Business Application servers on April 6, 2021. It has been brought to this court's attention that the jurisdictional Assessing Officer is now self- determined that the same shall be governed by the judgment of the Supreme Court in Ashish Agarwal (supra) and the jurisdictional Assessing Officer has accordingly proceeded to treat the notice dated March 31, 2021 as notice under section 148A(b).

The aforesaid acts of the jurisdictional Assessing Officer belie the submissions of the counsel for the Department that the generation of the notice on the Income Tax Business Application screen constitutes issuance. It further substantiates the contention of the petitioners that the date and time of issue of the e-mails by the Income Tax Business Application servers are readily available with the Department and therefore there is no disputed issue of facts.

25.23. We, therefore, answer question No. (I) in the negative against the Department and hold that the impugned notices dated March 31, 2021, which were despatched on April 1, 2021, or thereafter, would not meet the test of "issued" under section 149 of the Act of 1961 and would be time barred, unless saved by the judgment of the Supreme Court in Ashish Agarwal, (supra).

25.24. With respect to impugned notices falling in category "A", there is an additional factor which evidence that the said notices were admittedly not issued on March 31, 2021. The said notices were digitally signed on April 1, 2021, or thereafter. The note appearing at the foot of each notice clearly declares that the date of the affixation of digital signature shall be treated as the date of the

notice. The note reads "if digitally signed, the date of signature may be taken as date of document". In these notices therefore, the date of the notice itself is determined by the date of affixation of digital signature and not the date of generation. The contention of the Department that, the said note appearing at the footer of the notice has no basis in law and should be ignored by this court, cannot be accepted. The Department cannot deny the contents of its own notice and it is bound by the said contents.

25.25. In this regard it will also be useful to refer to para 2.10.6 of the Income Tax Business Application, User Assessment Manual, Version 1.9, August 2020, as referred to by the Department in its counter-affidavit in W. P. (C) No. 13814 of 2021. The said instruction draws the attention of the Income-tax Officer to the consequence of the date of digital signature and date of generation of document being different, if the digital signatures are affixed subsequently. Para 2.10.6 reads as under :

> "ii. Generate and Digitally sign later (Applicable for single as well as bulk generation):
>
> Click generate and digitally sign later. In this case, document will be generated successfully immediately.
>
> To sign the document later, go to 'view/edit despatch register' screen. Select the status as 'pending for signing' and search.
>
> Select the document and click sign documents. Ensure digital signature certificate is attached to the system.
>
> Select the digital signature certificate of the user.
>
> Click sign. Document will be signed successfully. However, this option is required to be very carefully exercised in the case of orders as the date of generation of document and date of digital sign may be different as these will be actual date of generation and digital signing."

Finding for notices falling under category "A"

We therefore hold that the impugned notices falling under category "A" shall be held to be dated as on the date digital signature certificate was affixed. Since the date of affixation of digital signature certificate on the impugned notices is April 1, 2021 and thereafter they were sent and delivered through the Income Tax Business Application portal on or after April 1, 2021, the impugned notices falling under category "A" can only be said to have been issued on or after April 1, 2021.

Illustratively, in W. P. (C) No. 1759 of 2022 the notice even though dated March 31, 2021 was digitally signed on April 1, 2021 and thereafter was sent and delivered through Income Tax Business

> Application portal on April 15, 2021, in this case, the date of the impugned notice is April 1, 2021 (i. e., the date on which it was digitally signed) and it was issued through e-mail on April 15, 2021.
>
> Finding for notices falling under category "E"
>
> 25.26. With respect to the impugned notices which have been classified as category "E", the date of despatch through speed post is determined as the date of issuance following the judgment of the Supreme Court in the case of R. K. Upadhyaya (supra).
>
> Illustratively, in W. P. (C) No. 11010 of 2021, the notice dated March 31, 2021 was booked for despatch through speed post on June 10, 2021, in this case, the notice can be said to have been issued only on June 10, 2021, i. e., when it was booked for despatch through speed post.
>
> 25.27. With respect to the impugned notices sent by e-mail and forming subject matter of category "C" the Department has raised an additional defence that though the e-mails were admittedly despatched on April 1, 2021 or thereafter, the same was due to the time taken by the Income Tax Business Application e-mail software system to trigger the e-mails, this delay in despatch should not be attributed to the jurisdictional Assessing Officer for despatch and the notices should be "deemed" to have been issued on March 31, 2021. This contention of the Department is specifically dealt with in answer to question No. (III).”

8. On a more fundamental plane, Mr. Vohra contended that the reasons as recorded would clearly evidence that the reassessment is essentially a “change of opinion” which had already been formed during the course of original assessment. This submission was addressed in light of the record of assessment including the various queries which were raised in the course of those proceedings and on the basis of which Mr. Vohra submitted that all four issues had been duly examined and noticed by the AO. In any case, according to Mr. Vohra, since the petitioner had made a full and true disclosure of all facts in the course of assessment, the action to reopen would not sustain bearing in mind the First Proviso to Section 147 and which forbids reopening of an assessment completed under Section 143(3) unless it be established

that the assessee had failed to make a full and true disclosure of facts.

9. Insofar as TDS payments made to SMC are concerned, Mr. Vohra firstly invited our attention to the notice dated 22 October 2010 issued under Section 143(2) of the Act and where the following queries were raised:

> "1. Power of Attorney, Statutory Audit Report and Copy of Tax Audit Report under section 44AB of the IT Act, 1961, copy of Return of Income, Computation of Income, Balance Sheet, Profit and Loss account, cash flow with Schedules for A.Y- 2009-10
>
> (Please give the full address and phone number of Authorized Representative's also)
>
> 2. A brief note on business activities and history alongwith the details regarding godowns, branch offices and sister concerns of the company and the method of accounting followed by you. In case of manufacturing activity :
>
> a) Explain the process of manufacturing activity with a flow chart
>
> b) Furnish the quantative details of by product generated as a result of manufacturing activity. Also furnish the manner of disposal and income generated on the same.
>
> c) The manufacturing activity must be resulting in certain quantities of generated scrap. Furnish the statement showing the details of scraps generated indicating the quantity and sale thereof.
>
> xxx xxx xxx
>
> 13. Details of loans and advances given alongwith the interest details. This should include details of Directors with complete addresses to whom company have given loan alongwith the rate of interest being charged by it.
>
> xxx xxx xxx
>
> 25. Furnish detail of making TDS during the previous year as under:
>
> 26. Furnish monthwise sales and purchases, Furnish the quantity wise and valuewise details of purchases and sales exceeding Rs.10 lakhs alongwith the name and address of the person from whom purchases / sales have been made.
>
> xxx xxx xxx
>
> 28. Furnish Employee wise/ Director wise detail of salary and Traveling expenses as under, whose gross salary exceeded Rs. 2,00,000/- during the previous year:

xxx xxx xxx

35. Furnish the details of payment made in foreign currency during the year under consideration in the following format:…

(b) Explain as to why the applicable payments should not be disallowed under section 40(a)(i) as the TDS has not been deducted.

