IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH 'G': NEW DELHI
(Through Video Conferencing)

BEFORE,
SHRI KUL BHARAT, JUDICIAL MEMBER
AND
SHRI ANADEE NATH MISSHRA, ACCOUNTANT MEMBER

ITA No.7681/Del/2018
(ASSESSMENT YEAR 2010-11)

Dy. Commissioner of Income Tax (E), Circle-2(1), New Delhi.	Vs.	National Internet Exchange of India, Flat No.6C, 6D & 6E, 6th Floor, Hansalaya Building,15, Barakhamba Road, New Delhi. PAN-AABCN 9308A
(Appellant)		**(Respondent)**

Appellant By	**Sh. Santanu Acharya, G.M.**
Respondent by	**Sh. Umesh Takyar, Sr. DR**

ORDER

PER ANADEE NATH MISSHRA, AM:

(A) This appeal by Revenue is filed against the order of Learned Commissioner of Income Tax (Appeals)-40, New Delhi, [Ld. CIT(A)", for short], dated 27.09.2018 for Assessment Year 2010-11. Grounds taken in this appeal of Revenue are as under:

"1. On the basis of facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the assessee's activities are not charitable in view of the proviso to section 2(15) of the Income Tax Act, 1961.

2. On the basis of facts and circumstances of the case and in law, the Ld. CIT(A) has erred in ignoring the fact that the assessee's activities are in the nature of trade commerce or business and hence exemption cannot be given under section 11 & 12 of the Income tax Act, 1961.

3. The appellant craves leave to add, to alter or amend any ground of appeal raised above at the time of hearing."

(B) Vide Assessment Order dated 01.12.2017 u/s 143(3) r.w.s. 147 of the Income Tax Act, 1961, the assessee's income was assessed at Rs.2,49,09,186/- as against returned income of Nil. The only addition made in the Assessment Order was on account of marketing fund, amounting to Rs.2,49,09,186/-. The relevant portion of the Assessment Order is reproduced as under:

4. The assessee Society is registered u/s 12A of the Income Tax Act, 1961 vide Order NO. DIT(E)/12A/2008-09/N-816/1699 dated 31.03.2009 and also notified u/s 80G(5)(vi) vide order no. DIT(E)/2011-12/DEL-SE23307-28092011-2029 dated 28.09.2011.

5. Main objects of the assessee company in brief are:

i. To protect and promote the interest of Internet Services providers of India in a manner that the interest of the interest of the Internet consumers at large is protect ted and they are benefited.

ii. To set up national level, internet peering points for interconnecting Internet Services Provider all over India.

iii. To enable routing and Exchange of domestic Internet traffic within the country.

iv. To improve the quality of Internet Services and save foreign exchanges.

v. To carry on Internet Domain Name Operations and Related Activities which includes.
   a) Set up In Network information Centre (INNIC) as an autonomous unit for In Domain registration.
   b) Operate IN Registry as a Non-for-Profit organization.
   c) IN Registry will function as an autonomous body, accountable to the Government on all policy matters and its satisfactory implementation.
   d) Maintain IN domain name and ensure its popularity, operational stability, reliability and security.

e) Carry out the registration of the domain name through Registrars to be appointed by it.
f) Implement effective Dispute Resolution Policy.

6. Facts of the case : The scrutiny assessment u/s 143(3) of I.T. Act,1961 was completed on 12.03.2013 at Rs. 10,08,67,924/- as the assessee was hit by proviso to section 2(15) and AO denied the benefit of section 11(4)(a) to the assessee taxed the whole surplus of Rs. 10,08,67,924/- generated from business activity under section 164. Further It was noticed that an amount of Rs. 2,49,09,186/- was appropriated towards 'Marketing Fund' in the balance sheet which is not an allowable expense.

7. With regard to notice u/s 148, assessee vide letter dated 15th September, 2017 had replied in response thereto, it is respectfully submitted as under:

"The following reasons recorded for reopening the proceedings under Section 147 of the Act have been communicated to the assessee:

The assessment of M/s National Internet Exchange of India for AY 2010-11 was completed u/s 143(3) of the Income Tax Act, 1961 on 12.03.2013 at an income of Rs. 10,08,67,924/- denying exemption u/s 11 & 12 of the I T Act. Later on , it has been noticed that assessee's actual surplus was Rs. 12,57,77,110/- instead of Rs. 10,08,67,924/-. An amount of Rs. 2,49,09,186/- was appropriated towards 'Marketing Fund' in the Balance Sheet which was not an allowable expenses.

In view of the facts stated above, I have reason to believe that income of Rs. 2,49,09,186/- has escaped assessment for the AY 2010-11 within the meaning of Section 147 of the I T Act, and it is fit case to reopen u/s 147 of the I T Act 1961."

