आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES, JAIPUR

श्री विजय पाल राव, न्यायिक सदस्य एवं श्री भागचंद, लेखा सदस्य के समक्ष
BEFORE: SHRI VIJAY PAL RAO, JM & SHRI BHAGCHAND, AM

आयकर अपील सं./ITA No. 437/JP/2017
निर्धारण वर्ष/Assessment Year : 2007-08

Dy. Commissioner of Income Tax, Circle-2, Jaipur.	बनाम Vs.	Vimal Chand Surana (HUF), 2231, Lal Katla, Haldiyon Ka Rasta, Johari Bazar, Jaipur.
स्थायी लेखा सं./जीआईआर सं./PAN/GIR No.: AABHV 6622 G		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

राजस्व की ओर से/ Revenue by : Shri Varinder Mehta (CIT)
निर्धारिती की ओर से/ Assessee by : Shri S.R. Sharma &
Shri R.K. Matra (CA)

सुनवाई की तारीख/ Date of Hearing : 07/05/2018
उदघोषणा की तारीख/ Date of Pronouncement : 17/05/2018

आदेश/ ORDER

PER: BHAGCHAND, A.M.

The appeal filed by the revenue emanates from the order of the ld. CIT(A)-4 Jaipur dated 30/03/2017 for the A.Y. 2007-08.

2. The Appellant filed his original return of Income for Assessment Year 2007 – 08 on 27-10-2007 declaring a total income of Rs. 5,66,74,000/- u/s. 139(1) of the Income Tax Act 1961 (in short the Act). The Assessment was completed u/s. 143(3) at the total income of Rs. 5,66,74,000/- on 09-10-2009. The appellant disclosed the shares

purchase transaction in his balance sheet filed during the course of assessment proceedings. Subsequently, a search and seizure operation was conducted on Shri Rajendra Jain Group and his associate group members on 23-05-2013 by the Investigation wing, Jaipur of the Income Tax Department, in which Mr. Madan Mohan Gupta was also covered. During the course of search and seizure operation on Mr. Madan Mohan Gupta, various incriminating documents were found and seized. Statement of Shri Madan Mohan Gupta was recorded on 23-05-2013 and 27-05-2013. The statement of appellant was also recorded u/s. 131 on 16-08-2013. Mr. Madan Mohan Gupta on 26-02-2015 retracted his original statement recorded on 23.5.2013 and 27.5.2013 by filing an affidavit, pursuant to filing an affidavit the statement of Shri Madan Mohan Gupta was recorded on 24 March 2015 by ACIT CC-2 and vide answer to question no. 5 he categorically denied having any receipt of cash from appellant. The A.O. issued notice u/s 148 dated 21-03-2014 on the assessee HUF on the basis of statement recorded in course of search from Shri Madan Mohan Gupta. The assessee complied the notice by filing return of income declaring same income as was assessed u/s 143 (3). The assessee requested copy of reasons recorded and copy of sanctions accorded u/s 151 which were supplied and also filed objections to notice u/s 148 which were rejected by A.O.. The A.O. proceeded to

reassess the assessee HUF and completed the re-assessment by adding Rs. 4,15,32,446/- as substantive addition in the hands of Madan Mohan Gupta as per section 292C of the Act as the papers were found from the premises of Madan Mohan Gupta and primary onus lies with him to explain these entries. However, a protective addition of Rs. 4,15,32,446/- has also been made in the hands of assessee HUF to safeguard the interest of revenue. The ld. CIT(A) has given relief to the assessee.

3. Now the revenue is in appeal before the ITAT by taking following grounds of appeal:

> *"1. Whether on the facts and the circumstances of the case and in law the Ld CIT(A)-4, Jaipur has erred in quashing the re-opening of assessment.*
>
> *2. Whether on the facts and in the circumstances of the case and in law the Ld CIT(A) has erred in deleting the whole protective addition of Rs. 4,15,32,446/- instead of restricting to the same to Rs. 2,80,00,792/-(being 13.44% of sale consideration of Rs.20,83,39,232-).*
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> *3. Whether on the facts and the circumstances of the case and in law the Ld CIT(A) has erred in deleting the whole protective addition of Rs 4,15,32,446/- by holding the transfer of shares took place on 05.04.2007 ignoring the date of signing of share transfer Form i.e. Form No. 7-B on 27.03.2007.*
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> *4. The appellant craves the right to amend alter or add to any of the grounds of appeal given above."*

4. The 1st ground of appeal is against quashing the reopening of the assessment by the ld. CIT(A). The ld. CIT(A) has quashed the proceeding

initiated U/s 147 of the Act by passing a speaking order. For the sake of convenience, the finding of the ld. CIT(A) is not required to be repeated.

5. The ld. CIT DR has vehemently supported the order of the Assessing Officer.

6. On the other hand, the ld AR of the assessee has reiterated the arguments as made before the ld. CIT(A) and further submitted as under:

> In this connection it is submitted that the Ld. A.O. while initiated proceeding u/s 148 recorded following reasons u/s 147 of the Act.
>
> "A search & seizure operation was carried out at the residential premises of Shri Madan Mohan Gupta at Vrindavan, Diggi Road, Sanganer Road, Jaipur and also survey proceedings were carried out at the Business premises of Shri Madan Mohan Gupta at A30, Sarswati Colony, Sanganer, Jaipur whereby certain incriminating documents were found and seized/impounded.
>
> During the course of statements, Shri Madan Mohan Gupta submitted that a transaction of land at village chainpura behind E.P. was carried out in which the said land was purchased by Shri Rajendra Kumar Jain through Shri Madan Mohan Gupta. The deal was finalized at Rs. 12,43,27,000/- out of which discount of 1% was allowed for early registration of land. Therefore Rs. 12,30,84,000/- was net payable to the sellers. This land was purchased during the A.Y. 2006-07 and sold to K.G. Kothari, Prithviraj Road, C-Scheme, Jaipur and Shri Vimal Chand Surana in the month of March, 2007. This sale transaction was finalized for Rs. 20,83,39,232/-.

In light of statements of Shri Madan Mohan Gupta, statement of Shri Vimal Chand Surana was recorded on oath on 16.08.2013. Shri Vimal Chand Surana had submitted that he did not purchase any land from Shri Madan Mohan Gupta nor any payment was made to Shri Madan Mohan Gupta. However, Shri Vimal Chand Surana accepted that he had purchased 1334 Equity shares of M/s Kalyan Buildmart Pvt. Ltd. in the name of his HUF out of which 667 Equity Shares were purchased from Shri Madan Mohan Gupta and 667 Equity Shares from Smt. Shashikala Gupta w/o Shri Madan Mohan Gupta. In this company, land near E.P. is an asset. These Equity Shares were purchased during March, 2007 and Rs. 67,700/- were paid to Shri Madan Mohan Gupta on 23.06.2007 and Rs. 67,700/- were paid to Smt. Shashikala Gupta on 19.04.2007, on account of sale consideration of these shares.

From the above it is clear that land behind E.P. was purchased in the guise of sale of shares of Shri Kalyan Buildmart Pvt. Ltd., in which Shri Vimal Chand Surana HUF has 20% shareholding.

Since, the share of land in Vimal Chand Surana HUF is 20%, his share in sale comes out to be 41667846/-. Hence, on the basis of above, I have reason to believe that income of Rs. 41532446/- [(41667846+135400)] has escaped assessment.

Thus, in lieu of the information in my possession, I have reason to believe that income of Rs. 41532446/- has escaped assessment. Hence, it is a fit case for issue of notice u/s 148."

In this connection it is submitted that in the reasons recorded as well as in discussion in assessment order it is stated that Shri Vimal Chand Surana accepted that he had purchased 1334 Equity shares of M/s Kalyan Buildmart Pvt. Ltd. in the name of his HUF out of which 667 Equity Shares were purchased from Shri Madan Mohan Gupta and 667 Equity Shares from Smt. Shashikala Gupta w/o Shri

Madan Mohan Gupta. In this company, land near E.P. is an asset. These Equity Shares were purchased during March, 2007 and Rs. 67,700/- were paid to Shri Madan Mohan Gupta on 23.06.2007 and Rs. 67,700/- were paid to Smt. Shashikala Gupta on 19.04.2007, on account of sale consideration of these shares and it is furthur stated that thus Shri Vimal Chand Surana has 20% shareholding of Shri Kalyan Buildmart P. Ltd.

In this connection it is brought on record that it is correct that Shri Vimal Chand Surana has purchased 1334 Equity shares of Kalyan Buildmart P. Ltd. from the persons as stated above but the same is not 20% shareholding in company. The paid up share capital of company is 10000 equity shares of Rs. 10 each (total paid capital Rs. 1,00,000/-) and holding of 1334 equity shares by Shri Vimal Chand Surana HUF is 13.34%. Thus equity share holding of Vimal Chand Surana in the company is 13.34% at the time of purchase of these shares from above stated persons. The reasons recorded are wrong to this extent.

The Sanction for reopening granted u/s 151 by Additional Commissioner while giving approval reads yes, it is a fit case for reopening of assessment u/s 147 as Rs. 1,70,51,406/- (being the amount paid in cash) has escaped assessment and CIT – 1, Jaipur has also endorsed it by noting yes I am satisfied that it is a fit case for issue of notice u/s 148 of the Act. The sanction accorded is thus irregular and has vitiated the proceedings which are bad in law.

In this connection we make following submissions:

1. The Appellant submits that a plain perusal of the above provided reasons for re-opening are the only reasons that can be considered when the formation of belief of “Income chargeable to tax has escaped assessment” is challenged. The Hon’ble Bombay High court in *Prashant S. Joshi v. ITO [2010] 324 ITR 154 (Bom)*held that “The basic postulate which underlines section 147 is the formation of the belief by the Assessing Officer that any income chargeable to tax has escaped

assessment for any assessment year. The Assessing Officer must have reason to believe that such is the case before he proceeds to issue a notice under section 147. The reasons which are recorded by the Assessing Officer for reopening an assessment are the only reasons which can be considered when the formation of the belief is impugned. The recording of reasons distinguishes an objective from a subjective exercise of power. The requirement of recording reasons is a check against arbitrary exercise of power. For it is on the basis of the reasons recorded and on those reasons alone that the validity of the order reopening the assessment is to be decided. The reasons recorded while reopening the assessment cannot be allowed to grow with age and ingenuity, by devising new grounds in replies and affidavits not envisaged when the reasons for reopening an assessment were recorded. The principle of law, therefore, is well-settled that the question as to whether there was reason to believe, within the meaning of section 147 that income has escaped assessment, must be determined with reference to the reasons recorded by the Assessing Officer. The reasons which are recorded cannot be supplemented by affidavits. The imposition of that requirement ensures against an arbitrary exercise of powers under section 148."

