

IN THE INCOME TAX APPELLATE TRIBUNAL
BANGALORE BENCHES “ C ” BENCH: BANGALORE

**BEFORE SHRI N.V. VASUDEVAN, VICE PRESIDENT
AND SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER**

ITA No.2181 to 2189/Bang/2018
(Assessment Years : 2005-06, 2008-09 to 2015-16)

M/s. Tata Advanced Materials Limited,
No.10, Jigani Industrial Area, Jigani,
Bangalore-560 105
PAN AA ACT 5435F

....Appellant

Vs.

Dy. Commissioner of Income Tax,
Circle 12(4), Bangalore.

.....Respondent.

Assessee By:	Shri Sharath Rao, C.A.
Revenue By:	Smt. R. Premi, JCIT (D.R)

Date of Hearing :	07.09.2020.
Date of Pronouncement :	28.09.2020.

ORDER

PER SHRI CHANDRA POOJARI, AM :

All these appeals by the assessee for Assessment Years 2005-06 to 2015-16 are directed against different orders of Commissioner of Income Tax (Appeals), Bangalore. Since the issues in these appeals are common in nature except for issue

regarding re-opening of assessment in ITA No.2181/Bang/2019, they were heard together and are being disposed off by this common order.

ITA No.2181/Bang/2018

2. The first ground in this appeal is with regard to reopening of assessment. The assessee has raised ground Nos.2.1 to 2.6 with regard to reopening of assessment stating that the assessment was reopened after four years from the end of the relevant assessment year though the original assessment was completed under Section 143(3) of the Act and there was no failure on the part of assessee to disclose fully and truly all the material facts during the course of original assessment. According to him it is only a mere change of opinion without any new material or information so as to reopen the concluded assessment.

3. The Brief facts relevant to this issue are that the assessee filed the Return of Income for the Assessment Year 2005-06 on 30.10.2005 and the assessment was completed under Section 143(3) of the Act on 31.8.2007 determining the Book Profit at Rs.1,21,01,885 against the returned Book Profit of Rs.1,16,98,788. In the original assessment, there was an addition to the Book Profit towards provision for warranty. On appeal the addition was deleted by the CIT(Appeals). The assessment was reopened by issue of Notice under Section 148 of the Act on 7.6.2011 by recording the reason for reopening as follows :



GOVERNMENT OF INDIA
INCOMETAX DEPARTMENT

OFFICE OF THE DEPUTY COMMISSIONER OF INCOME-TAX CIRCLE.12 (4), BANGALORE
No.14/3,4th Floor, Rastrohana Bhavan, (Opp.RBI), Nrupathunga Road, Bangalore-560001, Ph: +91-80-22248107

F.No. RA-19/DCIT/C-12 (4)/11-12

23rd June, 2011

To

The Managing Director
M/s Tata Advance Material Ltd.
No. 10 Jigani Industrial Area
Jigani Bangalore- 562 106

Sir,

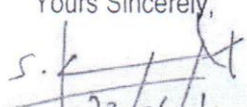
Sub: Reason for reopening the case u/s 147 for A.Y. 2005-06.

Ref: Your letter No. Nill dated 17th June, 2011

With reference to the above, your Company for A.Y. 2005-06 has debited an amount of Rs. 24,69,250/- under the head Provision of liquidated damages which is unascertained liability which it was not added back in the Computation of Income as well as Deemed Income u/s 115JB of *Income Tax Act, 1961*.



Yours Sincerely,


Pradeep S. Arya, I.R.S.
Deputy Commissioner of Income Tax,
Circle 12(4), Bangalore.

Regarding reopening of assessment, the learned Authorised Representative submitted that the reopening of assessment is bad in law. He relied on the following judgments :

- (i) Dell India Pvt. Ltd. Vs. JCIT 64 Taxman.com 68 (Kar)
- (ii) CIT Vs. Hewlett Packard Digital Global Soft Ltd. in ITA 406 & 407 of 2007 dt.19.09.2011 (Karnataka H.C.)
- (iii) CIT Vs. Hewlett Packard Digital Global Soft Ltd. 380 ITR 386 (Kar).
- (iv) CIT Vs. ;Kelvinator of India Ltd. 320 ITR 561 (SC)
- (v) CIT Vs. Kelvinator of India Ltd. 256 ITR 1 (Del)
- (vi) CIT Vs. Modipon Ltd. in ITA No.533 of 2011 Dt.21.03.2011 (Delhi H C)
- (vii) Madhukar Khosla Vs. ACIT 367 ITR 165 (Del)
- (viii) CIT Vs. Foramer France 264 ITR 566 (SC)
- (ix) CIT Vs. Tarajan Tea Co. Pvt. Ltd. 236 ITR 477 (SC)
- (x) Fibres & Fabrics International (P) Ltd. Vs. DCIT 48 ITR (T)46 (Bangalore – Trib.)