On perusal of the aforesaid, it is noticed that assessment of present assessee is sought to be reopened on account of marketing fund of Rs. 2,49,09,186/- which is not allowable expenses.

In reply thereto, it is respectfully submitted that the present reassessment proceedings, being without jurisdiction and bad in law, deserve to be dropped inasmuch:

1. Books of accounts of the assessee have already been examined by the assessing officer in the original assessment. The proposed reassessment proceedings, are thus, nothing but a mere re-appreciation of materials/ information already on record and are, accordingly based on mere change of opinion, which is clearly impermissible.

2. the captioned notice initiating the present reassessment proceedings has been issued after the expiry of a period of 4 years from the end of the relevant assessment year, and no reasons have been recorded pointing to any failure on the part of the assessee to fully and

truly disclose all material facts necessary for assessment, as required by the proviso to Section 147 of the Act.

It is respectfully submitted that under the provisions of Section 147 of the Act, as applicable from 01.04.1989, the assessing officer has the power to reopen the assessment where the assessing officer has `reasons to believe' that income chargeable to tax has escaped assessment. It is respectfully submitted that it is a well settled proposition of law that proceedings under section 147 of the Act cannot be initiated on a mere change of opinion to merely reexamine any issue on the basis of information/ material already available to the assessing officer at the time of completion of original assessment as explained hereunder:

Section 147 of the Act reads as under:

"147. Income escaping assessment

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

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

It is submitted that the provisions of Section 147 of the Act, as applicable from 01.04.1989, clothe the assessing officer with wide powers to reopen the assessment, if the assessing officer has reason to believe that income chargeable to tax has escaped assessment. Such power is, however, not unfettered, but is circumscribed. For instance, howsoever wide the scope for taking action under section 147 of the Act may be, it does not confer jurisdiction to reopen a completed

assessment on change of opinion on the interpretation of a particular provision, earlier adopted by the assessing officer. The assessing officer is not permitted under Section 147 of the Act to review the earlier order *suo moto*, in absence of there being any material to come to a different conclusion, apart from just having second thoughts about the inferences drawn earlier.

The power to reopen an assessment has been conferred by the Legislature not with the intention to enable the Assessing Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position, it would result in placing an unrestricted power of review in the hands of the assessing authorities depending on their "changing moods".

It is settled law that 'reason to believe' can never be the outcome of a change of opinion. It is essential that before any action is taken by the assessing officer he should substantiate his satisfaction. Thus, where the reasons recorded by the Assessing Officer disclose no more than mere change of opinion, the reassessment proceedings are liable to be quashed.

Applying the aforesaid settled legal position to the facts of the present case, it will kindly be noticed that the reassessment proceedings initiated in the present case is clearly based on mere change of opinion, which is not permissible in law. The assessee company had fully and truly disclosed all the material facts necessary for assessment of income for the year under reference and the same were duly examined by the Assessing Officer. Thus, in the absence of any new/ fresh material coming on record in respect of the aforesaid issue, the reassessment proceeding is, it is submitted, nothing but an attempt to re-appraise the material already available on record, which is not permissible in law.

The Supreme Court in the case of **CIT v. Foramer France: 264 ITR 567**, affirmed the decision of the Allahabad High Court in the case of **Foramer France v CIT: 247 ITR 463**, wherein it was, inter alia, held by the Court in the context of the provisions of section 147/148 of the Act, as amended with effect from 1.4.1989, that reassessment cannot be based on a mere change of opinion and that the law that an assessment could not be reopened on a change of opinion was the same before and after the amendment by the Direct Tax Laws (Amendment) Act, 1987.

Kind attention is invited to the decision of the Hon'ble jurisdictional **Delhi High Court** in the case of **CIT v. Kelvinator India Ltd: 256 ITR 1 (FB)**, where a Full Bench of the Court held that Section 147 of the Act did not postulate conferment of power upon the assessing officer to initiate reassessment proceedings upon mere change of opinion.

In that case, the assessee had, in the revised return of income, withdrawn the disallowance in respect of expenditure on rent and depreciation of the guest house, on the ground that since rent and depreciation were allowable under sections 30 and 32 respectively, the same could not be

disallowed under section 37(4) of the. Act. The assessing officer, in the original assessment, accepted the withdrawal of disallowance of guest house expenses as submitted in the revised return of income. Thereafter, notice under Section 148 of the Act was issued to disallow expenditure on maintenance of guest house inclusive of rent and depreciation. Counsel for the Revenue submitted before the Full Bench of the High Court that the reassessment was based on the information derived from the tax audit report, forming part of record, which had not been noticed by the Assessing Officer passing the original assessment.

