IN THE INCOME TAX APPELLATE TRIBUNAL
"C" BENCH : BANGALORE

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

ITA No. and Assessment Year	Appellant	Respondent
1832/Bang/2018 2008-09	The Joint Commissioner of Income Tax, LTU, Bangalore.	M/s. Vijaya Bank, HO Central Accounts Dept, 41/2, M G Road, Bangalore – 560 001. **PAN: AAACV 4791 J**
1837/Bang/2018 2008-09	M/s. Vijaya Bank, HO Bangalore – 560 001. **PAN: AAACV 4791 J**	The Joint Commissioner of Income Tax, LTU, Bangalore.

Assessee by	:	Shri. S.Ananthan, CA
Revenue by	:	Shri. Pradeep Kumar, CIT (DR) (ITAT), Bengaluru.

Date of hearing	:	11.1.2021
Date of Pronouncement	:	13.1.2021

O R D E R

Per N.V. Vasudevan, Vice President

ITA No.1832/Bang/2018 is an appeal by the Revenue and ITA No.1837/Bang/2018 is an appeal by the assessee. Both these appeals are directed against the order dated 27.03.2018 of CIT(A)-14, Bangalore, relating to Assessment Year 2008-09.

2. We shall first take up for consideration ground No.2 raised by the assessee in its appeal as it relates to the validity of initiation of reassessment proceedings under section 147 of the Income Tax Act, 1961 (hereinafter called 'the Act'). The said ground reads as follows:

> *2. The learned Commissioner of Income Tax (Appeals) erred in upholding the re-opening of assessment u/s 147.*
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> *2.1. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening was mere change of opinion as such. bad in law.*
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> *2 2 The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening was based on existing material and evidences and not based on any new evidences*
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> *2 3. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the re-opening beyond 4 years is hit by the First Proviso to section 147.*
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> *2 4. The learned Commissioner of Income Tax (Appeals) failed to appreciate the fact that the matters with respect to which the additions have been made are subject matter of appeal before CIT(A) and Hon'ble ITAT and therefore. they cannot be considered in the re-assessment proceedings in view of the Third Proviso to section 147*

3. The Assessee is a banking company carrying on business of banking. In its return of income filed for AY 2008-09 on 6.10.2010, the Assessee claimed deduction of a sum of Rs.200,03,24,219 on account of Provision for Bad and Doubtful Debts in respect of rural advances, u/s.36(1)(viia) of the Act. The provisions of Section 36(1)(viia)(a) of the Act lays down as follows:

> "viia) in respect of any provision for bad and doubtful debts made by – (a) a scheduled bank not being a bank incorporated by or under the laws of a country outside India] or a co-operative bank other than a primary agricultural credit society or a primary co- operative agricultural and rural development bank, an amount not exceeding

seven and one-half per cent of the total income (computed before making any deduction under this clause and Chapter VI-A) and an amount not exceeding ten per cent of the aggregate average advances made by the rural branches of such bank computed in the prescribed manner;

Explanation.—For the purposes of this clause,—

(ia)] "rural branch" means a branch of a scheduled bank or a non-scheduled bank situated in a place which has a population of not more than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year;

4. In an order passed u/s.143(3) of the Act dated 19.11.2010, the AO disallowed claim for deduction of Rs. 192,57,72,764/- out of the total claim of the Assessee for deduction of Rs.200,03,24,219/- on the ground that the provision for bad and doubtful debts in respect of rural advances was created by debit to profit and loss account of only a sum of Rs.7,45,51,455 whereas the claim for deduction actually made u/s.36(1)(viia) of the Act was a sum of Rs.200,03,24,219/-. The AO was of the view that as laid down by the Hon'ble Punjab and Haryana High Court in the case of State Bank of Patiala Vs. CIT 272 ITR 53 (P & H), claim for deduction u/s.36(1)(viia) of the Act can be granted only to the extent provision for bad and doubtful debts is debited in the profit and loss account. The deduction to be allowed cannot be greater than the amount debited to the profit and loss account as provision. The AO rejected the plea of the Assessee that 10% of Average Advances of Rural Branches (AARA) can be granted as adhoc deduction irrespective of the provision created and debited in the profit and loss account. The AO therefore disallowed a sum of Rs. 192,57,72,764/- (Difference between Rs.200,03,24,219 and Rs.7,45,51,455). The CIT(A) by order dated 19.1.2012, deleted the addition made by the AO by following

