आयकर अपीलीय अधिकरण, मुंबई न्यायपीठ 'G', मुंबई ।
IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCHES "G", MUMBAI

Before Shri Saktijit Dey, JM and Shri Ashwani Taneja, AM

ITA No.5858/Mum/2012 : Asst.Year 2005-2006
ITA No.5859/Mum/2012 : Asst.Year 2006-2007

M/s.Golden Tobacco Limited (Formerly GTC Industries Limited) Tobacco House, S.V.Road Vile Parle, Mumbai – 400 056. PAN : AAACG1421A.	बनाम/ Vs.	The Jt.Commissioner of Income-tax (OSD) 8(1) Mumbai.
(अपीलार्थी /Appellant)		(प्रत्यर्थी/Respondent)

अपीलार्थी की ओर से /Appellant by : Shri S.C.Gupta (AR)
प्रत्यर्थी की ओर से /Respondent by : Shri Vachaspati Tripathi (DR)

सुनवाई की तारीख / Date of Hearing : 14.10.2015		घोषणा की तारीख / Date of Pronouncement :28. 10.2015.

आदेश / O R D E R

Per Ashwani Taneja (AM) :

ITA No.5858/Mum/2012 : Asst. Year 2005-2006

This appeal is filed by the assessee-company against the order of learned Commissioner of Income-tax (Appeals) (in short "CIT(A)") dated 28.06.2012, passed against the assessment order u/s 143(3) r.w.s. 147 dated 23.12.2011 for assessment year 2005-2006. The assessee-company has filed numerous grounds. However, during the course of hearing, the learned Counsel appearing on behalf of the assessee-company, emphasized that this case is covered in favour of the assessee on the legal ground itself. Therefore, we shall first dispose the legal ground raised by the assessee.

2. At the outset, it was pointed out by the learned Counsel that there was a delay on the part of the assessee in filing of the appeal by 16 days. The learned Counsel has drawn our attention on the petition for condonation of delay in filing of appeal and affidavit filed along with that.

3. We have heard both the parties on this issue. No serious objection has been raised by the learned Departmental Representative for granting condonation of delay in filing of appeal by the assessee. It is further noted by us that the assessee has been able to demonstrate sufficient cause in explaining the delay of 16 days. Therefore, in the interest of justice, relying upon the judgment of the Hon'ble Supreme Court in the case of Collector, Land Acquisition v. Mst.Katiji & Ors. [(1987) 167 ITR 471 (SC)], we find it appropriate to admit this appeal, and therefore, the appeal is admitted for adjudication on its merits.

4. **In Ground No.1**, the assessee-company has challenged the reopening of the assessment. It has been argued that in this case original assessment was done u/s 143(3) of the Income-tax Act, 1961 (in short "the Act"). Subsequently, notice has been issued u/s 148, after the expiry of four years from the end of the assessment year. It is submitted that there is no allegation in the reasons about any failure on the part of the assessee in disclosure of material facts, and thus, the case of the assessee is protected by the proviso to section 147 of the Act. It has been submitted that the proviso to section 147 puts an embargo of time limit of four years. It is further submitted that apart from the above the reopening is invalid, also on the ground that there is no fresh tangible material coming in the possession of the Assessing Officer at the time of recording of reasons, and therefore, in the absence of the same, no reasons can be recorded for reopening

of the assessment. Reliance has been placed; in this case, on the judgment of Mumbai Bench of the Tribunal in the case of Motilal R.Todi and various cases discussed and relied in the said judgment. For the purpose of taking benefit of first proviso to section 147, reliance has been placed by the learned Counsel on the judgment of the Hon'ble Bombay High Court in the case of Titanor Components Limited in writ petition No.71 of 2005, order dated 9th June, 2011, Hindustan Lever Ltd. v. ACIT 268 ITR 332 (Bom.), CIT v. Shri Shailesh S.Shah in ITA No.1913 of 2013, order dated 30th September, 2015 (Bombay High Court), and on the judgment of the Hon'ble Supreme Court of India in the case of CIT v. Avadh Transformers (P.) Ltd. 51 Taxmann.com 369 (SC), wherein the judgment of the Hon'ble Allahabad High Court reported at 33 Taxmann.com 24 was upheld by the Hon'ble Supreme Court.

