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

BEFORE SHRI CHANDRA POOJARI, ACCOUNTANT MEMBER
AND SMT. BEENA PILLAI, JUDICIAL MEMBER

ITA Nos. 3384 to 3388/Bang/2018
Assessment years : 2010-11 to 2013-14 & 2015-16

M/s. VVD Constructions Pvt. Ltd., No.C-301, Ramky Utsav, Seenappa Layout, New BEL Road, Bangalore. **PAN: AACCV 5142K**	Vs.	The Deputy Commissioner of Income Tax, Circle 7(1)(2), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri H. Guruswamy, ITP
Respondent by	:	Smt. R. Premi, Jt.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	12.02.2021
Date of Pronouncement	:	22.03.2021

O R D E R

Per Chandra Poojari, Accountant Member

These appeals by the assessee are directed against the common order dated 24.10.2018 of the CIT(Appeals)-7, Bengaluru for the assessment years 2010-11 to 2013-14 & 2015-16.

2. The facts of the case are that the original assessment in these assessment years was completed u/s. 143(3) of the Income-tax Act, 1961 [the Act]. Later assessment was reopened by making the following additions towards lower net margin profit and disallowance u/s. 36(1)(iii) of the Act in all these assessment years :-

AY	Lower Net Profit Margin	Disallowance u/s. 36(1)(iii)
2010-11	241,94,928	89,09,701
2011-12	80,47,903	135,28,782
2012-13	48,41,786	135,28,782
2013-14	83,28,008	104,26,768
2015-16	-	101,80,490

3. Against this, the assessee went in appeals before the CIT(Appeals) challenging the additions on merits. The CIT(A), however, confirmed the order of AO. Against this, the assessee is in appeals before us.

4. The assessee has raised common grounds of appeal in all these years and there is only change in figures. The grounds of appeal in ITA No.3384/B/2018 are reproduced below:-

1.	The impugned Appellate order dated: 24-10-2018 passed by the Ld. CIT(A), Bangalore-7 is opposed to law, facts and circumstances of the case.	
2.	The Ld. CIT(A) has erred in confirming the addition of Rs. 2,41,99,928/- which was estimated by the AO by adopting 8% Net Profit Margin Method based on the alleged voluntary statement of the Appellant made u/s. 133A of the Act and also on the Post Survey Statements recorded on oath u/s. 131 of the Act without appreciating the fact that the Appellant had declared 8% Margin of Profit subject to deductions and depreciation which was neither considered by the AO nor by the Ld. CIT(A).	82,22,964/- (exclusive of interest charged u/s. 234B and 234C amounting to Rs.1,02,83,852 and Rs.5,64,490 respectively.
3,	The Ld. CIT(A) has erred in confirming the addition of Rs. 2,41,99,928/- which was estimated by the AO on the ground that the profit declared by the Appellant in the Return of income was very low when compared to the profit margin declared by other contractors in the same line of business without bringing on record any comparable cases.	Same as above.

4.	The Ld. CIT(A) has erred in confirming the addition of Rs. 2,41,99,928/- estimated by the AO without any basis except on the ground of non production of the books of account without appreciating the fact that the Appellant could not produce the Books of Account, since some of the Books of Account and other documents were impounded by the AO in the course of the Survey conducted on 27-09-2016, u/s. 133A of the Act, and the same were in the possession of the AO at the time of Assessment.	Same as above.
5.	The Ld. CIT(A) ought to have not confirmed the estimated addition of Rs. 2,41,99,928/- placing reliance on the statement said to be made voluntarily in the post survey investigation by invoking section 131 of the Act without appreciating the fact that the AO was not entitled to issue summons u/s. 131 of the Act, after the Survey in the absence of any evidence as to the refusal and evasive attitude of the Appellant in the course of the Survey.	Same as above.
6.	The Ld. CIT(A) ought to have not confirmed the addition of Rs. 2,41,99,928/- which was made by the AO mainly on the ground of voluntary statement made by the Appellant without appreciating the fact that the AO has not brought on record any corroborative evidence in support of the addition made, in spite of survey conducted u/s. 133A of the Act.	Same as above
7.	The Ld. CIT(A) ought to have not confirmed the addition made by the AO by way of causing disallowance of expenditure being the Interest of 89,09,701/- paid on the borrowed Loans said to be diverted for Non-Business Activity without appreciating the fact that such disallowance of interest is neither justifiable nor called for, since the income was estimated and therefore no further disallowances was called for.	30,29,263/-
8.	The Ld. CIT(A) has erred in confirming the addition of Rs.2,41,99,928/- in the Re-Assessment completed u/s. 143(3) r.w.s 147 of the Act, without appreciating the fact that the AO has issued the Notice u/s. 148 of the Act without any material evidence as to the escapement of income chargeable to tax and therefore the Notice so issued u/s. 148 of the Act is not maintainable in law and the same is liable to be quashed.	
9,	The Appellant craves leave to add, alter, amend and delete any of the grounds at the time of hearing.	

Common main grounds raised in all the appeals i.e., ITA Nos. 3384 to 3388/Bang/2018:

5. The ld. AR submitted that in the assessment year under consideration, the assessee declared profit as per books of account. However, it was rejected by the AO and estimated it as follows:-

A.Y.	Turnover	Declared Percent-age	Percent-age of Addition	Taxable Income Declared	Additions on enhanced percentage	Disallowance of Interest	Assessed Income by the AO
2010-11	112 26,24,898	5.67%	8%	6,36,35,113	2,41,94,928	89,09,701	9,67,39,742
2011-12	62,30,57,675	6.42%	8%	3,99,77,626	80,47,903	1,35,28,782	6,15,54,311
2012-13	39,62,83,279	6.29%	8%	2,49,07,920	48,41,786	1,35,28,782	4,32,78,488
2013-14	30,62,50,788	4.50%	8%	1,37,94,818	83,28,008	1,04,26,768	3,25,49,594
2015-16	8,85,56,648	9.45%	8%	83,67,603		1,01,80,490	1,85,48,012

The AO made estimation on the reason that during the survey u/s. 133A conducted by the AO on 27.9.2016, it was found that no regular books of account was maintained and bills & vouchers are not available. On being asked as to why the case of assessee should be subject to special audit, Shri Maki Reddy Venkat Reddy, MD submitted that under oath he declared 8% of turnover as net profit for all the assessment years 2010-11 to 2015-16 and requested to complete assessment u/s. 147 for all these assessment years. On the basis of voluntary declaration by MD during the course of survey on 27.9.2016, the AO completed the assessment by estimating income of assessee at 8% of declared turnover.

6. In our opinion, the assessee maintained regular books of account which were duly audited by the CA u/s. 44AB of the Act. These facts are not disputed. It was held by the Hon'ble Supreme Court in the case of *CIT v. Khader Khan & Sons, 352 ITR 480 (SC)* that additions cannot be made merely on the basis of voluntary statement without any material evidence as to irregularity of account books or any other relevant evidence.

7. Further it is pertinent to mention the CBDT Circular No. 14(XL-35) of 1955, dated 11.4.1955 as per which the lower authorities should have guided the assessee as to the correct proposition of the law regarding taxability of capital gain. For clarity, we reproduce the contents of the said Circular:-

> " Officers of the department must not take advantage of ignorance of an assessee as to his rights. It is one of their duties to assist a tax

payer in every reasonable way, particularly in the matter of claiming and securing reliefs and in this regard the officers should take the initiative in guiding a tax payer where proceedings or other particulars before them indicate that some refund or relief is due to him. This attitude would, in the long run, benefit the department, for it would inspire confidence in him that he may be sure of getting a square deal from the department. Although, therefore, the responsibility for claiming refunds and reliefs rests with the assesses on whom it is imposed by law, officers should —

(a) draw their attention to any refunds or reliefs to which they appear to be clearly entitled but which they have omitted to claim for some reason or other;

(b) freely advise them when approached by them as to their rights and liabilities and as to the procedure to be adopted for claiming refunds and reliefs".

8. Further, the Hon'ble Delhi High Court in the case of *CIT v. Bharat General Reinsurance Co. Ltd., 83 ITR 303 (Del)* held as follows:-

"It was true that the assessee itself had included that dividend income in its return for the year in question, but there was no estoppel in the Income-tax Act and the assessee having itself challenged the validity of taxing the dividend during the year of assessment in question, it must be taken that it had resiled from the position which it had wrongly taken while filing the return. Quit apart from it, it was incumbent on the income-tax department to find out whether a particular income was assessable in the particular year or not. Merely because the assessee wrongly included the income in its return for a particular year, it could not confer jurisdiction on the department to tax that income in that year even though legally such income did not pertain to that year. Therefore the income from dividend was not assessable during the assessment year 1958-59, but it was assessable in the assessment year 1953-54. It could not, therefore, be taxed in the assessment year 1958-59."

9. Further, the Hon'ble Bombay High Court in the case of *Nirmala L. Mehta vs. A. Balasubramaniam, C.I.T. (2004) 269 ITR 1 (Bom)* held that there cannot be any estoppel against the statute. Article 265 of the

Constitution of India in unmistakable terms provides that no tax shall be levied or collected except by authority of law. Acquiescence cannot take away from a party the relief that he is entitled to where the tax is levied or collected without authority of law.

10. The Hon'ble Supreme Court in the case of CIT, Madras vs V. MR. P. Firm, Muar reported in 56 ITR 67(SC) held as under:-

> "If a particular income is not taxable under the Income-tax Act, it cannot be taxed on the basis of estoppel or any other equitable doctrine. Equity is out of place in tax law; a particular income is either exigible to tax under the taxing statute or it is not. If it is not, the Income-tax Officer has no power to impose tax on the said income."

11. In view of the above discussion, we are of the opinion that the estimation of income based only on statement recorded during the survey cannot be sustained. Accordingly we delete the addition on this count. This ground of appeal is allowed.

12. The next addition made by the AO is with regard to disallowance u/s. 36(1)(iii) on account of investment of interest bearing borrowed funds in the sister concern, Smilex Labs P. Ltd.

13. The ld. AR submitted that investment was made in AY 2010-11 and no investment was made in AY 2011-12. Further , it was submitted that from AY 2011-12 to 2013-14 & 2015-16, investment was made for the purpose of business in sister concern since assessee is having business transaction with sister concern. Being so, it was a business expediency to invest in sister concern Smilex Labs P. Ltd. He relied on the judgment in the case of *The Senate, ITA No.538/Bang/2011 dated 27.2.2012.*

14. The ld. DR submitted that the assessee diverted interest bearing funds in these assessment years, as such disallowance u/s. 36(1)(iii) has to be confirmed. She relied on the orders of lower authorities.

15. We have heard both the parties and perused material on record. It is not disputed that the investment was made in sister concern, Smilex Labs P. Ltd. It is also not disputed that investment is for the purpose of business of assessee as it is having inter-related business. As held by Supreme Court in the case of *S.A. Builders Ltd. 288 ITR 1 (SC)*, the expression "*for the purpose of business" includes expenditure voluntarily incurred for commercial expediency, and it is immaterial if a third party also benefits thereby. The lower authorities should have approached the question of allowability of interest on the borrowed funds from the above angle. In other words, the lower authorities should have enquired as to whether the interest free loan was given to the sister company as a measure of commercial expediency, and if it was, it should have been allowed. The expression "commercial expediency" is an expression of wide import and includes such expenditure as a prudent businessman incurs for the purpose of business. The expenditure may not have been incurred under any legal obligation, but yet it is allowable as a business expenditure, if it was incurred on grounds of commercial expediency."*

16. It was the plea of assessee that amount advanced to sister concern was by way of commercial expediency. It was also argued by the ld. AR that the assessee is having interest free funds which was invested in sister concern and there was no basis for the AO to presume that interest free funds would have been utilized for the business purposes instead of advancing to sister concern. The lower authorities without examining the purpose for which the assessee advanced to its sister concern, interest on such advance was disallowed.

17. As held in the case of *S.A. Builders v. CIT, 288 ITR 1 (SC)*, once it is established that there was nexus between the expenditure and the purpose of the business (which need not necessarily be the business of the assessee itself), the Revenue cannot justifiably claim to put itself in the arm-chair of

the businessman or in the position of the board of directors and assume the role to decide how much is reasonable expenditure having regard to the circumstances of the case. The income-tax authorities must put themselves in the shoes of the assessee and see how a prudent businessman would act. The authorities must not look at the matter from their own view point but that of a prudent businessman. As already stated above, we have to see the transfer of the borrowed funds to a sister concern from the point of view of commercial expediency and not from the point of view whether the amount was advanced for earning profits.