the decision of the decision of the ITAT in the case of Syndicate Bank reported in 78 ITD 103 wherein it was held that irrespective of the debit to the profit and loss account on account of provision for bad and doubtful debts (PBDD), an Assessee is entitled to 10% of the AARA as deduction u/s.36(1)(viia) of the Act. Against the order of CIT(A), the revenue filed appeal before Tribunal in ITA No.538/Bang/2012 and the said appeal was decided along with appeal ITA No. 673/Bang/2012 filed by the Assessee. In the said appeal in Ground No.2 the Revenue projects the grievance of the Revenue against the order of the CIT(A) whereby the CIT(A) allowed the claim of the Assessee for deduction u/s.36(1)(viia) of the Act of Rs.192,57,72,764/- which according to the revenue was in excess of the provisions made in the accounts by the Assessee. It was the stand of the revenue that the deduction u/s.36(1)(viia) of the Act ought to be allowed only to the extent provision is made in the books of accounts for bad and doubtful debts. The Tribunal by its order dated 27.2.2015 reversed the decision of the CIT(A) and restored the order of the AO by relying on the decision of the ITAT Bangalore Bench in the case of Canara Bank in ITA No.58/Bang/2004 dated 9.6.2006 wherein it was held that after considering the decision of the ITAT in the case of Syndicate Bank 78 ITD 103(Bang) and the decision of the Hon'ble Punjab and Haryana High Court in the case of State Bank of Patiala (supra) that the decision rendered by the Hon'ble High Court has to be followed and held that claim for deduction u/s.36(1)(viia) of the Act cannot be greater than the amount debited to the profit and loss account as provision. The learned counsel for the Assessee submitted that the said decision of the Tribunal was also upheld by the Hon'ble Karnataka High Court.

5. While matters stood thus, even during the pendency of the appeal of the Revenue before the ITAT in the original proceedings u/s.143(3) of the Act on the issue of disallowance u/s.36(1)(viia) of the Act, the AO issued a notice under section 148 of the Act dated 21.03.2013 proposing to reassess the income that has escaped assessment within the meaning of section 147 of the Act. The assessment was re-opened on the allegation that the Assessee did not give details of rural branches and it had included various branches which are not rural as per the provisions of section 36(1)(viia). The sum and substance of the reason so recorded by the AO was that it transpired in the course of assessment proceedings of the Assessee for AY 2010-11 that some of the branches which were claimed as "rural branches" were in fact located in an area which cannot be defined as rural and that in areas where some of the branches are situate, the population was more than 10,000. The reasons recorded b the AO before issue of notice under section 148 of the Act is as follows:

> *"The assessee has claimed deduction u/s 36(1)(viia) of Rs. 14,79,66,9349/- in the computation of income. This was calculated as 10% of average aggregate rural advances of Rs. 1479,66,93,490/-.*
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> *During the course of assessment proceedings of the assessee hank for the AY 2010-11 the claim of deduction made by the bank u/s 36(1)(viia) was examined in details. As per section 36(1)(viia) the average aggregate advances made by rural branches will be taken into consideration for calculating the deduction available u/s 36(1)(viia). During the course of verification of details submitted by the bank it was noticed that in the following cases /branches, the branch is located in an area which cannot be defined as rural as per the decision of Hon'ble high Court f Kerala in the case Of CIT Vs. Lord Kirshna bank 339 ITR 606.*
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> *To be a rural branch, the branch must be located in a 'place' that is a revenue village. However, the branches below are situated in places*

which are defined as urban agglomerate by the census of India 2001. They are places which are defined as town panchayat, municipality etc. The evidence gathered is placed on record.

Sl.No	*Name of branch*
1	*Gonikop pal*
2	*Baipe*
3	*Thumbe*
4	*Manjeshwar*
5	*Belthangadi*

Further, in case of the following 12 branches, the population of the area exceeds 10,000. Therefore, the place cannot be said to be rural. The explanation (ia) to clause 36(i)(viia) reads as "rural branch means a branch of a scheduled bank or a non-scheduled Bank situated in a place which has a population of not more than10,000 according to the last proceeding census of which the relevant figures have been published before the first day of the previous year.