36. Furnish the reconciliation of receipts shown in the TDS Certificates with the receipts credited in the P&L account.

xxx xxx xxx

44. With respect to Foreign Travelling expenses, furnish the following details:

(i) Furnish the copy of passport and produce the original for verification highlighting the endorsement of the foreign exchange and VISA taken.

(ii) Date of departure and arrival,

(iii) Countries visited

(iv) Name, address and designation / relation of the persons, who have accompanied the assessee.

(v) Nature of Visa taken viz. tourist, social, business.

(vi) Foreign exchange as per passport and its value in Indian Rupees.

(vii) Copy of report/ if any, submitted to R.B.I. (before and after the visit) and copy of sanction letter for foreign exchange.

(viii) Purpose of visit and business transacted at each station and each country alongwith pre and post visit correspondences.

(ix) Actual business transaction as per the books of the company. Wherever there are no transaction/ furnish reasons.

(x) Bifurcation of expenses in India and abroad alongwith the necessary documentary evidence. Also furnish the breakup of expenses for tickets stay and others.

(xi) Whether the visit was in connection with the purchase of capital goods and setting up of new project"

10. Mr. Vohra then took us through the detailed replies which were submitted in response to that notice on 25 March 2011, 08 January 2013 and 29 January 2013:

"**Query No.3**: Details regarding Directors of the company along with their residential addresses, other business interests, personal bank accounts and income tax particulars (PAN and Ward/Circle

where assessed) and percentage shareholding in the assessee company as on 31/03/2009 along with copy of account of shareholders in the books of your company. Also, furnish the details of all business activity carried on by each of them and computation of their income.

The list and details of the Directors of the company is placed in Anneuxre-1

xxx xxx xxx

Query No.24: Furnish the list of key management personnel (KMP) as described in AS-18 "Those persons who have authority and responsibility for planning, directing and controlling activities of the reporting enterprises".

The key management personnel of the company for the financial year 2009-10 are specified in clause 25 of the notes to accounts in the Annual report of the company which has been submitted to your records vide our submission dated 16.12.2010. The information is reproduced below for your convenient reference:

Mr. Shinzo Nakanishi

Mr. Hirofumi Nagao

Mr.Tsuneo Ohashi

Mr. Keiichi Asai

Mr. Syuji Oishi

Query No.25: Furnish detail of making TDS during the previous year as per given format.

With reference to the above state query, we state that the company has an efficient system of recording and analyzing the transactions liable for TDS provisions under the Income Tax Act. The Tax auditor has verified the same and reported on the matter as stated under clause 17(f) and clause 27(b) of the Tax Audit report.

The company has been regular in filing all the TDS returns related to all foreign/domestic payments made by it before the due date of filing of respective returns and acknowledgement copies of all the relevant returns are enclosed for your honor’s reference in Pages 21 to 35of this submission.

xxx xxx xxx

Query No.35: Furnish the details of payment made in foreign currency during the year under consideration in given format (a). (b) Explain as to why the applicable payemts should not be disallowed under section 40(a)(i) as the TDS has bot been deducted.

In this regard kindly refer to our response to Query no.25 above.

Query No.36: Furnish the reconciliation of receipts shown in the TDS Certificates with the receipts credited in the P&L account.

The Incomes related to the amounts for which TDS certificates have been claimed have been credited to the Profit & loss account in the current assessment year.

xxx **xxx** **xxx**

Query No.25: Furnish month-wise sales and purchases. Furnish the quantity-wise and value-wise details of purchases and sales exceeding Rs. 10 lakhs along with the name and address of the person from whom purchases/sales have been made.

The information of month-wise sales and purchases is enclosed in Page-23 of this submission. The list of parties from whom purchases and sales have been made including their addresses has been submitted herewith in the enclosed CD."

11. Additionally, our attention was also drawn to the RoI submitted by the petitioner and more particularly to Clause 25 of the Notes to Accounts in Schedule 23 in which all related party transactions had been duly disclosed. Mr. Vohra also took us through the relevant parts of the Tax Audit Report which again, according to learned senior counsel, made full and complete disclosures with respect to persons specified in Section 40A(2) of the Act. We were also taken through the **Transfer Pricing Report**[10] in Form No. 3CEB in which payments made to SMC had been accounted for.

12. Proceeding along these lines, Mr. Vohra also took us through the assessment order passed in the case of the petitioner for AY 2013-14 as well as the decision taken in the MAP proceedings and where it was declared that SMC had no PE in India. The extract of the MAP proceedings is reproduced hereinbelow:

"[**TRANSLATION**]

Kunkvo 2-33

[10] TP Reports

April 6, 2001

Mr. Osamu Suzuki

Representative Director

Suzuki Motor Corporation

Kazuhiko Fushiya

Commissioner of National Tax Administration

(Seal)

Notice Regarding Agreement upon Mutual Consultation

With respect to mutual consultation relating to the taxation issue for the finding of permanent establishment in India, which you company applied on February 143,2001, the compet3ent authorities of Japan and India have reached an agreement on April 5, 2001 and I shall provide notice of such agreement as follows.

Suzuki Motor Corporation has no permanent establishment in India at all under Article 5 of the Tax Treaty between Japan and India"

13. Similar was the position which according to the writ petitioner would obtain in respect of share transactions and whether they would constitute business income. Mr. Vohra specifically drew our attention to the notice dated 22 October 2010 issued under Section 143(2) and where the following queries had been raised:

"20) Complete details regarding the unrealized forex gain/loss.

xxx **xxx** **xxx**

47. Details with supporting evidence in respect of short term capital gain / loss and long term capital gain / loss."

14. Responding to the aforesaid notice, the petitioner is stated to have provided the following information with respect to short term capital gain/loss and long term capital gain/loss as would be evident from the following extracts of its reply:

"**Query No.20**: Complete details regarding the unrealized forex gain /loss.

In this regard it is submitted that Gain/Loss on valuation on account of forex derivatives are excluded in the Income Tax Return Filed by

MSIL (Refer point 5(e) of Computation of Total INCOME) pursuant to CBDT Circular Dated 5th April 2010

xxx xxx xxx

Query No.47: Details with supporting evidence in respect of short term capital gain/loss and long term capital gain/loss.

Details of Short term capital gain/loss and Long term Capital gain/Loss is enclosed in Annexure A9 with this spiral book submission in pages 34-41."

15. Disclosures in respect of share transactions, according to Mr. Vohra, were also duly set out in Schedule CG of the computation of income and more particularly Item 7 thereof [at pages 229 and 232 of the digital record]. Mr. Vohra submitted that the petitioner had as per Annexure-9 to the Statement of Tax on Total Income also provided scrip-wise details in respect of the long and short term capital gains. Similar details appear to have been provided under the head of investments [at pages 594 and 611 of the digital record].

16. The third issue which was noticed and constituted a reason for reopening was with respect to the deductions claimed under Section 35(2AB) of the Act. Mr. Vohra in this respect firstly relied upon the notice issued under Section 142(1) dated 31 December 2012 and to Query no. 14 which read thus:

"14) Complete details regarding the claim of deduction of Z99,92,72,930/- u/s 35(2AB) along with the copies of approval & certificates of DSIR, copy of report and details submitted by you to DSIR, copy of report of M/s PwC and details of the expenditure incurred by you. Kindly also substantiates how all the conditions mentioned in the section 35(2AB) are fulfilled."