5. On the other hand, the learned Departmental Representative has supported the orders of the lower authorities and requested that the reopening should be held as valid. In response to our query that whether there was any failure on the part of the assessee in disclosure of material facts or whether there was any fresh material coming into the possession of the Assessing Officer, the learned Departmental Representative was not able to put forth any factual material to controvert the arguments of the learned Counsel of the assessee.

6. We have considered the facts and circumstances of the case as well as judgments relied upon by the learned Counsel and gone through the orders of the lower authorities. The brief facts are that in this case original assessment proceedings were done u/s 143(3) vide order dated 28.12.2007 determining the total income at nil, after set off of brought forward business loss of Rs.7,82,88,126

and brought forward unabsorbed depreciation of Rs.63,64,593. Subsequently, the Assessing Officer issued notice u/s 148 dated 31.3.2011. In response to the same, the assessee-company filed its return of income and asked for the `Reasons' for reopening of the assessment, which was furnished by the AO to the assessee. For the sake of ready reference these reasons are reproduced here under:-

> *"In this case, the assessee filed Return of Income for the A.Y. 2005-06 on 28/10/2005, declaring total income at Rs.1811/-. Assessment u/s. 143(3) was completed on 28/12/2007, determining total income at NIL after set off of brought forward unabsorbed business losses and depreciation.*
>
> *I. Irregular allowance of Depreciation :*
> *It is seen from depreciation statement as per Income Tax Act, the assessee has claimed depreciation of Rs.76,83,991/- on 'Time Sharing Unit Property'. The property is on lease for a period of 99 years and also the right to property is acquired prior to 01/04/1998, as such, the assessee is not eligible for depreciation either under the category of intangible assets or other. Omission to disallow the same has resulted into under assessment of Rs.76,83,991/-.*
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> *II. Incorrect computation of taxable income:*
> *While computing the taxable income, the assessee had taken profit as per Profit & Loss Account at Rs.30,39,015/0 which included income on account of exceptional items of Rs.6,09,98,126/-. The exceptional items (net) comprised of adjustment of account of liabilities, no longer required and expenses on account of loans & advances and sundry debtors.*
> *Further, it is seen that in computation statement, the assessee had reduced income of Rs.10,72,88,467/- chargeable u/s. 41(1) for considering it separately. It has also reduced an amount of Rs.119470524/-, chargeable u/s. 41(1) because the same was disallowed u/s. 43B, and as such, not claimed as expenditure in earlier assessment. The net impact of the above adjustment in the computation is as follows:*

	Particulars	*Amount (Rs)*
	Exceptional items included in the P & L A/c.	*6,09,98,126*
Less	*(i)Income chargeable u/s. 41(1) considered separately*	*107288467*

	(ii)Concession in interest on bank borrowings / debentures, etc. written back consequent to settlement reached as the same was disallowed u/s. 43B, and as such, not claimed as expenditure in earlier assessment (considered by statutory Auditor while computing income chargeable u/s. 41(1)	*11,94,70,524*
Add	*Income chargeable u/s. 41(1) on account of concession in interest on bank borrowings / debentures etc., written back consequent to settlement reached, as the same was claimed as expenditure in earlier assessment.*	*10,72,88,467*
	EFFECT OF ADJUSTMENTS ON ACCOUNT OF EXCEPTIONAL ITEMS AND INCOME U/S. 41(1)	*5,84,72,398*
	Liabilities in respect of principal amount of loans and interest thereon no longer payable written back on their negotiated settlements	*15,44,01,003/-*
Add:	*Liabilities in respect of luxury tax written back: Under amnesty scheme In terms of Supreme Court judgment*	*1,58,39,988/-* *5,65,18,000/-*
	Total	*22,67,58,991/-*
Less:	*Old Sundry Debtors and Loans & Advances written off (net)*	*16,57,60,865/-*
	Exceptional Items	*6,09,98,126/-*