Repelling the contention put forth by the counsel for the Revenue, their Lordships of the Delhi High Court observed as under:

> "**We are unable to agree with the submission of Mr. Jolly to the effect that the impugned order of reassessment cannot be faulted as the same was based on information derived from the tax audit report. The tax audit report had already been submitted by the assessee. It is one thing to say that the Assessing Officer had received information from an audit report which was not before the ITO, but it is another thing to say that such information can be derived by the material which had been supplied by the assessee himself**.
>
> We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. **When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind.** It is well known that a presumption can also be raised to the effect that in terms of clause (e) of Section 114 of the Indian Evidence Act, judicial and official acts have been regularly performed. **If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding with out anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong**." (Emphasis supplied).

The Court also took into account CBDT Circular No.549 dated 31.10.1989, explaining the scope of amended section 147 of the Act as under:

> "7.2 Amendment made by the Amending Act, 1989 to reintroduce the expression "reason to believe" in section 147 – A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the

> expression, "reason to believe" had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. *To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing, is of the opinion". Other provisions of the new section 147, however, remain the same.*" (Emphasis supplied).

The Court, at page 27 of the judgment, observed:

> "From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out, i.e. *only with a view to allay the fears that the omission of the expression "reason to believe" from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion.*
>
> ***It is, therefore, evident that even according to the Hon'ble CBDT a mere change of opinion cannot form the basis for reopening a completed assessment.***"

The aforesaid decision of the Delhi High Court has been affirmed by the Supreme Court in CIT v. Kelvinator of India Ltd.: 320 ITR 561. The relevant observations of the Court are as under:

> "On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. **Therefore, post-1st April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review**

would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.

Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote hereinbelow the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:

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

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

The Delhi High Court has, in the case **of CIT v. Eicher Ltd.: 294 ITR 310** following the earlier decisions reiterated that reassessment based on mere change of opinion, where material facts are already on record, is bad in law. The Court observed as under:

> "15. In Hari Iron Trading Co. vs. Commissioner of Income Tax (2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the assessing officer do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/ disallowances are made. We agree.
>
> 16. **Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the assessing officer at the time when the original assessment was made and the assessing officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the assessing officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.**
>
> 17. In so far as the present appeal is concerned, we find that the assessee had placed all the material before the assessing officer and where there was a doubt, even that was clarified by the assessee in its letter dated 8th November, 1995. If the assessing officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the assessing officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the

assessing officer or his successor to reopen the assessment of the assessee.

18. In sum and substance, this was the decision rendered by the Tribunal and we do not find any fault in the view taken. Consequently, we are of the view that since the case is one of a mere change of opinion, that does not justify the assessing officer's reopening the assessment of the assessee."

Kind attention is also invited to the following cases, where it has been held that proceedings under Section 147/148 of the Act initiated without any new information/material coming to the possession of the Assessing Officer are beyond jurisdiction in terms of that section and are, accordingly, liable to be quashed/set aside.

- Manjusha Estate (P) Ltd. v. ITO: 314 ITR 263 (Guj) - SLP dismissed by SC
- **Jal Hotels Co. Ltd. Vs ADIT: 184 Taxman 1 (Del.)**
- CIT v Feather Foam Ent (P) Ltd.: 296 ITR 342 (Del.)
- CIT v. Goetze Ltd: 321 ITR 431 (Del)
- Satnam Overseas v. Addl. CIT: 228 CTR 121 (Del)
- Jindal Photofilms Ltd. v. DCIT: 234 ITR 170 (Del.)
- IL&FS Investment Managers Ltd. vs. ITO: 298 ITR 32 (Bom)
- CIT v. Chakiat Agencies (P) Ltd.: 314 ITR 200 (Mad.)
- Berger Paints India Ltd. Vs. JCIT: 245 ITR 645 (Cal)
- Mercury Travels Ltd. v. DCIT: 258 ITR 533 (Cal)
- Siemens Information System ltd v ACIT, Mumbai: 295 ITR 333 (Bom.)
- Bimal Chimanlal Shah v. DCIT: 2010-TIOL-17-HC-GUJ-IT
- Bhavesh Developers v. Assessing Officer: 2010-TIOL-90-HC-MUM-IT
- Berger Paints India Ltd v. ACIT: 322 ITR 369 (Cal)
- Aventis Pharma Limited v. ACIT: 323 ITR 570 (Bom.)
- HK Buildcon Ltd. vs. ITO: 2010-TIOL-254-HC-AHM-IT [Special Civil Application No. 184 of 2010 (Guj)]
- ICICI Prudential Life Insurance Company Limited vs. ACIT: Writ Petition No. 2471, 2470 and 2472 of 2009 (Bom)
- Haryana Acrylic Manufacturing Company Ltd. Vs CIT [2009] 308 ITR 38 (Del.)