17. The petitioner while responding to the said notice had provided the following details along with its reply dated 14 January 2013, relevant parts whereof are reproduced hereinbelow:

"In this regard, it is submitted that the assessee company had

claimed deduction of Rs. 99,92,72,930/- on account of revenue expenditure u/s 35(2AB) in its original return of income.

However, this claim has reduced by Rs 6,26,09,435/- to Rs 93,66,63,495/- in the revised return dated 29.03.2011 filed by assessee. Copy of original and revised return of income has already been submitted before your honor with submission dated 09.02.2011.

xxx xxx xxx

The above expenditures have been duly certified by the statutory auditors of the company vide their certificate dated 25th August 2009 a copy of which is enclosed in Page 32 of this submission for your perusal.

The expenditure on R&D have been duly certified by the Tax auditors in Enclosure-IV, read with clause l5(a) of the Tax audit report. A copy of the Tax audit report has already been submitted to you during the course of this assessment proceeding.

Further, the R&D expenditure claim has been duly approved by the Secretary, DSIR of the Ministry of Science and Technology of the Government of lndia vide their letter in form 3CL no. TU/IV-15/(194)/35(2AB)/3CL/578/2010 dated 18th August, 2010-A copy of this approval letter is enclosed in Pages 29 to 31 of this submission for your kind perusal.

In light of the above details, it can be seen that the expenditure claimed by the assessee company has been duly certified by it's statutory auditors and tax auditors and reviewed and duly approved by the Secretary, DSIR, Ministry of Science and Technology, Govt of India. Accordingly, the expenditure has been rightfully claimed by the assessee in compliance with the provisions of the Income Tax Act, 1961 and hence should be allowed."

The aforesaid stand as taken by the writ petitioner is liable to be further appreciated alongside the documents which appear at pages 229, 642 and 725 of our record.

18. The petitioner also relied upon the Office Note prepared by the AO in the course of the original assessment proceedings and which reads as follows:

"**OFFICE NOTE (NOT FOR ASSESSEE)**

- Case has been selected by CASS with the following reasons – "Examine the Long term capital gain as regards sale consideration

and indexed cost of acquisition. Examine the disallowance u/s 14A. Examine the deductions u/s 35, 35(2AA), 35(2AB). Examine the claim of higher rates (80%/100%) of depreciation. All the above issues have been examined.

- ITS details have been examined.
- No addition on account of "excess consumption claimed" and "disallowance u/s 35DDA" has been made like the earlier assessment year as these issues were not relevant for this A. Y.
- No disallowance for non-deduction for TDS on Software u/s 40(a)(ia) has been made in view of the fact that similar disallowance made in the Draft Order for the A.Y. 2008-09, the Hon'ble DRP had given the relief to the assessee vide its order dated 24.09.2012.
- Application section 94(7) has been examined. Assessee has itself disallowed ₹2,41,19,646/- from the total Short Term Capital gain claimed by it.
- Assessment folders of last several assessment years have been examined."

19. Proceeding then to the issue of warranty, Mr. Vohra submitted that quite apart from the same having been conclusively answered in favour of the petitioner in its own case for AYs' 1994-95 to 1998-99, full and true disclosures were made in Schedules 14 & 19 of the audited financial statements [at pages 614 and 616 of the digital record], as also per Clause 26 of the Notes to Accounts comprised in Schedule 23 to the audited financial statements.

20. It was in the aforesaid backdrop that Mr. Vohra had submitted that the action for reassessment is rendered wholly untenable since it clearly amounted to a change of opinion and was thus liable to be struck down on this score. Mr. Vohra submitted that the copious record which has been placed for our consideration and formed part of the original assessment record would clearly establish that all material facts had not only been duly disclosed but had also been specifically examined by the AO in the course of that assessment. It was submitted

that in the absence of an allegation of the petitioner having failed to make a full and true disclosure, the reassessment action is liable to be quashed by this Court.

21. Mr. Vohra further submitted that there was no independent application of mind by the AO and who appears to have been constrained to issue notice under Section 148 prompted solely by the communication of the ACIT and the assessment order passed for AY 2010-11. According to learned senior counsel, a concluded assessment cannot possibly be reopened on the basis of a different opinion that the AO may arrive at while assessing a subsequent AY. According to learned senior counsel, Courts have consistently held that reassessment cannot be commenced merely by relying upon a subsequent assessment order unless the AO is independently satisfied that new facts have come to light and which may tend to taint the disclosures made as false, untrue or even misleading.

22. Refuting those submissions Mr. Chandra, learned counsel appearing for the respondent, on the other hand submitted that in the course of assessment for AY 2010-11, the AO had noted that no disallowance under Section 40(a)(ia) of the Act was made in respect of payments remitted to SMC. It was contended that the aforesaid information was received by the AO much after the original assessment proceedings for AY 2009-10 had been concluded and it was this information which prompted the issuance of the notice under Section 148.

23. Mr. Chandra contended that Courts have in unambiguous terms held that material which comes to light subsequent to completion of

assessment can be validly relied upon for the purposes of forming an opinion as to whether income had escaped assessment. Learned counsel sought to draw sustenance for the aforesaid submission from the following decisions:

a. **Clagett Brachi Co. Ltd. vs. CIT**[11]
b. **Phool Chand Bajrang Lal and Anr. vs. ITO**[12]
c. **Ess Kay Engineering Co. (P) Ltd. vs. CIT**[13]
d. **CIT vs. Velocient Technologies Ltd**.[14]

24. Insofar as the various queries are concerned, it was Mr. Chandra's submission that the responses of the petitioner were wholly vague, devoid of material details and consequently, the AO was deprived of complete information at the time when the final assessment order was framed for AY 2009-10. In view of the above, learned counsel submitted that the AO was justified in proceeding on the basis of credible information that had been received after completion of the original assessment and the same cannot possibly be said to constitute a change of opinion.

25. The first issue which arises for determination is whether the reassessment notice which was dispatched on 01 April 2016 would survive in light of what our Court held in *Suman Jeet Agarwal*. One of the primary questions which arose for consideration in *Suman Jeet Agarwal* was whether a notice, though generated on 31 March 2021 and yet issued after the said date, would survive the rigorous timeframes which are erected by Section 149 of the Act. The Court in *Suman Jeet*

[11] (1989) 177 ITR 409 (SC)
[12] (1993) 4 SCC 77
[13] (2001) 10 SCC 189
[14] (2015)376 ITR 131 (Del-HC)

Agarwal held that mere generation of a notice would not suffice and that for the purposes of evaluating whether a reassessment action had been initiated within the time stipulated by Section 149, it would be the date of issue which would be of critical significance.