From the above, it is clear that the assessee had reduced an amount of Rs.5,84,72,398/- from profit instead of making an addition of Rs.10,72,88,467/- u/s. 41(1) to it, as quantified by statutory Auditor. The same is accepted by the Department. The mistake resulted in under assessment of income of Rs.16,57,60,865/- (5,84,72,398 + 10,72,88,467). Alternatively, it is seent that exceptional items (net) of Rs.6,09,98,126/- in the Profit & Loss Account is arrived as follows:

The exceptional items of Rs.6,09,98,126/- is arrived after reducing old sundry debtors and loans & advances (net) of Rs.165760865/- from the liabilities which are written back on account of settlement /amnesty etc. As the expenses debited on account of loans & advances and sundry debtors are either capital or inadmissible expenditure, the same is required to be disallowed. Omission to disallow the same has resulted into under assessment of R.16,57,60,865/-

In view of the above, I have reasons to believe that, on the above two issues, the income amounting to Rs.17,34,44,856/- (Rs.76,83,991 + 16,57,60,865), chargeable to tax, has escapement within the meaning of

section 147 of the I.T. Act. Therefore, the case is re-opened by issue of notice u/s. 148 of the I.T. Act, after obtaining the prior approval from the Hon'ble CIT – 8, Mumbai vide her office letter dated 31.03.2011. Issue notice u/s. 148 of the I.T.Act, 1961."

6.1 The assessee has challenged the aforesaid `Reasons' on two counts, i.e., One - there is no fresh material coming into the possession of the AO at the time of recording of the reasons, and Two - the reopening has been done after expiry of four years from the end of the assessment year; and there is no allegation in the `Reasons' about failure on the part of the assessee in disclosure of material facts.

6.2 We shall now deal with both the arguments one by one :

6.3 No fresh tangible material :

A perusal of the aforesaid `Reasons' would clearly reveal that these have been recorded by the AO on the basis of examination done by the AO of the existing assessment records of the assessee-company. On none of the issues we could find reference to any fresh tangible material in the possession of the AO to make a belief about escapement of income. In our considered view, the law in this regard is now well settled. As relied upon by the learned Counsel also, recently Hon'ble Mumbai Bench of the Tribunal in the case of **Motilal R.Todi (ITA No.2910/Mum/2013, order dated 22.09.2015)** has analyzed the entire law available on this issue, and thereafter it was held by the Hon'ble Bench that reopening was invalid in the absence of fresh tangible material. The Hon'ble Bench has relied upon the judgment of the Hon'ble Bombay High Court in the case of Bombay Stock Exchange Limited, writ petition No.2468 dated 12.06.2014 reported at 89 CCH 118 and judgment of Hon'ble Delhi High Court in the case of

Pr.CIT v. Tupperware India Pvt. Ltd. (ITA No.415 of 2015, order dated 10.08.2015). The relevant parts of this judgment are reproduced here under for the sake of ready reference :-

> "6.6 . In the present case, it was noticed by us that the case of the assesse is that there was no fresh tangible material in the possession of AO at the time of recording of impugned reasons. A perusal of the 'Reasons' recorded by the AO in this case reveals that at the time of recording of these 'Reasons' the AO had examined original assessment records only and no fresh material had come in the possession of the AO. In response to our specific query also, Ld DR could not point out any fresh material available with the AO at the time of reopening of the case of the assessee. Thus, assertion of the assessee that there was no fresh material with AO for reopening of this case, remained uncontroverted.
>
> 6.7. Under these facts and circumstances, let us now examine settled position of law on this issue. It has been held in various judgments coming from various courts that availability of fresh tangible material in the possession of AO at the time of recording of impugned reasons is a *sine qua none*, before the AO can record reasons for reopening of the case. We begin with the judgment of Hon'ble Supreme Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC), laying down that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment.
>
> 6.8. Recently, Hon'ble Delhi High Court in the case of **Pr. CIT vs Tupperware India Pvt. Ltd.**, in its order dt 10-8-15 (ITA no 415/2015) got an occasion to analyse latest position of law on this issue. After discussing

many judgments on this issue, it was held that even in the case of original assessment order having been passed u/s 143(1), it is mandatory for the AO to have in its possession, fresh tangible material before reopening of the case.