18. In our opinion, when the money advanced to its sister concern was for the purpose of business, interest on such advances cannot be disallowed. Accordingly, we allow this ground taken by the assessee.

Additional grounds

19. Now we take up the additional grounds raised by assessee in all the appeals.

ITA No.3384/B/2018 (AY 2010-11).

20. Assessee has filed additional grounds along with application for admission of additional grounds. The additional ground raised on 08.01.2021 reads as follows:-

> "The ld. AO has erred in completing the scrutiny assessment for the AY 2010-11 u/s. 143(3) r.w.s. 147 dtd: 08.11.2017 without issue of mandatory notice u/s. 143(2) of the Act as a result of which the assessment is liable to be annulled since the assessment is non est in law."

21. Similarly, the assessee has filed further additional ground on 10.02.2021 as under:-

> "1. The Notice dtd: 27-03-2017 issued u/s. 148 of the Act despatched on 27-06-2017 is barred by limitation of time

2. The Notice u/s. 148 dtd: 27-03-2017 was a Second Notice and the first Notice was issued on 21-11-2016 on which no Assessment was completed and hence the second notice dtd: 27-03-2017 is not maintainable during the pendency of first Notice dtd: 21-11-2016

3. The Proposal seeking approval for issue of Notice u/s. 148 was u/s. 147(c) of the Act which is not applicable to the facts and circumstances of the Appellant's case and hence the proposal itself is bad and non-est in law.

4. The approval granted by the Pr. CIT vide letter dtd: 24-03-2017 itself is bad in law since the said sanction was accorded without application of mind."

22. Further, the assessee has filed petition for admission of additional grounds explaining the reasons for filing the additional grounds. The ld. AR submitted that these additional grounds are very necessary for the cause of rendering substantial justice and equity and there is no necessity of investigation of any fresh facts so as to adjudicate these additional grounds and requested to admit the additional grounds. He relied on the following judgments in support of his arguments:-

(i) National Thermal Power Corporation v. CIT (1998) 229 ITR 383 (SC)
(ii) ACIT v. Hotel Blue Moon, 321 ITR 362 (SC)
(iii) Order of Tribunal in the case of DCIT v. Shriram Chits (Karnataka) Pvt. Ltd. in ITA No.499/Bang/2011 dated 22.2.2013.

23. On the other hand, the ld. DR opposed admission of additional grounds.

24. We have heard both the parties and perused the material on record. These grounds being legal grounds, go to the root of the matter of reopening of the assessment. Being so, we are inclined to admit the additional grounds for AY 2010-11 for adjudication.

25. With regard to non-issue of mandatory notice u/s. 143(2) of the Act, the ld. AR submitted that notice dated 26.9.2017 was issued with reference to return of income filed on 15.10.2010 vide Acknowledgement No.173218811151010 for AY 2010-11 which was despatched on 27.09.2017 for which there was no acknowledgement available on record on investigation of the records of the AO. As such, it is deemed that no notice u/s. 143(2) was served on the assessee.

26. On the other hand, the ld. DR submitted that notice u/s. 143(2) was issued to the assessee for AY 2010-11 and she drew our attention to the relevant order sheet entry dated 26.9.2017 and submitted that on 26.9.2017 in response to notice u/s. 143(2), the AR of the assessee Shri G.S. Reddy, ITP appeared before the AO and vide written submissions stating that the return filed vide Acknowledgement No.173218811151010 dated 15.10.2010 may be considered as return of income in response to notice u/s. 148 of the Act. As such, notice u/s. 143(2) was issued to the assessee and there is no merit in the argument of the ld. AR that no notice u/s. 143(2) was issued to the assessee.

27. We have heard both the parties and perused the material on record. In the present case, notice u/s. 143(2) r.w.s. 147 of the Act was dated 26.9.2017. The date of dispatch of this notice suggests that it was despatched on 27.9.2017. The notice dated 26.9.2017 is reproduced below:-

GOVERNMENT OF INDIA
INCOME TAX DEPARTMENT
OFFICE OF THE DY. COMMISSIONER OF INCOME – TAX
Circle 7 (1) (2), 2nd Floor, BMTC Building, 80ft Road
Koramangala, Bangalore- 560 095.
Phone no. 25625541
Email: Bangalore.dcit7.1.2@incometax.gov.in

PAN No: AACCV5142K Dated : 26/09/2017

NOTICE UNDER SECTION 143(2) r.w.s 147 OF THE INCOME TAX ACT, 1961

To
The Principal Officer
M/s. VVD Construction Pvt.Ltd.
#C-301, RAMKY UTSAV
Senappa Badavne, New BEL Layout
Bangalore-560094

Sir/Madam,

There are certain points in connection with the return of income submitted by you on 15.10.2010 vide Acknowledgement number 173218811151010, for the assessment year 2010-11 on which I would like some further information.

2. You are hereby required to attend my office on 05/10/2017 at 11:30 AM either in person or by a representative duly authorized in writing in this behalf or produce or cause there to be produced at the said time any documents, accounts and any other evidence on which you may rely in support of the return filed by you.

(PRITHVIRAJ, *I.R.S*)
Deputy. Commissioner of Income-Tax,
Circle – 7(1) (2), Bangalore.

28. We also find from the Order Sheet entry on 26.9.2017 as follows:-

Dated: 26/09/2017

In response to reminder notice dated 21/09/2017 AR Shri G S Reddy, ITP attended and filed a written submission stating that return filed vide acknowledgement no. 173218811151010 dated 15.10.2010 may be considered as the return of income for the notice issued u/s 148 and same has been considered and order-sheet noting has been made.

AR

26.9.17

AO

26/09/2017

29. The order sheet entry dated 27.9.2017 is as follows:-

ORDER SHEET NOTING

Dated: 27/09/2017

Notice under section 143(2) has been issued along with Show cause notice under section with proposal for additions of Rs.2,41,94,928/- and Rs. 89,09,701/-. In this regard the hearing has been fixed on 06/10/2017 at 11.45 AM

30. Now the question before us is that how the assessee appeared before the AO on 26.9.2017 itself which is the date of notice issued to the assessee u/s. 143(2) of the Act, though it was despatched to assessee on 27.9.2017. Further, there was an order sheet entry on 27.9.2017 stating that the case was fixed for hearing on 06.10.2017 at 11.45 am. However, it is seen from the notice issued u/s. 143(2) dated 26.9.2017 that the case was fixed for hearing on 05.10.2017 at 11.30 am. Further it is noted that appearance on scheduled date was neither on 05.10.2017 or on 06.10.2017. The AO made the order sheet entry on 08.11.2017 as follows:-

Dated: 08/11/2017

As assessee failed to respond to show cause even after 40 days the assessment under section 143(3) has been concluded considering that assessee has nathing to say on the addition proposed in show cause notice dated 27/09/2017 and assessment is concluded by considering material available on record along with declaration made by MD of assessee company on statement on oath.

31. In the present case, it is to be noted that there was no valid issue of notice u/s. 143(2) of the Act. Therefore, the assessment order framed thereafter is bad in law as held by the Hon'ble Supreme Court in the case of *CIT v. Hotel Blue Moon, 321 ITR 362 (SC)* wherein it was held that issue of legally valid notice u/s. 143(2) is mandatory for assuming jurisdiction to frame scrutiny assessment u/s. 143(3) of the Act and absence of a valid notice u/s. 143(2) is not a curable defect. This ratio laid down by the Supreme Court in *Hotel Blue Moon (supra)*was reiterated by the Supreme Court once again in the case of *CIT v. Laxmandas Khandelwal, 108 taxmann.com 183 (SC)*. The relevant observations of the Supreme Court are as follows:-

> "5. At the outset, it must be stated that out of two questions of law that arose for consideration in Hotel Blue Moon's case (supra) the first question was whether notice under Section 143(2) would be mandatory for the purpose of making the assessment under Section 143(3) of the Act. It was observed:—
>
> > "3. The Appellate Tribunal held, while affirming the decision of CIT (A) that non-issue of notice under Section 143(2) is only a procedural irregularity and the same is curable. In the appeal filed by the assessee before the Gauhati High Court, the following two questions of law were raised for consideration and decision of the High Court, they were:
> >
> > > "(1) Whether on the facts and in circumstances of the case the issuance of notice under Section 143(3) of the Income Tax Act, 1961 within the prescribed time-limit for the purpose of making the assessment under Section 143(3) of the Income Tax Act, 1961 is mandatory? And
> > >
> > > (2) Whether, on the facts and in the circumstances of the case and in view of the undisputed findings arrived at by the Commissioner of Income Tax (Appeals), the additions made under Section 68 of the Income Tax Act, 1961 should be deleted or set aside?"

4. The High Court, disagreeing with the Tribunal, held, that the provisions of Section 142 and sub-sections (2) and (3) of Section 143 will have mandatory application in a case where the assessing officer in repudiation of return filed in response to a notice issued under Section 158-BC(a) proceeds to make an inquiry. Accordingly, the High Court answered the question of law framed in affirmative and in favour of the appellant and against the Revenue. The Revenue thereafter applied to this Court for special leave under Article 136, and the same was granted, and hence this appeal.

** ** **

13. The only question that arises for our consideration in this batch of appeals is: whether service of notice on the assessee under Section 143(2) within the prescribed period of time is a prerequisite for framing the block assessment under Chapter XIV-B of the Income Tax Act, 1961?

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27. The case of the Revenue is that the expression "so far as may be, apply" indicates that it is not expected to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143 strictly for the purpose of block assessments. We do not agree with the submissions of the learned counsel for the Revenue, since we do not see any reason to restrict the scope and meaning of the expression "so far as may be, apply". In our view, where the assessing officer in repudiation of the return filed under Section 158-BC(a) proceeds to make an enquiry, he has necessarily to follow the provisions of Section 142, sub-sections (2) and (3) of Section 143."

6. The question, however, remains whether Section 292BB which came into effect on and from 01.04.2008 has effected any change. Said Section 292BB is to the following effect:—

"292BB. Notice deemed to be valid in certain circumstances.—Where an assessee has appeared in

> any proceeding or cooperated in any inquiry relating to an assessment or reassessment, it shall be deemed that any notice under any provision of this Act, which is required to be served upon him, has been duly served upon him in time in accordance with the provisions of this Act and such assessee shall be precluded from taking any objection in any proceeding or inquiry under this Act that the notice was –
>
> (a) Not served upon him; or
> (b) Not served upon him in time; or
> (c) Served upon him in an improper manner:
>
> Provided that nothing contained in this section shall apply where the assessee has raised such objection before the completion of such assessment or reassessment."

7. A closer look at Section 292BB shows that if the assessee has participated in the proceedings it shall be deemed that any notice which is required to be served upon was duly served and the assessee would be precluded from taking any objections that the notice was (a) not served upon him; or (b) not served upon him in time; or (c) served upon him in an improper manner. According to Mr. Mahabir Singh, learned Senior Advocate, since the Respondent had participated in the proceedings, the provisions of Section 292BB would be a complete answer.

On the other hand, Mr. Ankit Vijaywargia, learned Advocate, appearing for the Respondent submitted that the notice under Section 143(2) of the Act was never issued which was evident from the orders passed on record as well as the stand taken by the Appellant in the memo of appeal. It was further submitted that issuance of notice under Section 143(2) of the Act being prerequisite, in the absence of such notice, the entire proceedings would be invalid.

8. The law on the point as regards applicability of the requirement of notice under Section 143(2) of the Act is quite clear from the decision in Hotel Blue Moon's case (supra). The issue that however needs to be considered is the impact of Section 292BB of the Act.

> 9. According to Section 292BB of the Act, if the assessee had participated in the proceedings, by way of legal fiction, notice would be deemed to be valid even if there be infractions as detailed in said Section. The scope of the provision is to make service of notice having certain infirmities to be proper and valid if there was requisite participation on part of the assessee. It is, however, to be noted that the Section does not save complete absence of notice. For Section 292BB to apply, the notice must have emanated from the department. It is only the infirmities in the manner of service of notice that the Section seeks to cure. The Section is not intended to cure complete absence of notice itself.
>
> 10. Since the facts on record are clear that no notice under Section 143(2) of the Act was ever issued by the Department, the findings rendered. by the High Court and the Tribunal and the conclusion arrived at were correct. We, therefore, see no reason to take a different view in the matter."

32. In the present case, admittedly, there was no proper service of notice u/s. 143(2) issued to the assessee. In such circumstances, the assessment order framed thereafter is bad in law.