4. According to the ld.AR that as per the 1st proviso to Section 147 of the Act there is an assessment under Section 143(3) or 147 of the Act has already been completed for the relevant assessment year, no action shall be taken under Section 147 of the Act after expiry of four years from the end of the relevant assessment year unless any income chargeable to tax has escaped assessment for such assessment year by the following reasons :

- (a) The assessee has failed to file a Return under Section 139 of the Act or
- (b) The assessee has failed to file a return in response to Notices issued under Section 142(1) and 148 of the Act or

(c) the assessee has failed to disclose fully and truly of the material facts necessary in the course of assessment.

According to Id. AR in the present case, the assessment under Section 143(3) of the Act was concluded vide order dt.31.08.2007 and the assessee's case falls under the above proviso. Therefore reassessment proceedings could be initiated after the expiry of four years only if the assessee had failed to furnish the Return of Income or failed to respond to notices issued or failed to disclose fully and truly all material facts for the purpose of assessment. Since there is no allegation in the reasons recorded by the Assessing Officer, in this regard, the reassessment notice issued to the assessee on 7.6.2011 is bad in law and consequently the assessment framed thereunder to be annulled. He drew our attention to the following judgments :

(i) CIT Vs. Foramer France 264 ITR 566 (SC)

(ii) Gujarat Eco Textile Park Ltd. Vs. ACIT 60 taxman.com
296 (Gujarat H.C.)

(iii) Nirmal Bang Securities (P) Ltd. Vs. ACIT 67 taxman.com 57 (Bom).

(iv) Tata Business Support Services Ltd. Vs.DCIT 59 taxmann.com 76
(Bom H C)

According to the Id. AR, Section 147 of the Act does not give arbitrary powers to Assessing Officer to reopen the concluded assessment merely only on the basis of mere change of opinion and cases can be reopened only if there is “tangible material” to come to conclusion that there is escapement of income from

assessment. He relied on the judgment of Hon'ble Supreme Court in the case of CIT Vs. Kelvinator of India Ltd. 320 ITR 561 (SC). According to ld. AR during the course of original assessment proceedings, the information regarding provision towards liquidated damages and R&D expenses were called for and filed before the Assessing Officer vide letter dt.15.06.2007 and 18.07.2007. These were scrutinized by the Assessing Officer and certain expenses were allowed. No action under Section 147 of the Act was taken, the said assessment cannot be reviewed without any tangible or fresh material before the A.O. so as to reopen the assessment. He submitted that the judgment of **CIT Vs. Kelvinator** of India Ltd. (supra) was valid in the following cases :

- i) CIT Vs. Hewlett Packard Globalsoft (P) Ltd. 79 taxmann.com 387 (Kar H C)
- ii) GMR Holdings (P) Ltd. Vs. DCIT 18 taxmann.com 153 (Bangalore – Trib.)
- iii) Asteroids Trading and Investments (P) Ltd. Vs. DCIT 308 ITR 190 (Bom)
- iv) Asian Paints Ltd. Vs. DCIT 308 ITR 195 (Bom)
- v) ICICI Prudential Life Insurance Co. Ltd. Vs. ACIT 231 CTR 233 (Bom)
- vi) Aventis Pharma Ltd. Vs. ACIT 323 ITR 570 (Bom)

According to him there is no belief that the income escaped assessment, as such reassessment is bad in law. For this purpose he relied on judgment of Ganga Saran & Sons Pvt Ltd Vs. ITO & Others 130 ITR 1 (SC) and also decision of Bangalore Tribunal in the case of Fibres and Fabrics International (P.) Ltd. Vs. DCIT 83

Taxman.com 35; NYK Line India Ltd. Vs. DCIT 28 taxmann.com 229 (Bom); CIT Vs. Srusti Diam 57 taxmann.com 392 (Bom); Debashu Services (P) Ltd. Vs. DCIT 49 taxmann.com 41 (Bom) and Rabo India Finance Ltd. Vs. DCIT 26 taxmann.com 122 (Bom).