6.9 In the case of Bombay Stock Exchange Ltd. (writ petition no.2468 dt. 12.06.2014) (89 CCH 118), Hon'ble Bombay High Court observed as under:

"5. It is pertinent to note that Respondent No.1 has not set out in the reasons which fact or other material was not disclosed by the Petitioner that led to income escaping assessment. In fact, on going through the reasons, we find that Respondent No.1 has come to the conclusion/belief that income had escaped assessment on the basis of the material already before him and ***no new tangible material has been relied upon by Respondent No.1*** *to come the said conclusion/belief. This is clear from the use of the words "on perusal of the records it is noticed.....", "further perusal of statement 2 enclosed with the computation of income shows....." and "it is further noticed....." in the impugned notice."*

6.10. In the case of **CIT vs. Orient Craft Ltd. 354 ITR 536,** it was observed by Hon'ble Delhi High Court that in the said case**,** Reasons for reassessment disclosed that AO reached belief that there was escapement of income "on going through the return of income" filed by assessee after he accepted return u/s. 143(1) without scrutiny, and nothing more. In these facts, it was held by the Hon'ble High Court that it was nothing but review of earlier proceedings and abuse of power by AO. It was further held that since there was no whisper in reasons recorded, of any tangible material which came to possession of AO subsequent to issue of intimation, therefore, it was an arbitrary exercise of power conferred u/s 147. Thus, reopening was held to be invalid on this ground itself.

6.11. In the case of **Mohan Gupta (HUF) vs. CIT 366 ITR 115,** same view has been followed by Hon'ble Delhi High Court.

6.12. Further, in the case of **CIT vs. K. L. Arora in ITA 118/2014 dated 21-04-2014, Hon'ble Delhi High Court observed as under:**

"This Court is of the opinion that no fault can be found with the Tribunal's order. It is well settled that in order to issue a valid reassessment notice, the AO has to be satisfied on the basis of ***tangible material or information subsequently available*** *to him that the assessee had not made full and true disclosure which led to income escaping assessment at the stage when the original assessment was completed. Short of that a re-appreciation of the* ***existing materials*** *which really amounts to review is impermissible. The Tribunal, in the circumstances of this case was justified in concluding that re-assessment proceedings themselves were not in accordance with law and consequently dismissing the Revenue's appeal. No question of law arises for consideration."*

6.13. In the case of **CIT vs. Shri Atul Kumar Swami** in ITA No. 112/2014 dated 18-03-2014 reported at 52 Taxmann.com 47, Hon'ble Delhi High Court observed as under:

".....Reopening of assessment is valid if it is based on tangible material to justify conclusion that there was escapement of income—In instant case note forming part of return clearly mentioned and described nature of the receipt under a non-compete agreement—Reasons for issuance of notice u/s 147 nowhere mentioned that revenue came up with any other fresh material warranting reopening of assessment—Mere conclusion of proceedings u/s 143(1) ipso facto does not bring invocation of powers for reopening assessment—Reopening of assessment was unjustified—Revenue's appeal dismissed."

6.14. Further reliance can be placed on the detailed judgment in the case of **Madhukar Khosla vs. ACIT 367 ITR 165 (Delhi),** wherein it has been held that the reopening is not permitted under the law unless it is based on fresh tangible material and that if The "***reasons to believe***" are not based on ***new, "tangible***

materials", the reopening amounts to an impermissible review**.** It has been further observed that :