33. Further, the date mentioned in the order sheet entry dated 27.9.2017 for fixing the case for hearing in response to 143(2) notice is not tallying with the date of hearing mentioned in the notice issued u/s. 143(2) on 26.9.2017. On these grounds, we are of the opinion that there is no valid issue of notice u/s. 143(2) of the Act and the assessment for AY 2010-11 is bad in law.

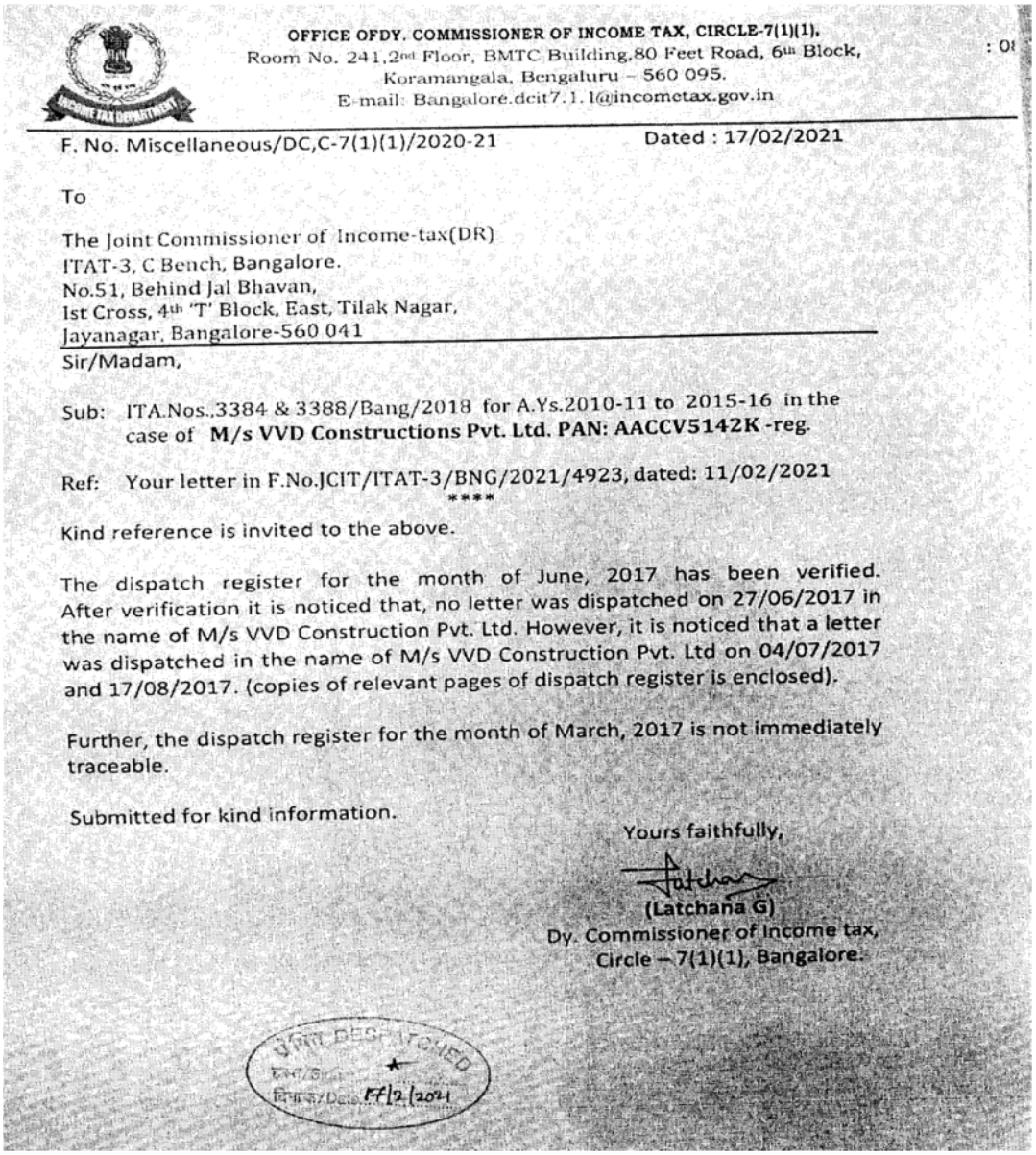
34. On merits of additional grounds raised on 10.02.2021, the ld. AR drew our attention to 148 notice dated 27.3.2017 which is placed in PB page 4 of the PB of the additional rejoinder and submitted that though the date was mentioned as 27.3.2017, but it was despatched on 27.6.2017. The time limit for issue of notice is 6 years from the end of assessment year, ending on 31.3.2017 the assessment year involved being AY 2010-11. Since it was despatched on 27.6.2017, the issue of notice u/s. 148 on 27.6.2017 is barred by limitation. Further it was submitted that the first notice was issued on

21.11.2016 on which no assessment has been framed. The second notice dated 27.6.2016 is also not maintainable during the pendency of the first notice dated 21.11.2016. It was also submitted that notice u/s. 148 stated to have been issued is not maintainable since it was not at all served on the assessee within the limitation period.

35. The ld. AR submitted that the assessment year ended on 31.3.2011. Six years limitation period commences from 1.4.2011 and ends on 31.3.2017. In the present case, no notice u/s. 148 was despatched on 27.6.2017, after expiry of limitation period. Hence submitted that the notice which has been issued after the period of six years from the end of assessment year has no relevant and assessment order is to be quashed.

36. Further, it was submitted that the proposal as per format available on record was submitted u/s. 147(c) of the Act, as such the Pr. CIT without application of mind ha mechanically approved the case for issue of notice u/s. 148 on the basis of approval submitted u/s. 147(c). The Pr.CIT was not justified in according approval without fulfilling the condition laid down u/s. 147(c) of the Act, inasmuch as income chargeable to tax was not under-assessed or not assessed or not assessed at too low rate or no excessive relief was claimed and no excessive losses were claimed, since the AO has not completed the original assessment upon filing of return of income. He relied on the judgment of Hon'ble Delhi High Court in the case of *Unique Electrical P. Ltd. & Ors. v. CIT 258 ITR 317 (Del)* wherein it has been held that the competent authority is not entitled to grant approval casually or in a routine manner without application of mind. On this ground also, he prayed for quashing the assessment itself.

37. The ld. DR submitted that as per the records, the only notice u/s. 148 was on 27.03.2017 and not 21.11.2016. Regarding service of notice, the ld. DR produced a copy of letter dated 16.02.2021 from the DCIT, Circle 7(1)(1), Bangalore stating as follows:-



OFFICE OFDY. COMMISSIONER OF INCOME TAX, CIRCLE-7(1)(1),
Room No. 241,2nd Floor, BMTC Building,80 Feet Road, 6th Block,
Koramangala, Bengaluru – 560 095.
E-mail: Bangalore.dcit7.1.1@incometax.gov.in

F. No. Miscellaneous/DC,C-7(1)(1)/2020-21 Dated : 17/02/2021

To

The Joint Commissioner of Income-tax(DR)
ITAT-3, C Bench, Bangalore.
No.51, Behind Jal Bhavan,
Ist Cross, 4th 'T' Block, East, Tilak Nagar,
Jayanagar, Bangalore-560 041

Sir/Madam,

Sub: ITA.Nos..3384 & 3388/Bang/2018 for A.Ys.2010-11 to 2015-16 in the case of **M/s VVD Constructions Pvt. Ltd. PAN: AACCV5142K** -reg.

Ref: Your letter in F.No.JCIT/ITAT-3/BNG/2021/4923, dated: 11/02/2021

****

Kind reference is invited to the above.

The dispatch register for the month of June, 2017 has been verified. After verification it is noticed that, no letter was dispatched on 27/06/2017 in the name of M/s VVD Construction Pvt. Ltd. However, it is noticed that a letter was dispatched in the name of M/s VVD Construction Pvt. Ltd on 04/07/2017 and 17/08/2017. (copies of relevant pages of dispatch register is enclosed).

Further, the dispatch register for the month of March, 2017 is not immediately traceable.

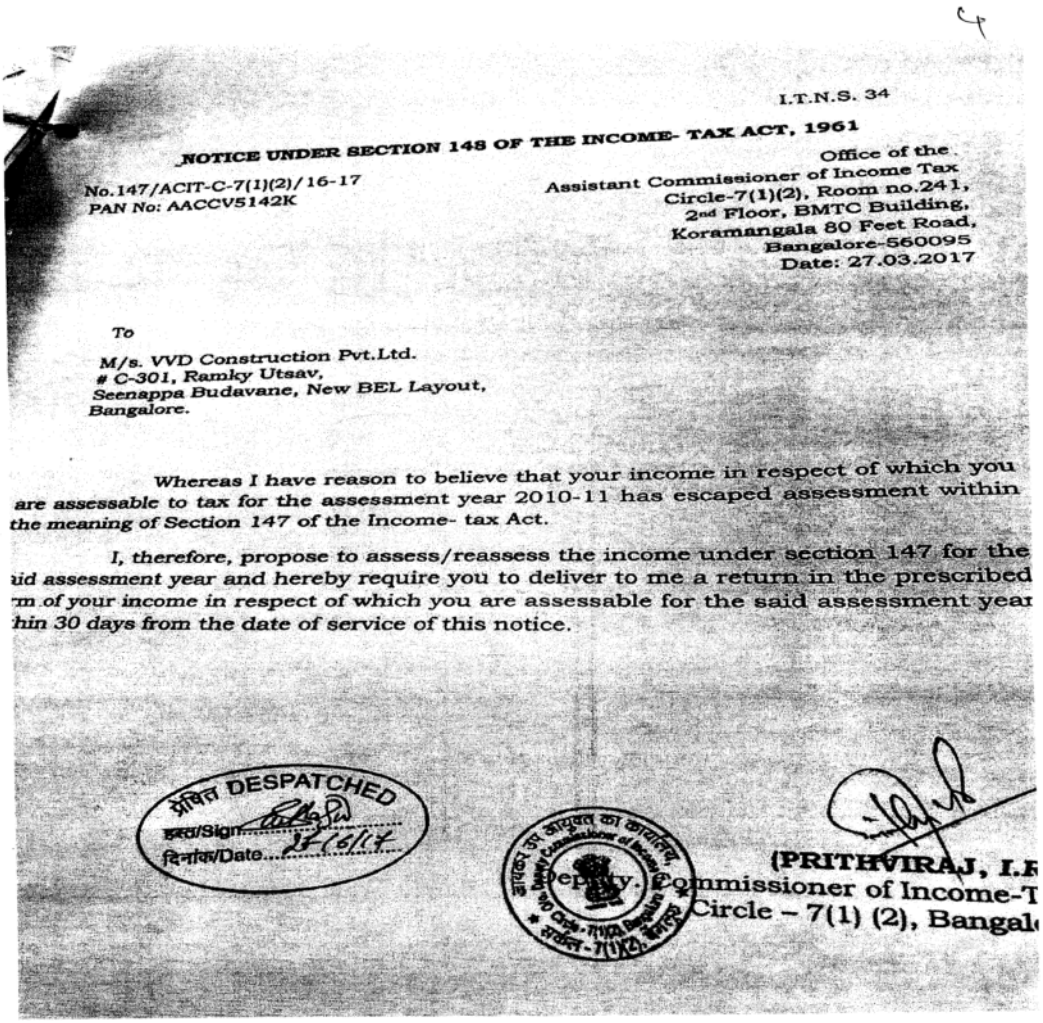
Submitted for kind information.

Yours faithfully,

(Latchana G)
Dy. Commissioner of Income tax,
Circle – 7(1)(1), Bangalore.

38. According to the ld. DR, no letter was despatched on 27.6.2017 in the case of assessee and dispatch register for the month of March,2017 is not readily available.

39. We have heard both the parties and have carefully gone through the records. In this case original assessment was completed u/s. 143(3) of the Act. We have gone through notice u/s. 148 dated 27.3.2017 which is as follows:-



I.T.N.S. 34

NOTICE UNDER SECTION 148 OF THE INCOME- TAX ACT, 1961

No.147/ACIT-C-7(1)(2)/16-17
PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle-7(1)(2), Room no.241,
2nd Floor, BMTC Building,
Koramangala 80 Feet Road,
Bangalore-560095
Date: 27.03.2017

To

M/s. VVD Construction Pvt.Ltd.
C-301, Ramky Utsav,
Seenappa Budavane, New BEL Layout,
Bangalore.

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2010-11 has escaped assessment within the meaning of Section 147 of the Income- tax Act.