A clear reading of the reasons recorded for re-opening of Assessment in case of the Appellant shows that there is no allusion at all to the appellant in the recorded reasons. There is hence no tangible basis provided in the recorded reasons that show that there may be Income that has escaped Assessment in the hands of the Appellant in the case due to the failure of the Assessee to disclose fully and truly all material facts necessary for his assessment.

2. The Appellant submits that in *3i Infotech Ltd. V. ACIT [2010] 329 ITR 257 (Bombay)*, the Hon'ble Bombay High Court held that "the validity of the reopening of the assessment has to be determined with reference to the reasons which have weighed with the Assessing Officer. Those norms cannot be added to or supported on a basis which was not present to the mind of the Assessing Officer

when he issued the notice to reopen". The Appellant submits that the mind of the Assessing Officer while re-opening are given in the reasons recorded for re-opening. When these reasons themselves are vague and ambiguous, then the supplying of further reasons while disposing the objections taken by the Appellant are against the words and the spirit of the Judgement of the Hon'ble Apex Court in the case of *GKN Driveshafts (Supra)* that holds field on the subject. It is clear that, while justifying the reopening of an assessment, the Assessing officer is bound to prima facie consider only the recorded reasons for re-assessment.

3. The Hon'ble Bombay High Court in the case of *Hindustan Lever Ltd. V. R.B. Wadkar [2004] 268 ITR 332 (Bombay HC)* observed that "It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach to the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. Reasons are the manifestation of mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so

as to establish vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing affidavit or making oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches to the Court, on the strength of affidavit or oral submissions advanced." This Judgment of the Hon'ble Bombay High Court has been followed in the case of Hon'ble High Court of Gauhati in *CIT v. Shiv Shakti Flour Mills Pvt. Ltd. [2010] 327 ITR 430 (Gauhati)*, Hon'ble Calcutta High Court in *Anil Kumar Bhandari v. JCIT [2007] 294 ITR 222 (Calcutta)*and the Hon'ble Gujrat High Court in *Aayojan Developers v. ITO [2011] 335 ITR 235 (Gujrat)*which observed that "What transpires from the judicial pronouncements, as discussed above, is that there must be a live link between the materials on which conclusions are based and the actual conclusion of the Assessing Officer in formation of his belief that any income chargeable to tax has escaped assessment. Such reason must be held in good faith and cannot be pretence and also cannot be based on extraneous or irrelevant consideration. Unless the Assessing Officer has "reason to believe" and such reason is material and relevant to form a belief that there is an escaped assessment, no action under section 147 of the Act can be taken. The Appellant submits that the reasons recorded for reopening of the Assessment do not make out any such 'live link' between the materials on which conclusions are based and the actual conclusion of the Assessing officer in formation of his belief that any income chargeable to tax had escaped assessment.

4. The Hon'ble Calcutta High Court in the case of *East Coast Commercial Co. Ltd. V. ITO [1981] 128 ITR 326 (Cal.)* observed that "The recording of reasons in our opinion is not an idle formality but is a mandatory requirement of the statute casting a duty and obligation on the ITO to record his reasons for issuing a notice for reopening an assessment and the CBDT or the Commissioner, as the case may

be, being satisfied that it is a fit case for issue of such notice solely on the basis of the said reasons recorded, accords its sanction to the issue of such notice." This judgement of the Hon'ble Calcutta High Court has been followed by the Hon'ble ITAT Jaipur bench in the case of Satyam Food Specialities (P) Ltd vs. DCIT [2015] 68 SOT 449 (Jaipur Trib) while examining the provisions of 153C of the Income Tax Act which observed that "Satisfaction note itself must display reasons or basis of conclusion that the documents belong to a person other than the searched person. It is also settled law that the satisfaction note has to be read as it is without any addition, subtraction or with the help of allied documents. It cannot be supplemented or supplanted. The Appellant submits that it is not the case of the Assessing officer that the documents found with Shri Madan Mohan Gupta belonged to the Appellant. In fact there is a categorical conclusion in the assessment order that the primary onus to explain the contents of the loose papers was that of Shri Madan Mohan Gupta.

5. The Hon'ble High Court of Rajasthan in the case of *CIT v. Uttam Chand Nahar [2007] 295 ITR 403 (Rajasthan)* observed that "the initial satisfaction about the escapement of income, which requires initiation of proceedings under section 147, must be of the Assessing Officer himself". If the conditions under section 151(1) or (2) require the satisfaction of the Deputy Commissioner or the Chief Commissioner or the Commissioner, as the case may be, before issuance of such notice, such satisfaction must also be only on the basis of the reasons recorded by the Assessing Officer and not de hors it. That is to say the satisfaction recorded by the Assessing Officer must be endorsed by the Deputy Commissioner, the Chief Commissioner or the Commissioner, as the case may be, before the Assessing Officer assumes jurisdiction. Satisfaction independent of the reasons recorded by the Assessing Officer is not envisaged. This clearly indicates that foundation of initiating the proceedings is the reason to the belief held by the Assessing Officer. Reasons for holding such belief are to be recorded in writing by the Assessing Officer. The satisfaction of the Deputy Commissioner or the Commissioner, as the

case may be, has to be only about the fitness of the case to be subject to proceeding by reassessment under section 148 only on the basis of the reasons recorded by the Assessing Officer.

Similarly, in the case of *CIT v. Shiv Rattan Soni [2008] 217 CTR 222 (Rajasthan)* the Hon'ble High Court observed that If the Reasons recorded before initiating proceeding under s. 148 it need record to find some material which could be related by Court to satisfaction of AO, do not satisfy the test of an honest belief or satisfaction reached by AO about escapement of the income before issuance of notice. It remains an action more on suspicion. Law requires where AO has reason to believe and does not rest at his reason to suspect that income of the assessee has escaped assessment. Such a stand cannot be supported on specious plea that one can make a search or enquiry into any material on record which is relevant for the assessment year for holding the belief whether income for particular assessment year has escaped assessment. If that were so, legislature would not have provided an important safeguard against unnecessary harassment that reasons for such belief must be recorded before issuance of notice, and the existence of such satisfaction has to be supported within the parameter of reasons and not outside. One does not have to remember the contents of material that have gone into consideration but material that has gone into consideration must have specific reference so that check on *ultra vires* exercise of powers can be effectively exercised through judicial review.

The Appellant submits that re-assessment proceedings cannot be initiated to make a protective assessment. It is a fact that the addition made in the hands of the Appellant of Rs. 4,15,32,446/- is made on a protective basis. A belief that Income has escaped assessment is the sin qua non for the initiation of proceedings u/s 147. A protective assessment is made when the department has a doubt to the person who is or will be deemed to be the receipt of the Income. Belief by itself is 'absence' of doubt. A belief that Income has escaped assessment

is the antithesis of having a doubt as to the person to who the impugned income belongs to. By no stretch of imagination can the two said to be congruous to any degree. This proposition of the Appellant finds favour in the Judgement of the Hon'ble Bombay High Court in the case of ***DHLF Venture Capital Fund v. ITO [2013] 358 ITR 471 (Bombay)*** which elucidated that "A protective assessment … is regarded as being protective because it is an assessment which is made *ex abundant cautela* where the department has a "doubt as to the person who is or will be deemed to be in receipt of the income". A departmental practice, which has gained judicial recognition, has emerged where it appears to the Assessing Officer that income has been received during the relevant Assessment Year, but where it is not clear or unambiguous as to who has received the income. Such a protective assessment is carried out in order to ensure that income may not escape taxation altogether particularly in cases where the Revenue has to be protected against the bar of limitation. But equally while a protective assessment is permissible a protective recovery is not allowed. However, such an exercise which is permissible in the case of a regular assessment must necessarily yield to the discipline of the statute where recourse is sought to be taken to the provisions of Section 148. Protective assessments have emerged as a matter of departmental practice which has found judicial recognition. Any practice has to necessarily yield to the rigour of a statutory provision. Hence, when recourse is sought to be taken to the provisions of Section 148, there has, necessarily to be the fulfilment of the jurisdictional requirement that the Assessing Officer must have reason to believe that income has escaped assessment. To accept the contention of the Revenue in the present case would be to allow a reopening of an assessment under Section 148 on the ground that the Assessing Officer is of the opinion that a contingency may arise in future resulting an escapement of income. That would, in our view, be wholly impermissible and would amount to a rewriting of the statutory provision. It further went on to observe that "the entire exercise is only contingent on a future event and a consequence that may ensure

upon the decision of the Tribunal, that again if the Tribunal were to hold against the Revenue. A reopening of an assessment under Section 148 cannot be justified on such a basis. There has to be a reason to believe that income has escaped assessment. 'Has escaped assessment' indicates an event which has taken place. Tax legislation cannot be rewritten by the Revenue or the Court by substituting the words 'may escape assessment' in future. Writing legislation is a constitutional function entrusted to the legislature."

The Appellant submits that by making a protective assessment, the Assessing officer has demonstrated that there exists a doubt about the taxability of said amount in the hands of the Appellant. This doubt manifests itself in para 20. Where the Assessing officer has discussed that the papers were found in the possession of Shri Madan Mohan Gupta and it was the primary onus of Shri Madan Mohan Gupta to explain the same. Therefore, an addition of Rs. 4,15,32,446 /- has been made in the hands of Shri Gupta and a protective addition to safeguard the interest of the revenue has been made in the hands of the Appellant which by itself has no nexus for the reasons furnished for reopening of the assessment. Hence, no actual addition has been made on the reason for which the assessment itself was reopened on basis of as the addition is made only to safeguard the interest of the revenue. The Hon'ble Bombay High Court in *CIT v. Jet Airways (I) Ltd. [2011] 331 ITR 236 (Bombay)* held that if the Assessing officer does not assess the income for which reasons were recorded u/s 147 for reopening of assessment, he cannot assess any other Income u/s 147.This ratio of the Hon'ble Bombay High Court is based upon the ratio of the Hon'ble Jurisdictional High Court in the case of *CIT v. Shri Ram Singh [2008] 306 ITR 343*.