*"The foundation of the AO's jurisdiction and the raison d'etre of a reassessment notice are the "reasons to believe". Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective "trigger", the AO does not possess jurisdiction to reopen the assessment. It is at the next stage that the question, whether the re-opening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "reasons to believe" based on new, "tangible materials", then the reopening amounts to an impermissible review. Here, there is nothing to show what triggered the issuance of notice of reassessment – no information or new facts which led the AO to believe that full disclosure had not been made (**Kelvinator of India Ltd** [(2010)320 ITR 561 (SC)] and **Orient Craft Ltd** [(2003)354 ITR 536 (Delhi)] followed, **Usha International** [(2012)348 ITR 485 (Del) (FB)] referred)"*

6.15. In the case of **CIT vs Jyoti Devi 218 CTR 264,** Hon'ble Rajasthan High Court held that since Revenue could not point out any information or material which had subsequently come to the notice of the AO to enable him to form the requisite belief that any income liable to be assessed had escaped assessment, therefore, the initiation of reassessment proceedings was not valid.

6.16. Hon'ble Madras High Court in the case of **Bapalal & Co. Exports 289 ITR 37,** held that in the absence of any new material, the AO is not empowered to reopen an assessment irrespective of the fact whether it was made under s. 143(1) or s. 143(3).

6.17. Recently, Mumbai Bench of ITAT in the case **HV Transmissions Ltd.** in I.T.A No. 2230/Mum/2010 held that even though original assessment was made under s. 143(1) and not under s. 143(3), assessee having made full disclosure of its income, AO was not justified in reopening the assessment in the absence of any new material. Hon'ble Bench has relied upon third member judgment from Mumbai Bench of ITAT in the case **Telco Dadajee Dhackjee Ltd** vs DCIT (ITA No 4613/Mumbai/2013 dt 12-5-2010), in support of this view.

6.18. Similar view has been expressed by Hon'ble Delhi Bench of ITAT in the case of **M/s Nexgen School of Business Vs. Deputy Commissioner of Income Tax, [ITA No. 5609/DEL/2010]** holding that the Assessing Officer was not justified to initiate the reopening proceedings in absence of any new information or material on record since the date of filling and processing of the return of income.

6.19. In the present case, it has already been discussed that admitted facts are that there was no fresh material coming into the possession of the AO, at the time of recording of the 'Reasons'. These facts have not been rebutted by Ld DR also. The case law relied upon by Ld DR in the case of Dr. Amin's Pathology, supra is not applicable on the issue being decided here. The issue that in absence of any fresh material, whether AO can proceed to record Reasons, was not before Hon'ble High Court, therefore Hon'ble High court had decided the issue of Change of opinion in that case. In the case before us, as discussed above, we are not going into that issue. In our considered opinion, at this stage, we need not go into the other aspect i.e. whether there was change of opinion or not. This issue has been aptly clarified by Hon'ble High Court in the case of Madhukar Khosla, (supra), wherein it has been held by their lordships that external facts or material constitute the driver, or the key which enables the AO to legitimately reopen the completed assessment and in absence of this objective "trigger", the AO does not possess

jurisdiction to reopen the assessment. Further, most importantly, it was held by the Hon'ble High Court that it is at the next stage when the question, whether the reopening of assessment amounts to "review" or "change of opinion" arises. In other words, if there are no "new tangible materials", then there would be no "reasons to believe", and consequently reopening would be an impermissible review. Under these circumstances there would not arise any need to go the next stage to examine the next question, i.e., whether there was "review" or "change of opinion". The condition with respect to availability of "new tangible material" is step anterior to the condition of no "change of opinion" or "review".

6.20 Thus, in view of judgments directly on the issue under consideration, as discussed in paras 6.7 to 6.18, above, reopening done by Ld. AO in the absence of fresh tangible material, is invalid and bad in law. Therefore, the initiation of reassessment proceedings was not valid. Thus, re-assessment order framed in pursuance to invalid reopening is illegal; the same is hereby quashed. Since assessment order has been quashed on jurisdictional ground itself, other grounds are not being adjudicated."

6.4 In view of the above discussion by the Hon'ble Bench, we find that the issue stands squarely covered with the judgment of Hon'ble Bombay High Court, Hon'ble Delhi High Court and other Courts. Therefore, reopening is held invalid for want of availability of requisite conditions for exercising the jurisdiction of reopening by the Assessing Officer.