I, therefore, propose to assess/reassess the income under section 147 for the aid assessment year and hereby require you to deliver to me a return in the prescribed m of your income in respect of which you are assessable for the said assessment year hin 30 days from the date of service of this notice.

प्रेषित DESPATCHED
हस्ता/Sign.....
दिनांक/Date 27/6/17

(PRITHVIRAJ, I.R
Deputy Commissioner of Income-T
Circle – 7(1) (2), Bangal

40. The purported notice said to have been despatched to the assessee on 27.6.2017 is seen from the copy furnished by the ld. DR before us. She also filed a copy of letter dated 17.02.2021 stating that no letter was despatched to assessee on 27.6.2017, however a letter was despatched to the assessee on 4.7.2017 for which the ld. DR produced the dispatch register.

41. On going through the above documents, we are of the opinion that the notice issued u/s. 148 dated 27.3.2017 left the office of the DCIT Circle 7(2)(1) on 27.6.2017 as seen from the dispatch seal. It might have actually been sent by Speed Post on 4.7.2017. Now the question before us is whether notice u/s. 148 was issued within the time limit prescribed u/s.149 of the Act. In the present case, the impugned notice dated 27.3.2017 though said to be despatched from the department on 27.6.2017, was actually sent by speed post to the assessee on 4.7.2017. It is apparent that though signature to the said notice was affixed by the Officer on 27.3.2017, actually it was despatched to the assessee on 4.7.2017 and mere signing of the notice cannot be equated with the actual issuance of notice as contemplated u/s. 149 of the Act. The date of issue of notice would be the date on which the same was handed over to service to the proper person which in effect in the present case, would be the date on which notice was actually handed over to the post office for the purpose of effecting service to the assessee. Till that point of time, the envelope containing the notice was with the dispatch Clerk, it cannot be stated that the process of issue of notice was completed. The notice u/s. 148 issued for reopening assessment beyond the period of four years from the end of relevant assessment year was barred by limitation. Section 150(2) of the Act could not save the limitation as limitation had already expired on the date of issue of notice u/s. 148 i.e., on 04.7.2017. Further we place reliance on the judgment of the Hon'ble High Court of Karnataka in the case of *Spences Hotels P. Ltd. v. DCIT, 263 ITR 263 (Karn)* wherein it was held that reopening notice issued beyond the period of limitation u/s. 149(1)(a)(iii) expired on the date of issue of notice and therefore notice of reassessment was barred by limitation. The Hon'ble Bombay High Court in the case of *Dynacraft Air Controls v. Smt. Sneha Joshi & Ors., 355 ITR 102 (Bom)* held that under the present section 147, no action could be taken after expiry of 4 years from the end of relevant assessment year, unless any income chargeable to tax has escaped

assessment for such assessment year by reason of failure on the part of assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. The fulfillment of this condition is a pre-requisite and if it is absent, an assessment cannot be reopened beyond four years. If the reasons recorded did not indicate fulfillment of this condition, reopening is invalid.

42. In the present case, the copy of reasons recorded are as follows:-

Annexure I

M/s VVD Constructions Private Limited

A.Y. 2010-11

Reasons to believe that income has escaped assessment

M/s VVD Constructions Pvt Ltd is assessed at this circle and for the AY 2010-11 the assessee company has filed a return of income on 15/10/2010 declaring Rs. 6,36,35,113/- as total income. There was no assessment order passed for this year u/s 143(3) of the IT Act. The total turnover of the company for FY 2009-10 was Rs. 62,30,57,675/-. On 27/09/2016 a survey under section 133A of the Income-tax Act, 1961 has been conducted by this office during the course of survey the financials of the company has been examined and on perusal of record it is noticed that, during this year (i.e. the year under consideration) the assessee company has made investments of Rs. 11,27,39,850/-in M/s Smilax Lab Pvt Ltd as investment in the form of equity share.

2. The assessee company has taken financial assistance in the form of loans to run its business for which it is paying interest and during the year, the assessee has paid an amount of Rs. 2,54,82,741/- as interest on loans barrowed. However, the assessee company is not receiving any interest income/dividend on its investments with the above mentioned company.

3. As the assessee is paying a huge interest on the loans barrowed which was supposed to use for its regular business activities but diverted in investments which is not bearing any income in the form of dividend/interest from the above mentioned company. Even if it is assumed that, assessee is having sufficient interest free funds, it would have been utilized for the business purposes instead of incurring financial cost and legal obligation in terms of loans. In the case ACIT Vs Punjab Stainless Steel Industries (ITAT, Del) 128 ITD 12, The ITAT had held that, *'assessee claimed that it gave interest free advances from its own funds and then borrowed funds from banks on interest for business purposes; such borrowing from banks can be treated as for supplementing cash diverted by assessee without any benefit to it then claim for deduction of interest on borrowing to be disallowed.'*

4. The borrowed funds need to be utilised for the purpose of business as per the section 36(1)(iii) of the Income-tax Act, 1961 and in number of judicial judgement the *"For the purpose of business', what it means"* has been defined and address. In this regard some of the case laws are discussed as follow:

*In the case of CIT v. Malayalam Plantations Ltd. (1964) 53 ITR 140 (SC), where the phrase **'for the purpose of the business'** in section 10(2)(xv) of 1922 Act [corresponding to section 36(1)(iii) of the 1961 Act] arose for consideration, the Apex Court held as under :*

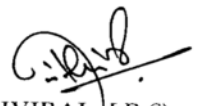
> *'8. The expression **'for the purpose of the business'** is wider in scope than the expression **'for the purpose of earning profits'**. Its range is wide: it may take in not only the day to day running of a business but also the rationalization of its administration and modernization of its machinery;*
>
> 1. *it may include measures for the preservation of the business and for the protection of its assets and property from expropriation, coercive process or assertion of hostile title;*
> 2. *it may also comprehend payment of statutory dues and taxes imposed as a pre-condition to commence or for carrying on of a business;*
> 3. *it may comprehend many other acts incidental to the carrying on of a business.*
>
> *.....However, wide the meaning of the expression may be, **its limits are implicit in it**. The purpose shall be for the purpose of the business, that is to say, the expenditure incurred shall be for the carrying on of the business and the assessee shall incur it in his capacity as a person carrying on the business. It cannot include sums spent by the assessee as agent of a third party, whether the origin of the agency is voluntary or statutory; in that event, he pays the amount on behalf of another and for a **purpose unconnected with the business**. In the present case, the company, as a statutory agent of the deceased owners of the shares, paid the sums payable by the legal represents of the deceased shareholders. **The payments have nothing to do with the conduct of the business.** ....'"*

5. The assessee company is engaged in the business of road contract work. So, as per the submission of the assessee the main business activity is the road contract and advances made to above mentioned concern is unknown. Because as per going through the MCI website and website of M/s Smilax Lab Pvt Ltd, it is into the business of *"research-driven, vertically integrated pharmaceutical company manufacturing Active Pharmaceutical Ingredients, API Intermediates and NDDS/Pellets for the generics market across the world"*. When the same issue brought to the knowledge of AR during the scrutiny proceedings for the AY 2014-15, the authorised representative could not substantiate the business nexus between M/s Smilax Lab Pvt Ltd and M/s VVD Constructions Pvt Ltd.

As per the provisions laid down in the section 36(1)(iii) of the Income-tax Act, 1961, the interest expenses incurred should be for the purpose of business. The assessee company has failed to establish that investment is for the purpose of business as per the provisions of section 36(1)(iii) of the Income-tax Act, 1961. In *CIT v/s Sujani Textiles (P) Ltd. (1997) 225 ITR 560 (Mad),* it was observed that interest paid by the company on the borrowed fund, which were utilised for non-business purposes, cannot be allowed under section 36(1)(iii).

6. Considering the above mentioned facts, it is certain that, the assessee company is claiming interest expenses on the loans which were taken for the business purposes but were diverted towards investments without using for business purposes. Since, assessee company has claimed interest expenses of Rs. Rs. 1,35,28,782/- (Rs. 11,27,39,850 @ 12.5 %) which are not related to business activities thus, understating its returned income to that extent.

7. Therefore, I am satisfied that, assessee company has failed to disclose true and correct income and its income of Rs. 1,35,28,782/- has been escaped assessment, due to incorrect claim, within the meaning of section 147 of the Income-tax Act, 1961. Therefore, the assessment proceedings are required to be reopened by issuing notice u/s 148 of the Income-tax Act, 1961.



(PRITHVIRAJ., *I.R.S*)
Asst. Commissioner of Income-tax,
Circle-7(1)(2), Bangalore

43. There is no allegation in the reasons recorded for reopening the assessment by the AO that there is a failure on the part of assessee to disclose fully and truly all material facts necessary for assessee's assessment for the impugned assessment year. Being so, reopening is bad in law. In these facts and circumstances of the present case, the impugned notice having been sent for booking through speed post centre only on 4.7.2017, the date of issue of such notice would be 4.7.2017 only and not 27.3.2017 or 27.6.2017, which is clearly beyond 6 years from the end of relevant assessment year 2010-11 i.e., 31.3.2011 which is barred by limitation and cannot be sustained. Accordingly, we are of the opinion that reassessment framed vide notice dated 148 dated 27.3.2017 is bad in law.

44. Next argument of the ld. AR is that notice u/s. 148 dated 21.11.2016 was issued prior to the date of obtaining approval from the competent authority which was accorded on 23.3.2017. Therefore, the notice u/s. 148 dated 21.11.2016 issued without approval is bad in law, consequently the assessment framed thereon is also bad in law. Further he submitted that the notice issued u/s. 148 on 21.11.2016 has not resulted in framing of assessment, hence second notice u/s. 148 cannot be issued. He relied on the judgment of the coordinate Bench of the Tribunal in the case of *M/s. The Archdiocesan Board of Education v. DCIT in ITA No.585/Bang/2019 dated 19.07.2019* and also drew our attention to the copy of 1st notice u/s 148 of the Act on 21.1.2016, which is as follows:-

I.T.N.S – 34

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

No.147/ACIT-C-7(1)(2)/16-17

PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle – 7(1)(2), Room No. 241
2nd Floor, BMTC Building,
Koramangala 80 Feet Road
Bangalore – 560 095
Date: 21.11.2016

To,

M/s. VVD Constructions (P) Ltd
C-301, Ramky utsav,
Seenappa Budavane, New BEL Layout
BANGALORE

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2010-11 has escaped assessment within the meaning of Section 147 of the Income – tax Act.

I, therefore, propose to assess/reassess the income under section 147 for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within 30 days from the date of service of this notice.

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

CERTIFIED COPY
H. GURUSWAMY
(Authorised Representative

45. The ld. DR submitted that only notice u/s. 148 dated 27.3.2017 was issued no other notice u/s. 148 was issued for AY 2010-11.

46. Admittedly, in this case there was a copy of notice dated 21.11.2016 and no action was taken consequent to issue of this notice for framing the assessment. It is to be noted that the Tribunal in the case of *M/s. The Archdiocesan Board of Education (supra) held as follows:-*

> "6. We have considered the rival submissions. First of all, we examine the applicability of the judgment of Hon'ble Karnataka High Court cited by ld. DR of revenue because if we find that this judgment of Hon'ble Karnataka High Court is applicable in the present case, then the judgment of any other High Court is not required to be considered because we are duty bound to follow the judgment of Hon'ble Karnataka High Court in preference to any judgment of any other High Court.
>
> 6. To examine the applicability of this judgment in the present case, we reproduce para nos. 12 to 17 of this judgment from pages 17 to 19 of case law compilation filed by ld. DR of revenue. These paras read as under.
>
> > "12. From the material on record, it is noticed that in respect of the assessment year 1991-92, which is under

consideration, the last, date for filing of the return was 30/10/1991. However, no such return was filed by the appellant before the said date. Subsequently, on 24/2/1992, a search was conducted in the premises of the appellant under Section 132 of the Act and thereafter, a declaration of income of Rs. 3 lakhs was made by the appellant. However, there was no return which was filed. Therefore, notice under Section 148 of the Act was issued on 14/12/1992, which was served on the assessee on 24/12/1992. Even prior to the service of notice in the interregnum, the assessee filed his return of income on 22/12/1992, declaring income of Rs. 3 lakhs. In the usual course, within a period of two years i.e., by 31/3/1995, the assessment had to be completed. However, assessment order in the instant case was passed on 27/3/1997 and another notice under Section 148 was issued on 24/11/1994 and a revised return was filed on 31/3/1995. The contention of the counsel for the appellant is that the second notice dated 24/11/94 is barred by limitation since the time limit for the conclusion of the assessment was 31/3/1995 and after that date, since by then, no assessment order had been passed, it must be deemed to have been concluded and hence, the assessment order dated 27/3/1997 is invalid. Before answering the points for consideration, it would be necessary to refer to the documents annexed to the memorandum of appeal.