He also relied on the following judgments :

1.	Calcutta Discount Co. Ltd. Vs. ITO 41 ITR 191 (SC)
2.	B J Services Company Middle East Ltd. Vs. DDIT 12 taxmann.com 493 (Uttarakhand HC)
3.	Jindal Photo Films Ltd. Vs. DCIT 234 ITR 170 (Del)
4.	Garden Silk Mills Ltd. Vs. DCIT 222 ITR 68 (Guj)
5.	CWT Vs. Shivaram Singh 163 ITR 773 (Patna HC)
6.	DCIT Vs. Smt. Ranjit Kaur 81 TTJ 269 (Chandigarh ITAT)

5. On the other hand, the ld. DR relied on the order of CIT(Appeals) and submitted that in the original assessment passed under Section 143(3) of the Act on 31.08.2007 the Assessing Officer made addition only in respect of provision for warranty and he has not considered liquid damages in the assessment order. According to the ld. DR, mere filing of documents by the assessee which has not been verified and considered by the Assessing Officer will not prevent the Assessing Officer to take a view on the same and initiate reassessment proceedings. Explan. 1 to Section 147 provides that production before the Assessing Officer, Books of Accounts or other evidences of material evidence could with due diligence has been disclosed by the Assessing Officer will not

necessarily amount to disclosure. According to her, there is no presumption anywhere in the provisions of the Act to effect that every regular assessment completed is after due consideration of every claim under the provisions of the Act and on the other hand scope of Explan. 2 to Section 147 is such that the Assessing Officer is free to re-examine the correctness and decided the tax aspect, tax apply relief and allowances granted are in terms of provisions of the Act and is not to revise assessment in terms of Section 147 of the Act. She has relied on the Hon'ble Kerala High Court in the case of Popular Vehicles & Services Ltd. 191 taxman 333 (Ker). She also relied on the judgements of Hon'ble jurisdictional High Court in the case of Rinku Chakraborty 20 taxman.com 09 (Kar) wherein it was held that if in the original assessment the income liable to tax has escaped assessment due to oversight and inadvertence or a mistake committed by the ITO, the ITO has the jurisdiction to reopen the original assessment. It is not necessary that for such reopening of such assessment the information is to be derived from external source of any kind or disclosure of new and important matters subsequent to the original assessment. Even if the information is obtained from the record of the original assessment after a proper investigation from the material on record or the facts disclosed thereby or from any enquiry or research into facts or law, reassessment is permissible. The income may escape assessment as a result of lack of vigilance of the ITO or due to perfunctory performance of his duties without due

care and caution. Even in a case where return has been submitted to the ITO who erroneously fails to tax a part of assessable income, it is a case of said part of the income as having escaped the assessment, the Assessing Officer has jurisdiction under Section 147 of the Act to reopen assessment and to bring to tax the income that has escaped assessment. A taxpayer cannot be allowed to take advantage any of those lapse, as ultimately if such an advantage is allowed, it would be prejudicial to the interest of revenue. He relied on the order of CIT(Appeals) on this issue.

6. We have heard both the parties and perused the material on record. At this stage, it is appropriate to mention the principles of law governing reassessment as below :

(i) The Court should be guided by the reasons recorded for the reassessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of reassessment. To put it in other words, having regard to the entire scheme and the purpose of the Act, the validity of the assumption of jurisdiction under [Section 147](#) can be tested only by reference to the reasons recorded under [Section 148\(2\)](#) of the Act and the Assessing Officer is not authorized to refer to any other reason even if it can be otherwise inferred or gathered from the records. The Assessing Officer is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of

the reasons and keep the others upto his sleeves to be disclosed before the Court if his action is ever challenged in a court of law.

(ii) At the time of the commencement of the reassessment proceedings, the Assessing Officer has to see whether there is prima facie material, on the basis of which, the department would be justified in reopening the case. The sufficiency or correctness of the material is not a thing to be considered at that stage.

(iii) The validity of the reopening of the assessment shall have to be determined with reference to the reasons recorded for reopening of the assessment.

(iv) The basic requirement of law for reopening and assessment is application of mind by the Assessing Officer, to the materials produced prior to the reopening of the assessment, to conclude that he has reason to believe that income has escaped assessment. Unless that basic jurisdictional requirement is satisfied - a postmortem exercise of analysing the materials produced subsequent to the reopening will not make an inherently defective reassessment order valid.