7. The other argument taken up by the learned Counsel was that there was no allegation in the `Reasons' about failure on the part of the assessee in disclosure of material facts. Again, the perusal of aforesaid `Reasons' shall

reveal that the AO has nowhere mentioned about any failure on the part of the assessee in disclosure of material facts. Rather what has been mentioned in the `Reasons' is about the omission or mistake committed by the AO himself. In our considered view, the law does not give powers to the AO to reopen an assessment carried out u/s 143(3) after the expiry of four years unless the AO is able to demonstrate that there was failure on the part of the assessee in disclosure of material facts. In this regard, we feel it appropriate to reproduce hereunder the first proviso to section 147 of the Act:-

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

It may be noted that the reading of the `Reasons', as reproduced in earlier part of this order, that neither there is any allegation of `failure and disclosure of material facts' nor AO has made out any case of any failure on the part of assessee in disclosure of material facts. Thus these `Reasons' are apparently contrary to law.

7.1.8 Further, as has been rightly contended by the learned AR that this issue is no more *res integra.* Hon'ble Bombay High Court in many judgments has held that in those cases where the first proviso to section 147 is applicable, the reopening cannot be done unless there is allegation in the reasons that there was failure on the part of the assessee in disclosure of material facts. We place our first reliance upon the judgment of Hon'ble Bombay High Court in the case of **Tata Business Support Services Ltd. v. DCIT 232 Taxman 702.** Relevant para is reproduced here under:-

> *"In the present case, when the Revenue alleges failure to make full and true disclosure of material facts, then, the term failure has some specific legal connotation. Here, material facts are pertaining to the expenses under the head "management fees". It is apparent that the words employed are material facts. It is not just facts but material facts. The word "material" in the context means "important, essential, relevant concerned with the matter, not the form of reasoning" (see Oxford Dictionary Concise Eighth Edition). Just as disclosure of every fact would not suffice but for proceeding under section 147 non disclosure ought to be of a material fact."*

7.2 We also rely upon the judgment of the Hon'ble Bombay High Court in the case of **Titanor Components Limited, supra, and CIT v. Shri Shailesh S.Shah**, supra. Further, reliance is placed by us on the judgment of the Hon'ble Supreme Court in the case of **CIT v. Avadh Transformers (P.) Ltd. 51 Taxmann.com 369**, wherein the Hon'ble Supreme Court has upheld the judgment of the Allahabad High Court, wherein it was held by the Hon'ble High Court that in absence of failure on the part of the assessee in disclosure of material facts, the reassessment proceedings could not be initiated after

expiry of four years from the end of relevant assessment year merely on the ground that in view of the retrospective amendment to provisions of section 80IA, the assessee was not entitled to deduction granted earlier under said section. Thus, even in such cases, when there was a retrospective amendment in the law, the Hon'ble Supreme Court has approved the order of the Hon'ble High Court, upholding the view that no reopening can be done after the expiry of four years unless there was failure on the part of the assessee in disclosure of material facts. It is noted that the present case stands on a better footing.

7.3 Before we part with, it is found appropriate to refer to a recent judgment of Hon'ble Delhi High Court in the case of **Pr.CIT v. Samcor Glass Ltd. (ITA No.768/2015 dated 12.10.2015),** wherein Hon'ble High Court came down heavily upon the Income Tax Department for reopening of the assessments of the tax payers, in a casual manner and without complying with mandatory conditions of law. Relevant portion of the judgment is reproduced below:-

> *"4. Although the Assessees in both the appeals are different, the issue involved in both cases is similar, i.e., whether the reopening of the assessment under Section 147/148 of the Act is valid?*
>
> *5. Apart from the fact that the impugned order of the ITAT suffers from no legal infirmity, the court is of the view that on the face of it, the reasons for reopening of the assessment in both the cases did not satisfy the basic requirement of the law, in at least in two aspects. One was that the reopening was of assessment beyond four years after the AY for which the original assessment was framed and yet the reasons for*

reopening did not categorically state that there was a failure by the Assessees to disclose any material particulars on the basis of which there were reasons to believe that the income has escaped assessment. This Court has recently, in a decision dated 22nd September 2015 in ITA No.356 of 2013 (CIT v. Multiplex Trading & Industrial Co. Ltd.), clearly stated in cases where reopening of assessment is beyond four years from the end of the relevant assessment year "the condition that there has been a failure on the part of the Assessee to truly and fully disclose all material facts must be concluded with certain level of certainty."