The Ld. CIT (A) after considering above submissions and also on relying on the judgement of jurisdiction High Court in case of *Dhadda Exports Vs. I.T.O. (2015) 58 Taxmann.com 176 (Raj.)* (P. B. Page 136-140). Held the proceedings initiated by A.O. u/s 147 as unsustainable in law which is correct in law. The assessee HUF

also relies on the recent judgement of Hon'ble Bench in case of *Navrattan Kothari Vs. ACIT (ITA No. 425/JP/2017)* order dated 13-12-2017 wherein exactly same facts were involved and after considering the various judicial pronouncements on the issue held the issue of notice u/s 147 without jurisdiction. The assessee relies on the said judgement also. Copy of which is placed on P.B. Page 141-184). The issue is also covered from the said judgement of Hon'ble Bench.

In light of the above submissions and the facts that share purchase transaction was duly disclosed in the balance sheet filed during the course of assessment proceedings and accordingly there was no failure on the part of the assessee to disclose fully and truly all material facts. The Appellant submits that the reassessment proceedings had no legs to stand upon and were bad in law.

The ld AR of the assessee has also filed a supplementary written submissions regarding ground No. 1 of the appeal, wherein he has submitted as under:

a) No failure on the part of assessee to disclose fully and truly all material facts necessary for assessment.

As already submitted that earlier the assessment was completed u/s 143 (3) at the total income of Rs. 5,66,74,000/- on 09-10-2009. The Ld. A.O. sought to reopen the said assessment completed u/s 143 (3) by issue of notice u/s 148.

In this connection we would like to bring your kind attention to first proviso of Section 147, reproduced hereunder:

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 escape4d 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 <u>to disclose fully and truly all material facts necessary for his assessment for that assessment year.</u>

It is submitted that proceeding under section 147 r.w.s. 148 can be initiated if two conditions are satisfied, namely (1) the assessing officer must have reason to believe that income chargeable to tax has escaped assessment and: (2) he must have reason to believe that such income has escaped assessment *by reason of omission or failure on the part of the assessee to disclose fully and truly material facts necessary for his assessment,* for that assessment year. Both the condition should be *cumulatively satisfied* to confer jurisdiction to assessing officer to initiate the assessment proceeding.

Comparing the above said conditions for reopening the assessment vis-à-vis the assessee's it may be mentioned that :

b) There is no failure on the part of the assessee company to disclose fully and truly all material facts necessary for his assessment, for that assessment year.

The assessment cannot be reopened merely because subsequently the Assessing Officer changes his opinion or some other officer takes a different view. A decision is right or wrong is none of the concern of the subsequent officer. (refer *Sita World Travel (India) Ltd. Vs. CIT (2005) 274 ITR 186)*. The Hon'ble Supreme Court in case of *Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)* held that the *concept of "change of opinion" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income-tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of*

power. In a recent judgement by full Bench of Delhi High Court in case of *CIT Vs. Usha International Ltd. (2012) 348 ITR 485* the court held that the expression 'change of opinion' postulates formation of opinion and then a change thereof. In the context of section 147 it implies that the Assessing Officer should have formed an opinion at the first instance, i.e. in the proceedings under section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view. The same view were held by Delhi High Court in CIT Vs. Eicher Ltd. (2007) 297 ITR 310 (Del). In a recent judgment the Hon'ble Gujarat High Court has adjudicated on similar facts in the case of M/s Ganesh Housing Corporation Ltd. Vs. DCIT (2013) 350 ITR 131 (Guj.)

In the reasons recorded by Ld. A.O. there is no whisper that "due to failure on the part of assessee to disclose fully and truly all material facts necessary for assessment" the income has escaped assessment and, therefore the notice issued u/s 148 is wrong and bad in law and Ld. A.O. CIT (A) has rightly quashed the reopening of assessment.

c) Further reassessment pursuant to material found in search can be done through recourse to section 153C only and not by invoking provisions of section 147/148. The provisions of section 153C are over-riding in nature and contain *non obstante* clause for sections 139, 147, 148, 149, 151 and 153.

It is submitted that Section 147 and 153C are not interchangeable but are mutually exclusive sections. It is not the choice of the revenue to invoke either of the two sections at its whims. The scope of the two sections have been legislated differently with a definite purpose.

Reliance is placed on the following judicial pronouncements, the relevant extracts of which have been set out hereunder for the sake of ready reference:-

Arun Kumar Kapoor [2011] 140 TTJ 249 (Amritsar)

"Head Notes :Section 153C, read with section 148, of the Income-tax Act, 1961 – Search and seizure – Assessment of income of any other person – Assessment year 2006-07 – A search was conducted under section 132 in case of 'T' Ltd., during course of which certain incriminating documents were allegedly seized – Deputy Commissioner intimated Assessing officer of assessee about seizure of certain documents pertaining to assessee during search and enclosed copy of those documents requesting him to take appropriate action under section 153C/148 – Thereupon, Assessing officer having initiated reassessment proceedings under section 148, passed an assessment order – Assessee took an additional ground of appeal to effect that reassessment proceedings initiated by Assessing officer under section 148 were illegal and void ab-initio – Commisioner (Appeals) held that Assessing officer should have issued notice under section 153C and should have framed assessment under section 153C, read with section 153A – He further held that since Assessing officer had not followed procedure laid down under section 153C, notice issued under section 148 and reassessment proceedings became illegal and void ab –initio Whether on facts, Commissioner (Appeals) was justified in setting aside reassessment proceedings – Held yes [in favour of assessee].

G. Koteswara Rao [2015] 64 taxmann.com 159 (Visakhapatnam – Trib.)

"….Considering the facts and circumstances of the case and also applying the ratios of the above mentioned decisions, we are of the considered opinion that the Assessing officer, has no jurisdiction to issue notice u/s 148 of the Act to reopen the assessments in respect of those six assessment years immediately preceding the assessment year in which search is conducted or requisition is made. The period under consideration falls within the exclusive domain of section 153A. In the instant case, since the assessment is made consequent to search in another case, the Assessing officer is bound to issue notice u/s 153C and thereafter proceed to assess or reassess total income under section 153A of the Act. The Assessing officer, instead of complying with the provisions of section 153C, proceeded with the reassessment under section 147/148 which is not applicable to search cases. Therefore, the impugned assessment order passed u/s 143 (3), r.w.s. 147 of the Income Tax Act, 1961 is illegal, arbitrary and without any jurisdiction. Hence, the assessment order dated 31-12-2010 passed u/s 143 (3) r.w.s. 147 is quashed…."

Rajat Shubra Chatterji, ITA No. 2430/Del/2015, ITAT Delhi Bench

"…. On having gone through the decisions cited above especially the decision of Amritsar Bench in the case of I.T.O. Vs. Arun Kumar Kapoor (supra), we find that in that case as in the present case before us,

reassessment was initiated on the basis of incriminating material found in search of third party and the validity of the same was challenged by the assessee before the Learned CIT (Appeals) and the Learned CIT (Appeals) vitiated the proceedings. The same was questioned by the Revenue before the ITAT and the ITAT after discussing the cases of the parties and the relevant provisions in details has come to the conclusion that in the above situation, provisions of sec. 153C were applicable which excludes the application of sections 147 and 148 of the Act. The ITAT held the notice issued under sec. 148 and proceedings under sec. 147 as illegal and void ab intio. It was held that Assessing officer having not followed procedure under sec. 153C, reassessment order was rightly quashed by the Learned CIT (Appeals). In the present case before us, it is an admitted fact, as also evident from the reasons recorded and the assessment order that the initiation of reopening proceedings was made by the Assessing officer on the basis of information received from the Directorate of Income-tax (Inv.) on the basis of search & seizure operation conducted at the premises of Rock Land Group of Cases and the documents related to the assessee found during the course of search were made available to the Assessing officer of the present assessee. We thus respectfully following the decision of Co-ordinate Bench of the ITAT in the case of ACIT vs. Arun Kapur – 140 TTJ 249 (Amritsar) hold that provisions of sec. 153C of the Act were applicable in the present case for framing the assessment, if any, which excludes the application of sec. 147 of the Act, hence, notice issued under sec. 148 of the Act and assessment framed in furtherance thereto under sec. 147 read with section 143 (3) of the Act are void ab –initio…."

Further reliance is placed on Ashok Kumar Batawni Talwandi, Kota vs. CIT [D.B. Income Tax Appeal No. 204/2004 dated 10.1.2017 of Hon'ble Rajasthan High Court] hold that authority who is issuing the notice must be aware of the Act and must construe the provision strictly.

The assessee also relies on the recent judgement of Hon'ble Bench in case of *Navrattan Kothari Vs. ACIT (ITA No. 425/JP/2017)* order dated 13-12-2017 wherein exactly on same facts were involved and after considering the various judicial pronouncements on the issue held as under: -

"Therefore, in conjoint reading of provisions of section 153A, 153C and 147/148 of the Act as well as a consistent view taken by this Tribunal in a series of decision cited (supra) we hold that the assessment or reassessment of income of the person other than

search persons based on seized material can be only be made u/s 153C r.w.s. 153A and the provisions of section 147/148 of the Act are not applicable in such cases. No contrary decision has been brought to our notice. Accordingly, we hold that initiation of proceedings u/s 147/148 by the A.O. to reassess the income is illegal being without jurisdiction and consequently the reassessment order passed u/s 147 r.w.s. 143 (3) is also illegal and void ab initio and is liable to be quashed."

Thus the issue of notice u/s 148 and consequent reassessment are illegal and *void ab initio* and Ld. CIT (A) has rightly quashed the reassessment proceedings u/s 148.