Sl. No.	*Name of the branch*
1	*B C Road*
2	*Kankalitola*
3	*Dupalli*
4	*Kalichamaram*
5	*Moodlupalya*
6	*Nagnoor*
7	*Vamanjoor*
8	*Sal vady*
9	*Mulki*
10	*Jakribettu*
11	*Hal ebedanur*

Hence, it is evident that the claim deduction u/s 36(1)(viia) of Rs. 172,70,57,425/- was incorrect and the assessee has made excess claim u/s 36(1)(viia) the IT Act, 1961. In the present case the income chargeable to tax which has escaped the assessment amounts to or is likely to amount to one lakh

rupees or more for the AY 2006-07. Therefore, 1 have reason to belief that income chargeable to tax has escaped assessment by reason of failure on part of assessee to disclose fully and truly all materials fact necessary for his assessment for the AY 2007-08".

6. The assessee challenged the validity of initiation of reassessment proceedings before AO on the ground that the reopening of assessment is based on already existing material and on an incorrect appreciation of law and that the initiation of reassessment proceedings is purely based on change of opinion. It was contended by the Assessee that the entire assessment has been re-opened based on the verification conducted by the learned Assessing Officer during the assessment year 2010-11. However, what is to be seen is the details of rural branches based on 2001 census which was available even at the time of original assessment. Further, the claim u/s 36(1)(viia) was a specific claim in the return. The learned Assessing Officer also dealt with the claim in the order dated 19-11-2010 passed u/s 143(3). Therefore, all the materials were available before the learned Assessing Officer. If the learned Assessing Officer had not conducted a thorough scrutiny of the issue, the successive officer cannot do the same by re-opening the assessment. It was contended that even at the time of original assessment, the 2001 census data was very much available in public domain and can be accessed by anybody. In the assessment for the assessment year 2010-11, the Assessing Officer relied on the very same data. Therefore, it is not a case where a new data or information came to the possession of the Assessing Officer empowering him to re-open the assessment. The Assessee submitted that the reopening of reassessment is bad in law and is hit by the prohibition contained in the 3rd Proviso to section 147, which reads as follows:

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

The Assessee contended that as per the 3rd proviso to Sec.147 of the Act, the AO can assess only such income **other than the income involving matters which are subject matter of any appeal**. In other words, in respect of any matter which was subject matter of appeal, the Assessing Officer is debarred from re-assessing. In other words, the matters which got merged with the appellate orders cannot be re-assessed in the re-opened proceedings.

7. The AO however held that the Assessee did not file population and location of rural branches in the course of original assessment proceedings. The places where the rural branches were located at a population exceeding 10,000 and that the bank had failed to disclose the necessary details. The AO also held that though the census data was available in the website, it was the duty of the assessee to have furnished necessary details. The AO also relied on the fact that in the course of assessment proceedings for Assessment Year 2010-11, verification of population of rural branches have been carried out and it turned out that many of the rural branches had population in excess of 10,000. The AO also relied on certain judicial pronouncements in support of his conclusion on the validity of initiation of reassessment proceedings. The AO also rejected the contention of the assessee that the third proviso to section 147 of the Act is not applicable because the reassessment proceedings were initiated based on facts that

came to notice of the AO during the assessment proceedings for Assessment Year 2010-11 regarding the incorrect declaration of rural branches.

8. Before CIT(A), the assessee reiterated the contentions as put forth before the AO. In particular, the Assessee placed on the decision of Hon'ble Supreme Court in the case of CIT Vs Kelvinator of India Ltd., [2010] 320 ITR 561 (SC), wherein the Hon'ble Supreme Court held that the assessment cannot be re-opened on mere change of opinion. Once the Assessing Officer raises any specific query about an item, it is to be deemed that he has applied his mind and allowed it. Therefore, in respect of those items, no action can be taken u/s 147. It was pointed out by the Assessee that in the case of the Assessee, the details of the deduction claimed u/s 36(1)(viia) were part of the return and it was a specific claim made in the computation. In fact the Assessing Officer raised specific query with regard to the deduction u/s 36(1)(viia) and the Assessee furnished replies for the same. Therefore, any further re-opening on the same issue by holding that no detailed scrutiny was carried out in the original assessment would amount to change of opinion. The law expects that the assessee should disclose the details. It is for the Assessing Officer to call for further details and examine an issue. If he decides not to make any further examination, the same cannot be subjected to review subsequently by re-opening u/s 147. This would amount to review of the order which is clearly prohibited u/s 147.