(v) The crucial link between the information made available to the Assessing Officer and the formation of the belief should be present. The reasons must be self evident, they must speak for themselves.

(vi) The tangible material which forms the basis for the belief that income has escaped assessment must be evident from a reading of the reasons. The entire material need not be set out. To put it in other words, something therein, which is critical to the formation of the belief must be referred to. Otherwise, the link would go missing.

(vii) The reopening of assessment under [Section 147](#) is a potent power and should not be lightly exercised. It certainly cannot be invoked casually or mechanically.

(viii) If the original assessment is processed under [Section 143\(1\)](#) of the Act and not [Section 143\(3\)](#) of the Act, the proviso to [Section 147](#) will not apply. In other words, although the reopening may be after the expiry of four years from the end of the relevant assessment year, yet it would not be necessary for the Assessing Officer to show that there was any failure to disclose fully or truly all the material facts necessary for the assessment.

(ix) In order to assume jurisdiction under [Section 147](#) where assessment has been made under sub-section (3) of [section 143](#), two conditions are required to be satisfied;

(i) The Assessing Officer must have reason to believe that the income chargeable to tax has escaped assessment;

(ii) Such escapement occurred by reason of failure on the part of the assessee either

(a) to make a return of income under [section 139](#) or in response to the notice issued under sub-section (1) of [Section 142](#) or [Section 148](#) or

(b) to disclose fully and truly all the material facts necessary for his assessment for that purpose.

(x) The Assessing Officer, being a quasi judicial authority, is expected to arrive at a subjective satisfaction independently on an objective criteria.

(xi) While the report of the Investigation Wing might constitute the material, on the basis of which, the Assessing Officer forms the reasons to believe, the process of arriving at such satisfaction should not be a mere repetition of the report of the investigation. The reasons to believe must demonstrate some link between the tangible material and the formation of the belief or the reason to believe that the income has escaped assessment.

(xii) Merely because certain materials which is otherwise tangible and enables the Assessing Officer to form a belief that the income chargeable to tax has escaped assessment, formed part of the original assessment record, per se would not bar the Assessing Officer from reopening the assessment on the basis of such material.

The expression "tangible material" does not mean the material alien to the original record.

(xiii) The order, disposing of objections or any counter affidavit filed during the writ proceedings before the Court cannot be substituted for the "reasons to believe".

(xiv) The decision to reopen the assessment on the basis of the report of the Investigation Wing cannot always be condemned or dubbed as a fishing or roving inquiry. The expression "reason to believe" appearing in [Section 147](#) suggests that if the Income Tax Officer acts as a reasonable and prudent man on the basis of the information secured by him that there is a case for reopening, then [Section 147](#) can well be pressed into service and the assessments be reopened. As a consequence of such reopening, certain other facts may come to light. There is no ban or any legal embargo under [Section 147](#) for the Assessing Officer to take into consideration such facts which come to light either by discovery or by a fuller probe into the matter and reassess the assessee in detail if circumstances require.

(xv) The test of jurisdiction under [Section 143](#) of the Act is not the ultimate result of the inquiry but the test is whether the income tax officer entertained a "bona fide" belief upon the definite information presented before him. Power under this section cannot be exercised on mere rumours or suspicions.

(xvi) The concept of "change of opinion" has been treated as a built in test to check abuse. If there is tangible material showing escapement of income, the same would be sufficient for reopening the assessment.

(xvii) It is not necessary that the Income Tax Officer should hold a quasi judicial inquiry before acting under Section

147. It is enough if he on the information received believes in good faith that the assessee's profits have escaped assessment or have been assessed at a low rate. However, nothing would preclude the Income Tax Officer from conducting any formal inquiry under [Section 133\(6\)](#) of the Act before proceeding for reassessment under [Section 147](#) of the Act.

(xviii) The "full and true" disclosure of the material facts would not include that material, which is to be used for testing the veracity of the particulars mentioned in the return. All such facts would be expected to be elicited by the Assessing Officer during the course of the assessment. The disclosure required only reference to those material facts, which if not disclosed, would not allow the Assessing Officer to make the necessary inquiries.