7. We have heard the rival contentions of both the parties and perused the material available on the record. The assessee HUF filed original return of income on 27/10/2007 declaring total income of Rs. 5,66,74,000/-. The assessment was completed U/s 143(3) of the Act at the returned income on 09/10/2009. Subsequently, a search and seizure operation U/s 132 of the Act was conducted in the case of Shri Rajendra Jain group and his associates members on 23/3/2013. During the course of search and seizure action, statement of Shri Madan Mohan Gupta was recorded. Who had explained the various documents found and seized during the search operation. Consequently, the Assessing Officer proposed to reopen the assessment of the assessee to assessee own money payment for purchase of land at village Chainpura, behind the Entertainment Paradise (EP). The Assessing Officer accordingly issued a

notice U/s 148 of the Act dated 21/3/2014 by recording the reasons for reopening the assessment as under:

"A search & seizure operation was carried out at the residential premise of Shri Madan Mohan Gupta at Vrindavan, Diggi Road, Sanganer Road, Jaipur and also survey proceedings were carried out at the Business premise of Shri Madan Mohan Gupta at A30 Sarswati colony, Sanganer, Jaipur whereby certain incriminating documents were found and seized/ impounded.

During the course of statements, Shri Madan Mohan Gupta submitted that a transaction of land at village Chainpura behind E.P. was carried out in which the said land was purchased by Shri Rajendra Kumar Jain through Shri Madan Mohan Gupta. The deal was finalized at Rs. 12,43,27,000/- out of which discount of 1% was allowed for early registration of land. Therefore Rs. 12,30,84,000/- was net payable to the sellers. This land was purchased during the A.Y. 2006-07 and sold to K.G. Kothari, Prithviraj Road, C-Scheme, Jaipur and Shri Vimal Chand Surana in the month of March, 2007. This sale transaction was finalized for Rs. 20,83,39,232/-.

In the light of statements of Shri Madan Mohan Gupta, statement of Shri Vimal Chand Surana were recorded on oath on 16.08.2013. Shri Vimal Chand Surana had submitted that he did not purchase any land from Shri Madan Mohan Gupta nor any payment was made to Shri Madan Mohan Gupta. However, Shri Vimal Chand Surana accepted that he had purchased 1334 Equity Shares of M/s Shri Kalyan Builmart Pvt. Ltd. in the name of his HUF out of which 667 Equity Shares were purchased from Shri Madan Mohan Gupta and 667 Equity Shares from Smt. Shashikala Gupta w/o Shri Madan Mohan Gupta. In this company, land near E.P. is an asset. These Equity Shares were purchased during March, 2007 and Rs. 67,700/- were paid to Shri Madan Mohan Gupta on 23.06.2007

and Rs. 67,700/- were paid to Smt. Shashikala Gupta on 19.04.2007, on account of sale consideration of these shares.

From the above it is clear that land behind E.P. was purchased in the guise of sale of shares of Shri Kalyan Builmart Pvt. Ltd., in which Vimal Chand Surana HUF has 20% shareholding.

Since, the share of land in Vimal Chand Surana HUF is 20%, his share in sale comes out to be 41667846/-. Hence, on the basis of above I have reason to believe that income of Rs. 41532446/- [41667846-135499/-] has escaped assessment. Since it is failure on the part of the assessee to disclose his true income, hence permission for taking action U/s 147 may kindly be accorded in the case of Vimal Chand Surana HUF for the A.Y. 2007-08, the case has already been completed U/s 143(3) of the I.T. Act, 1961."

Thus, the Assessing Officer has proceeded on the premises that the assessee alongwith Shri K.G. Kothari and Shri Vimal Chand Surana (Individual) had invested the money in purchase of land in the name of M/s Shri Kalyan Builmart Pvt. Ltd. The Assessing Officer in the reassessment has assessed the income of Rs. 4,15,32,446/- on protective basis as the substantive addition was made in the hands of Shri Madan Mohan Gupta. There is no dispute that the Assessing Officer proposed to reassess the income on account of transaction of purchase of land. However, the said land was purchased by M/s Shri Kalyan Builmart Pvt. Ltd. on 24/08/2006. Thereafter the assessee alongwith Shri Navratan Kothari and Shri Vimal Chand Surana (Individual) purchased the shares

of M/s Shri Kalyan Builmart Pvt. Ltd. from Shri Madan Mohan Gupta and his wife Smt. Shashi Kala Gupta. It is evident from the record that the assessee has duly declared the transaction of purchase of shares of M/s Shri Kalyan Builmart Pvt. Ltd. in its books of account and also in the return of income originally filed on which the assessment was completed U/s 143(3) of the Act on 09/10/2009. Therefore, the reopening of the assessment to assessee the consideration allegedly paid by the assessee for purchase of land is contrary to the record and actual facts of transaction of purchase of the land in question in the name of M/s Shri Kalyan Builmart Pvt. Ltd. and not in the name of assessee. Further, it is also not in dispute that Shri Madan Mohan Gupta and his wife Smt. Shashi Kala Gupta were the promoters and share holders of M/s Shri Kalyan Builmart Pvt. Ltd. prior to the purchase of shares by the assessee, the Assessing Officer has not brought on record any material to show that M/s Shri Kalyan Builmart Pvt. Ltd. has any connection with the assessee. We further note that an identical issue of reopening of the assessment in the case of Shri Navrattan Kothari Vs. AciT in ITA No. 425/JP/2017 has been considered and decided by this Tribunal vide order dated 13/12/2017 in paragraphs No. 6 and 7, which is reproduced as under:

6. We have considered the rival submissions as well as relevant material on record. The matter revolves around the transaction of purchase and sale of land situated at Village Chainpura, Tehsil Sanganer (behind of Entertainment Paradise) Jaipur. The said land was purchased by M/s Shri Kalyan Buildmart Pvt. Ltd. on 24.08.2006. Thereafter the assessee purchased 8,000 shares M/s Shri Kalyan Buildmart Pvt. Ltd. from Shri Madan Mohan Gupta and his wife Smt. Shashi Kala Gupta. There is no dispute that this transfer of purchase of shares of M/s Shri Kalyan Buildmart Pvt. Ltd. was dully reflected in the books of accounts as on 31.03.2008 and also brought before the Assessing Officer in the course of initiation assessment completed u/s 143(3) r.w.s. 153A on 31.03.2013. Thereafter the AO proposed to reopen the assessment to assess the consideration paid by the assessee for alleged purchase of land by issuing notice u/s 148 on 25.03.2014. The AO recorded the reasons for reopening of the assessment as reproduce at page 4 of the assessment order are as under:-

> *"During the course search and seizure operation in the case of Rajendra Jain Group DOS 23-05-2013 and survey proceedings at the business premises of Shri Madan Mohan Gupta, certain incriminating documents were found and seized which were inventories as Exhibit 1 to 5 of Annexure-AS and Exhibit 1 to 8 of Annexure- A. The documents found and seized from the residence and business premise of Shri Madan Mohan Gupta during the course of search proceedings revealed that on various page of Exhibit- 1,2 & 5 of Annexure-A as well as Exhibit-1 of Annexure-As, some date wise amounts have been written in the name of 'KGK'. These transactions noted on page no. 28,43,69 and 73 of Exhibit-1 of Annexure-A total up to Rs. 14,24,12,650/-. The assessee has failed to satisfactorily explain the transactions recorded on this page. I have thus reason to believe that income to the extent of Rs. 14,24,12,650/- has escaped assessment within the meaning of section 147of the I.T. Act, 1961."*

Thus, it is clear that the basis of reopening of the assessment is the seized material found during the course of search and seizure operation in the case of Rajendra Jain Group and the statement of Shri Madan Mohan Gupta recorded u/s 132(4) and 131 of the Act. The Assessing Officer analyzed the

statement and the seized material for his satisfaction as recorded in paras 4 and 5 of the assessment order as under:-

"4. In his statements, recorded during the course of search/post search proceedings, Shri Madan Mohan Gupta submitted that the following pagers of various exhibits are related to land transactions at Chainpura behind Entertain Paradise, Jaipur.

Sr.	*Annexure No. & Exhibit No.*	*Page No.*	*Found/seized from*
1	*Annexure A Exhibit-1*	*15 to 24,27,38,43,44, and 69 to 74*	*Residential premises*
2	*Annexure A Exhibit-2*	*47 and back side of 48, 50 to 54*	*Residential premises*
3	*Annexure A Exhibit-5*	*1 to 77*	*Residential premises*
4	*Annexure AS Exhibit-1*	*1 to 3,7,9,10*	*Office premises*

5. Further in the statements of Shri Madan Mohan Gupta, he submitted that on the above page, details w.r.t. a land transactions at Village chainpura behind entertainment Paradise, Jaipur has been recorded which was purchase by Shri Rajendra Kumar Jain resident of D-25, Lal Bahadur nagar, Jaipur, through him i.e. Shri Madan Mohan Gupta. The deal was finalized at Rs. 12,43,27,000/- out of which discount of Rs. 1% was allowed for registration of land. Therefore, Rs. 13,30,84,000/- were net payable to the seller and the details of the same have been recorded on page No. 15-18 of Exhibit-1 of Annexure-A, found and seized from his residence. Later on this land was sold to Shri K.G. Kothari. Shri Madan Mohan Gupta further submitted that this land was purchased in the name of M/s Kalyan Buildmart Pvt. Ltd. in which he was a director along with hiswife Smt. ShashiKala Gupta. This land was purchased during the year 2006-07 and sold to K G. Kothari, Prithviraj Road, C-Scheme, Jaipur and Shir vimal Chand Surana in the month of March, 2007 and the details of the same have been recorded on page Nos. 27 & 28 of Exhibit of Annexure-A. During the course of statement, Shri Madan Mohan Gupta admitted that the amounts mentioned against dates have been recorded in coded form such as Rs. 1.00 crore have been written as 1=00 and Rs. 50.00 lacs have been written as .50. This sale transactions were finalized for Rs. 20,83,39,232/- and the payments to the sellers were made through Shri Rameshwar Prasad Sharma resident of Barkat Nagar, Tonk Phatak, Jaipur. Shri Madan Mohan Gupta further admitted that he got Rs. 8.00 lacs as his reimbursement from this land transaction."