9. The Assessee also contended that no re-opening is possible on the basis of same materials. It was argued that the AO re-opened the assessment to examine the very same issue of deduction u/s.36(1)(viia)

of the Act, without any fresh tangible materials. It was pointed out that the assessment has been re-opened based on the verification conducted by the learned Assessing Officer during the assessment year 2010-11. However, the details of rural branches based on 2001 census was available even at the time of original assessment. The Assessee pointed out that the Assessing Officer relied on the decision of Hon'ble Supreme Court in the case of Kalyanji Mavji & co vs CIT 102 ITR 287. However, this decision has been overruled by a subsequent decision in the case of Indian & Eastern Newspaper Society vs CIT 119 ITR 986, in which Hon'ble Supreme Court held that power to re-open does not include power to review. This has been further reiterated by the Apex Court in ALA Firm vs CIT 183 ITR 285. It was contended that the Assessing Officer was therefore not right in holding that he can review the order of the previous assessing officer.

10. It was submitted that the Assessing Officer in the reasons recorded has noted that some of the branches are located in place which are defined as town panchayat, municipality etc., as per the census data. Therefore, these branches cannot be treated as rural branches. Further, he has also observed that in the case of 12 branches the population of the area exceeded 10000 and therefore, they cannot be treated as rural. It was contended that both the above observations are based on incorrect appreciation of law and factually not correct. The Assessee pointed out that the term rural branch is defined in the Act. The definition reads as follows:

> "(ia) "rural branch" means a branch of a scheduled bank [or a non-scheduled bank situated in a place which has a population of not

> more than ten thousand according to the last preceding census of which the relevant figures have been published before the first day of the previous year".

The definition lays down that any branch situated in a place not having a population of more than 10000 as per the last preceding census has to be considered as rural branch. Therefore, what is to be seen is the population of the place. The category of the place as per the census data is not the criteria to decide whether a branch is a rural branch or not. For eg., if a branch is in a village and the population of which is more than 10000, it cannot be considered as a rural branch. Likewise, if a branch is in a place which is classified as municipality, town or panchayat, which has a population of less than 10000, then, the same has to be treated as a rural branch. Therefore, it is only the population that decides the fact whether it is rural or non rural.

11. It was submitted that the AO while rejecting the objections of the Assessee placed wrongly reliance on the decision of Hon'ble Kerala High Court in the case of Lord Krishna Bank(supra). It was pointed out that in the case decided by the Hon’ble Kerala High Court, the Assessee Bank in that case contended that for the purpose of place, it is only the ward that has to be considered. The Hon'ble High Court rejected the argument that the term 'place' referred to in the definition is the ward of a local authority like panchayat or municipality. It held that it is a revenue village that has to be considered and not a ward of the village. It was pointed out that in the case of the Assessee in the appeal, they never considered the population of a ward in a village in order to decide whether it is rural or non rural. What has been considered is a village /

panchayat / town. Therefore, the facts of the case Lord Krishna Bank is totally different as that of the Assessee. It was further submitted that the classification of rural branches is primarily made based on the data furnished by Reserve Bank of India. Further, Reserve Bank of India classified branches as 'rural' based on the census data in which the population is less than 10000. The Assessee filed a copy of book published by Reserve Bank of India on classification of rural branches and the Census data and data of Reserve Bank of India would clearly demonstrate that the branches considered by the Assessing Officer in the reasons recorded before issuing notice u/s.148 of the Act are only rural branches and the conclusion of the Assessing Officer that they are non rural branches is without any basis and is erroneous. The Assessee thus submitted that the entire recorded reasons are based on Surmises and conjunctures and as such, the re-opening based on the same is not tenable.