6. Secondly, the Court finds that at lease in respect of one of the issues, viz., payment of interest on fixed deposits, the Assessees drew the attention of the Assessing Officer (`AO') to the fact that the amount has already been offered to tax and tax had been paid and yet, in the order disposing of the objections, the AO is completely silent as regards this objection.

7. The Court is of the view that notwithstanding several decisions of the Supreme Court as well as this Court clearly enunciating the legal position under Section 147/148 of the Act, the reopening of assessment in cases like the one on hand give the impression that reopening of assessment is being done mechanically and casually resulting in unnecessary harassment of the Assessee.

8. The Court would have been inclined to impose heavy costs on the Revenue for filing such frivolous appeals but declines to do so since the appeals are being dismissed ex parte. However, the court directs the Revenue through the Principal Chief Commissioner of Income Tax (Pr CIT) to issue instructions to the AOs to strictly adhere to the law explained in various decisions of the Supreme Court and the High Court in regard to Sections 147/148 of the Act and make it mandatory for them to ensure that an order for reopening of an assessment clearly records the compliance with each of the legal requirements. Secondly, the AOs must be directed to strictly

comply with the law explained by the Supreme Court in GKN Driveshafts (India) Ltd v. Income Tax Officer (2003) 259 ITR 19 (SC) as regards the disposal of the objections raised by the Assessee to the reopening of the assessment."

7.4 Thus, in our considered view, this issue is squarely covered in favour of the assessee by the judgments of the Hon'ble jurisdictional High Court and Hon'ble Supreme Court of India, and therefore, reopening is held to be invalid on this ground as well.

7.5 Thus, ground with regard to reopening is allowed and reassessment order is quashed, and therefore, other grounds with respect to merits and other legal issues are not being adjudicated.

ITA No.5859/Mum/2012 : Asst.Year 2006-2007

8. In this appeal, there is delay of 16 days in filing of appeal by the assessee, similar to that in A.Y. 2005-06. We follow our order for A.Y.2005-06, as per our observations given in para 2 and 3 of this order, and condone the delay, and admit this appeal for adjudication, after taking consent of the parties.

8.1 In this appeal also, the learned Counsel has challenged validity of reopening of the assessment. In this case also the facts are similar. The original assessment proceedings was done u/s 143(3) vide order dated 30.12.2008, subsequently, a notice was issued u/s 148 dated 31.03.2011, i.e., within four years from the expiry of the relevant assessment year. Thus, the only difference is that this case has been reopened within the period of four years, and therefore, the assessee shall not get the benefit of proviso to section 147 of the Act.

9. The `Reasons' recorded by the AO are reproduced here under for the sake of ready reference :-

"In this case, the assessee filed Return of income for the A.Y. 20906-07 on 28/11/2006, declaring total income at Rs.8,31,753/- Assessment u/s 143(3) was completed on 30/12/2008, determining total income at Rs.8,30,050/-, being Long Term Capital Gain, after set off business loss and depreciation against the current year's business income.

Irregular allowance of Depreciation:
It is seen from depreciation statement as per Income Tax Act, the assessee has claimed depreciation of Rs.57,62,993/- on `Time Sharing Unit Property'. The property is on lease for a period of 99 years and also the right to property is acquired prior to 01/04/1998, as such, the assessee is not eligible for depreciation either under the category of intangible assets or other. Omission to disallow the same has resulted into under-assessment of Rs.57,62,993/-.