Thus it reveals from the assessment order that after the initial assessment u/s 143(3) r.w.s. 153A the AO got the alleged incriminating material in the shape of diary and transactions recorded therein found and seized in the search and seizure operation in case of Rajendra Jain Group. Accordingly, the AO proceeded to reassess the income of the assessee u/s 147 of the Act. The entire decisions of the AO to reassess the income of the assessee is based on the seized material and statement of Shri Madan Mohan Gupta recorded u/s 132(4) of the Act for which the specific remedy is provided u/s 153C of the Act. For ready reference we quote section 153C as under:-

" **153C.** [79][(1)] [80][Notwithstanding anything contained in section 139, section 147, section 148, section 149, section 151 and section 153, where the Assessing Officer is satisfied that,—

(*a*) any money, bullion, jewellery or other valuable article or thing, seized or requisitioned, [81]belongs to; or

(*b*) any books of account or documents, seized or requisitioned, pertains or pertain to, or any information contained therein, relates to,

a person other than the person referred to in section 153A, then, the books of account or documents or assets, seized or requisitioned shall be handed over to the Assessing Officer having jurisdiction over such other person] [82][and that Assessing Officer shall proceed against each such other person and issue notice and assess or reassess the income of the other person in accordance with the provisions of section 153A, if, that Assessing Officer is satisfied that the books of account or documents or assets seized or requisitioned have a bearing on the determination of the total income of such other person [82a]**[***for six assessment years immediately preceding the assessment year relevant to the previous year in which search is conducted or requisition is made and***]** for the relevant assessment year or years referred to in sub-section (1) of section 153A] :]

[83][**Provided** that in case of such other person, the reference to the date of initiation of the search under section 132 or making of requisition under section 132A in the second proviso to [84][sub-section (1) of] section 153A shall be construed as reference to the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person :]

[85][**Provided further** that the Central Government may by rules[86] made by it and published in the Official Gazette, specify the class or classes of cases in respect of such other person, in which the Assessing Officer shall not be required to issue notice for assessing or reassessing the total income for six assessment years immediately preceding the assessment year relevant to the previous year in which

search is conducted or requisition is made [86a]**[***and for the relevant assessment year or years as referred to in sub-section (1) of section 153A***]** except in cases where any assessment or reassessment has abated.]

[87][(2) Where books of account or documents or assets seized or requisitioned as referred to in sub-section (1) has or have been received by the Assessing Officer having jurisdiction over such other person after the due date for furnishing the return of income for the assessment year relevant to the previous year in which search is conducted under section 132 or requisition is made under section 132A and in respect of such assessment year—

(*a*) no return of income has been furnished by such other person and no notice under sub-section (1) of section 142 has been issued to him, or

(*b*) a return of income has been furnished by such other person but no notice under sub-section (2) of section 143 has been served and limitation of serving the notice under sub-section (2) of section 143 has expired, or

(*c*) assessment or reassessment, if any, has been made,

before the date of receiving the books of account or documents or assets seized or requisitioned by the Assessing Officer having jurisdiction over such other person, such Assessing Officer shall issue the notice and assess or reassess total income of such other person of such assessment year in the manner provided in section 153A."

This section begins with non-obstante clause and therefore, has an overriding effect on the Sections 147&148 of the Act. As per the scheme and object of Section 153C r.w.s 153A the AO has no discretion or choice to invoke the provisions of Section 147/148 instead of section 153C r.w.s. 153A of the Act. Once the case of reassessment is made out by the AO which falls in the preview of specific provisions of section 153C of the Act, the AO cannot resort to invoke the provisions of Section 147/148 of the Act to assessee or reassess income of the assessee. The action of the AO to initiate the proceedings Under section 147/148 of the Act vitiates the entire reassessment proceedings and the assessment order. Once, the AO is satisfied that the documents seized belong to the persons other than the searched person, the Assessing Officer shall proceed against such other persons and issued notice u/s 153C and assessee or reassess income of such other persons in accordance with the provisions of section 153A of the Act.

Therefore, it is mandatory for the AO to proceed u/s 153C if he is satisfied that the seized material reveals the income of such other persons to be assessed or reassessed. The Amritsar Bench of this Tribunal in case of ITO vs. Arum Kumar Kapoor (supra) while deciding an identical issue of validity of initiation of proceedings u/s 147/148 on the basis of seized material has held in paras 7.2 and 8 as under:-

*"**7.2**. The undisputed facts are that a search was conducted under s. 132 of the Act in the case of M/s. Today Homes & Infrastructure (P.) Ltd. on 28th March, 2006, during the course of which certain incriminating documents were allegedly seized. It is also a matter of record that the Dy. CIT, Central Circle-22, New Delhi intimated the AO of the assessee about seizure of certain documents pertaining to the assessee during search and enclosed copy of those documents requesting him to take appropriate action under s. 153C/148 of the Act. It is after that that during the course of appellate proceedings before the CIT(A) the assessee took an additional ground of appeal to the effect that the reassessment proceedings initiated by the AO under s. 148 are illegal and void ab initio. In the instant case, the learned CIT(A) has correctly observed that the AO should have issued notice under s. 153C of the Act and should have framed the assessment under s. 153C r/w s. 153A of the Act. Sec. 153C of the Act reads as under :*

"153C. Notwithstanding anything contained in s. 139, s. 147, s. 148, s. 149, s. 151 and s. 153, where the AO is satisfied that any money, bullion or other valuable article or thing or books of account or documents seized or requisitioned belongs or belong to a person other than the person referred to in s. 153A, then the books of account or documents or assets seized or requisitioned shall be handed over to the AO having jurisdiction over such other person and that AO shall proceed against each such other person and issue such other person notice and assess or reassess income of such other person in accordance with the provisions of s. 153A."

***8.** On a perusal of the above provisions, it would be clear that the provisions of s. 153C of the Act were applicable, which supersedes the applicability of provisions of ss. 147 and 148 of the Act. As we have already noted hereinabove that the documents were seized during the search under s. 132 of the Act and the same were sent to the assessee's AO at Amritsar by the officer at Delhi in our view, the learned CIT(A) has correctly observed that only the provision in which any assessment could be made against the assessee in the IT Act was s. 153C r/w s. 153A of the Act. It is also apparent from the record that the officer at Delhi has mentioned in his letter that the necessary action may be taken as*

per law under s. 153C/148 of the Act. Hence, notice issued under s. 148 of the Act and proceedings under s. 147 of the Act by the AO are illegal and void ab initio. In view of the provisions of s. 153C of the Act, s. 147/148 stands ousted. In the instant case, the procedure laid down under s. 153C has not been followed by the AO and, therefore, assessment has become invalid. We also observe that the CIT(A) was justified in following the ratio laid down by the Hon'ble Supreme Court in the case of Manish Maheshwari v. Asstt. CIT [2007] 289 ITR 341 / 159 Taxman 258 wherein it has been held that if the procedure laid down in s. 158BD is not followed, block assessment proceedings would be illegal. The CIT(A) has correctly observed that the provisions of s. 153C are exactly similar to the provisions of s. 158BD of the Act in block assessment proceedings. Thus, considering the entire facts and the circumstances of the present case, we hold that the CIT(A) was fully justified in quashing the reassessment order. We also do not find any merit in the submissions of the learned Departmental Representative that during the course of search, it was found at premises of M/s. Today Homes & Infrastructure (P.) Ltd. pertaining to M/s. P.R. Infrastructure Ltd. and not the assessee. In this regard, we may point out that the contention raised by the learned Departmental Representative is factually incorrect and contrary to the available records of seized documents specifically mentioned in the assessment order dt. 30th Dec, 2008. In view of the above factual discussion, we do not find any merit and substance in the contention of the learned Departmental Representative. Therefore, we uphold the order of the CIT(A) and dismiss the ground Nos. 1 to 4 of the appeal."

A similar view was taken by the Visakhapatnam Bench of this Tribunal in case of G. Koteswara Rao vs. DCIT (supra) in para 11 to 17 as under:-

*"**11.** A careful study of section 153A to 153C and also the circular issued by the CBDT explaining the procedure of assessment in search cases, it shows that these are separate provisions independent of other provisions relating to reassessment, because of the non abstante clause begins with the said sections. The language used in these sections, i.e. 'notwithstanding anything contained' in section 139, section 147, section 148, section 149, section 151 and section 153 made it clear that provisions of these sections are not made applicable to the assessments covered by the provisions of section 153A. Prior to the introduction of these three sections, there was a separate chapter XIV -B of the Act, by section 158BC to 158BE which governs the search assessments which is popularly known as Block assessment. The earlier provisions provides for single assessment to be made in respect of undisclosed income of Block period consisting of 10 assessment years immediately preceding the assessment year in which search took place and the broken period of up to the date of search*

was also included in the block period. After the introduction of new sections, i.e. section 153A to 153C, the single block assessment concept was done way with the new scheme of assessment of search cases where the Assessing Officer is to assess or reassess the total income of each of the assessment years falling within the period of six assessment years immediately preceding the assessment year in which the search is conducted. Therefore, under the new scheme, the Assessing Officer is required to exercise the normal assessment powers in respect of the previous year in which the search took place. From these facts, one thing is clearly emerged that both i.e. earlier concept of Block assessment and the new scheme of assessment is separate provisions created for assessment of search cases where the search is conducted u/s 132 or requisition was made u/s 132A of the Act.

12. *Under the provisions of section 147, the Assessing Officer is having power to re-open the assessment, if he is of the opinion that the income chargeable to tax has escaped assessment. Before doing so, the Assessing Officer should satisfy himself that, there is material which suggests that there is an escapement of income. The AO can exercise these powers with a reasonable belief coupled with some material which suggest the escapement of income. Once the conditions precedent for assumption of jurisdiction to commence the reassessment proceedings, he has to cross the hurdles attached with reassessment by way reasons for reopening of assessment, time limit for issue of notice and provision for obtaining sanction of higher authority in certain circumstances. Under the provisions of section 153A to 153C these hurdles are cleared by using the non abstante clause in the said section. In other words, under the new provisions of section 153A, the AO is not required to satisfy these conditions before issue of notice. The only requirement is that there should be a search action u/s 132 or books of account, other documents or any other asset are requisitioned under section 132A. Therefore, we are of the opinion that though, the Assessing Officer from both sections empowered to tax the income escaped from tax, both are works in a different situations, i.e. section 147 comes in to operation where there is an escapement of income chargeable to tax and section 153A comes in to operation where there is search u/s 132.*

13. *Under the provisions of section 153A, the Assessing Officer is bound to issue notice to the assessee to furnish the returns of income for each assessment years falling within the six assessment years immediately preceding the assessment year in which search or requisition is made. Another significant feature of this section is that the Assessing Officer is empowered to assess or reassess the total income of the aforesaid period which includes disclosed and undisclosed income. Therefore, the new provisions has given wide powers to the Assessing Officer to assess or reassess the total income of six assessment*

years falling within the period of those six assessment years immediately preceding the assessment year in which search is conducted. Under the new provisions of section 153A, the statute is provides wide powers to the Assessing Officer in respect of assessments already completed u/s 143(1) or 143(3). If such orders is already in existence prior to the initiation of search, the Assessing Officer is empowered to reopen those proceedings and reassess the total income taking note of the undisclosed income, if any, found during the course of search. For this purpose, the restrictions imposed on the Assessing Officer by way of sections 148 to 153 to reopen the assessment u/s 147 has been removed by the non abstante clause used in section 153A.