26. The petitioners had contended that the notice was in fact dispatched on 01 April 2016. From the response which has been filed by the respondents in these proceedings, we find that there has been an abject failure to controvert the aforenoted submission. The assertion of the writ petitioner that the notice was in fact dispatched on 01 April 2016 would thus have to be accepted. Undisputedly, the last date for commencement of reassessment action for AY 2009-10 was 31 March 2016. The notice impugned before us, as we have found, came to be issued thereafter. The reassessment action is thus liable to be struck down on this short ground alone.

27. Regard must also be had to the fact that we are in this particular case not concerned with a notice which may have been issued after 01 April 2021 and in which case, we would have had to examine the challenge raised on this score bearing in mind the directions framed by the Supreme Court in **Union of India v. Ashish Agarwal**[15] and in light of the law as enunciated in **Union of India v. Rajeev Bansal**[16]. This writ petition, in that sense, is not really concerned with Taxation and Other Laws (Relaxation and Amendment of Certain Provisions) Act, 2020, the original notice being deemed to be one referrable to Section 148A(b) or surviving period and which were aspects which the Supreme Court dealt with in *Rajeev Bansal* in light of the impact of its

[15] (2023) 1 SCC 617
[16] 2024 SCC OnLine SC 2693

decision in *Ashish Agarwal*. It is for the aforesaid reasons that we come to the conclusion that the principles enunciated in *Suman Jeet Agarwal* would apply and lead us to answer this question in favour of the petitioner.

28. While this would have been sufficient to dispose of the writ petition, learned counsels for respective sides had addressed elaborate submissions relating to the material which was taken into consideration for formation of opinion that reopening was warranted and whether the same amounted to a change of opinion. It is in the aforesaid backdrop that we proceed further to rule on the rival submissions which were addressed on this score.

29. As was noted hereinabove, it was Mr. Vohra's contention that the petitioner had made a full, complete and candid disclosure pertaining to all transactions with SMC as well as the aspects pertaining to short and long term capital gains, Section 35(2AB) and the claim of warrant provision. It was in the aforesaid backdrop that Mr. Vohra had submitted that since the original assessment had been completed in terms of Section 143(3), no reassessment proceedings could have been initiated in light of the full and true disclosures that were made. It was in this context that Mr. Vohra had alluded to the proscription of a change of opinion feeding the invocation of Sections 147 and 148 of the Act.

30. Mr. Vohra had submitted that once the petitioner had placed all material facts and documentation on record, it was incumbent upon the AO to draw appropriate inferences if it sought to contest the position as advocated by the assessee. Learned senior counsel argued that in the

facts of the present case, the record would reflect that not only was a full and true disclosure made, but the issues which are sought to be picked up now and made the basis for initiation of action under Section 147 were duly noticed, flagged and examined in the course of the original assessment proceedings. According to learned senior counsel, it is for the aforenoted additional reasons that the reassessment action would not sustain.

31. Mr. Chandra, learned counsel appearing for the respondents, on the other hand, had contended that the law does not bar an AO from taking into consideration subsequent facts which may come to light in the course of an assessment which may have been undertaken. According to Mr. Chandra, an assessment for a subsequent year may result in new material or evidence coming to light and which may tend to shroud the case set up by an assessee or even lead to the disclosures being viewed as false or incorrect. According to learned counsel, merely because those facts are gathered subsequently, would not deprive the AO of the power to reopen an assessment made. The submission of the respondents essentially was that since the new facts and material were never in the possession of the AO when the original assessment was undertaken, it would be wholly incorrect for the writ petitioners to aver that the reassessment was based on a change of opinion.

32. In order to evaluate the correctness of the rival submission so addressed, we deem it apposite to advert to the lucid enunciation of the power to reassess which appears in the judgment of the Full Bench of

our Court in **CIT v. Usha International Ltd.**[17]. The scope of the power to reassess was succinctly encapsulated by the Full Bench in the following words:

> "**13.** It is, therefore, clear from the aforesaid position that:
>
> (1) Reassessment proceedings can be validly initiated in case return of income is processed under section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion.
>
> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the 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."

33. Proceeding further to explain the second and third situations which were spoken of above, the Court in *Usha International* pertinently observed that the salutary remedy comprised in Section 263 of the Act was sufficient to protect the interest of the Revenue even though it may be barred in law from invoking the powers conferred by Sections 147 and 148. However, in *Usha International*, the Court also took into consideration cases where fresh factual information may come to the knowledge of the AO and which may warrant a finalized assessment being reopened. It was in this respect observed as follows:

> "**16.** Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases where

[17] 2012 SCC OnLine Del 4995

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

34. The Full Bench then proceeded to rule on contingencies where although facts may have existed on the assessment record, the AO had omitted to draw an appropriate inference. Dealing with such a situation, it pertinently observed as under:

> "**17.** Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. A decision of this court in Writ Petition (Civil) No. 6205 of 2010, dated September 26, 2011—since reported in Dalmia P. Ltd. v. CIT (2012) 348 ITR 469 (Delhi) and a decision of the Bombay High Court in Writ Petition No. 1017 of 2011, dated November 8, 2011, Indian Hume Pipe Co. Ltd. v. Asst. CIT (2012) 348 ITR 439 (Bom) are two such cases. In the first case, the Assessing Officer in the original assessment had made addition of Rs. 19,86,551 under section 40(1) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details, etc.,were not

> furnished, were to the extent of Rs. 52,84,058 and not Rs. 19,86,551. In Indian Hume Pipe Co. Ltd. (supra), after verification the claim under section 54EC was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/ facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not appreciate the implications or did not apply the correct law. The second category will be a case of "change of opinion" and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interests of the Revenue, can be made subject-matter of adjudication under section 263 of the Act."

35. The Full Bench in *Usha International* further cleared a misconception which appears to have been harboured with respect to certain observations which appeared in a previous decision of a Full Bench of this Court in **Commissioner of Income-tax, Delhi-II v. Kelvinator of India Ltd.**[18]. It held that the decision in *Kelvinator* cannot possibly be construed as having laid down a principle that even if the AO had not examined a particular subject matter or failed to express an opinion, it must be presumed that such an opinion had in fact been formed. This clarification was rendered in the context of an argument which appears to have been addressed to the effect that as long as material existed on the record, it should be presumed that the AO had duly scrutinized the same and agreed with the stand as taken by the assessee. This becomes apparent from a reading of paragraphs 22 to 25 of the report and which are extracted hereunder:

> "**22.** In the last paragraph quoted above, the Full Bench rejected the submission that reassessment proceedings would be justified if the assessment order is silent or does not record reasons or analysis of material on record. This, the Revenue had propounded, would show non-application of mind by the Assessing Officer. It was held that

[18] 2002 SCC OnLine Del 441

the said submission was fallacious. The Full Bench explained that when an assessment order was passed under section 143(3), a presumption could be raised that the order was passed after application of mind. Reference was made to clause (e) to section 114 of the Indian Evidence Act, 1872. The contention if accepted would give premium to the authority exercising quasi-judicial function to take benefit of its own wrong, i.e., failure to discuss or record reasons in the assessment order. The aforesaid observations have been made in the context and for explaining the principle of "change of opinion". The said principle would apply even when there is no discussion in the assessment order but where the Assessing Officer had applied his mind. A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. The assessee is required to disclose full and true material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under section 263 of the Act.