12. In support of the claim of the Assessee that the initiation of reassessment is not valid owing to the prohibition in the 3rd proviso to Sec.147 of the Act, the Assessee relied on the following decisions:

- ICICI Bank Ltd vs DCIT [2012] 246 CTR 292 (Bom.)
- CIT vs Reliance Energy Ltd [2013] 214 Taxman 64 (Bombay)
- CIT vs Nirma Ltd [2014] 47 taxmann.com 415 (Gujarat)
- ACIT vs Major Deepak Mehta [2012] 344 ITR 641 (Chattisgarh)
- ACIT vs BSES Ltd & ors 2011 (9) TMI 135 — ITAT Mumbai

13. The CIT(A) did not agree with the contentions put forth by the assessee and he upheld the order of the AO. He held that the Assessee had wrongly

disclosed non-rural branches as rural branches and made provision for bad and doubtful debts and claimed deduction u/s.36(1)(viia) of the Act. Since the Assessee concealed true particulars and made wrongful claim for deduction, Explanation 1 to Sec.147 of the Act was applicable and initiation of reassessment was valid. It may be clarified here that Explanation 1 to Sec.147 of the Act is applicable only in the case of reassessment initiated to which proviso to Sec.147 of the Act applies, i.e., to a case where reassessment is initiated beyond 4 years from the end of the relevant Assessment year and where an assessment has already been completed u/s.143(3) of the Act. In the present case, reassessment was initiated within 4 years and therefore the proviso to Sec.147 of the Act is not applicable. The CIT(A) relied on the decision of the Hon'ble Kerala High Court in the case of Popular Vehicles & services Ltd. (2010) 191 Taxman 333 (Ker.) which again is a case where proviso to Sec.147 of the Act was applicable. The CIT(A) also relied on the decision Hon'ble Karnataka High Court in the casse of Rinku Chakraborth (2012) 20 Tamann.com 609 (Karn.) wherein it was held that the AO can initiate reassessment proceedings even to rectify an error committed by him.

14. Aggrieved by the order of CIT(A), the assessee raised ground No.2 before the Tribunal.

15. We have heard the rival submissions. The learned counsel for the Assessee reiterated the arguments put forth before the AO/CIT(A). The learned DR relied on the order of the CIT(A).

16. As far as the validity of initiation of reassessment proceedings on the ground that the reopening was merely on a change of opinion without there

being any tangible material coming into possession of the AO after conclusion of the original assessment proceedings, the facts on record show that in its return of income filed for AY 2008-09 on 6.10.2010, the Assessee claimed deduction of a sum of Rs.200,03,24,219 on account of Provision for Bad and Doubtful Debts in respect of rural advances, u/s.36(1)(viia) of the Act. In an order passed u/s.143(3) of the Act dated 19.11.2010, the AO disallowed claim for deduction of Rs. 192,57,72,764/- out of the total claim of the Assessee for deduction of Rs.200,03,24,219/- on the ground that the provision for bad and doubtful debts in respect of rural advances was created by debit to profit and loss account of only a sum of Rs.7,45,51,455 whereas the claim for deduction actually made u/s.36(1)(viia) of the Act was a sum of Rs.200,03,24,219/-. The AO was of the view that as laid down by the Hon'ble Punjab and Haryana High Court in the case of State Bank of Patiala Vs. CIT 272 ITR 53 (P & H), claim for deduction u/s.36(1)(viia) of the Act can be granted only to the extent provision for bad and doubtful debts is debited in the profit and loss account. The deduction to be allowed cannot be greater than the amount debited to the profit and loss account as provision. The AO rejected the plea of the Assessee that 10% of Average Advances of Rural Branches (AARA) can be granted as adhoc deduction irrespective of the provision created and debited in the profit and loss account. The AO therefore disallowed a sum of Rs. 192,57,72,764/- (Difference between Rs.200,03,24,219 and Rs.7,45,51,455). The CIT(A) by order dated 19.1.2012, deleted the addition made by the AO. Against the order of CIT(A), the revenue filed appeal before Tribunal in ITA No.538/Bang/2012 and the Tribunal by its order dated 27.2.2015 reversed the decision of the CIT(A) and restored the order of the AO. In the first round of proceedings the AO did not question the correctness of the

classification by the Assessee of rural branches for the purpose of claiming deduction u/s.36(1)(viia) of the Act.