14. *In the present case on hand, admittedly, the Assessing Officer has reopened the assessment based on a search conducted in a third party case. The AO formed the opinion based on the statement recorded from the assessee, consequent to post search proceedings taken up by the DDIT(Inv), which shows undisclosed income which is the very basis of reopening the assessment. The search is conducted on 22-8-2008 which comes under the assessment year 2009-10. The Assessing Officer reopened the assessment year 2008-09, which is falling within those six assessment years immediately preceding the assessment year in which search is conducted. The assessee case falls within the provisions of section 153C, as the incriminating document seized in the case of search in another case. The Assessing Officer, on satisfying the above condition is under obligation to issue notice to the person requiring him to furnish the return for the six assessment years immediately preceding the assessment year in which search is took place. Thereafter, the Assessing Officer has to assess or reassess the total income of those six assessment years. The word "shall" used in section 153A made it clear that the Assessing Officer has no option, but to issue notice and proceed thereafter to assess or reassess the total income. In the instant case, the Assessing Officer issued notice u/s 148 to reopen the assessment. Therefore, in view of the non-abstante clause begin with section 153A, the Assessing Officer has no jurisdiction to issue notice u/s 148 reopen the assessment of those six assessment year which falls within the exclusive jurisdiction of section 153A. Though, both provisions of the Act empowers the Assessing Officer to assess or reassess the income escaped from assessment, both sections are dealing with different situations. Section 147 comes into operation when, the Assessing Officer believes that there is an escapement of income chargeable to tax, either from the return already filed or through some external material evidence came to his knowledge, which shows the escapement of income. Whereas, section 153A comes into operation when there is search u/s 132 or books of accounts, or any other asset or other documents requisitioned u/s 132A. If Assessing Officer justified in proceeding with section 147 to reopen the assessment, then there would be no relevance to*

section 153A, which was inserted in to the Act to deal exclusively with search cases. The legislators in their wisdom clearly spelt out the provisions of law applicable to search cases by using the word shall to begin with section 153A, made it mandatory that the Assessing Officer bound to issue notice u/s 153A or 153C, thereafter proceed to assess or reassess the total income, where search is conducted u/s 132 or requisition is made u/s 132A. Therefore, in our opinion, the AO is not justified in reopening the assessment u/s 147 and his order is illegal and arbitrary.

15. *A similar issue came up for consideration before the Special Bench of this tribunal and the special bench had an occasion to deal with the interpretation of section 153A of the Act in the case of All Cargo Global Logistics Ltd. v. Dy. CIT [2012] 137 ITD 287/23 taxmann.com 103 (Mum) (SB). The Special Bench after considering the provisions of section 153A and CBDT circular has held as under:*

'52. The provision comes into operation if a search or requisition is initiated after 31.5.2003. On satisfaction of this condition, the AO is under obligation to issue notice to the person requiring him to furnish the return of income of six years immediately preceding the year of search. The word used is "shall" and, thus, there is no option but to issue such a notice. Thereafter he has to assess or reassess total income of these six years. In this respect also, the word used is "shall" and, therefore, the AO has no option but to asses or reassess the total income of these six years. The pending proceedings shall abate. This means that out of six years, if any assessment or reassessment is pending on the date of initiation of the search, it shall abate. In other words pending proceedings will not be proceeded with thereafter. The assessment has now to be made u/s 153A (1)(b) and the first proviso. It also means that only one assessment will be made under the aforesaid provisions as the two proceedings i.e. assessment or reassessment proceedings and proceedings under this provision merged into one. If assessment made under sub-section (1) is annulled in appeal or other legal proceedings, then the abated assessment or reassessment shall revive. This means that the assessment or reassessment, which had abated, shall be made, for which extension of time has been provided under section 153B.

53. The question now is - what is the scope of assessment or reassessment of total income u/s 153A (1) (b) and the first proviso? We are of the view that for answering this question, guidance will have to be sought from section 132(1). If any books of account or other documents relevant to the assessment had not been produced in the course of original assessment and found in the course of search in our humble opinion such books of account or other documents have to be taken into account while making assessment or reassessment of total

income under the aforesaid provision. Similar position will obtain in a case where undisclosed income or undisclosed property has been found as a consequence of search. In other words, harmonious interpretation will produce the following results :-

(a) In so far as pending assessments are concerned, the jurisdiction to make original assessment and assessment u/s 153A merge into one and only one assessment for each assessment year shall be made separately on the basis of the findings of the search and any other material existing or brought on the record of the A.O.

(b) in respect of non-abated assessments, the assessment will be made on the basis of books of account or other documents not produced in the course of original assessment but found in the course of search, and undisclosed income or undisclosed property discovered in the course of search."

58. Thus, question No. 1 before us is answered a) as under

(a) In assessments that are abated, the A.O. retains the original jurisdiction as well as jurisdiction conferred on him under s. 153A for which assessments shall be made for each of the six assessment years separately ;'

***16.** In yet another case, the ITAT Mumbai Bench, in the case of State Bank of India v. Dy CIT [2013] 22 ITR (Trib.) 609, had considered the issue. The Mumbai bench after considering the relevant sections and CBDT circular has held as under:*

"18. A perusal of Section 153A shows that it starts with a non obstante clause relating to normal assessment procedure which is covered by Sections 139, 147, 148, 149, 151 and 153 in respect of searches made after 31.5.2003. These Sections, the applicability of which has been excluded, relate to returns, assessment and reassessment provisions. Prior to, the introduction of these three Sections, there was Chapter XIV- B of the Act which took care of the assessment to be made in cases of search and seizure. Such an assessment was popularly known as block assessment because the Chapter provided for a single assessment to be made in respect of a period of a block of ten assessment years prior to the assessment year in which the search was made. In addition to these ten assessment years, the broken period up to the date on which the search was conducted was also included in what was known as block period. Though a single assessment order was to be passed, the undisclosed income was to be assessed in the different assessment years to which it related. But all this had to be made in a single assessment order. The block assessment so made was independent of and in addition to the normal assessment proceedings as

clarified by the Explanation below Section 158BA(2). After the introduction of the group of Sections namely, 153A to 153C, the single block assessment concept was given a go-by. Under the new Section 153A, in a case where a search is initiated under Section 132 or requisition of books of account, documents or assets is made under Section 132A after 31.5.2003, the Assessing Officer is obliged to issue notices calling upon the searched person to furnish returns for the six assessment years immediately preceding the assessment year relevant to the previous year in which the search was conducted or requisition was made. The other difference is that there is no broken period from the first day of April of the financial year in which the search took place or the requisition was made and ending with the date of search/requisition. Under Section 153A and the new scheme provided for, the AO is required to exercise the normal assessment powers in respect of the previous year in which the search took place.

19. Under the provisions of Section 153A, as we have already noticed, the Assessing Officer is bound to issue notice to the assessee to furnish returns for each assessment year falling within the six assessment years immediately preceding the assessment year relevant to the previous year in which the search or requisition was made. Another significant feature of this Section is that the Assessing Officer is empowered to assess or reassess the "total income' of the aforesaid years. This is a significant departure from the earlier block assessment scheme in which the block assessment roped in only the undisclosed income and the regular assessment proceedings were preserved, resulting in multiple assessments. Under Section 153A, however, the Assessing Officer has been given the power to assess or reassess the total income of the six assessment years in question in separate assessment orders. This means that there can be only one assessment order in respect of each of the six assessment years, in which both the disclosed and the undisclosed income would be brought to tax.

20. A question may arise as to how this is sought to be achieved where an assessment order had already been passed in respect of all or any of those six assessment years, either under Section 143(1)(a) or Section 143(3) of the Act. If such an order is already in existence, having obviously been passed prior to the initiation of the search/requisition, the Assessing Officer is empowered to reopen those proceedings and reassess the total income, taking note of the undisclosed income, if any, unearthed during the search. For this purpose, the fetters imposed upon the Assessing Officer by the strict procedure to assume jurisdiction to reopen the assessment under Sections 147 and 148, have been removed by the non obstante clause with which sub section (1) of Section 153A opens. The time-limit within which the notice under Section 148 can be issued, as provided in Section 149 has also been made inapplicable by the non obstante

clause. Section 151 which requires sanction to be obtained by the Assessing Officer by issue of notice to reopen the assessment under Section 148 has also been excluded in a case covered by Section 153A. The time-limit prescribed for completion of an assessment or reassessment by Section 153 has also been done away with in a case covered by Section 153A. With all the stops having been pulled out, the Assessing Officer under Section 153A has been entrusted with the duty of bringing to tax the total income of an assessee whose case is covered by Section 153A, by even making reassessments without any fetters, if need be.