13. It is seen from the documents annexed, that as per Annexure-B dated 24.10.1992 statement of return of income as disclosed on 31.3.1992 at the time of search under Section 132(4) of the Act is given. In the said statement it is noted that agricultural income is not included since the same was being worked out and was to be furnished at the time of filing a revised return. Though the said document is dated 24.10.1992, it has not been filed in the Income Tax Office. In the absence of there being any return filed, notice under Section 148 of the Act was issued dated 14.12.1992 stating that, return has to be filed in the prescribed form within 30 days from the date of service of notice. Between the date of service of notice dated 14.12.1992 and the receipt of notice on 24.12.1992 the appellant has filed Return of Income on 22.12.1992 as per Annexure-D. After receipt of notice dated 24.12.1992 reply was given by the petitioner on 29.12.1992 stating that return has been filed on 22.12.1992. After verifying the said

return notice under Section 148 of the Act was issued on 24.11.1994 stating that there has been escapement of income. In response to the said notice, the appellant filed another statement of Return of Income on 18.10.1995. The case was taken up for scrutiny by issue of notice under Section 143(2) on 15.5.1996 and thereafter various details were called for and the assessment order was passed on 27.3.1997.

14. Under explanation to Section 147 certain situations which are deemed to be cases of income escaping assessment are stated as follows:

(a) where no return of income is furnished by an assessee, although total income is above the taxable limit;

(b) where a return of income has been furnished, but no assessment has been made, and the assessee is found to have understated his income or claimed, excessive loss deduction, etc., in the return; and

(c) where an assessment has been made, but income chargeable to tax has been under assessed or has been assessed at too low a rate or any excessive loss or relief or depreciation allowance or any other allowance under the Act has been allowed.

15. The Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matter of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.

16. Having regard to the facts of the present, case, it becomes clear that in respect of the assessment year 1991-92, the appellant assessee had to file his return on or before 30.10.1991. The same was not done. Subsequently, a search was conducted in the premises of the appellant under Section 132 of the Act on 24.2.1992. A declaration of income of Rs. 3.00 lakh was made by the appellant but no return was filed till then. Since there was no return filed by the appellant notice under Section 148 of the Act was issued on 14.2.1992 as per Annexure-C which was served on the assessee on 24.12.1992. Therefore, when the notice under Section 148 of the Act was issued, the assessee had not filed his return of income only on 22.12.1992, the assessee filed

his return declaring income of Rs. 3.00 lakh. If the appellant-assessee had filed his return in the usual course that is on or before 30.10.1991, then the assessment would have to be completed by 31.3.1994. But in the present case a return was filed only on 22.12.1992 after issuance of notice under Section 148 of the Act. The said return was therefore, filed subsequent to the issuance of notice dated 14.12.1992. Thereafter, on consideration of the return filed by the assessee on 22.12.1992, notice under Section 148 was issued on 24.11.1994. In response to which, a revised return was filed on 20.10.1995. On the facts of the present case, it becomes clear that as on the date the first notice was issued, there was no return which had been filed by the appellant. If a return is not filed within time prescribed under Section 139(1) or within the time allowed under Section 142(1), a notice can be issued under Section 148 seeking a return to be filed in the prescribed form as it would be deemed to be a case of income escaping assessment, particularly when the total income is above the total limit. After the filing of his return on 22.12.1992, another notice was sent on 24.11.1994 pursuant to which the assessee filed a revised return declaring revised total income of Rs. 4,57,934/- on 20.10.1995. In fact, in the return filed on 22.12.1992, the assessee had declared a total income of Rs. 3.00 lakh without profit and loss account and balance sheet.

17. Having regard to the position of law and the peculiar facts of the case, in the absence of any return being filed notice under Section 148 of the Act dated 14/12/1992 was rightly issued by the Assessing officer. When the return was filed by the assessee on 22/12/1992 the Assessing officer had time till 31/3/1995 to complete the assessment, when he considered the return dated 22/12/1992 and found that there was escapement of income, he issued notice dated 24/11/1994 which was also responded to by the appellant-assessee only on 20/10/1995 by filing a revised return therefore the (notice dated 24/11/1994 is in fact not a "second notice", under Section 148 of the Act during the pendency of an earlier or first notice under Section 148 of the Act. The circumstances under which the two notices have been sent have to be borne in mind. The first notice dated 14/12/1992 was issued under Section 148 of the Act, when there was no return filed and the said notice was validly issued. When a return was filed on 22/12/1992, even before the service of the said notice the purpose of

> sending such a notice was fulfilled. However, there is no bar in law to send a notice under Section 148 of the Act after the return dated 22/12/1992 was filed by the appellant. Such a notice can be issued by the Assessing Officer after perusal of the return filed by the assessee after a return is filed but no assessment has been made and the assessee is found to have under stated his income or claimed excessive loss or deduction in the return. This notice dated 24/11/1994 was in fact not objected to by the appellant, but was also responded to by filing a revised return on 20/10/1995. Therefore, the notice dated 24/12/1994 was validly issued after considering the return filed by the appellant on 22/12/1992. Point No. 1 is accordingly answered against the appellant."

8. From above para reproduced from this judgment of Hon'ble Karnataka High Court, we find that in that case, first notice u/s. 148 was issued by the AO on this basis that even after expiry of the time fixed for filing the return of income u/s. 139(1) of IT Act which was 30.10.1991 in that case, no return of income was filed by the assessee and in between, search took place in that case of assessee on 24.02.1992. It is also noted in that case that the assessee in that case declared income of Rs. 3 Lakhs in course of search but there was no return of income filed by the assessee and therefore, notice u/s. 148 was issued on 14.12.1992 which was served on the assessee on 24.12.1992. This is also noted by Hon'ble High Court in that case that even before service of notice on 24.12.1992, the assessee filed return of income on 22.12.1992 declaring income of Rs. 3 Lakhs. In view of these facts, it is noted by Hon'ble Karnataka High Court in that case in para 17 of the judgment reproduced above that the circumstances under which the two notices have been sent have to be borne in mind. The Hon'ble High Court has noted that the first notice dated 14.12.1992 was issued u/s. 148, when there was no return filed and the said notice was validly issued. This is also noted by Hon'ble Karnataka High Court that when return was filed on 22.12.1992 even before the service of the said notice, the purpose of sending such a notice was fulfilled but there is no bar in law to send a notice u/s. 148 of the Act after the return dated 22.12.1992 was filed by the assessee. It is also noted by Hon'ble Karnataka High Court in that case that after perusal of the return filed by the assessee on 22.12.1992, the AO found that there was escarpment of income

although no assessment has been made and because of this reason, second notice was issued on 24.11.1994. It is also noted by Hon'ble Karnataka High Court in that case that second notice dated 24.11.1994 was in fact responded to by filing a revised return on 20.10.1995 and under these facts, it was held that the second notice u/s. 148 dated 24.12.1994 was validly issued after considering the return filed by the assessee on 22.12.1992. Hence as per this judgment of Hon'ble Karnataka High Court, it is very important to consider that under which circumstances, two notices have been issued by the AO u/s. 148. In the present case, the reasons recorded by the AO for issuing the first notice u/s. 148 on 18.04.2013 are available on page 132 of the paper book and the reasons recorded by the AO for issuing the second notice u/s. 148 on 31.03.2015 are available on page 133 of the paper book. Both these reasons are identical as per which, this is stated by the AO that, the assessee is not registered u/s 12A and hence not eligible for exemption u/s 11 and the assessee is not eligible for exemption u/s 10 (23C) (vi) also and therefore, entire income of the assessee is taxable. These facts show that both notices u/s 148 were issued for the same reason in the present case whereas in the case of P. Dayananda Pai Vs. ACIT (Supra), the first notice u/s 148 was issued for this reason that no return of income was filed by the assessee in spite of expiry of time allowed u/s 139 (1) and pursuant to search, a declaration of income of Rs. 3 Lacs was made but no return was filed. This is also a fact of that case that even before service of the first notice on 24.12.1992, the assessee filed return of income on 22.12.1992 declaring an income of Rs. 3 lacs and second notice in that case was issued by the AO for this reason that there is escarpment of income as per the AO as per the return filed on 22.12.1992. As per Para 17 of this judgment as reproduced above, it is categorically stated by Hon’ble Karnataka High Court that this judgment is having regard to peculiar facts of that case. These peculiar facts are these that the first notice was issued in view of non filing of return of income by the assessee even after expiry of time allowed u/s 139 (1) of I T Act and declaration of income of Rs. 3 lacs in course of search. This is also a fact of that case that even before the service of the first notice u/s 148 on 24.12.1992, the assessee had filed return of income on 22.12.1992 and because of these facts, a categorical finding is given by Hon'ble Karnataka High Court in the same Para 17 as reproduced above that notice dated 24/11/1994 is in fact not a "second notice", under Section 148 of the Act during

the pendency of an earlier or first notice under Section 148 of the Act. In that case, Hon'ble High Court was of the view that first notice stood disposed of the moment the return of income was filed by the assessee because the first notice was for asking the assessee to file return of income because no return was filed by the assessee even after expiry of time permitted u/s 139 (1) and therefore, the second notice was held to be not during the pendency of an earlier or first notice under Section 148 of the Act. But in the present case, the reasons recorded for both notices are same as noted above being non eligibility of the assessee for exemption u/s 11 and section 10 (23C) (vi). Hence in the facts of the present case, the second notice was issued during pendency of the first notice and therefore, in our considered opinion, this judgment of Hon'ble Karnataka High Court rendered in the case of P. Dayananda Pai Vs. ACIT (Supra) is not applicable in the present case.

9. Now we examine the applicability of the remaining judgments cited by ld. DR of revenue. First of all, we examine the applicability of the judgment of Hon'ble Apex Court rendered in the case of Comunidado of Chicalim vs. ITO (supra). In this case, it was held by Hon'ble Bombay High Court that section 148 merely required that reasons should be recorded, not that they should be communicated. Against this judgment of Hon'ble High Court, the appeal was filed by the assessee before Hon'ble Apex Court and Hon'ble Apex Court restored the matter back to the file of Hon'ble Bombay High Court by observing that when an assessee challenges a notice to reopen under Section 147 on the ground that no reasons under Section 148 had been recorded or disclosed, the court must call for and examine the reasons. It was also held that Hon'ble Bombay High Court did not appreciate that if the appellant had already been served with a notice under Section 148 and had complied therewith by filing a return, it was entitled to contend that no second notice lay and also to submit that, in any event, the second notice was barred by time. On both these aspects, the matter was restored back by Hon'ble Apex Court to the Hon'ble Bombay High Court and therefore, this judgment does not render any help to revenue in the present case.

10. Now we examine the applicability of the second judgement of Hon'ble Apex Court rendered in the case of Tapan Kumar Datta Vs. CIT (supra). This judgment is not in respect of any notice u/s.

148 but this judgment is in respect of notice issued by the AO u/s. 158BD r.w.s. 158BC of IT Act. As per the facts of that case, it is noted by Hon'ble Apex Court that assessee was a partner in partnership firm by name "Nityakali Rice Mill" and on 06.11.1998, a search was conducted at the business premises of the firm by the department and several documents/books including a sum of Rs. 34 Lakhs were seized. It is also noted by Hon'ble Apex Court that on 09.09.1999, a notice was issued to the assessee by the AO u/s. 158BC of the IT Act. On the same date, a notice was issued by the AO to the said partnership firm also u/s. 158BC of the IT Act. On 20.11.2000, Block assessment order was passed by the AO in the case of the firm and in the same, it was held that in the case of the firm, Nil income reported by the firm should be accepted and this was also directed to initiate proceedings against the Appellant for the assessment of undisclosed income for the block period. Pursuant to the order dated 20.11.2000 passed by the AO in the case of the firm, a fresh notice u/s. 158BD r.w.s. 158BC was issued to the assessee who was the partner of that firm. Since in that case, there was no issue regarding notice u/s. 148 and regarding the issue of two notices also, it is seen that the first notice was issued u/s. 158BC whereas the second notice was issued u/s. 158BD and therefore, in our considered opinion, this judgment of Hon'ble Apex Court is also not applicable in the facts of present case.