17. The assessment was re-opened on the allegation that the Assessee did not give details of rural branches and it had included various branches which are not rural as per the provisions of section 36(1)(viia). According to the AO, it transpired in the course of assessment proceedings of the Assessee for AY 2010-11 that some of the branches which were claimed as "rural branches" were in fact located in an area which cannot be defined as rural and that in areas where some of the branches are situate, the population was more than 10,000. The question that would arise for consideration is, can it be said that any fact which comes to the notice of an Assessing Officer while framing assessment subsequently for another Assessment year is fresh material? The learned counsel for the Assessee has in support of his plea that facts coming to notice of the AO in the course of subsequent assessment year cannot be regarded as fresh tangible material, relied on the decision of the Hon'ble Karnataka High Court in the case of Infosys Ltd. Vs. DCIT 2019 (6) TMI 1261 (Karn.) (W.P.No.53886/2013 judgment dated 17.6.2019). In the aforesaid decision, the facts were that an Assessee's regular assessments under the provisions of the Act relating to A.Y.2004-05 to 2006-07 were concluded by the AO who allowed the Assessee's claim for deduction under Section 10-A while disallowing a small portion of the deduction on certain grounds. To the extent of disallowance of a portion of the deduction under Section 10-A in the original assessment orders, the matters were taken in appeal and the appeals were pending. In the meanwhile, the AO took up the Assessee's assessment relating to the assessment year 2007-2008 and concluded the

same under the provisions of Section 143(3) of the Act by order dated 28.12.2010 wherein the Assessee's claim for deduction under Section 10-A was disallowed substantially. Taking clue form the above order relating to assessment year 2007-08, the respondent issued notices under Section 148 proposing to re-assess the Assessee for the assessment years AY 2004-05 to 2006-07 on the ground that certain income had escaped assessment. The correctness of initiation of reassessment proceedings was challenged by the Assessee before the Hon'ble Karnataka High Court. The Hon'ble Court after examining various decisions held as follows:

> "38. It is beneficial to refer to the CBDT circular dated 17.01.2013 issued by the Government of India,Ministry of Finance, Department of Revenue wherein, it is clarified thus:
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> > "[b] It has also been brought to notice that it is a common practice in the software industry to depute Technical Manpower abroad [at the client's place] for software development activities [like upgradation, testing, maintenance, modification, trouble- shooting etc.,], which often require frequent interaction with the clients located outside India. Due to the peculiar nature of software development work, it has been suggested that such deputation of Technical Manpower abroad should not be considered detrimental to the benefits of the exemption under Sections 10A, 10AA and 10B merely because such activities are rendered outside the eligible units/undertakings.
> >
> > The matter has been examined.
> >
> > Explanation 3 to sections 10A and 10B and Explanation 2 to section 10AA clearly declare that profits and gains derived from 'services for development of software' outside India would also be deemed as profits derived from export. It is therefore clarified that profits earned as a result of deployment of Technical Manpower at the client's place abroad specifically for software development work pursuant to a contract between

the client and the eligible unit should not be denied benefits under sections 10A, 10AA and 10B provided such deputation of manpower is for the development of such software and all the prescribed conditions are fulfilled."

39. Though the aforesaid circular was not available before the Assessing Authority at the time of issue of notice under Section 147/148 of the Act, the same throws light on the aspect of deployment of technical manpower vis-à-vis deduction under Section 10A of the Act. This circular clarifies that the profits earned as a result of deployment of technical manpower at the client's place specifically for software development work pursuant to contract between the client and the eligible unit should not be denied benefits under Section 10A of the Act provided such deputation of manpower is for the development of such software. It is not in dispute that the notices impugned were issued during the pendency of the appeals relating to the assessment years in question.