<u>Re (2): Embargo under the proviso to section 147</u>

Furthermore, **it is also settled law that where reassessment proceedings are sought to be initiated for any assessment year beyond a period of 4 years from the end of such assessment year, the proviso to the Section 147 places further fetters on the powers of the assessing officer by providing that reassessment proceedings cannot be initiated unless the income has escaped assessment by reason of the failure of the assessee to disclose fully and truly all material facts necessary for assessment.** The said proviso reads as under:

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

In terms of the above proviso, proceedings to reassess the income of an assessee in respect of any assessment year can be initiated after the expiry of a period of four years from the end of such assessment year only where income chargeable to tax has escaped assessment for such assessment year ***"by reason of the failure on the part of the assessee ... to disclose fully and truly all material facts necessary for his assessment for that assessment year".***

In other words, reassessment proceedings can be initiated after a period of 4 years only where income chargeable to tax has escaped assessment by reason of the failure of the assessee to disclose fully and truly all material facts for assessment of income.

It is submitted that the **Courts have held reassessment proceedings initiated beyond four years from the end of the relevant assessment year to be invalid in terms of the proviso to section 147 of the Act, where there was no failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment.**

Your goodself's attention is invited to the case of **CIT v. Shri Tirath Ram Ahuja (HUF): 306 ITR 173 (Del.)**, where the Hon'ble High Court of Delhi examined the validity of the reassessment proceedings initiated after the expiry of the period of 4 years stipulated by the proviso to Section 147 of the Act. In that case, the original assessments for the assessment years 1991-92, 1992-93 and 1993-94 were completed under Section 143(3) of the Act. Subsequently, the assessing officer came to know that the rateable value of a property owned by the assessee had been determined at Rs.10,28,900 by the Municipal Corporation of Delhi ("MCD") against Rs.3,61,000 declared by the assessee. On that basis, the assessing officer reopened the assessment of the assessee, after a period of 4 years had expired since the end of the relevant assessment years.

The assessee challenged the reassessment proceedings inasmuch as the statutory period of 4 years had expired and the assessing officer had failed to allege/ substantiate that escapement of income, if any, was attributable to the failure of the assessee to disclose truly and fully all material facts. The plea of the assessee was allowed by the CIT(A) and the Tribunal. Aggrieved, the Revenue filed appeals before the High Court. Dismissing the Revenue's appeal and quashing the reassessment, the Court held as under:

> "However, where an assessment under section 143(3) of the Act or this section has been made for the relevant assessment year and the initiation is taking place after the expiry of four years from the end of the relevant assessment year, the proviso to section 147 of the Act would be attracted and no action can be taken under section 147 of the Act unless such income has escaped assessment by reason of the omission or failure on the part of the assessee to make a return under section 139 of the Act or failure to file a return in response to a notice under section 142(1) or section 148 of the Act, or to disclose fully and truly all material facts necessary for his assessment for that year.
>
> ………..
>
> From the narration of the facts given above, it is clear that the returns for all the three assessment years had been filed by the assessee and there was no failure to file returns and further during the course of assessment for the assessment years, all material facts had been disclosed fully and truly and assessment was completed under section 143(3) of the Act after scrutiny. As the assessee can be fastened with the duty to disclose such facts or materials as are in existence at the relevant time and which are known to him, the initiation under section 147 of the Act based on the order of the Municipal Corporation of Delhi regarding the rateable value was dated March 31, 1994, which was not available at the time of the original assessment, cannot be sustained. Therefore, the action of reassessment was taken on the basis of subsequent material which was not in existence at the time of original assessment, was not justified.
>
> Further, it is only when the case falls under the proviso to section 147 of the Act that the question of non-disclosure of material facts would become relevant. **In such cases, if the assessee has made full disclosure of material facts, then even if such income has escaped assessment, no action can be initiated by the Assessing Officer under section 147 of the Act.** However, where the said period of four years has not expired, the conduct of the assessee regarding disclosure of material facts need not be the basis for initiating the proceedings and they can be commenced if the Assessing Officer has reason to believe that the income has escaped assessment notwithstanding that there was full disclosure of material facts on record."