(xix) The word "information" in [Section 147](#) means instruction or knowledge derived from the external source concerning the facts or particulars or as to the law relating to a matter bearing on the assessment. An information anonymous is

information from unknown authorship but nonetheless in a given case, it may constitute information and not less an information though anonymous. This is now a recognized and accepted source for detection of large scale tax evasion. The non-disclosure of the source of the information, by itself, may not reduce the credibility of the information. There may be good and substantial reasons for such anonymous disclosure, but the real thing to be looked into is the nature of the information disclosed, whether it is a mere gossip, suspicion or rumour. If it is none of these, but a discovery of fresh facts or of new and important matters not present at the time of the assessment, which appears to be credible to an honest and rational mind leading to a scrutiny of facts indicating incorrect allowance of the expense, such disclosure would constitute information as contemplated in clause (b) of [Section 147](#).

(xx) The reasons recorded or the material available on record must have nexus to the subjective opinion formed by the Assessing Officer regarding the escapement of the income but then, while recording the reasons for the belief formed, the Assessing Officer is not required to finally ascertain the factum of escapement of the tax and it is sufficient that the Assessing Officer had cause or justification to know or suppose that the income had escaped assessment. It is also well settled that the sufficiency and adequacy of the reasons which have led to the formation of a belief by the

Assessing Officer that the income has escaped the assessment cannot be examined by the court.

Now, we go through the provisions of Section 147 of the Act.

147. Income escaping assessment.--

If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of [sections 148 to 153](#), assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in [sections 148 to 153](#) referred to as the relevant assessment year)."

6.3 Considering the above, the Apex Court in the case of Kelvinator of India Ltd. (320 ITR 561) (SC) observed and held in para 4 as under :-

"4. On going through the changes, quoted above, made to [Section 147](#) of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment 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, 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 re-open the assessment. Therefore, post-1st April, 1989, power to re-open 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 re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and

power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening 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, Assessing Officer has power to re-open, 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 re-introduced 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 31st October, 1989, 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."

For the afore-stated reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs."

6.4 The reopening of assessment being based on a mere change of opinion, the assumption of jurisdiction on the part of the A.O. lacks validity and the notice u/s 148 of the Act cannot be sustained.

6.5 The Assessing Officer has power to reopen the assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment and the reasons must have a live link with the formation of belief.

In the present case, there is no tangible material. The issuance of the impugned notice u/s.148 is nothing but mere change of opinion. In absence of any new tangible material available with the A.O., it is not open to the A.O. to change his opinion by issuing the notice of re-assessment.

6.6 From the reasons recorded it can be said that the original assessment is sought to be reopened in exercise of powers under [section 147/148](#) of the Act on change of opinion by the AO, which is not permissible more particularly when the original assessment is sought to be reopened after a period of four years from the end of the assessment year. Under the circumstances, the conditions stipulated under first proviso to [section 147](#) are not satisfied and therefore, on the aforesaid ground alone, the impugned notice deserves to be quashed and set aside.

7. Having regard to the position of law and material available on record, it cannot be said that there was no full and true disclosure at the end of the Assessee of the material fact necessary for the purpose of assessment. In such circumstances, it can be said that there was no tangible material for the purpose of reopening the assessment except change of opinion. Hence in our opinion, there was no fault on the part of assessee to disclose full and truly all the material facts necessary for the assessment. Further as rightly pointed out by the Id.AR in the case of CIT Vs. Chaitanya Properties Pvt. Ltd. 240 Taxmann 659, it was held that

reasons recorded by the Assessing Officer, no where the A.O. states that there was failure on the part of assessee to disclose fully and truly all material facts during the assessment year under consideration. It is for the Assessing Officer to apply his mind through mentioning reasons. He has to justify through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all the material facts necessary for the assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put on record in black and white all the material facts. The reasons recorded should be clear and unambiguous. Our attention was also drawn to the decision of the Hon'ble Karnataka High Court in the case of CIT and ACIT v. Hewelett Packard Digital Global Solutions Ltd., ITA No. 406 of 2007, judgment dated 19.09.2011, wherein the Hon'ble Karnataka High Court after making a reference to the decision of the Hon'ble Bombay High Court in the case of Hindustan Lever Ltd. v. R.B. Wadkar [2004] 137 Taxmann 479 (Bom.) observed as follows:—