23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject-matter, entry or claim/deduction and, therefore, had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject-matter, entry or claim/deduction is not examined.

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 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.
>
> **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."

36. Of equal significance are the following principles which the Full Bench culled out from the various precedents rendered by the Supreme Court in the context of Sections 147 and 148:

> "**34.** The Supreme Court thereafter referred to the subsequent decision in Indian and Eastern Newspaper Society v. CIT (1979) 119 ITR 996 (SC) wherein it was observed that some of the observations made in Kalyanji Mavji (supra) were far too wide and the statute did not permit reappraisal of material considered by the Assessing Officer during the original assessment. The observations in Kalyanji Maviji (supra) that reopening would cover a case "where income has escaped assessment due to the oversight, inadvertence or mistake" was too broadly expressed and did not lay down the correct law. It was clarified and observed at page 1004 in Indian and Eastern Newspaper Society (1979) 119 ITR 996 (SC) as:
>
> > "Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji and Co. v. CIT (1976) 102 ITR 287 (SC), where a Bench of

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

35. In A. L. A. Firm (supra), the Supreme Court specifically dealt with propositions (2) and (4) quoted in paragraph 34 above and thereafter elucidated and explained that there was no difference between the observations of the Supreme Court in Kalyanji Maviji (1976) 102 ITR 287 (SC) and Indian and Eastern Newspaper Society case (1979) 119 ITR 996 (SC), as far as proposition (4) is concerned. It was held that (page 297 of 189 ITR):

> "We have pointed out earlier that Kalyanji Maviji's case (1976) 102 ITR 287 (SC) outlines four situations in which action under section 34(1)(b) can be validly initiated. The Indian Eastern Newspaper Society's case (1979) 119 ITR 996 (SC) has only indicated that proposition (2) outlined in this case and extracted earlier may have been somewhat widely stated ; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji's case. The facts of the present case squarely fall within the scope of propositions 2 and 4 enunciated in Kalyanji Maviji's case (1976) 102 ITR 287 (SC). Proposition (2) may be briefly summarised as permitting action even on a 'mere change of opinion'. This is what has been doubted in the Indian and Eastern Newspaper Society case (1979) 119 ITR 996 (SC) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Maviji's case (1976) 102

ITR 287 (SC). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on 'information' in the shape of some light thrown on aspects of facts or law which the Income-tax Officer had not earlier been conscious of. To give a couple of illustrations ; suppose an Income-tax Officer, in the original assessment, which is a voluminous one involving several contentions, accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently, he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the Income-tax Officer derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose the Income-tax Officer accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under section 147(b) by virtue of proposition (4) of Kalyanji Mavji. The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.

What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Maviji's case (1976) 102 ITR 287 (SC). The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the Income- tax Officer initiates reassessment proceedings in the light of 'information' obtained by him by an investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier, for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the Income-tax Officer, having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion

that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian and Eastern Newspaper Society's case (1979) 119 ITR 996 (SC), it also ropes in cases of a 'bare or mere change of opinion' where the Income-tax Officer (very often a successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor Income- tax Officer) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and the Indian and Eastern Newspaper Society's case (1979) 119 ITR 996 (SC) has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji (1976) 102 ITR 287 (SC). The second paragraph from the judgment in the Indian and Eastern Newspaper Society's case (1979) 119 ITR 996 (SC) earlier extracted has also reference only to this situation and insists upon the necessity of some information which make the Income-tax Officer realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas 21 STC 326. Even making allowances for this limitation placed on the observations in Kalyanji Mavji, the position as summarised by the High Court in the following words represents, in our view, the correct position in law (at page 629 of 102 ITR):

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

36. The aforesaid observations are a complete answer to the submission that if a particular subject-matter, item, deduction or claim is not examined by the Assessing Officer, it will nevertheless be a case of change of opinion and the reassessment proceedings will be barred.

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

38. It will be appropriate to reproduce the succeeding passage from A. L. A. Firm (1991) 189 ITR 285 (page 299):

> "We think there is force in the argument on behalf of the assessee that, in the face of all the details and statement placed before the Income-tax Officer at the time of the original assessment, it is difficult to take the view that the Income-tax Officer had not at all applied his mind to the question whether the surplus is taxable or not. It is true that the return was filed and the assessment was completed on the same date. Nevertheless, it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It is not as if the assessment record contained a large number of documents or the case raised complicated issues rendering it probable that the Income-tax Officer had missed these facts. It is a case where there is only one contention raised before the Income-tax Officer and it is, we think, impossible to hold that the Income-tax Officer did not at all look at the return filed by the assessee or the statements accompanying it. The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee's contention that the surplus was not taxable. But, in doing so, he obviously missed to take note of the law laid down in G. R. Ramachari and Co. [1961] 41 ITR142 (Mad) which there is nothing to show, had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under section 147(b). The material which constituted information and on the basis of which the assessment was reopened was the decision in G. R. Ramachari and Co. [1961] 41 ITR142 (Mad). This material was not considered at the time of the original assessment. Though it was a decision of 1961 and the Income-tax Officer could have known of it had he been diligent, the obvious fact is that he was not aware of the

existence of the decision then and, when he came to know about it, he rightly initiated proceedings for reassessment."

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 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."

37. From the guiding principles which came to be expounded by the Full Bench in *Usha International*, the following position would emerge. A Court would, while examining a challenge to the invocation of Section 148, and where it be asserted that it essentially amounts to a change of opinion, have to bear in mind that the power to reassess would be wholly unjustified in a case where the assessment order itself reflects that an issue was raised and duly examined. *Usha International* further lays emphasis on the assessment record and the various queries that may have been addressed by the AO for eliciting information. It thus held that if the record of the reassessment proceedings were to evidence a query being specifically addressed and answered by the assessee and the same not being pursued by the AO or leading to an

addition being made must necessarily be rendered finality and a quietus. This it observed since it found that even if the view taken by the AO in that respect were erroneous or prejudicial to the interest of the Revenue, it did not stand deprived of a right to adopt corrective measures including those provisioned for in Section 263 of the Act. However, it was held that such a contingency would not justify the power of reassessment being exercised.

38. That then takes us to the aspect of fresh or new factual information that may come to light pursuant to an order of assessment made subsequently. The Full Bench in *Usha International* held that if new information comes to the knowledge of the AO in the course of undertaking an assessment for a subsequent period, the same could be validly taken into consideration and would not amount to a change of opinion. It observed that an opinion which may have been formed originally, if established to be based on wrong or incorrect facts, would not stand insulated or rendered immunity from review. It thus held that factual information or material which was either not available at the time of original assessment or which comes to light subsequently may justify the initiation of reassessment proceedings.

39. However, *Usha International* pertinently observes that it is equally important to bear in consideration the fact that if material facts are duly disclosed by an assessee, it is for the AO to draw appropriate legal inferences and appreciate the implications of those disclosures. It thus held that a failure on the part of the AO to duly apply a legal provision or give shape to a liability which would arise under the Act

despite appropriate disclosures being made, would not justify the invocation of Section 148.