In coming to the conclusion that recourse to reassessment proceedings was impermissible in view of the fact that the escapement of income was not attributable to the failure of the assessing

officer to disclose fully and truly all material facts necessary for assessment, the Court held as under:

> "17. Let us now examine the provisions of section 147 as applicable to the present case. It has been pointed out above that the present case, being a case of re-opening of an assessment after four years (but before six years) from the end of the assessment year in question, would be governed by the proviso to section 147. ...
>
> 19. Examining the proviso [set out above], **we find that no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:**
>
> (a) an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year; and
>
> (b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee:
>
> (i) to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148; or
>
> (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.
>
> Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148. This is clearly not the case here because the assessee did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year.**If it is also found that the assessee had disclosed fully and truly all material facts necessary for its assessment, then no action under section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the assessee had made a full and true disclosure of all material facts.**
>
> 20. **In the reasons supplied to the assessee, there is no whisper, what to speak of any allegation, that the assessee had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessmentsbeyond the four year period indicated above.** The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. **This, is a necessary condition for overcoming the bar set up by the proviso to section 147.If this condition is not satisfied, the bar would operate and no**

> **action under section 147 could be taken. We have already mentioned above that the reasons supplied to the assessee does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled.** In our recent decision in Wel Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the assessee as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above." (Emphasis supplied).

In the case of **CIT v. Indian Farmers Fertilizer Cooperative Ltd 171 Taxman 379, the Hon'ble High Court of Delhi**, noting that for the assessment year 1992-93 (in respect of which the statutory period of 4 years expired on 31.03.1997), notice under Section 148 was issued on 20.11.1997, but the reasons recorded for issuing such notice contained no allegation of any failure on the part of the assessee to disclose all material facts, dismissed the appeal of the Revenue, observing as under:

> "3. The proviso to section 147 of the Act is that no action shall be taken after the expiry of four years from the end of the relevant assessment year unless certain conditions are met. One of the conditions is that there must be failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.
>
> 5. The reasons for reopening the assessment have been recorded in the order passed by the Tribunal. There is no allegation whatsoever therein that the assessee had failed to disclose fully or truly all material facts necessary for the assessment for the relevant assessment year. The Tribunal accordingly came to the conclusion that the action initiated by the revenue under section 147/148 was barred by limitation. ...
>
> 6. We find that this is a pure question of fact. In our opinion, the facts that have been referred hereinabove, there is no perversity in the conclusion arrived at by the Tribunal." (Emphasis supplied).

Reverting to the facts of the present case, the assessment year in question is the Assessment Year 2010-11. The income for the said assessment year was originally assessed vide order dated 12.03.2013 passed under Section 143(3) of the Act. The statutory period of 4 years, within which reassessment proceedings under Sections 147/148 could have been initiated without triggering the provisions of the proviso to Section 147 of the Act, expired on 31.03.2015. Undisputedly, the

captioned notice under Section 148 of the Act proposing to initiate the present reassessment proceedings was issued on 20.03.2017, i.e. after the expiry of the said period of 4 years.

As would be appreciated, the statutory period of 4 years had expired before the impugned notice under Section 148 of the Act was issued. Being so, the provisions of the proviso to Section 147 of the Act are clearly attracted to the present case.

It is respectfully submitted that all necessary material facts were fully and truly disclosed by the assessee at the time of original assessment proceedings under section 143(3) of the Act.

Thus, applying the aforesaid legal position that where the original assessment has been completed under section 143(3), re-assessment proceedings beyond the period of four years from the end of the relevant assessment year cannot be sustained unless there is a clear, visible failure on the part of the assessee to disclose fully and truly all material facts, it will kindly be appreciated that the present proceedings are clearly barred by limitation prescribed in proviso to section 147 of the Act.

Further, it has also been repeatedly held that alleged failure on the part of the assessee must be recorded by the Assessing Officer in the reasons recorded by the Assessing Officer for initiating reassessment proceedings. The reasons recorded by the Assessing Officer must, it is respectfully submitted, state both the factum of failure of the assessee to fully and truly disclose all material facts as well as the manner in which such failure was occasioned.

Reference in this regard is placed on the above cited decisions of jurisdictional High Court of Delhi in the cases of Shri Tirath Ram Ahuja (supra), Haryana Acrylic Manufacturing Company (supra) and Indian Farmers Fertilizer Cooperative Ltd (supra).

The **Bombay High Court in the case of Hindustan Lever Limited: 268 ITR 332** has categorically observed that the reasons recorded by the Assessing Officer should specify the failure on the part of the assessee to disclose the necessary facts. Their Lordships observed that it is for the Assessing Officer to reach conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and he has to put his opinion/ conclusion on record in black and white.