"7. It is observed in the said judgment that the reason recorded by the Assessing Officer no where state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is for the Assessing Officer to disclose and open his mind through reasons. He has to speak through his reasons. It is for the Assessing Officer to reach 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. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the

reasons. Reasons provide the link between conclusion and evidence. The order passed by the Assessing Authority did not state anywhere that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that year. All that has been stated in the order is that the assessee has appended the note and at no point of time, the assessee has disclosed as to the nexus between the amount of Rs. 10,06,617/-and the 10A unit. The disclosure has to be full and true. Both the criteria have to be met. In the assessee's case, by failing to bring out the nexus between the 10A unit and the interest income, the assessee has not discharged its responsibility of furnishing full disclosure of facts. As set out above, the note clearly sets out the interest income earned by the STP unit and the claim of the assessee for exemption under Section 10A. It is not the requirement of law that further the assessee should show the nexus between the amount claimed and 10A unit. When he has categorically stated that the interest, which is earned from STP unit, is eligible for exemption under Section 10A, even that nexus is manifest. The Assessing Authority has not properly applied his mind towards the statutory provisions and has not taken into consideration that the original assessment passed under Section 143(3) which was also reopened once and adjustment was made. It is for the second time, he was raising all these objections. When admittedly the second reopening of the assessment is beyond four years, under law, it is barred by time and the findings recorded by the Tribunal is legal and valid and does not suffer from any legal infirmity. In that view of the matter, no substantial question of law arises for consideration in these appeals. Accordingly, the appeals are dismissed."

8. Being so, in our opinion the reopening of assessment which is already concluded under Section 143(3) of the Act of the assessment cannot be reopened without any allegation by the Assessing Officer that there was non-disclosure of true and correct facts by the assessee while framing the original assessment. Hence we are inclined to annul the assessment. Since we have quashed the assessment, we are refrained to go into the other grounds of appeal raised by the assessee in this appeal. In the result, the appeal in ITA No.2181/Bang/2018 is allowed.

ITA Nos.2182 to 2189/Bang/2018.

9. The first common ground in ITA Nos.2183 to 2189 is with regard to disallowance of expenditure relating to design and development expenses. Considering it as capital expenditure the said expenditure brings value addition and benefit of enduring nature to the business of the assessee. The assessee incurred expenditure towards R & D to meet the specific requirements of the customer. It mostly comprised of training and statutory expenses, audit fees for performance review, travelling, telephone and checking charges. The said expenses said to be incurred for the sale of products and to maintain quality standards. Though the expenditure specified under the head 'Design and Development', these expenditure are not in the nature of capital expenditure and these expenses were incurred to maintain the quality of the product sold by the assessee. These expenditure are allowable expenditure under Section 37(1) of the Act as it is incurred wholly and exclusively laid out or expended for the purpose of running the business of the assessee. He submitted that it fulfill all the conditions laid down in Section 37 of the Act and it has to be allowed as revenue expenditure only. He submitted that if it is not revenue expenditure and considered as capital expenditure, the assessee is entitled for depreciation on it.

10. The ld. DR submitted that these expenditure is in the nature of continuous process to develop and improvise new project which create value addition, hence

enduring benefit brought to the assessee. It is further submitted that the assessee itself has amortised the said expenditure over the period of useful life of the asset of five years whichever is lower. Government expenditure was stabilized as an internally generated intangible asset only if it is imposed strict criteria to technical feasibility and generation of future economic benefit for its useful economy upto maximum five years of product. Accordingly the assessee itself treated as capital expenditure in his books of accounts and submitted that the argument of Id. AR is contrary to the treatment given to this extent in the Books of Accounts.

11. We have heard the rival contentions, perused and carefully considered the material on record. The assessee incurred this expenditure towards design and development. The assessee itself treated it as capital expenditure by amortising the same over a period of use of an asset or five years whichever is lower. Contrary to this the learned Authorised Representative made an argument that this is an expenditure incurred in day to day running of the business and eligible for deduction under Section 37 of the Act. Being so, the expenditure is in capital nature and it cannot be allowed as revenue expenditure. However he submitted that alternative argument that the assessee is entitled for depreciation on the same at applicable rate. Accordingly, we direct the Assessing Officer to grant depreciation at applicable rate since he has treated as capital expenditure. This

ground of assessee is partly allowed. This ground in ITA Nos.2183/Bang/2018 to 2189/Bang/2018 are partly allowed.