40. The observations as appearing in the earlier decision of *Kelvinator* were explained by the Full Bench as being liable to be read as pertaining to the principle of change of opinion only. It was thus observed that it would be wholly incorrect to hold that the AO should be presumed to have formed an opinion even if it had failed to examine a particular item of income or expenditure. It thus laid emphasis on the distinction that must be assumed to exist between a change of opinion and a case where no opinion at all may have been formed by the AO on a particular issue.

41. The Court in *Usha International* also affirmed the right to reopen in case the said decision be based on fresh material that may come to the fore. It was thus observed that while it would be open to the AO to base its opinion to reopen on material and facts that may come to its notice subsequently, the same would have to be assessed subject to the caveat that material did not originally exist and the AO was thus powerless to have examined the issues emanating therefrom. The Court in *Usha International* then also dealt with situations where a query raised and the information elicited may itself be demonstrative of an issue having been examined by the AO and consequently precluding it from resorting to the power to reopen as conferred under the Act.

42. It is on a balanced application of the aforenoted precepts that the challenge raised in this writ petition would have to be evaluated. However, and before we proceed to do so, we also deem it apposite to notice the following illuminating passages which appear in **New Delhi**

Television Ltd. v. Deputy CIT[19] and where the Supreme Court had an occasion to also notice **Claggett Brachi Co. Ltd. v. CIT**[20] and **Phool Chand Bajrang Lal v. Income Tax Officer**[21], two decisions which had been cited by Mr. Chandra for our consideration.

43. While dealing with information that may come to light subsequently and post closure of the original assessment proceedings, the Supreme Court in *New Delhi Television Ltd.* observed as follows:

> "**22.** A perusal of the aforesaid judgments clearly shows that subsequent facts which come to the knowledge of the Assessing Officer can be taken into account to decide whether the assessment proceedings should be re- opened or not. Information which comes to the notice of the Assessing Officer during proceedings for subsequent assessment years can definitely form tangible material to invoke powers vested with the Assessing Officer under section 147 of the Act.
>
> **23.** The material disclosed in the assessment proceedings for the subsequent years as well as the material placed on record by the minority shareholders form the basis for taking action under section 147 of the Act. At the stage of issuance of notice, the Assessing Officer is to only form a prima facie view. In our opinion the material disclosed in assessment proceedings for subsequent years was sufficient to form such a view. We accordingly hold that there were reasons to believe that income had escaped assessment in this case. Question No. 1 is answered accordingly.
>
> *Question No. 2*
>
> **24.** Coming to the second question as to whether there was failure on the part of the assessee to make a full and true disclosure of all the relevant facts. The case of the assessee is that it had disclosed all facts which were required to be disclosed.
>
> **25.** The Revenue has placed reliance on certain complaints made by the minority shareholders and it is alleged that those complaints reveal that the assessee was indulging in round tripping of its funds. According to the Revenue the material disclosed in these complaints clearly shows that the assessee is guilty of creating a network of shell companies with a view to transfer its untaxed income in India to entities abroad and then bring it back to India thereby avoiding

[19] 2020 SCC OnLine SC 446
[20] 1989 Supp (2) SCC 182
[21] (1993) 4 SCC 77

taxation. We make it clear that we are not going into this aspect of the matter because those complaints have not seen the light of the day either before the High Court or this court and, therefore, it would be unfair to the assessee if we rely upon such material which the assessee has not been confronted with.

26. Even before the assessment order was passed on August 3, 2012, the Assessing Officer was aware of the entities which had subscribed to the convertible bonds. This is apparent from the communication dated April 8, 2011. The case of the Revenue is that the assessee did not disclose the amount subscribed by each of the entities and furthermore the management structure of these companies. We are not in agreement with this submission of the Revenue. It is apparent from the records of the case that the Revenue was aware of the entities which subscribed to the convertible bonds. It has been urged that these are bogus companies, but we are not concerned with that at this stage. The issue before us is whether the Revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso to section 147 of the Act. This can only be done if the Revenue can show that the assessee had failed to disclose fully and truly all material facts necessary for its assessment. The assessee, in our view had disclosed all the facts it was bound to disclose. If the Revenue wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts."

44. Reverting then to the facts of our case, we find that the petitioner had unmistakeably placed copious material on the record during the original assessment proceedings and which would have been relevant and determinative of the *"four new issues"* which constitute the basis for invoking Section 147. The respondents, therefore, cannot justifiably urge that the petitioner had failed to make a full and true disclosure. Whether it be with regard to remittances to SMC, TDS, long or short term capital gains, the petitioner had not only made adequate disclosures, these aspects also appear to have been duly flagged and noticed by the AO in the course of the original assessment. The details of the material placed for the consideration of the AO, the documentation submitted, the nature of the queries that were addressed

and the replies submitted leave us in no doubt that all material germane and relevant to the assessment had been duly presented by the writ petitioner.

45. Having thus found that the petitioner has crossed the rubicon of a full and true disclosure, we then proceed forward to consider whether the impugned action constitutes a change of opinion and whether the fresh material could have been validly taken into consideration for the purposes of formation of opinion that reassessment was warranted. From the nature of queries that were addressed in the course of the assessment undertaken initially as well as the material that was placed on the record, it is impossible to hold that the AO was unaware of remittances made to SMC, related party transactions and details of TDS deposited. The record which has been analysed by us leads us to the inevitable conclusion that it would be wholly incorrect to hold that the AO was not cognizant of the relevant facts, the different heads of income and expenditure involved, the remittances made to SMC as well as the issue of short and long term capital gains. The petitioner has also demonstrated that appropriate disclosures were made with respect to placement of representatives of SMC in India. This, therefore, clearly appears to be a case where the AO, though conscious and cognizant, chose not to make any additions, draw any adverse inference or doubt the stand which was taken by the writ petitioner.

46. Let us then examine whether the material disclosed was subsequently found to be false, misleading or incomplete on the basis of fresh information that may have come to the fore in a subsequent assessment proceeding. The discussion on this aspect, however, must

be prefaced with the observation that it is not the case of the respondent that what was disclosed by the petitioner in the earlier assessment had been found to be incorrect or wrong. It is also not their case that the material and information that came to light in the subsequent AY casts a doubt on the correctness or credibility of the responses which were submitted. It is these aspects which convince us to hold that the "four new issues" neither constituted fresh information nor could have validly formed the basis for commencement of action under Section 147 of the Act. In our considered opinion, this was at best a case where the respondents could have perhaps only alleged that the AO had failed to correctly appreciate and apply the appropriate legal provisions or give shape to a liability under the Act despite adequate disclosures having been made. But that, as the decision in *Kelvinator* explains, cannot in law form a basis for invocation of Section 147.

47. In *New Delhi Television Ltd*. the Supreme Court was faced with a case where fresh material had come to light in a subsequent AY and which cast an indelible cloud upon the truthfulness and adequacy of the disclosures that had been made in the previous AY. It was in that backdrop that their Lordships had held that such information constituted tangible material justifying the exercise of powers conferred by Section 147. Concededly, that is not the position which either obtains here or one which was canvassed by the respondents for our consideration.