Further, in the case of **Fenner (India) Ltd. v. DCIT 241 ITR 672**, the Madras High Court, while dealing with the proviso to Section 147 of the Act, held as under:

> **"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.**

To the same effect are the decisions in the following cases:

- Jashan Textile Mills (P) Limited: 284 ITR 542 (Bom.)
- **German Remedies Ltd V. DCIT: 287 ITR 494 (Bom.)**
- Babu Lal Jug Raj & Co V. ITO: 289 ITR 115 (Raj.)
- Berger Paints India Ltd. v. JCIT: 245 ITR 645 (Cal.)
- Vishwanath Prasad Ashok Sarraf vs. CIT in W.P No. 51 of 2004 (Allah)
- Bhagwati Sahakari Sakhar Karkhana Ltd. v. DCIT: 269 ITR 186 (Bom)
- Durga Prashad Goyal V. ITO: 98 ITD 227 (Asr.) (SB)

It is submitted that in the reasons recorded for initiating the present reassessment proceedings, no failure on the part of the assessee company in fully and truly disclosing all material facts necessary for assessment of income has been pointed out.

It has been held by the jurisdictional Delhi High Court in the recent decision in the case of **CIT v. SIL Investments Limited 2010-TIOL-327-HC-DEL-IT, rendered** in ITA No. 700/2010 and 701/2010 on 07.05.2010, where the High Court, while examining the validity of reopening the assessment of the assessee therein on the basis of a subsequent retrospective amendment in law, held as under:

> "4. We have heard the counsel for the Revenue and have also examined the orders passed by the authorities below. It is clear that for invoking the proviso to Section 147 beyond the period of four years, there must be failure on the part of the assessee to either make a return under Section 139 or in response to a notice under Section 147/148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. Insofar as the filing of the return is concerned, that is not in dispute and, therefore, the focus is entirely on whether the assessee had failed to disclose fully and truly all material facts necessary for the assessment. The Tribunal, on an examination of the material on record, concluded that all the relevant facts were available on record and that it could not be said that at the time when the assessee filed the return, he had failed to disclose fully and truly all material facts necessary for the assessment because the amendment which was introduced retrospectively was not there at all. The Tribunal also observed, and in our view rightly so, that **the law cannot contemplate the performance of an impossible act. It was not expected of the assessee to foresee or forecast a future amendment which was to be brought into effect retrospectively. Therefore, The Tribunal has**

rightly concluded that the proviso to Section 147 could not be invoked merely because there was an amendment in the future which was introduced retrospectively and covered the period in question. The Tribunal has correctly appreciated the law and applied the same to the undisputed facts. We see no reason to interfere with the impugned order as no substantial question of law arises for our consideration. However, we make it clear that we have only examined the jurisdictional issue qua validity of the Section 147 proceedings and have not examined the merits of the matter.

The appeals are dismissed."

In view of the aforesaid legal position, it is submitted that since there was no failure on the part of the assessee company to fully and truly disclose necessary material facts and that since a subsequent retrospective amendment cannot itself constitute attribution of failure of the assessee company, the provisions of the proviso to Section 147 of the Act clearly bar the present reassessment proceedings.

Therefore, it is respectfully submitted that in the present case, there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of income of the appellant. All the material facts with respect to each of the aforesaid three issues, as discussed hereinbefore, were, at all times, before the assessing officer during the course of original assessment proceedings under section 143(3) of the Act.

Being so, it is respectfully submitted that the said notice dated 20.03.2017 issued by your good self under Section 148 of the Act as well as the proceedings initiated pursuant thereto are wholly without jurisdiction, void ab initio and are liable to be dropped."

An order was passed on 03.11.2017 disposing of the objection of the assessee against the notice u/s 148 and same is reproduced as below:

"Notice u/s 148 dated 20/03/2017 was issued in this case after duly recording the reasons. The assessee also requested to provide the reasons for the issue of notice u/s 148 which was duly provided to the assessee.

The assessee vide its letters dated 15.09.2017 has objected on certain grounds to re-opening of case and the same has been disposed off vide this office Order dated 16.10.2017. The assessee vide its letter no. 186 dated 01.11.2017 has further re-objected to re-opening of the case. However, the gist of objection raised are disposed off as under:

1. The assessee's case was reopened not on the change of opinion of the assessing officer but on solid facts and as per the provisions of the I.T.Act 1961. The various provisions of the

I.T.Act 1961 governing the reopening of the case beyond four years from the relevant assessment year are stated as under:

As per proviso to sec 151(1) of the I.T.Act 1961, in cases where the assessment under section 143(3) or section 147 has been made for the relevant assessment year, and to reopen a case after expiry of four years from the end of the relevant assessment year, approval from the CCIT or CIT should be taken to issue notice under section 148.