In view of the above, I have reasons to believe that, on the above issue, the income chargeable to tax of Rs.57,62,993/- on account of depreciation, has escapement assessment within the meaning of section 147 of the I.T.Act. Therefore, the case is reopened by issue of notice u/s 148 of the Income Tax Act, after getting approval from the Hon'ble CIT-8, Mumbai. Issue notice u/s 148 of the I.T.Act."

10. The perusal of these `Reasons' would show that, again, these `Reasons' have been recorded by the AO by making examination of records, which are part of the existing assessment records, which were available with AO since the time of the framing of the original assessment order u/s 143(3). It is noted that in this case also, no fresh material has come into the possession of the AO. Therefore, following our order of assessment year 2005-2006, we hold that the `Reasons' are not valid in the eyes of law on this ground, i.e., the `Reasons' have been recorded without there being any fresh

tangible material coming into the possession of the AO after the framing of the original assessment u/s 143(3).

11. Further, the learned Counsel has taken one more argument, i.e., in this case the reopening has been done on the basis of change of opinion by the AO. It was argued by him that the issue of depreciation on time sharing unit property, which has been raised in the aforesaid `Reasons', came up for consideration before the AO in assessment year 2003-2004, wherein it was allowed by the Assessing Officer, after taking proper details and documentary evidences from the assessee. Our attention has been drawn on various pages of the paper book, wherein the AO had raised query on this very issue in the assessment proceedings of assessment year 2003-2004, replies were submitted by the assessee, giving full details and justification, these were considered by the AO, and thereafter only after consideration of these replies and details / documents of the assessee, the AO passed order u/s 143(3), wherein claim of the assessee was allowed and no disallowance was made of the depreciation on time sharing unit property. It was, thus, argued that it is a case of change of opinion on the part of the AO. Reliance was placed on the judgment of the Hon'ble Bombay High Court in the case of **DIT v. HSBC Asset Management India Pvt. Ltd. (IT Appeal No.254 of 2012, dated 18th June, 2014)** for the proposition that if depreciation is allowed in first year, then in subsequent years it becomes part of block of assets, and therefore, the depreciation is allowed on block of assets and not on the individual assets, and therefore, the same cannot be disallowed. We have considered this aspect also very carefully. We find force in the argument of the learned Counsel. It is noted that this issue has already been

examined by the Assessing Officer himself in the assessment year 2003-2004. This issue was again examined by the Assessing Officer in the original assessment proceedings u/s 143(3) of the impugned assessment year. Therefore, reopening the same, now on this very issue, which has already been examined by the Assessing Officer, amounts to review or change of opinion on the part of the Assessing Officer. It is settled law that `Reasons' cannot be recorded, as per law, on the basis of change of opinion by the Assessing Officer. Therefore, viewed from this angle also, impugned `Reasons' are invalid in the eyes of law, and therefore, reopening of the case and resultant reassessment order becomes bad in law, and therefore, the same is hereby quashed.

12. Since the appeal has been allowed on the legal grounds itself, we refrain from adjudicating other grounds raised by the assessee on merits.

13. In the result, both the appeals are allowed, on the grounds as discussed above.

Order pronounced on this 28th day of October, 2015.
आदेश की घोषणा दिनांकः 28.10.2015 को की गई ।

Sd/-	Sd/-
(**Saktijit Dey**)	(**Ashwani Taneja**)
न्यायिक सदस्य / JUDICIAL MEMBER	लेखा सदस्य / ACCOUNTANT MEMBER

मुंबई Mumbai; दिनांक Dated : 28th October, 2015.
Devdas*

आदेश की प्रतिलिपि अग्रेषित/Copy of the Order forwarded to :

1. अपीलार्थी / The Appellant
2. प्रत्यर्थी / The Respondent.
3. आयकर आयुक्त(अपील) / The CIT, Mumbai.
4. आयकर आयुक्त / CIT(A) - 16, Mumbai
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, मुंबई / DR, ITAT, Mumbai
6. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

सत्यापित प्रति //True Copy//

उप/सहायक पंजीकार (Dy./Asstt. Registrar)
आयकर अपीलीय अधिकरण, मुंबई / ITAT, Mumbai