11. The remaining judgements cited by ld. DR of revenue are of various other High Courts i.e. Hon'ble Allahabad High Court and Hon'ble Kerala High Court and hence, before examining the applicability of these two judgments, we feel it proper to examine the applicability of the judgment of Hon'ble Gujarat High Court cited by ld. AR of assessee having been rendered in the case of Marwadi Shares & Finance Ltd. Vs. DCIT (supra). As per the facts of that case, for Assessment Year 2010-11, the assessee filed return of income on 29.09.2010 and the assessment order was passed by the AO u/s. 143(3) on 28.02.2013. Later on, the AO issued notice u/s. 148 on 31.03.2015 and as per the reasons recorded by the AO for issuing that notice as reproduced by Hon'ble Gujarat High Court, it is stated by the AO in the reasons recorded by him that information has been received by him in respect of fictitious losses created by some brokers by misusing the client code modifications facility in F & O segment on NSE during March 2010 and that

assessee i.e. M/s. Marwadi Shares and Finance Ltd. is reported to be one of the beneficiaries of such fictitious losses by misuse of client code modification facility. The assessee in that case challenged he said notice of reopening by filing Special Civil Application before the Hon'ble Gujarat High Court and as per the judgment dated 21.06.2016, it was held by Hon'ble Gujarat High Court that it was submitted by ld. Counsel for the department that the respondent Assessing Officer would withdraw the impugned notice for re-opening of the assessment based on the reasons supplied to the petitioner, with a view to issuing a fresh notice after recording fresh reasons. Subsequently the AO issued fresh notice of re-opening on 29.03.2017 after recording fresh reasons which are also reproduced by Hon'ble Gujarat High Court in that judgment. Against this second notice issued by the AO u/s. 148, Special Civil Application was filed by the assessee before Hon'ble Gujarat High Court and in this, the assessee challenged the validity of the fresh notice issued by the AO u/s. 148. Paras 17 and 18 of this judgment are relevant in respect of decision of Hon'ble Gujarat High Court on this aspect of the matter i.e. validity of the second notice issued by the AO u/s. 148 and therefore, these two paras from this judgment are reproduced hereinbelow.

> "17. When therefore in the present case the first notice of reopening of assessment was not withdrawn, there was no scope, nor permissible in law to issue fresh notice of reopening. Counsel for the Revenue, however, vehemently contended that such withdrawal of notice of reopening must be deduced from facts and attendant circumstances. His contention was that the Revenue had, all along, intended to withdraw the notice and the fact, that such notice was abandoned, was sufficient to establish withdrawal thereof. We, however, hold a slightly different belief. A notice of reopening which is once issued would remain in operation unless it is specifically withdrawn, quashed or gets time barred. First instance would be at the volition of the Assessing Officer as the person who had issued the notice. He can recall the notice for valid reasons and may even issue a fresh notice which is not impermissible in law. Nevertheless, there has to be an action of withdrawal. Mere intention, a stated intention or even an intention which is otherwise put in practice cannot be equated with withdrawal of the notice. By mere intention to abandon the proceedings arising out of the

> notice, the Assessing Officer cannot bring about the desired result of withdrawing the notice. The notice was either withdrawn or is stood as it is, may be without any follow up action on part of the Assessing Officer.
>
> 18. The material on record would clearly demonstrate that the Assessing Officer in the present case did not travel beyond expressing his clear intention to withdraw the notice. He had so stated before the High Court through his advocate on 21.06.2016 when Special Civil Application No. 2120 of 2016 was being disposed of. He has so stated at multiple places in the reply dated 20.11.2017 filed before us. At no stage, either he passed and communicated the order of withdrawal of the notice to the petitioner. Even the files do not show any such formal withdrawal of the notice with or without communication thereof to the petitioner. The conclusion that we have reached would invariably result in frustrating the Revenue's attempt to reopen the assessment and may have been seen to be based on somewhat technical reasons. Having succeeded on all other grounds, the Revenue may legitimately feel somewhat disappointed. Nevertheless, our duty is to give effect to the legal principles. The law does not recognize two parallel assessments. In absence of withdrawal of the first notice of reassessment, the proceedings would survive making the subsequent notice of reopening invalid."

12. From the above two paras reproduced from this judgement of Hon'ble Gujarat High Court, it is seen that in that case, the second notice u/s. 148 was issued by the AO without withdrawing the first notice issued by the AO u/s. 148. This was held by Hon'ble Gujarat High Court that the law does not recognize two parallel assessments. It was held that in the absence of withdrawal of the first notice of reassessment, the proceedings would survive making the subsequent notice of reopening invalid. In the present case, we have noted that second notice of reassessment was issued on 31.03.2015 whereas the assessment pursuant to first notice of reassessment u/s. 148 could have been made by the AO up to 31.03.2015 and therefore, it has to be accepted that second notice of re-opening u/s. 148 was issued during the pendency of first notice issued by the AO u/s. 148 and therefore, this judgment of Hon'ble Gujarat High Court is squarely applicable and respectfully following the same, we hold that the second notice of reassessment

u/s. 148 issued by the AO on 31.03.2015 is invalid and therefore, the assessment framed by the AO pursuant to this notice of reassessment u/s. 148 issued on 31.03.2015 is void-ab-initio.

13. Regarding the reliance placed by ld. DR of revenue on two other judgments of Hon'ble Allahabad High Court and Hon'ble Kerala High Court, we would like to observe that we find force in the submissions of ld. AR of assessee that in view of judgment of Hon'ble Apex Court rendered in the case of CIT vs. Vegetable Products Ltd. (supra), if in case of taxing provision, two reasonable constructions are possible, the construction which favours the assessee must be adopted. Hence in our considered opinion even if these two judgments of Hon'ble Allahabad High Court and Hon'ble Kerala High Court are found to be applicable in the present case, then also, we have to follow the judgment of Hon'ble Gujarat High Court which favours the assessee and therefore, we do not examine the applicability of these two judgments cited by ld. DR of revenue having been rendered by Hon'ble Allahabad High Court and Hon'ble Kerala High Court. In view of this decision that the assessment order is void-ab-initio, other grounds raised by the assessee in this appeal have become infructuous and no adjudication is called for."

47. Being so, in our opinion, no further notice for reassessment could be issued unless an earlier notice u/s. 148 was culminated by framing assessment or closing the further action for framing assessment in accordance with law. Accordingly, we are of the opinion that the second reassessment notice issued on 148 on 4.7.2017 cannot be proceeded with and the assessment framed consequent to this notice is bad in law.

ITA NO.3385/Bang/2018 (AY 2011-12)

48. The assessee has filed additional ground as follows:-

"The ld. AO has erred in completing the scrutiny assessment for the AY 2011-12 u/s. 143(3) r.w.s. 147 dtd: 08.11.2017 of the Act without issue of mandatory notice u/s. 143(2) of the Act as a result

of which the Assessment is liable to be annulled since the assessment is non est in law."

49. Further, the assessee has also filed the following additional grounds:-

"1. The Notice dtd: 27-03-2017 issued u/s. 148 of the Act is not maintainable since the proposal u/s. 147 was submitted by the AO dtd: 14-03-2016 and sanction was accorded as per Pr.CIT Letter dtd: 24-03-2017 in view of the fact that the limitation period was less than 4 years and Pr.CIT was not a competent Authority to accord the sanction.

2. The Notice u/s. 148 dtd: 27-03-2017 was a Second Notice and the first Notice was issued on 21-11-2016 on which no Assessment was completed and hence the second notice dtd: 27-03-2017 is not maintainable during the pendency of first Notice dtd: 21-11-2016.

3. The Proposal seeking approval for issue of Notice u/s. 148 was u/s. 147(c) of the Act which is not applicable to the facts and circumstances of the Appellant's case and hence the proposal itself is bad and non-est in law.

4. The approval granted by the Pr. CIT vide letter dtd: 24-03-2017 itself is bad in law since the said sanction was accorded without application of mind."

50. The assessee has filed petition as in earlier year pleading admission of above additional grounds placing reliance on the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Corporation (supra), Hotel Blue Moon (supra)* and *Shriram Chits (Karnataka) Pvt. Ltd. (supra)*. The ld. DR opposed admission of the additional grounds.

51. After hearing both the parties, these additional grounds being legal grounds, go to the root of the matter of reopening of assessment. Being so, we admit the same for adjudication for the AY 2011-12.

52. On merits, the ld. AR submitted that there was no notice issued u/s. 143(2) of the Act. Non-issue of 143(2) notice is bad in law. He relied on the judgments of the Hon'ble Supreme Court in the case of *Hotel Blue Moon (supra)* and CIT v. Laxman Das Khandelwal, 417 ITR 325 (SC).

53. On the other hand, the ld. DR submitted that as per the order sheet entry dated 26.9.2017, the AR of assessee Shri G.S. Reddy appeared on 26.9.2017 and filed written submission stating that return filed vide Acknowledgement No.304084331300911 dated 30.9.2011 may be considered as return in response to notice u/s. 148 and the same was signed by the AR of assessee. Further it was submitted that as per order sheet entry, the notice u/s. 143(2) has been issued along with show cause notice fixing the hearing on 6.10.2017 and she filed copies of order sheet entries.

54. We have carefully gone through the relevant order sheet entry dated 26.9.2017 and 27.9.2017. However, physical copy of notice u/s. 143(2) is not made available to the Bench. Being so, under these circumstances, we are not in a position to hold that there was issue of notice u/s. 143(2) to the assessee before completion of assessment for AY 2010-11. Relying on the judgments of the Hon'ble Supreme Court in the case of *Hotel Blue Moon (supra) and CIT v. Laxmandas Khandelwal (supra) o*n this issue, the assessment cannot be upheld. The additional ground is allowed.

55. On the additional ground with regard to notice u/s 148 of the Act, the ld. AR submitted as follows:-

> "1 The AR of the Appellant Company in obedience to the directions of the Hon'ble ITAT has inspected the Assessment Records for the A.Y 2011-12 in the office of the Departmental Representative on 08-02-2021. The events observed during Inspection of records are submitted as under.
>
> i. A Proposal dtd: 14-03-2017 for approval for issue of Notice u/s. 148 was despatched on 15-03-2017.

ii. The Approval was accorded by the Pr.CIT vide Letter F.No.88/Re-OP/Pr.CIT-B(7)/2015-16 dtd: 23-03-2017 with a direction to take utmost care and service of Notice u/s. 148 within in the limitation date.

iii. The proposal format submitted by the AO was returned by the Pr.CIT.

iv. A Notice u/s. 148 dtd: 27-03-2017 was found in the Assessment Records

v. No Acknowledgment was found on record in support of the service of Notice u/s. 143(2) of the Act dtd: 26-09-2017

2. Remarks (i):-

2.1 A Notice u/s. 148 dtd: 21-11-2016 was issued (placed at page 8 of the Paper Book dtd: 11-01-2021), prior to the date of obtaining the approval from the competent authority which was accorded on 23-03-2017. Therefore the Notice u/s. 148 dtd: 21-11-2016 issued without approval is bad in law and consequently the Assessment made thereon is also bad in law and liable to be annulled in view of the Notice u/s.148 dtd: 21-11-2016.

2.2 Further it is observed that a second notice after getting the approval vide Pr. CIT's letter dtd: 24-03-2017 was dated 27-03-2017 but it was not served on the Appellant in spite of direction of Competent Authority to take utmost care to serve the Notice u/s. 148 within the Imitation date. The Second Notice stated to have been despatched on 27-03-2017 was not received by the Appellant.

3. Remarks (ii):-

3.1 The Proposal as per the format available on record was submitted u/s. 147(c) of the Act which reads as under:

"147 (c) where an assessment has been made, but-

(i) income chargeable to tax has been underassessed; or

(ii) such income has been assessed at too low a rate; or

(iii) such income has been made the subject of excessive relief under this Act ; or

(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed;"

3.2 The Pr.CIT without application of mind has mechanically approved the case for issue of notice u/s. 148 on the basis of the approval submitted u/s. 147(c). The Pr.CIT was not justified to accord the approval without fulfilling the conditions laid down u/s. 147(c) of the Act in as much as .the income chargeable to tax was not under-assessed, not assessed at a loo lower rate, no excess of relief was claimed and no excessive loss was claimed since the AO has not completed the Original Assessment upon filing the Original Return of Income.