48. We also find merit in the submission of Mr. Vohra, learned senior counsel, that reopening of an assessment would be invalid if the AO merely relied on a report without independently applying its mind.

As is manifest from a reading of the reasons which were assigned in support of invocation of Section 147, the AO has merely referred to the communication received from the ACIT and the obligation to review. The reasons fail to demonstrate the AO having even prima facie examined whether there was any fresh information which had been discovered in the subsequent AY and which may have led it to believe that the information which formed the basis for the original assessment was rendered false, misleading or incorrect. The AO also does not allude to any material fact placed on the assessment record for AY 2009-10 being either incomplete or insufficient for the purposes of formation of opinion or which may have constituted a reason for an item of income, expenditure or remittance having been either overlooked or having escaped its scrutiny or attention. The lack of an independent application of mind becomes even more stark and glaring when we examine the aspect of the existence of a PE.

49. We have in a recent decision in **Grid Solutions OY (Ltd.) v. CIT**[22] held that the existence of a PE is a fact specific issue and which must be answered in the context of what may have existed in a particular AY coupled with the satisfaction of the AO that there has been no change in the set of fundamental facts which would be germane for determination. This becomes evident from a reading of the following passages of our decision in *Grid Solutions OY*:

> "**18.** Indisputably, there is no principle akin to that of *res judicata* which can be recognized to be applicable to taxing disputes. Though this principle is well settled, we deem it appropriate to refer to the following enunciation of the well-settled legal position in *National Petroleum Construction Co.* v. *Dy. CIT*—where the Supreme Court had held as follows:—

[22] 2025 SCC OnLine Del 183

> **"37.** The High Court rightly held that the question of whether the appellant had permanent establishment, could not possibly be undertaken in an enquiry for issuance of certificate under section 197 of the Income-tax Act, having regard to the time-frame permissible in law for deciding an application, more so, when regular assessment had been completed in respect of the immediate preceding year and the appellant found to be taxable under the Income-tax Act at 10 per cent. of the contractual receipts. The assessing authority found that the appellant had permanent establishment in India in the concerned assessment years. The appeal of the appellant is possibly pending disposal."
>
> **"38.** As held by the High Court, it is well settled that the principle that res judicata is not applicable to Income-tax proceedings because assessment for each year is final only for that year and does not cover later years."
>
> **"39.** Whether the appellant had permanent establishment or not, during the assessment year in question, is a disputed factual issue, which has to be determined on the basis of the scope, extent, nature and duration of activities in India. Whether project activity in India continued for a period of more than nine months, for taxability in India in terms of the Agreement for Avoidance of Double Taxation, is a question of fact, that has to be determined separately for each assessment year. * (2010) 327 ITR 456 (SC)."

19. In order to appreciate what the Supreme Court held in *National Petroleum*, it would be apposite to notice the more elaborate discussion which appears in the judgment of this Court in *National Petroleum Con. Co.* v. *Deputy CIT*, the relevant parts whereof are extracted hereunder:—

> "**24.** The respondents have granted the impugned certificate for deduction at 4 per cent. of the gross receipts. The assessment for the above noted contracts would be undertaken in the future, viz., the assessment years 2019-2020 and 2017-2018 respectively. As of now, we are not concerned with a regular assessment proceeding but, with determination of rate of tax deduction. On perusal of reasons, it becomes manifest that during the course of enquiry under section 197 of the Act, the petitioner was asked to furnish the details regarding the scope and nature of the aforenoted contracts. The Revenue contends that for the R-series contracts, the petitioner has made contradictory statement regarding commissioning period and period of as-built documentation etc. The petitioner, in its submission dated June 22, 2019, contends that commissioning work is

not undertaken by them for the R-series contracts, and the same is to be performed by the Oil and Natural Gas Corporation. Without going into the question as to whether the petitioner's stand is contradictory, we may note that the Assessing Officer while exercising its power under section 197, during the course of the enquiry, cannot undertake an exhaustive exercise to determine this issue conclusively. We find force in the submissions of Mr. Raghvendra Kumar Singh that the question as to whether the petitioner has constituted a permanent establishment, cannot possibly be undertaken in the enquiry having regard to the time frame permissible under law for deciding the application under section 197 of the Act. The reasons shown to us also take note of the fact that in the immediate preceding years, i.e., the assessment year 2016-2017 and the assessment year 2017-2018, for which regular assessment has been completed, the petitioner has been held to have a permanent establishment (PE) in India, and its total income from the contracts with the Oil and Natural Gas Corporation have been held to be taxable under the Income-tax Act. Section 44BB of the Act is applied, and 10 per cent. of the contractual receipts were considered as business profits. The rate of tax being 40 per cent., a certificate was, accordingly, issued at 4 per cent. For the other assessment years as well, assessment has been completed and appeal is pending before the appellate authorities. The petitioner, obviously, disputes the finding of the respondent as erroneous and misplaced, on the ground that for the assessment year 2015-2016, the first appellate authority following the decision of this court in the petitioner's own case, has held that the petitioner has no permanent establishment in India. Be that as it may, for the assessment years 2016-2017 and 2017-2018, this question has been determined against the petitioner. It is well-settled proposition that in tax jurisprudence, the principle of res judicata is not applicable to income tax proceedings. “In matters of recurring annual tax a decision on appeal with regard to one year's assessment is said not to deal with eadem questio as that which arises in respect of an assessment for another year and consequently not to set up an estoppel”. [Ref : *New Jehangir Vakil Mills Co. Ltd.* v. *CIT*, (1963) 49 ITR 137 (SC)]. “It is well settled that in matters of taxation there is no question of res judicata because each year's assessment is final only for that year and does not govern later years, because it determines only the tax for a particular period”. [Ref : *Installment Supply P. Ltd.* v. *Union of India* [1962] AIR 1962 SC 53 (Constitution Bench)].

25. The petitioner has argued that the need for consistency and certainty requires that there must exist strong and compelling reasons for a departure from a settled position, which must be spelt out and they are conspicuously absent in the present case. Mr. Balbir Singh has strongly argued that the stand taken by the respondents in the previous year should have been followed and in this regard, he relies upon the decision of the Supreme Court in the case of *Radhasoami Satsang* v. *CIT*, (1992) 193 ITR 321 (SC). Besides, Mr. Singh, as quoted earlier has also led considerable emphasis on the decision of this court dated May 9, 2017, wherein this court directed the respondents to issue certificate under section 197 of the Act, accepting the alternative plea of the petitioner that the Oil and Natural Gas Corporation would deduct tax at 4 per cent. plus surcharge plus education cess on the revenues in respect of only the inside India activities of the petitioner.

26. We are, however, not impressed with the aforesaid contention and do not find the judgment of the Supreme Court in *Radhasoami Satsang* (supra) to be applicable in the present case. In the said case, the issue arose whether the assessee is a charitable trust, and this position had not been contested by the Income-tax Department from the assessment year 1937-1938 to the assessment year 1963-1964. In these circumstances, the court held as under (headnote of 193 ITR 321):

"Where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year."