40. **To sum up, it is held that 'Note' on Software development projects and the various stages of software development placed by the assessee before the Assessing Authority discloses the stages wherein the petitioner - assessee was required to carry out the project at the customer's site/onsite and the same are reflected in the Annual Reports. Considering these materials, deduction under Section 10A was allowed in the order passed under Section 143[3] of the Act. In such circumstances, it is presumed that Assessing Authority has examined the entitlement of deduction under Section 10A of the Act by the assessee in all angles. Withdrawal of the deduction allowed under Section 10A of the Act based on the assessment order relating to the assessment year 2007-08 is without application of mind and nothing but change of opinion, which tantamounts to review and the same is not permissible to initiate the proceedings under Section 147/148 of the Act.**

41. It is also significant to note that there is no iota of material available in the reasons recorded by the assessing officer to believe escapement of tax on any such agreement where the petitioner has received the revenue from foreign companies for deputing the technical members independent of software development work.

> 42. For the reasons aforesaid, this Court is of the opinion that there was no material on record before the Assessing Authority to establish failure on the part of the assessee to disclose truly and fully the relevant material while passing the original assessment order under Section 143[3] of the Act and as such the respondent authority had no jurisdiction to invoke Section 147 and 148 of the Act for the assessment years in question.
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> Writ petitions are allowed.
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> The impugned notices at Annexure-E dated 30.03.2011 [Assessment Year 2004-05], Annexure-F dated 01.03.2012 [Assessment Year 2005-06] and Annexure-E dated 13.09.2012 [Assessment Year 2006-07] issued under Section 148 read with Section 147 of the Act as well as the orders passed by the respondent - Deputy Commissioner of Income Tax, Circle-11[4], Bengaluru rejecting the preliminary objection as to his jurisdiction in the respective writ petitions are quashed."
> (Emphasis supplied)

18. Two aspects that emerge from paragraph-40 of the aforesaid decision of the Hon'ble High Court that is relevant for the present appeal are (i) when the AO examines the claim for deduction u/s.36(1)(viia) of the Act while completing the assessment u/s.143(3) of the Act, he is deemed to have examined the same from all angle including the correctness of the classification of branches as rural branches for the purpose of deduction u/s.36(1)(viia) of the Act. (ii) Disallowance of deduction u/s.36(1)(viia) of the Act on the ground that the rural branches were not properly classified in AY 2011-12 cannot be regarded as tangible material that has come to possession of the AO, so as to justify reopening of assessment.

19. In view of the conclusion that there was no fresh tangible material in the possession of AO at the time of recording of reasons for initiating proceedings u/s.147 of the Act., the law laid down by the Hon'ble Supreme

Court in the case of CIT vs. Kelvinator India Ltd. 320 ITR 561 (SC), has to be applied. It was held by the Hon'ble Supreme Court that for reopening of the assessment, the AO should have in its possession 'tangible material'. The term 'tangible material' has been understood and explained by various courts subsequently. There has been unanimity of the courts on this issue that in absence of fresh material indicating escaped income, the AO cannot assume jurisdiction to reopen already concluded assessment. The decision in the case of Kalyanji Mavji & Co 102 ITR 287 (SC), where it was held that "*oversight, inadvertence or mistake"* in passing assessment order will give the A.O jurisdiction to reopen the assessment, is not good law in view of the subsequent decision in Indian and Eastern Newspaper Society Vs. CIT 119 ITR 996 (SC) wherein it was held that an error discovered on a reconsideration of the same material (and no more) does not give him that power. The aforesaid view on the above proposition has been reiterated by the Apex Court in A.L.A.Firm vs. CIT 183 ITR 285. Thus, reopening has held to be invalid on this ground also.

20. With regard to the decision of the Hon'ble Karnataka High Court in the case of Rinku Chakravarthy (2012) 20 taxmann.com 609 (Karnataka) our attention was drawn by the learned counsel for the Assessee to the fact that correctness of the said decision has been doubted and a reference has been made to a larger bench by the Hon'ble Karnataka High Court in the case of Dell India Pvt.Ltd. Vs. JCIT 382 ITR 310 (Karna) and hence the reference to the said decision by the CIT(A) is not of any use. Regarding the decision of the Hon'ble Kerala High Court in the case of Popular Vehicles & services Ltd. (2010) 19 taxmann.com 333 (ker), the same is contrary to the

law laid down by the Hon'ble Supreme Court in the case of Kelvinators India Ltd. (supra).