In the present case as the case for the relevant assessment year was assessed u/s 143(3) and since four years have elapsed for the relevant assessment year, approval from the CIT (E) has been taken prior to the issue of notice u/s 148. Hence the reopening of the case is valid and as per law.

As per the proviso to sec 147 of the I.T.Act 1961, any case which was completed u/s 143(3) or u/s 147, the case can be reopened even after the expiry of four years from the relevant assessment year if any income chargeable to tax has escaped assessment for such assessment year if the assessee has failed to make a return u/s 139 or in response to notice issued u/s 142(1) or u/s 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.

In the case of Gruh Finance Ltd. vs Joint Commissioner Of Income-tax (243 ITR 482) (GUJARAT High Court), the Hon'ble Court has upheld the action of the A.O on similar grounds. The Hon'ble GUJARAT High Court has stated as under:

"The expression "reason to believe" employed in section 147 of the Income-tax Act would mean some cause or justification if the competent authority has a cause or ground or some justification that some income has escaped assessment or that there was a mistake in making assessment. In the peculiar facts and special circumstances emerging from the record, we are extremely unable to uphold the contention raised on behalf of the petitioner that the respondent authority has no jurisdiction to issue the impugned notices under section 148 of the Income-tax Act, 1961, as it involved only a mere "change of opinion".

This court, in Praful Chunilal Patel v M.J. Makwana, Asst. CIT [1999] 236 ITR 832 has observed in this behalf while interpreting the provisions of section 147 of the Income-tax Act that the expression "reason to believe" which are relied on behalf of the respondents, are also material for reinforcing the view which we are taking in this group of petitions.

In cases where an error or mistake is detected, it can never be said that there is only a mere change of opinion. The mistake or error which is detected and which constituted a valid decision or cause to form a belief in the first assessment as a result of which the income has escaped assessment, would constitute a reason to believe that the income had escaped assessment and such cases where mistakes and errors are detected and which constitute a valid justification or cause to form a belief sought to be corrected, cannot be said to be cases of mere change of opinion'.

In so far as the expressions "reason to believe" and "change of opinion" are concerned, we are of the view that though the material was available on record, at the time of first assessment, when no conscious consideration of the material is made and a mistake has been committed take has been committed, it would not, in any case, create an embargo or a ban on the competent officer to exercise powers under the amended section 147 of the Income-tax Act, 1961, as prima facie, there could not be "change of opinion" in that factual scenario.

In the case of in Praful Chunilal Patel v M.J. Makwana, Asst. CIT [1999] 236 ITR 832, the Hon'ble Gujarat High Court has reiterated the same view in favour of the Dept, holding the reassessment as valid.

In the case of Indo-aden Salt Manufacturing And Trading Co. Pvt. Limited. vs Commissioner Of Income-Tax, Bombay. (159 ITR 624), the Hon'ble Supreme Court stated as under:

"Explanation 2 to section 147 of the Act makes the position abundantly clear. The principles have also been well-settled and reiterated in numerous decisions of this court: See Kantamani Venkata Narayana & Sons v. First ITO [1967] 63 ITR 638 (SC) and ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC). Hidayatullah J., as the learned Chief justice then was, observed in Calcutta Discount Co.'s case [1961] 41 ITR 191 (SC) that mere production of evidence before the Income-tax Officer was not enough, that there may be omission or failure to make a true and full disclosure, if some material for the assessment lay embedded in the evidence which the Revenue could have uncovered but did not, then it is the duty of the assessee to bring it to the notice of the assessing authority. The assessee knows all the material and relevant facts-the assessing authority might not. In respect of the failure to disclose, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. It is sufficient to refer to the decision of this court in Calcutta Discount Co.'s case [1961] 41 ITR 191 (SC) where it had been held that if there are some primary facts from which a reasonable belief could be formed that there was some non-disclosure or failure to disclose fully and truly all material facts, the Income-tax Officer has jurisdiction to reopen the assessment. This position was again reiterated by this court in Malegaon Electricity Co. P. Ltd. v. CIT [1970] 78 ITR 466 (SC)."

2. It is stated that the case was reopened on the grounds that despite the exemption u/s 11 and u/s 12 was denied to the assessee, while computing the income the actual surplus which was at Rs. 12,57,77,110/- was not taken as taxable income and in its place Rs. 10,08,67,924/- was incorrectly taken. This was done on account of the fact that the assessee has not shown the correct surplus in the income and expenditure account and cleverly appropriated an amount of Rs. 2,49,09,186/- towards marketing fund in the balance sheet.