21. Now there can be cases where at the time when the search is initiated or requisition is made, the assessment or reassessment proceedings relating to any assessment year falling within the period of the six assessment years mentioned above, may be pending. In such a case, the second proviso to sub section (1) of Section 153A says that such proceedings "shall abate'. The reason is not far to seek. Under Section 153A, there is no room for multiple assessment orders in respect of any of the 'six assessment years under consideration. That is because the Assessing Officer has to determine not merely the undisclosed income of the assessee, but also the total income of the assessee in whose case a search or requisition has been initiated. Obviously there cannot be several orders for the same assessment year determining the total income of the assessee. In order to ensure this state of affairs namely, that in respect of the six assessment years preceding the assessment year relevant to the year in which the search took place there is only one determination of the total income, it has been provided in the second proviso of sub Section (1) of Section 153A that any proceedings for assessment or reassessment of the assessee which are pending on the date of initiation of the search or making requisition "shall abate". Once those proceedings abate, the decks are cleared, for the Assessing Officer to pass assessment orders for each of those six years determining the total income of the assessee which would include both the income declared in the returns, if any, furnished by the assessee as well as the undisclosed income, if any, unearthed during the search or requisition. The position thus emerging is that where assessment or reassessment proceedings are pending completion when the search is initiated or requisition is made, they will abate making way for the Assessing Officer to determine the total income of the assessee in which the undisclosed income would also be included, but in cases where the assessment or reassessment proceedings have already been completed and assessment orders have been passed determining the assessee s total income and such orders are subsisting at the time when the search or the requisition is made, there is no question of any abatement since no proceedings are pending. In this latter situation, the Assessing Officer will reopen the assessments or reassessments already made (without having the need to follow the strict

provisions or complying with the strict conditions of Sections 147, 148 and 151) and determine the total income of the assessee. Such determination in the orders passed under Section 153A would be similar to the orders passed in any reassessment, where the total income determined in the original assessment order and the income that escaped assessment are clubbed together and assessed as the total income. In such a case, to reiterate, there is no question of any abatement of the earlier proceedings for the simple reason that no proceedings for assessment or reassessment were pending since they had already culminated in assessment or reassessment orders when the search was initiated or the requisition was made.

20. Applying the ratio of the above decisions to the facts of the present case, we find that there is no dispute that the original assessment for the A.Y. 2001-02 was completed u/s 143(3) on 13-2-2004 determining the total income at Rs. 26354942360/-. Thereafter, a search and seizure action was initiated in assessee's case by the Department on 2-7-2005 on which date the assessment for the A.Y. 2001-02 was not pending. Therefore, in view of the non- obstinate clause with which sub section (1) of section 153A opens, the A.O. has no jurisdiction to issue notice u/s 148 of the Act in respect of those six assessment years which falls within the exclusive jurisdiction of section 153A of the Act and accordingly the A.O. was not justified in issuing notice u/s 148 on 28-8-2006 and in completing the impugned assessment u/s 143(3) r.w.s. 147 of the Act on 31-10-2006. The A.O. instead of complying with the requirement of section 153A proceeded with the provisions of section 147/148 which are not applicable in the assessment u/s 153 A of the Act, therefore, the impugned assessment completed u/s 143(3) r.w.s. 147 of the Act is a nullity and as such the assessment order dtd. 31-10-2006 passed u/s 143(3) r.w.s. 147 of the Act is illegal, arbitrary, wholly without jurisdiction and, hence, the same is quashed."

17. *Considering the facts and circumstances of the case and also applying the ratios of the above mentioned decisions, we are of the considered opinion that the Assessing Officer, has no jurisdiction to issue notice u/s 148 of the Act to reopen the assessments in respect of those six assessment years immediately preceding the assessment year in which search is conducted or requisition is made. The period under consideration falls within the exclusive domain of section 153A. In the instant case, since the assessment is made consequent to search in another case, the Assessing Officer is bound to issue notice u/s 153C and thereafter proceed to assess or reassess total income under section 153A of the Act. The Assessing Officer, instead of complying with the provisions of section 153C, proceeded with the reassessment under section 147/148 which is not applicable to search cases. Therefore, the impugned assessment order passed u/s 143(3), r.w.s. 147 of the Income tax Act, 1961 is illegal, arbitrary and*

without any jurisdiction. Hence, the assessment order dated 31-12-2010 passed u/s 143(3) r.w.s. 147 is quashed."

Thus, it is clear that the Tribunal has taken a consistent view on this issue and further the Delhi Benches of this Tribunal in case of Rajat Shubra Chatterji vs. ACIT (supra) has held in para 7 as under:-

"*7. On having gone through the decisions cited above especially the decision of Amritsar Bench in the case of ITO vs. Arun Kumar Kapoor (supra), we find that in that case as in the present case before us, reassessment was initiated on the basis of incriminating material found in search of third party and the validity of the same was challenged by the assessee before the Learned CIT(Appeals) and the Learned CIT(Appeals) vitiated the proceedings. The same was questioned by the Revenue before the ITAT and the ITAT after discussing the cases of the parties and the relevant provisions in details has come to the conclusion that in the above situation, provisions of sec. 153C were applicable which excludes the application of sections 147 and 148 of the Act. The ITAT held the notice issued under sec. 148 and proceedings under sec. 147 as illegal and void ab initio. It was held that Assessing Officer having not followed procedure under sec. 153C, reassessment order was rightly quashed by the Learned CIT(Appeals). In the present case before us, it is an admitted fact, as also evident from the reasons recorded and the assessment order that the initiation of reopening proceedings was made by the Assessing Officer on the basis of information received from the Directorate of Income-tax (Inv.) on the basis of search & seizure operation conducted at the premises of Rock Land Group of Cases and the documents related to the assessee found during the course of search were made available to the Assessing Officer of the present assessee. We thus respectfully following the decision of Co-ordinate Bench of the ITAT in the case of ACIT vs. Arun Kapur – 140 TTJ 249 (Amritsar) hold that provisions of sec. 153C of the Act were applicable in the present case for framing the assessment, if any, which excludes the application of sec. 147 of the Act, hence, notice issued under sec. 148 of the Act and assessment framed in furtherance thereto under sec. 147 read with section 143(3) of the Act are void ab initio. The reassessment in question is accordingly quashed. The ground No.1 is accordingly allowed."*

Therefore, in conjoint reading of provisions of section 153A, 153C and 147/148 of the Act as well as a consistent view taken by this Tribunal in a series of decision cited (supra) we hold that the assessment or reassessment of income of the person other than search persons based on seized material can be only be made u/s 153C r.w.s. 153A and the provisions of section 147/148 of the Act

are not applicable in such cases. No contrary decision has been brought to our notice. Accordingly, we hold that initiation of proceedings u/s 147/148 by the AO to reassess the income is illegal being without jurisdiction and consequently the reassessment order passed u/s 147 r.w.s. 143(3) is also illegal and void abinitio and is liable to be quashed.

7. As regards the second objection of the assessee against the reopening of the assessment u/s 148 we find that undisputedly the notice u/s 148 issued on 25.03.2014 is after the expiry of 4 years from the end of the assessment year under consideration. The initial assessment was framed by the Assessing Officer u/s 143(3) r.w.s. 153A and therefore, the proviso to section 147 comes to play and the Assessing Officer cannot reopen the assessment except when there is failure on the part of the assessee to disclose fully and truly all the facts necessary for the assessment. The reasons recorded by the AO has been reproduced by us in the foregoing part of this order and it is clear that the AO has not stated in the reasons that the assessee failed to disclose fully and truly all the facts necessary for the assessment. The AO while completing the initial assessment on 31.03.2013 Under section 143(3) r.w.s. 153A accepted the transaction of purchase of 8000 shares of M/s Kalyan Buildmart Pvt. Ltd. from Shri Madan Mohan Gupta and his wife Smt. Shashi kala Gupta. When the transaction of purchase of shares was disclosed by the assessee and accepted by the AO in the post search assessment framed u/s 153A then even if the purchase consideration is subsequently found to be incorrect or under stated it does not give jurisdiction to AO to resort to the provisions of section 147/148 of the Act after expiry of 4 years from the end of the assessment year. Further, reassessment proceedings were initiated by the AO on the premise that the assessee has not disclosed the purchase consider of the alleged land, however, it is pertinent to note that the assessee did not purchase any land as it remained with M/s Shri Kalyan Buildmart Pvt. Ltd. and there is no change of the ownership of the

said land as belong to M/s Kalyan Buildmart Pvt. Ltd. We find that there is no transaction of sale and purchase of land in question between the assessee and Shri Madan Mohan Gupta. What was transferred by Shri Madan Mohan Gupta and his wife Smt. Shashi Kala Gupta were the shares of M/s Kalyan Buildmart Pvt. Ltd. which owned the land in question. There may be a case of under valuation of shares and understatement of consideration paid by the assessee however, it is not a case of purchase of land. The purchase consideration of shares was accepted by the AO while completing the assessment u/s 143(3) r.w.s. 153A and therefore, the AO is precluded to reassess the income on the basis of non existing transaction of purchase of land. Further, the AO himself was not sure about the escapement of income and assess the income in the hands of the assessee only on protective basis. The very basis of invoking the provisions of section 147/148 is contrary to the facts and record that it was a transaction of purchase of shares of M/s Kalyan Buildmart Pvt. Ltd. and not purchase of land owned by the said company. Even if the purchase consideration of share is under stated the reasons for reopening do not state so and therefore, the reopening on the basis of non existing transaction is not permitted. Once, the transaction of purchase of shares was revealed during the assessment u/s 143(3) r.w.s. 153A and the same was considered and accepted by the AO then the AO is not permitted to reopen the assessment to review its order as it would amount to change of opinion. The Hon'ble Madras High court in case of CIT vs. Remedies Ltd. (Supra) has held in paras 10 to 12 as under:-

> *"10. We find from the order of the Tribunal and also on the facts as has been culled out from the assessment order in question that there is no element of failure to disclose fully and truly all material facts necessary for assessment. Therefore, there was no justification for the department for invocation of proceeding under Section 147 r/w 148 of the Income Tax Act.*
>
> *11. Our stand is further fortified by the decision of this Court in TCA No.217/2015 dated 2.6.2015, wherein in a similar matter, this Court has held as under :—*

'16. Our view is fortified by the decision of the Full Bench of the Delhi High Court in the case of Commissioner of Income-tax v. Kelvinator of India Ltd. reported in [2002] 256 ITR 1 (Del), wherein, the Delhi High Court held as follows:

"We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the Income-tax Officer, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself.