21. As far as the applicability of the third proviso to section 147 of the Act is concerned, we find that the reassessment proceedings were initiated by the AO by issue of notice dated 21.03.2013. The proceedings with reference to the original order of assessment passed under section 143(3) of the Act dated 19.11.2010 is pending before the Hon'ble ITAT and in those proceedings, the very same issue of quantum of deduction under section 37(1)(via) of the Act was pending for consideration before Hon'ble ITAT. Therefore, clearly the third proviso to section 147 of the Act was attracted. In this regard, we find that since the issue of deduction under section 36(1)(viia) of the Act was a subject matter of appeal before the CIT(A) and ITAT, it was no longer amenable to reassessment proceedings under section 147 of the Act. In the case of ACIT vs BSES Ltd & ors 2011 (9) TMI 135 — ITAT Mumbai, the Tribunal analysed the issue of merger and the applicability of the 3rd proviso to Sec.147 of the Act and held as follows:

> "10.4 Merger of the Order
>
> It was also one of the contention that the issue of quantification of deduction under section 80IA in respect of the Dahanu plant by the Assessing Officer, in the original assessment order has merged with the orders of the CIT (A) and ITAT and, therefore, the re-computation thereof by adopting a different method of working of profit eligible for deduction u/s 80IA was beyond the powers of the Assessing Officer. The Learned Departmental Representative vehemently argued that the issue in original assessment was entirely different. We are not in a position to accept the contention. The issue in original assessment was determination of profit for the purpose of deduction u/s 80IA on the Dahanu Generation Plant. The claim of profit, as determined by the assessee on the basis of

> average sale price to the customers was not accepted and the Assessing Officer re-determined that profit by invoking the provisions of section 80IA(8) and determined on the basis of average purchase price from Tata Power Companies. The ITAT order in the AY 2000-01 indicates that the issue in appeal was a quantum of profit generated by the Dahanu Unit. Since this quantum of profit is being re-determined at 16% on the basis of reasonable return considered while fixation of tariff by the MERC, we are of the opinion that, the issue being similar, the orders of the AO merged with that of ITAT and accordingly the Assessing Officer looses his jurisdiction to reopen the assessment as second proviso to section 147 is clearly applicable. Since the issue of profit for deduction under section 80IA, having been made subject matter of appeal before the CIT (A) and the ITAT, the said issue of determination of profit for the purpose of 801A(10) has merged with the order of the appellate authorities as a whole and hence, it was no longer amenable to the reassessment proceedings u/s 147 by virtue of second proviso to section 147. On this principles also, since in both the assessment years, the issue was originally considered and agitated at the level of the ITAT, the reopening on the same issue is to be considered as bad in law. We need not examine the various case law relied on this issue. Suffice to say that on facts and in law the issue having merged with the orders of ITAT was not amenable for reassessment".

22. The aforesaid decision is squarely applicable to the facts of the appellant bank case. In this case also, the additions made by the learned Assessing Officer all pertain to the matters which got merged with the order of CIT(A). Therefore, the same could not have been considered in the re-opened assessment as per the Third Proviso to section 147. The decision of the ITAT, Mumbai Bench, in the case of Reliance Energy Ltd., Vs. DCIT (2010) 40 SOT 314 (Mum) on similar lines also supports the plea of the assessee in this regard.

23. For the reasons given above, we allow grounds raised with regard to validity of initiation of reassessment proceedings u/s.147 of the Act and hold that the proceedings u/s.147 of the Act were not validly initiated. Therefore, order of the reassessment is liable to be annulled and is hereby annulled. Since the re-assessment order has been annulled, the other grounds raised by the Assessee in its appeal and by the Revenue in its appeal do not require any adjudication.

24. In the result, the appeal of the assessee is allowed while the appeal of the Revenue is dismissed.

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

Sd/-	Sd/-
(CHANDRA POOJARI)	**(N. V. VASUDEVAN)**
Accountant Member	**Vice President**

Bangalore,
Dated: 13.1.2021.
/NS/*

Copy to:
1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore. 6. Guard file

By order

Assistant Registrar
ITAT, Bangalore.