3.3 The Appellant Company begs to place reliance on the decision of the Delhi High Court in the case of United Electrical Co. P. Ltd v/s. CIT and others (2002) 258 ITR 317 (Del), wherein it has been held that the competent authority is not entitled to grant approval causally or in a routine manner without application of mind. In this view of the matter the Pr. CIT was not justified to issue the approval dtd: 23-03-2017 upon which a Notice u/s. 148 dtd: 27-03-2017 was issued and despatched on 27-06-2017 which was barred by limitation of time. Therefore the assessment for the A.Y 2010-11 is not sustainable in law and more so the reasons recorded were based on the material already available on records and not on the basis of any new material evidence which lead to form a opinion as to the escapement of income chargeable to tax."

56. The ld. DR submitted that as per the available assessment records, no such notice dated 21.11.2016 was issued to asse, but notice u/s. 148 dated 27.3.2017 was issued to assessee and furnished a copy of the same. According to the ld. DR, as per the copy of proposal it could be seen that proposal was made under section 147 (b) of the Act and not under section 147 (c) of the Act. Further, it was submitted that proposal was made on 14.3. 2017 and not 14.3.2016. According to the ld. DR, though the letter was dated 14.3.2016, it could be very well seen that it is only a clerical mistake. The despatch seal is 14.3.2017 and file number is also for the AY 2016-17. So,

according to her, the approval is rightly accorded by the Pr. CIT and she furnished a copy of the same.

57. We have heard both the parties on the issue. We have carefully gone through the Form for recording intimation of proceedings u/s. 147 and obtaining approval of the Addl. CIT, Range 7, Bangalore with the covering letter addressed to the Pr. CIT 7 dated 14.3.2016 which was actually despatched on 15.3.2017. The date mentioned in the covering letter as 14.3.2016 instead of 14.3.2017 which is only a clerical error and it is evidence from the affixture seal of despatch as 15.3.2017.

58. Coming to the argument of the ld. DR that no notice u/s. 148 was issued on 21.11.2016 and notice u/s. 148 was dated only on 27.3.2017, we have gone through the order sheet entry which shows that the only notice u/s. 148 dated 27.3.2017 was issued. However, two proposals were sent to the Pr. CIT, one is vide ACIT letter dated 14.3.2016 for which Pr. CIT accorded approval on 20.3.2017. Another proposal has been sent for approval vide ACIT letter dated 17.11.2016, but no copy of approval by the Pr.CIT has been furnished with regard to this proposal of 17.11.2016. Even order sheet entry is not made available to us.

59. We have gone through the another proposal sent by the AO to the Pr.CIT to accord permission for reopening the assessment which was sent by AO on 14.3.2017. As seen from the proposal approved by the Pr. CIT on 20.3.2017, it was approved u/s. 147(b) of the Act as mentioned in the column of the proposal, and not u/s. 147(c) of the Act. Being so, we do not find any merit in the argument of the ld. AR that the proposal was approved by the Pr. CIT u/s. 147(c) of the Act. Therefore, this ground of the assessee is rejected.

60. The next additional ground in this appeal is with regard to the fact that the first notice issued u/s. 148 dated 27.3.2017 has not culminated with the

assessment. For the purpose of clarity, we reproduce a copy of notice dated 21.11.2016 for AY 2011-12:-

I.T.N.S – 24

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

No. 147 ACIT-C-7(1)(2)/16-17

PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle – 7(1)(2), Room No. 241
2nd Floor, BMTC Building,
Koramangala 80 Feet Road
Bangalore – 560 095
Date: 21.11.2016

To,

M/s MVD Constructions (P) Ltd
1111, Ramky utsav,
Somappa Budavane, New BEL Layout
BANGALORE

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2011-12 has escaped assessment within the meaning of Section 147 of the Income – tax Act.

I therefore, propose to assess/reassess the income under section 147 for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within 30 days from the date of service of this notice.

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

CERTIFIED COPY

H. GURUSWAMY
(Authorised Representative

61. After going through both the notices issued u/s. 148 dated 21.11.2016 and 27.3.2017, we are of the opinion that the first notice dated 21.11.2016

for AY 2011-12 has not culminated with the framing of assessment or closure of further action for framing the assessment in accordance with law. Accordingly, by placing reliance on the order of Tribunal in *M/s. The Archdiocesan Board of Education (supra)* the reassessment order is bad in law on this count also.

62. In view of the above discussion, we are of the opinion that reassessment order cannot be sustained.

63. The next additional ground in this appeal is that notice u/s. 148 has been issued only on change of opinion since all the issues are considered in the original assessment. We have heard both the parties on this issue. The issue taken up by the AO in reopening assessment is with regard to low net profit margin and disallowance of interest on account of diversion of funds to sister concern, Smilex Labs Pvt. Ltd. These issues are not subject matter of original assessments, being so, it cannot be said that there is change of opinion to reopen the concluded assessment on the basis of notice u/s. 148 of the Act.

ITA No.3386/Bang/2018 (AY 2012-13)

64. The assessee has filed additional ground as follows:-

> "The ld. AO has erred in completing the scrutiny assessment for the AY 2012-13 u/s. 143(3) r.w.s. 147 dtd: 08.11.2017 of the Act without issue of mandatory notice u/s. 143(2) of the Act as a result of which the Assessment is liable to be annulled since the assessment is non est in law."

65. Further, the assessee has also filed the following additional grounds:-

> "1. The Notice u/s. 148 stated to have been issued is not maintainable since it was not served on the Appellant Company within the limitation period.

> 2. The Notice u/s. 148 stated to have been issued without service on appellant was a Second Notice and the first Notice was issued on 21-11-2016 on which no Assessment was completed and hence the second notice is not maintainable during the pendency of first Notice dtd: 21-11-2016.
>
> 3. The Notice u/s. 148 stated to have been issued without service on the Appellant is on a change of opinion since all the issues were considered in the Original Assessment dtd: 10-03-2015."

66. The assessee has filed petition as in earlier year pleading admission of above additional grounds placing reliance on the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Corporation (supra), Hotel Blue Moon (supra) and Shriram Chits (Karnataka) Pvt. Ltd. (supra).* The ld. DR opposed admission of the additional grounds.

67. After hearing both the parties, these additional grounds being legal grounds, go to the root of the matter of reopening of assessment. Being so, we admit the same for adjudication for the AY 2011-12.

68. For this assessment year also, there is no service of notice u/s. 143(2) on the assessee. Therefore, as held in the earlier assessment year 2011-12, we quash the assessment in the absence of notice u/s. 143(2) of the Act served on the assessee.

69. The next additional ground in this appeal is with regard to the fact that the first notice issued u/s. 148 dated 27.3.2017 has not culminated with the assessment. For the purpose of clarity, we reproduce a copy of notice dated 21.11.2016 for AY 2012-13:-

I.T.N.S – 34

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

No.147/ACIT-C-7(1)(2)/16-17

PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle – 7(1)(2), Room No. 241
2nd Floor, BMTC Building,
Koramangala 80 Feet Road
Bangalore – 560 095
Date: 21.11.2016

To,

M/s. VVD Constructions (P) Ltd
C-301, Ramky utsav,
Seenappa Budavane, New BEL Layout
BANGALORE

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2012-13 has escaped assessment within the meaning of Section 147 of the Income – tax Act.

I, therefore, propose to assess/reassess the income under section 147 for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within 30 days from the date of service of this notice.

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

70. The ld. DR submitted that no such notice u/s. 148 dated 21.11.2016 was issued to the assessee and the notice u/s. 148 dated 23.11.2016 only was issued to the assessee, after getting approval from the competent authority.

71. After hearing both the parties, we are of the opinion that there was issue of notice u/s. 148 dated 21.11.2016 as reproduced above and there is no merit in the argument of the ld. DR that that there is no such notice dated 21.11.2016 and only there was a notice dated 23.11.2016. Being so, we are

of the opinion that the first notice dated 21.11.2016 for AY 2012-13 has not culminated with the framing of assessment or closure of further action for framing the assessment in accordance with law. Accordingly, by placing reliance on the order of Tribunal in *M/s. The Archdiocesan Board of Education (supra)*, the reassessment order is bad in law on this count also.

72. The next additional ground in this appeal is that notice u/s. 148 has been issued only on change of opinion since all the issues are considered in the original assessment. We have heard both the parties on this issue. The issue taken up by the AO in reopening assessment is with regard to low net profit margin and disallowance of interest on account of diversion of funds to sister concern, Smilex Labs Pvt. Ltd. These issues are not subject matter of original assessments, being so, it cannot be said that there is change of opinion to reopen the concluded assessment on the basis of notice u/s. 148 of the Act.

ITA No.3387/Bang/2018 (AY 2013-14)

73. The assessee has filed additional ground as follows:-

> "The ld. AO has erred in completing the scrutiny assessment for the AY 2013-14 u/s. 143(3) r.w.s. 147 dtd: 08.11.2017 of the Act without issue of mandatory notice u/s. 143(2) of the Act as a result of which the Assessment is liable to be annulled since the assessment is non est in law."

74. Further, the assessee has also filed the following additional grounds:-

> "1. The Notice dtd. 27-03-2017 u/s. 148 stated to have been issued u/s. 148 of the Act is not maintainable since it was not served on the Appellant Company within the limitation period.

2. The Notice u/s. 148 dtd. 27-03-2017 stated to have been issued without service on appellant was a Second Notice and the first Notice was issued on 21-11-2016 on which no Assessment was completed and hence the second notice is not maintainable during the pendency of first Notice dtd: 21-11-2016.

3. The Notice u/s. 148 dtd: 27-03-2017 stated to have been issued without service on the Appellant is on a change of opinion since all the issues were considered in the Original Assessment dtd: 17-03-2016."

75. The assessee has filed petition as in earlier year pleading admission of above additional grounds placing reliance on the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Corporation (supra), Hotel Blue Moon (supra) and Shriram Chits (Karnataka) Pvt. Ltd. (supra).* The ld. DR opposed admission of the additional grounds.

76. After hearing both the parties, these additional grounds being legal grounds, go to the root of the matter of reopening of assessment. Being so, we admit the same for adjudication.

77. For this assessment year also, there is no service of notice u/s. 143(2) on the assessee. Therefore, as held in the earlier assessment year 2011-12, we quash the assessment in the absence of notice u/s. 143(2) of the Act served on the assessee.

78. The next additional ground in this appeal is with regard to the fact that the first notice issued u/s. 148 dated 21.11.2016 has not culminated with the assessment and the second notice dated 27.3.2017 is not maintainable since no assessment was completed on the basis of first notice dated 21.11.2016. For the purpose of clarity, we reproduce a copy of notice dated 21.11.2016 for AY 2013-14:-

I.T.N.S – 34 (D

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

No: ACIT-C-7(1)(2)/16-17

PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle – 7(1)(2), Room No. 241
2nd Floor, BMTC Building,
Koramangala 80 Feet Road
Bangalore – 560 095
Date: 21.11.2016

To:

M/s. VVD Constructions (P) Ltd
No. 1-301, Ramky utsav,
Seetappa Budavane, New BEL Layout
BANGALORE

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2013-14 has escaped assessment within the meaning of Section 147 of the Income – tax Act.

I, therefore, propose to assess/reassess the income under section 147 for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within 30 days from the date of service of this notice.

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

CERTIFIED COPY
H. GURUSWAMY
(Authorised Representative

79. The ld. DR submitted that no such notice u/s. 148 dated 21.11.2016 was issued to the assessee and the notice u/s. 148 dated 23.11.2016 only was issued to the assessee, after getting approval from the competent authority.