12. Next ground with regard to disallowance of R & D expenses on the ground that the said expenditure brings value addition and benefit of enduring nature. This is a common ground in ITA Nos.2182 to 2189/Bang/2018. This expenditure was disallowed by the lower authorities on the reason that R & D is not revenue in nature. It provides enduring benefit to the assessee by means of continuous process to improvise new product which raised the value of the product. This expenditure was capitalized and reflected in work in progress and ready for use and depreciation may be subsequently claimed when it is ready to use.

13. The learned Authorised Representative submitted that the R & D expenditure was incurred for the purpose of business and they pertain to the salary paid to the employees. Accordingly these expenditure are to be allowable as revenue expenditure under Section 137 of the Act and as does not include any capital expenditure incurred for the purpose of capital equipments. This expenditure does not brought in any enduring benefit to the assessee or creating any new asset. This expenditure was incurred so as to survive in the assessee's business and the assessee require to make continuous efforts on design and development in order to keep pace with the technical changes that are taking place every day and strive for improvement in the performance of the existing product

for better capability and quality. According to him there is a rapid change in technology on day to day basis and being so the assessee is forced to incur R & D expenditure on day to day basis and no capital asset by the assessee by incurring this expenditure and benefit extend to more than one order cannot be considered as capital expenditure. He relied on the following decisions :

- i. JCIT Vs. Modi Olivetti Ltd. 3 SOT 22 (Del – Trib)
- ii. Indian Telephone Industries Ltd. Vs. CIT 117 ITR 682 (Kar)
- iii. DCIT Vs. Max India Ltd. 105 TTJ 1002 (Amritsar – Trib)
- iv. Alembic Chemical Works Co. Ltd. Vs. CIT 77 ITR 377 (SC)
- v. Assam Bengal Cement Co. Ltd. Vs. CIT 27 ITR 34 (SC)
- vi. CIT Vs. BPL Systems and Projects Ltd. 227 ITR 779 (Ker)
- vii. CIT Vs. PragaTools Ltd. 157 ITR 282 (AP)
- viii. CIT Vs. Wolkem (P) Ltd Co. 258 ITR 350 (Raj)
- ix. Tejas Networks India Ltd. Vs. ACIT (ITA No.470/Bang/2006) (Bang – Trib.)
- x. CIT Vs. Tejas Networks India P. Ltd. 229 Taxman 40 (Kar)
- xi. Empire Jute Co. Ltd. Vs. CIT 124 ITR 1 (SC)
- xii. CIT Vs. Talisma Corporation (P) Ltd 40 taxmann.com 400 (Kar)
- xiii. CIT Vs. Associated Cements Co. Ltd. 172 ITR 257 (SC)

Thus he submitted that R & D expenditure does not pertain to any tangible or intangible assets into the assessee's business and no enduring benefit to the assessee, the expenditure was incurred for facilitating the assessee's business for day to day improvement of the assessee's business.

14. On the other hand, the ld. DR relied on the orders of the lower authorities and submitted that the assessee has not been able to substantiate the above expenditure on in-house scientific research is related to the business carried out by

the assessee. The assessee in its financial statements charged component of R & D expenditure to the P & L account as revenue expenditure, on the other hand the capital component of the research expenditure as the assessee itself was capitalized. Being so, the assessee cannot have any grievance on the treatment given by the lower authorities towards this expenditure. He drew our attention to the treatment given by the assessee to this expenditure in its financial statements which was reproduced by the ld. CIT(Appeals) in para 6.3 for the Assessment Year 2009-10.

15. We have heard the rival contentions, perused and carefully considered the material on record. We have carefully gone through the various judgements cited. As rightly pointed out by the ld. DR, the assessee has treated the portion of the R & D expenditure as revenue and another portion as capital expenditure in its financial statements. The Assessing Officer has allowed the revenue portion of the R & D expenditure claimed by the assessee, however not allowed capital portion of the R & D expenditure. He has gone by the treatment given by the assessee towards R & D expenditure in its financial statements. Now the contention of the assessee that these Books of Accounts cannot be conclusive for the purpose of Income Tax assessment and the entire R & D expenditure is in the revenue filled and entire expenditure has to be allowed. However, the assessee is not able to substantiate the above expenditure on in-house is related to carrying out day to day

business of the assessee. Being so, in our opinion the capital portion of the R & D expenditure cannot be allowed as revenue expenditure. However the assessee has raised alternative contention that it is regarded as a capital expenditure, the same has to be allowed as deduction under Section 35(1)(iv) of the Act, the same be allowed as deduction or grant depreciation on the said expenditure. Regarding deduction under Section 35(1)(iv) of the Act, the assessee has not placed any evidence in support of the claim. The same is rejected. However we consider the alternative ground of the assessee and set aside the matter to the file of Assessing Officer to grant depreciation on it. Accordingly, this ground of appeal is partly allowed for all the Assessment Years under consideration.