27. In the present case, there cannot be any dispute that existence of permanent establishment is required to be determined by law for each year separately on the basis of the scope, extent, nature and duration of activities in each year. In this regard, the contracts in question, i.e., R-series contracts dated February 7, 2018 and LEWPP series contracts dated September 30, 2016 would have to be taken into consideration. Concededly, this court in its decision dated May 9, 2017 did not have the occasion to consider the R-series contract dated February 7, 2018. The court only considered the contract dated September 30, 2016 as noted in para-1 of the said decision. There is thus, a distinguishing feature - the R-series contract has not been considered by this court in its order dated May 9, 2017. Moreover, in the

> instant case, the reasons record that the two contracts are indivisible, and the petitioner cannot divide the contractual receipts in two categories, viz., inside India and outside India services. The installation permanent establishment will come into existence, if "project or activity continues for a period of more than 9 months" under Indo-UAE Double Taxation Avoidance Agreement. This question of fact will have to be determined separately for each assessment year, and we are informed that for the assessment year 2016-2017 and the assessment year 2017-2018, the determination is presently against the petitioner.
>
> We cannot accept the petitioner's contention that the assessment proceedings for the assessment years 2007-2008, 2008-2009 and 2009-2010 have already determined this question in favour of the petitioner and there is no change in any circumstances. This question would require to be determined and finding of the fact would have to be arrived at, by a careful consideration of terms of contract, determination whereof cannot be undertaken in the proceedings under section 197 of the Act."

20. The interplay between the principle of consistency and the facts of each year of assessment was lucidly explained by our Court in *Galileo Nederland BV* v. *Assistant Director of Income Tax (International Taxation)* as under:—

> **"19.** We are aware that each assessment year is separate and distinct and principle of res judicata does not apply to proceedings for subsequent or other years. However, the decision on an issue or question though not binding should be followed and not ignored unless there are good and sufficient reasons to take a different view. Thus, it was/is possible for the Assessing Officer to depart from the finding or a decision in one year as it is final and conclusive only in relation to a particular year for which it is made but as observed in *Radhasoami Satsang* v. *CIT*, (1992) 193 ITR 321 (SC), when a fundamental aspect pervading through different assessment years has been found as a fact in one way or the other, it would inappropriate to allow the position to be changed in a subsequent year particularly when the said finding has been accepted. The said principle is also based upon the rules of certainty and consistency that a decision taken after due application of mind should be followed consistently as this lead to certainty, unless there are valid and good reasons for deviating and not accepting the earlier decision."

21. The Court also takes note of the succinct enunciation of this legal

principle in *Dwarkadas Kesardeo Morarka* v. *Commissioner of Income Tax, Central* where the Supreme Court had held as under:—

> "**7.** The conclusion of the Tribunal was amply supported by evidence. It cannot be said that because in the previous years the shares were held to be stock-in-trade, they must be similarly treated for Assessment Year 1949-1950. In the matter of assessment of income tax, each year's assessment is complete and the decision arrived at in a previous year on materials before the taxing authorities cannot be regarded as binding in the assessment for the subsequent years. The Tribunal is not shown to have omitted to consider the material facts. The decision of the Tribunal was on a question of fact and no question of law arose which could be directed to be referred under Section 66(2) of the Income Tax Act."

22. The position of a PE being a facts-specific issue and thus liable to be examined against the backdrop of what obtained in a particular tax period is one which is underscored even by the OECD Commentary on Article 5 and the relevant part whereof is reproduced hereunder:—

> "8. It is also important to note that the way in which business is carried on evolves over the years so that the facts and arrangements applicable at one point in time may no longer be relevant after a change in the way that the business activities are carried on in a given State. Clearly, whether or not a permanent establishment exists in a State during a given period must be determined on the basis of the circumstances applicable during that period and not those applicable during a past or future period, such as a period preceding the adoption of new arrangements that modified the way in which business is carried on."

23. It is in the aforesaid backdrop that the observations of the Supreme Court in *CIT* v. *Gupta Abhushan (P) Ltd.* also assume significance and where it was unambiguously held that a survey report pertaining to a particular tax period cannot *ipso facto* be read or countenanced as being relevant and binding for independent assessment years as is evidenced from paragraph 6 of the report which is extracted hereinbelow:

> **"6.** The second part of the reasons recorded by the Assessing Officer indicate that during the survey, it was noticed that extensive renovation work in the business premises of the assessee had been undertaken and that the renovation in respect of the ground floor had been completed and that the renovation in respect of the first floor was going on. It is further noted that the assessee had

> not booked any expenses on account of renovation of the said business premises. On the basis of these facts, the Assessing Officer noted that he was satisfied that investments made in the renovation work had escaped assessment. Here too, we note that the survey was conducted on March 7, 2002, which falls in the year subsequent to the three years in question in these appeals. The fact that the renovation expenses had not been booked in that year, i.e., financial year ending on March 31, 2002, does not by itself indicate that the renovation work had been carried on in the earlier three years and, if so, the expenses in respect of the same had not been booked. The conclusion of the Assessing Officer, based on what was noticed in the course of the survey, cannot be extrapolated to other years. The purported belief of the Assessing Officer, on this aspect of the matter, was not a belief at all but was merely a suspicion.
>
> Such suspicion cannot take the place of a belief and that too a belief which is based on reasons."

24. While and as our Court explained in *Galileo* it may be permissible for an AO to take cognizance of a "*fundamental aspect pervading through different assessment years has been found as a fact in one way or the other….*", the said precept could have been legitimately invoked provided the AO were satisfied or had come to record its prima facie opinion that the facts which prevailed and obtained in AY 2013-2014 upto AY 2017-2018 were identical to those which had been found in the course of the two surveys which had been undertaken in 2007 and 2019. However, no such finding has either been returned nor conclusion recorded in the "reason to believe" drawn by the AO.

25. The reliance placed by Mr. Bhatia on *Raymond Wollen Mills* is equally misplaced since the phrase "assumptions of facts" is clearly being misconstrued and read out of context. Learned counsel sought to contend that the said decision is an authority for the proposition that an AO could reopen basis an "assumption" of facts that may have obtained in a particular AY remaining unchanged. The said contention ignores the basic facts on which that decision was founded, namely, of the AO there having found that the assessee was charging to its profit and loss account fiscal duties "*during the year*" resulting in undervaluation of inventories and understatement of profits. The observation with respect to an assumption being reached is liable to be appreciated in the aforesaid light. The reassessment action is thus liable to be set aside on this short score alone.

26. We accordingly allow the instant writ petitions and quash the following impugned notices issued under Section 148…"

50. However, a reading of the reasons assigned establishes that the AO has not even made a token or superficial attempt to evaluate the issue from that perspective. The decision to reopen thus clearly appears to have been predicated solely on the basis of what the AO came to hold in AY 2010-11. We thus and for all the aforesaid reasons find ourselves unable to sustain or uphold the impugned action under Section 147 of the Act.

51. The writ petition shall consequently stand allowed. The impugned notice dated 31 March 2016 is quashed and set aside.

YASHWANT VARMA, J.

RAVINDER DUDEJA, J.

FEBRUARY 21, 2025/DR/RW