We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding with out anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

17. The above said decision of the Full Bench of the Delhi High Court was upheld by the Supreme Court in the decision reported in Commissioner of Income-tax v. Kelvinator of India Ltd [2010] 320 ITR 561 (SC)., wherein the Supreme Court held that the concept of "change of opinion" on the part of the Assessing Officer to reopen the assessment did not stand obliterated after the substitution of Section 147 of the Income Tax Act. The Supreme Court also held that the Assessing Officer has power to reopen the assessment, provided there is "tangible material" to come to a conclusion that there was an escapement of income from assessment. For better appreciation, the relevant portion of the said decision reads as follows:

"6. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act (with effect from 1st April, 1989),

they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1st April, 1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review ; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No. 549 dated October 31, 1989 ([1990] 182 ITR (St.) 1,29), which reads as follows :

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in section 147.—A number of representations were received against the omission of the words 'reason to believe' from section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new section 147, however, remain the same." (emphasis supplied)

18. Similar view has been taken by this Court in the decision reported in Commissioner of Income-tax v. Cholamandalam Investment and Finance Co. Ltd. [2009] 309 ITR 110 , wherein it was held as follows:

"In those circumstances, it could not be regarded that the assessee had failed to disclose fully and truly all material facts relevant for the assessment. As the facts revealed that the Assessing Officer who made the original assessment order has called for all the details regarding the case where 100 per cent. depreciation were claimed and the assessee had furnished the invoices for purchase of assets on which 100 per cent. depreciation were claimed, there was no failure on the part of the assessee and if at all there was any failure, according to the Commissioner of Income-tax (Appeals), it was on the part of the Assessing Officer, who made the original assessment without going behind the nature of the transactions accepting the details furnished by the assessee. The Tribunal also extracted that portion of the order and found on the fact that there was no fault on the part of the assessee so as to enable the Department to reopen the assessment as the proviso to section 147 of the Income-tax Act would squarely apply to the case of the assessee. We find no infirmity in the order passed by the Tribunal. Hence, the appeal is dismissed."

19. In an identical circumstances, a learned single Judge of this Court considered the issue in the decision reported in Fenner (India) Ltd. v. Deputy Commissioner of Income-Tax [2000] 241 ITR 672 (Mad), wherein, it was observed as follows:

"The pre-condition for the exercise of the power under section 147 in cases where power is exercised within a period of four years from the end of the relevant assessment year is the belief reasonably entertained by the Assessing Officer that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of four years from the end of the assessment year, a further pre-condition for such exercise is imposed by the proviso namely, that there has been a failure on the part of the assessee to make a return under section 139 or in response to a notice issued under section 142 or section 148 or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding under section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. The relevant words in the proviso are,

". . . . unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee ... . ."

Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment. Whenever a notice is issued by the Assessing Officer beyond a period of four years from the end of the relevant assessment year, such notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose the material facts. The reasons referred to in the main paragraph of section 147 would, in cases where the proviso is attracted, include reasons referred to in the proviso and it is necessary for the Assessing Officer to record that any one or all the circumstances referred to in the proviso existed before the issue of notice under section 147....

. . . . . .

The duty of an assessee is limited to fully and truly disclosing all the material facts. The assessee is not required thereafter to prepare a draft assessment order. If the details placed by the assessee before the Assessing Officer were in conformity with the requirements of all applicable laws and known accounting principles, and material details had been exhibited before the Assessing Officer, it is for the Assessing Officer to reach such conclusions as he considered was warranted from such data and any failure on his part to do so cannot be regarded as the assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the Assessing Officer in understanding the details placed before him cannot confer a justification for reopening the assessment, long after the period of four years had expired. On the facts of this case, it is clear that the escapement of income, if any, on this account is not on account of any failure on the assessee's part to disclose the material facts fully and truly. The notice issued by the Assessing Officer in exercise of his power under section 147, therefore, cannot be sustained.

As the error here is one of jurisdiction it is not necessary for the assessee to have recourse to the remedies by way of appeal, revision, etc. It is well settled that when a jurisdictional error is brought to the notice of this court such errors are capable of being corrected by this court in exercise of the court's powers under article 226 of the Constitution of India. The Supreme Court in the case of CIT v. Progressive Engineering [1993] 200 ITR 231 (sic), held that when all the relevant facts were before the court and the law is clear on the subject, it is the duty of the High Court to interfere. That was also a case where the proceedings were sought to be initiated against the assessee under section 147 of the Act.

20. In the case of ICICI Securities Ltd . v. Assistant Commissioner of Income Tax 3(2), Mumbai, the Bombay High Court vide order dated 22.08.2006 in W.P.No.1919 of 2006, while dealing with the issue on the reopening of assessment, held as follows:

"7. In the facts of the present case, there is nothing new which has come to the notice of the revenue. The accounts had been furnished by the Petitioner when called upon.

Thereafter the assessment was completed under section 143(3) of the Income Tax Act. Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analysis. In our view, this is not something which is permissible under the proviso to section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record.

8. In the circumstances, we allow this petition in terms of prayer (a) and quash and set aside the notice dated 27th March 2006 directing reopening of the assessment for the year 1999-2000.

21. The above-said view of the Bombay High Court was affirmed by the Supreme Court in Civil Appeal No.5960 of 2012.'

12. In the light of the above, we hold that when the Assessing Officer had failed to record anywhere his satisfaction or belief that the income chargeable to tax had escaped assessment on account of the failure of the assessee to disclose truly and fully all material facts necessary for assessment. On the contrary, it was the Assessing Officer, who failed to consider the materials placed before him at the time of regular assessment for which the assessee cannot be found fault with. Therefore, the notice issued under Section 147 of the Income Tax Act beyond the period of four years was wholly without jurisdiction and cannot be sustained. Accordingly, for the reasons stated above, the substantial question of law is answered in favour of the respondent/assessee and against the appellant/Revenue."

Thus, when the AO has not recorded in his satisfaction or believe that the income chargeable to tax has escaped assessment on account of failure of the assessee to disclose fully and truly all material facts necessary for assessment then the notice issued u/s 148 beyond the period of 4 years was without jurisdiction and is not sustainable. Hon'ble Bombay High Court in case of Sitara

Diamond (P.) Ltd. vs. DCIT (supra) while considering the validity of notice issue u/s 148 after 4 years has held in para 6 as under:-

> *"**6.** We have considered the rival submissions. By the impugned notice dated 20 June 2011, the assessment for Assessment Year 2005-06 is sought to be reopened beyond a period of four years of the end of the relevant assessment year. The condition precedent to the exercise of the jurisdiction to reopen an assessment beyond a period of four years as spelt out in the proviso to Section 147 is that there ought to be a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment for that assessment year. In the present case, the sole basis on which the assessment proceedings were sought to be reopened is the order which has been passed on 5 July 2011 for Assessment Year 2007-08. In that order, according to the Revenue, it has been held that the assessee acts as a mere facilitator and is not a manufacturer so as to entitle it to the deduction under Section 10A. The issue, however, before the Court, is as to whether that can form the basis of the reopening of the assessment beyond a period of four years. The reasons which have been disclosed by the Assessing Officer do not set out as to what facts the assessee had failed to fully and truly disclose. Even a prima facie reference to the basis on which it is sought to be inferred that there was a failure to disclose all material facts has not been set out in the reasons. In that view of the matter, we are of the view that the primary jurisdictional requirement for reopening the assessment beyond a period of four years has not been fulfilled in this case. Since the order passed by the CIT (Appeals) for Assessment Year 2007-08 has been passed after the assessment for Assessment Year 2005-06 has been sought to be reopened by the notice dated 29 June 2011, we have, for the purposes of this discussion, kept that circumstance out of consideration. We have come to the conclusion that the Assessing Officer having failed to establish that there was a failure on the part of the assessee to disclose fully and truly all material facts for Assessment Year 2005-06, the reopening beyond a period of four years is clearly not valid. There was a finding of fact by the Assessing Officer in the assessment order for Assessment Year 2005-06 that the business activity of the assessee is manufacturing of jewellery in a Special Economic Zone. That finding, as the assessment order notes, was based upon a consideration of the facts of the case and upon examining the contentions of the assessee."*

When the AO has failed to set out in the reasons recorded as to what facts the assessee has failed to disclose fully and truly then the reopening after 4 years is invalid being without jurisdiction. We do not wish to multiply the precedent on this issue though relied upon by the ld. AR of the assessee. Accordingly, in the

facts and circumstances of the case and in view of the various decisions as stated above we hold that the reopening after 4 years from the end of the assessment year is bad in law being without jurisdiction and consequential assessment is invalid, accordingly, the reassessment order is quashed. Since, we have quashed the reassessment order itself, therefore, we do not propose to go into the other grounds raised by the assessee."

The reasons recorded by the Assessing Officer in reopening the assessment of the assessee are identical to that of Shri Navrattan Kothari. Further the Assessing Officer has proceeded in the case of assessee as well as in the case of Shri Navrattan Kothari on the premises that the assessee alongwith two other persons have purchased the land in question by paying on money as found recorded in the seized material, which was explained by Shri Madan Mohan Gupta. However, as per the sale deed, the said land was purchased by M/s Shri Kalyan Builmart Pvt. Ltd. from the owner of the land and therefore, when the purchase transaction was not in the name of the assessee then the Assessing Officer has failed to set out in the reasons recorded as to how the assessee has failed to disclose fully and truly all relevant materials necessary for assessment particularly when the assessee had already disclosed the transaction of shares of M/s Shri Kalyan Builmart Pvt. Ltd. from Shri Madan Mohan Gupta and Smt. Shashi Kala Gupta. Following the earlier order of this Tribunal in the case of Shri Navrattan Kothari Vs.

ACIT (supra), we hold that the reopening of the assessment after four years from the end of the assessment year under consideration is not valid and the same is quashed.

8. Since, we have quashed the validity of the reopening and consequential reassessment order, therefore, we do not propose to go into the other grounds raised by the revenue on the merits of the addition.

9. In the result, the appeal of the revenue stands dismissed.

Order pronounced in the open court on 17/05/2018.

Sd/-	Sd/-
(विजय पाल राव)	(भागचंद)
(VIJAY PAL RAO)	(BHAGCHAND)
न्यायिक सदस्य/Judicial Member	लेखा सदस्य/Accountant Member

जयपुर/Jaipur
दिनांक/Dated:- 17th May, 2018
*Ranjan
आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:

1. अपीलार्थी/The Appellant- The DCIT, Circle-2, Jaipur.
2. प्रत्यर्थी/ The Respondent- Shri Vimal Chand Surana (HUF), Jaipur.
3. आयकर आयुक्त/ The CIT
4. आयकर आयुक्त(अपील)/The CIT(A)
5. विभागीय प्रतिनिधि, आयकर अपीलीय अधिकरण, जयपुर/DR, ITAT, Jaipur
6. गार्ड फाईल/ Guard File (ITA No. 437/JP/2017)

आदेशानुसार/ By order,

सहायक पंजीकार/Asst. Registrar