16. The next ground in ITA Nos. 2182 & 2183/Bang/2018 is with regard to disallowance of provision of warranty on the reason that it is not created on a scientific basis and there is no actual expenditure incurred in this regard.

17. At the time of hearing, this ground is not pressed in both the appeals, accordingly these grounds are dismissed.

18. The next ground in ITA No.2183/Bang/2018 is with regard to disallowance of sales commission. The assessee made provision towards sales commission and same is disallowed by the Assessing Officer on the reason that no evidences and documents were submitted to substantiate the claim of the assessee or how the

prices are created towards unknown liability which does not exist at the time of creation.

19. Before us, no evidence is furnished to show that the basis towards non-existing liability. Accordingly this ground is dismissed in ITA No.2183/Bang/2018.

20. The next ground is with regard to interest disallowance in ITA No.2183/Bang/2018. The assessee has debited this interest expenditure on borrowed funds in the P & L Account and disallowed by the Assessing Officer on the reason that the capital expenditure incurred during the year was forced by the borrowed funds since surplus funds were not available with the company for this purpose. Further the Assessing Officer stated that the company was not able to establish that capital and interest free funds available with the company utilized for addition to capital in work in progress. In other words, it is observed by the Assessing Officer that the assessee utilized the borrowed funds for capital work in progress and addition to fixed assets and it is not a revenue expenditure so as to allow and it is in the capital nature. On appeal, the CIT(Appeals) confirmed the same. The assessee is in appeal before us.

21. We have heard the rival contentions, perused and carefully considered the material on record. As rightly pointed out by the lower authorities, this interest expenditure was with regard to on account of loans availed which was invested in

capital work in progress and as an addition to fixed assets. Being so, this is in capital field and no interest could be allowed as revenue expenditure. The lower authorities are justified in treating the claim of the assessee as capital work in progress. However, the assessee filed petition for admitting additional grounds stating as follows :

“ 5.3 The ld. CIT (Appeals) and A.O., while attributing the interest towards Capital Work-in-Progress (CWIP), have erred in considering the entire closing balance of CWIP as on the balance sheet date which included the opening balance brought forward from earlier year, instead of considering only the movement / net additions to CWIP.

5.4 Notwithstanding and without prejudice to Grounds 5.1 to 5.3, should the interest expense be capitalized, the CIT (Appeals) has erred in not granting consequential de on the same.”

22. We, considering the additional ground on the reason that there is good and sufficient reason for not raising this additional ground inadvertently. Accordingly, we admit the additional ground and accede to the belief of the ld. AR and the assessee is entitled for consequential depreciation on capitalization in the year capital work in progress by the assessee at applicable rate. We direct the Assessing Officer to allow consequential depreciation. This ground of assessee is partly allowed.

23. The next ground is disallowance of reimbursement of expenses in ITA No.2183/Bang/2018 on the reason that tax has not been withheld on the reimbursement of expenses.

24. We have heard the rival contentions, perused and carefully considered the material on record. Before us, the assessee has not substantiated that the assessee has deducted tax on the said reimbursement of expenditure. Being so, we are not in a position to allow this expenditure. We confirm the order of the lower authorities on this issue and dismiss the ground taken by the as in ITA No.2183/Bang/2018.

25. In the result, the ITA No.2181/Bang/2018 is allowed; ITA Nos.2182 to 2189/Bang/2018 are partly allowed.

Pronounced in the open court on the date mentioned on the caption page.

Sd/-

(N.V. VASUDEVAN)
VICE PRESIDENT

Sd/-

(CHANDRA POOJARI)
ACCOUNTANT MEMBER

Dated: 28.09.2020.

*Reddy GP

Copy to

1. The appellant
2. The Respondent
3. CIT (A)
4. Pr. CIT
5. DR, ITAT, Bangalore.
6. Guard File

By order

Assistant Registrar
Income-tax Appellate Tribunal
Bangalore