80. After hearing both the parties, we are of the opinion that there was issue of notice u/s. 148 dated 21.11.2016 as reproduced above and there is merit in the argument of the ld. DR that that there is no such notice dated 21.11.2016 and only there was a notice dated 23.11.2016. As seen from the order sheet entry on 23.11.2016 there was approval for issue of notice u/s. 148 for the AY 2013-14 by Addl. CIT, Range 7(1) on 23.11.2016 only which is reproduced below:-

FORM FOR RECORDING THE INITIATION OF PROCEEDINGS U/S. 147 AND FOR OBTAINING THE APPROVAL OF THE ADDL. COMMISSIONER OF INCOME TAX, RANGE-7(1), BANGALORE

1.	Name and address of the assessee	:	M/s. VVD Constructions (P) Ltd # C-301, Ramky utsav, Seenappa Budavane, New BEL Layout, BANGALORE
2.	Permanent Account No.	:	AACCV5142K
3.	Status	:	Company
4.	District/Circle/Range	:	Circle – 7(1)(2)
5.	Asst. Year in respect of which it is proposed to issue notice u/s. 148	:	A.Y(s) -2013-14
6.	The Quantum of income which has escape assessment	:	More than One Lakh in each AY
7.	Whether the provision of sec. 147 (a) or 147 (b) are applicable or both the section are applicable	:	Provision of sec. 147(c)
8.	Whether the assessment is proposed to be made for first time. If the reply is in the affirmative please state a) Whether any voluntary return had already been filed ; and b) If so, the date of filing the said return:	:	No. The assessment was done and **Rs. 21,50,915**/- was added to the income during asst. Yes 2013-14 30.09.2013
9.	If the answer to item 8 is in the negative please state:- a) The income originally assessed b) Whether it is a case of under assessment, assessment at too low a rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation	:	**Rs. 21,50,915**/- Under assessment of Income due to excess allowance of expenses.
10	Whether the provision of sec. 150 (1) are applicable. If the reply is in the affirmative, the relevant facts may be stated against item No. 11 and it may also be brought out that the provisions of sec. 150(2) would not stand in the way of initiating proceedings u/s. 147	:	Not Applicable
11	Reasons for the belief that income has escaped assessment	:	As per Annexure - I

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

(11)

M/S VVD Constructions Pvt Ltd (PAN-AACCV5142K)

for A.Y. 2013-14

12.	Whether Addl.CIT is satisfied that it is fit case for issue notice u/s 148 on the basis of reasons recorded by the AO.	Yes. I am satisfied on the reasons that, it is a fit case to issue notice u/s 148 of the IT Act. 23/11/2016 (Vikas K. Suryawanshi, IRS), Addl. Commissioner of Income Tax, Range 7(1), Bengaluru. Date:-
13.	Whether Pr.CIT is satisfied that it is fit case for issue notice u/s 148 on the basis of reasons recorded by the AO.	

81. This is supported by the corresponding order sheet entry date 23.11.2016 as follows:-

(12)

ORDER SHEET NOTING

M/S VVD CONSTRUCTIONS PRIVATE LIMITED
(PAN: AACCV5142K)
AY 2013-14

Dated: 17.11.2016

M/s VVD Construction Private Limited is assessed at this circle and for the assessment year 2013-14 the assessee case has been proposed for the approval under section 147 for the concealment of Income. In this regard after recording the reasons for reopening the proposal under section 147 has been referred to The Additional Commissioner of Income Tax Range-7(1), Bangalore.

The facts of the case - The assessee is into the business of execution of contract work on the construction of roads and dams of Government of Karnataka. Based on the information a survey under section 133A has been conducted at registered office of the company on 27/09/2016 and information has been gathered. Based on the information a statement u/s 133A has been recorded on 27/09/2016. In the statement Managing Director of the Company Shri Makireddy Venkat Reddy declared net profit margin at 8% of the total turnover.

Based on the information proposal under section 147 has been initiated and sent for the approval of The Additional Commissioner of Income Tax Range-7(1), Bangalore.

AO

Dated: 23/11/2016

In this regard the approval has been granted on 23/11/2016. Based on the approval the notice u/s 148 has been issued on same day 23/11/2016 and same has been served on the assessee

AO

82. Being so, we are of the opinion that notice u/s. 148 was issued to the assessee on 21.11.2016 i.e., before getting approval from Addl. CIT, Range 7(1). As such, assessment framed on the basis of such notice u/s. 148 is bad in law.

83. The next additional ground in this appeal is that notice u/s. 148 has been issued only on change of opinion since all the issues are considered in the original assessment. We have heard both the parties on this issue. The issue taken up by the AO in reopening assessment is with regard to low net profit margin and disallowance of interest on account of diversion of funds to sister concern, Smilex Labs Pvt. Ltd. These issues are not subject matter of original assessments, being so, it cannot be said that there is change of opinion to reopen the concluded assessment on the basis of notice u/s. 148 of the Act.

ITA No.3388/Bang/2018 (AY 2015-16)

84. The assessee has filed additional ground as follows:-

> "The ld. AO has erred in completing the scrutiny assessment for the AY 2015-16 u/s. 143(3) r.w.s. 147 dtd: 08.11.2017 of the Act without issue of mandatory notice u/s. 143(2) of the Act as a result of which the Assessment is liable to be annulled since the assessment is non est in law."

85. Further, the assessee has also filed the following additional grounds:-

> "1. The Notice u/s. 148 stated to have been issued is not maintainable since it was not served on the Appellant Company within the limitation period.
>
> 2. The Notice u/s. 148 stated to have been issued without service on appellant was a Second Notice and the first Notice was issued on 21-11-2016 on which no Assessment was completed and hence the second notice is not maintainable during the pendency of first Notice dtd: 21-11-2016.
>
> 3. The Notice u/s. 148 stated to have been issued without service on the Appellant is on a change of opinion since all the issues were considered in the Original Assessment dtd: 17-03-2016."

86. The assessee has filed petition as in earlier year pleading admission of above additional grounds placing reliance on the judgment of Hon'ble Supreme Court in the case of *National Thermal Power Corporation (supra), Hotel Blue Moon (supra) and Shriram Chits (Karnataka) Pvt. Ltd. (supra)*. The ld. DR opposed admission of the additional grounds.

87. After hearing both the parties, these additional grounds being legal grounds, go to the root of the matter of reopening of assessment. Being so, we admit the same for adjudication.

88. For this assessment year also, there is no service of notice u/s. 143(2) on the assessee. Therefore, as held in the earlier assessment year 2011-12, we quash the assessment in the absence of notice u/s. 143(2) of the Act served on the assessee.

89. The next additional ground in this appeal is with regard to the fact that the first notice issued u/s. 148 dated 21.11.2016 has not culminated with the assessment. For the purpose of clarity, we reproduce a copy of notice dated 21.11.2016 for AY 2015-16:-

I.T.N.S – 34

NOTICE UNDER SECTION 148 OF THE INCOME-TAX ACT, 1961

ACIT-C-7(1)(2)/16-17

PAN No: AACCV5142K

Office of the
Assistant Commissioner of Income Tax
Circle – 7(1)(2), Room No. 241
2nd Floor, BMTC Building,
Koramangala 80 Feet Road
Bangalore – 560 095
Date: 21.11.2016

To:

M/s V.V.D Constructions (P) Ltd
No. 111, Ramky utsav,
Venkappa Budavane, New BEL Layout
BANGALORE

Whereas I have reason to believe that your income in respect of which you are assessable to tax for the assessment year 2015-16 has escaped assessment within the meaning of Section 147 of the Income – tax Act.

I, therefore, propose to assess/reassess the income under section 147 for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within 30 days from the date of service of this notice.

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

CERTIFIED COPY
H. GURUSWAMY
(Authorised Representative

90. The ld. DR submitted that the only notice u/s. 148 issued is on 23.11.2016 and not on 21.11.2016. So, there is no question of 1st notice issued on 21.11.2016.

91. We are of the opinion that there was issue of notice u/s. 148 dated 21.11.2016 as reproduced above and there is merit in the argument of the ld. DR that that there is no such notice dated 21.11.2016 and only there was a notice dated 23.11.2016. As seen from the order sheet entry on 23.11.2016 there was approval for issue of notice u/s. 148 for the AY 2013-14 by Addl. CIT, Range 7(1) on 23.11.2016 only which is reproduced below:-

FORM FOR RECORDING THE INITIATION OF PROCEEDINGS U/S. 147 AND FOR OBTAINING THE APPROVAL OF THE ADDL. COMMISSIONER OF INCOME TAX, RANGE-7(1), BANGALORE

1.	Name and address of the assessee	:	M/s. VVD Constructions (P) Ltd # C-301, Ramky utsav, Seenappa Budavane, New BEL Layout BANGALORE
2.	Permanent Account No.	:	AACCV5142K
3.	Status	:	Company
4.	District/Circle/Range	:	Circle – 7(1)(2)
5.	Asst. Year in respect of which it is proposed to issue notice u/s. 148	:	A.Y(s) - 2015-16
6.	The Quantum of income which has escape assessment	:	More than One Lakh in each AY
7.	Whether the provision of sec. 147 (a) or 147 (b) are applicable or both the section are applicable	:	Provision of sec. 147(b)
8.	Whether the assessment is proposed to be made for first time. If the reply is in the affirmative please state a) Whether any voluntary return had already been filed ; and b) If so, the date of filing the said return:	:	Yes Yes 2015-16 30.09.2015
9.	If the answer to item 8 is in the negative please state:- a) The income originally assessed b) Whether it is a case of under assessment, assessment at too low a rate, assessment which has been made the subject of excessive relief or allowing of excessive loss or depreciation	:	--

10	Whether the provision of sec. 150 (1) are applicable. If the reply is in the affirmative, the relevant facts may be stated against item No. 11 and it may also be brought out that the provisions of sec. 150(2) would not stand in the way of initiating proceedings u/s. 147	:	Not Applicable
11	Reasons for the belief that income has escaped assessment	:	As per Annexure - I

(PRITHVIRAJ, I.R.S)
Asst. Commissioner of Income-Tax,
Circle 7(1)(2), Bangalore

M/S VVD Constructions Pvt Ltd (PAN-AACCV5142K)

for A.Y. 2015-16

12.	Whether Addl.CIT is satisfied that it is fit case for issue notice u/s 148 on the basis of reasons recorded by the AO.	Yes. I am satisfied on the reasons recorded that, it is a fit case for issue of notice u/s 148 of the IT Act. 23/11/2016 (Vikas K. Suryawanshi, IRS), Addl. Commissioner of Income Tax, Range 7(1), Bengaluru. Date:-
13.	Whether Pr.CIT is satisfied that it is fit case for issue notice u/s 148 on the basis of reasons recorded by the AO.	

92. This is supported by the corresponding order sheet entry date 23.11.2016 as follows:-

ORDER SHEET NOTING

M/S VVD CONSTRUCTIONS PRIVATE LIMITED
(PAN: AACCV5142K)
AY 2015-16

Dated: 17.11.2016

M/s VVD Construction Private Limited is assessed at this circle and for the assessment year 2015-16 the assessee case has been proposed for the approval under section 147 for the concealment of Income. In this regard after recording the reasons for reopening the proposal under section 147 has been referred to The Additional Commissioner of Income Tax Range-7(1), Bangalore.

The facts of the case - The assessee is into the business of execution of contract work on the construction of roads and dams of Government of Karnataka. Based on the information a survey under section 133A has been conducted at registered office of the company on 27/09/2016 and information has been gathered. Based on the information a statement u/s 133A has been recorded on 27/09/2016.

Based on the information proposal under section 147 has been initiated and sent for the approval of The Additional Commissioner of Income Tax Range-7(1), Bangalore.

AO

Dated: 23/11/2016

In this regard the approval has been granted on 23/11/2016. Based on the approval the notice u/s 148 has been issued on same day 23/11/2016 and same has been served on the assessee

AO

Dated: 24/01/2017

Statement on oath u/s 131 of Shri Makireddy Venkat Reddy has been recorded on 23/01/2017 and in the statement Managing Director of the Company Shri Makireddy Venkat Reddy declared net profit margin at 8% of the total turnover and same has been considered. Further, AR Shri G S Reddy attended and filed Authorization letter from the company and taken adjournment to file the details. On the request case adjourned to first week of February 2017.

AO

93. We have heard both the parties. Admittedly in this case, approval of Addl. CIT, Range 7(1), Bangalore was obtained on 23.11.2016. However, notice u/s. 148 was issued on 21.11.2016 for AY 2015-16 as seen from the notice reproduced above. Being so, the notice issued u/s. 148 before approval of the same by the competent authority cannot be upheld. Consequently, assessment framed thereafter is bad in law.

94. The next additional ground in this appeal is that notice u/s. 148 has been issued only on change of opinion since all the issues are considered in the original assessment. We have heard both the parties on this issue. The issue taken up by the AO in reopening assessment is with regard to low net profit margin and disallowance of interest on account of diversion of funds to sister concern, Smilex Labs Pvt. Ltd. These issues are not subject matter of original assessments, being so, it cannot be said that there is change of opinion to reopen the concluded assessment on the basis of notice u/s. 148 of the Act.

95. In the result, ITA No.3384/Bang/2018 is allowed, while ITA Nos.3385 to 3388/Bang/2018 are partly allowed.

Pronounced in the open court on this 22nd day of March, 2021.

Sd/-	**Sd/-**
(BEENA PILLAI)	(CHANDRA POOJARI)
JUDICIAL MEMBER	ACCOUNTANT MEMBER

Bangalore,
Dated, the 22nd March, 2021.

/*Desai S Murthy /*

Copy to:

1. Appellant 2. Respondent 3. CIT 4. CIT(A)
5. DR, ITAT, Bangalore.

By order

Assistant Registrar
ITAT, Bangalore.