It is stated that the assessee has not contested denial of exemption of u/s 11 and u/s 12 of the I.T. Act in the present proceedings. The assessee is only contesting to re-opening on the grounds that the incorrect figure, erroneously taken as surplus in the assessment order should not be corrected by taking the actual surplus of Rs. 12,57,77,110/-. The

figures are apparent on the face of the records and there cannot be two opinions about the correctness of the figures of actual surplus. The assessee has infect not contested that Rs. 12,57,77,110/- is not the actual surplus and yet it is objecting to the proposition of bringing to the tax, the correct amount of surplus which is taxable in the event of denial of exemption u/s 11 and u/s 12 of the IT Act.

The Hon'ble Supreme Court in the case of Raymond Woolen Mills Ltd. vs. ITO (1999) 236 ITR 34 (SC) has held that while considering whether commencement of reassessment proceedings was valid, it is only to be seen that whether there was some prima facie material on the basis of which the department could reopen the case. The sufficiency or correctness of material is not a thing to be considered at that stage. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous.

In the case of G. Sukesh v. Deputy CIT [2001], 252 ITR 230 (Ker), the Hon'ble High Court observed that while the completed assessment has sanctity, it does not offer complete immunity, where the Assessing Officer stumbles on materials, which he believes are indicative of concealment in the original return. It was observed that the assessee, in such cases, "need not be apprehensive unless he has skeletons in his cupboard". The Hon'ble High Court further observed, adverting to the decision of the Hon'ble Supreme Court in the case of Phool Chand Bajrang Lal (supra) that a taxpayer cannot advance a plea that his claims having been once accepted cannot be called into question even in the face of fresh information indicating concealment. It was further observed that at the stage of issue of notice, it is not necessary that the Assessing Officer should have all the necessary particulars. It is enough if he has reason to believe that income has escaped assessment.

***In the case of HA Hanji & Co. Vs. ITO (1979) 120-ITR-593, their Lordships of the Calcutta High Court** held that "At the time of issue of notice of assessment it is not incumbent on the ITO to come to a finding that income has escaped assessment by reason of omission or failure of the assessee to disclose fully and truly all material facts necessary for assessment. The belief which the ITO entertains at that stage is a tentative belief on the materials before him which have to be examined and scrutinized on such evidence as may be available in the proceedings for reassessment. There must be some grounds for the reasonable belief that there has been a non-disclosure or omission to file a true or correct return by the assessee resulting in escapement of assessment or in under-assessment. Since belief must be held in good faith, and should not be a mere pretence or change of opinion or inferential facts or fact extraneous or irrelevant to the issue and the material on which the belief is based must have a rational connection or live link or relevant bearing on the formation of belief."*

In the case of Sheo Singh Vs. AAC (1971) 82-ITR, their Lordships of the Supreme Court have held that "The word 'reasons to believe' suggest that the belief must be that of an honest and reasonable person based upon reasonable grounds and that the ITO would be acting without jurisdiction if the reasons for his belief that the conditions are satisfied does not exist or is not material or relevant to the belief required by the section. The court can always examine this aspect though the declaration or sufficiency of the reasons for the belief cannot be investigated by the Court".

The notice u/s 148 has been issued as per provision of Law. Before issuing the notice, approval of the competent authority has been taken which is on record.

In view of the above, the objection filed by the assessee to the initiation of re-assessment proceedings are rejected. With the above, all objections of the assessee to the re-opening of the case have been finally disposed off.."

8. The assessment u/s 143 (3) was completed and it was noticed that assessee is hit by the proviso to Sec 2(15). Therefore, assessing officer denied the benefit of section 11(4A) to the assessee and taxed the whole of the surplus of Rs. 10,08,67,924/- generated from business activity under section 164. Further, it was also noticed that as per the Income and Expenditure account of the assessee actual surplus was Rs. 12,57,77,110/-. An amount of Rs. 2,49,09,186/- was appropriated towards 'Marketing Fund' in the balance sheet which was not an allowable expense.

9. Disallowance of Marketing Fund

9.1 AS per Balance sheet for March, 2010 which is reproduced as below:

NATIONAL INTERNET EXCHANGE OF INDIA

BALANCE SHEET AS AT MARCH 31, 2010

	Schedule	As at March 31,2010	As at March,2009
SOURCES OF FUNDS	I		
I Capital Fund			
a) Government Grants - Capital Gransts		9,714,890	11,804,010
b) Reserve Funds		392,223,946	291,356,023
II Marketing Funds	II	23,949,936	21,149,491
		425,888,772	324,309,524

9.1.1. Marketing fund was shown in Balance sheet and not in Income & Expenditure account. Assessment was completed on 12.03.2013 at total taxable income of Rs. 10,08,67,924/- u/s 143(3). Assessee was hit by proviso to section 2(15) and therefore, exemption was withdrawn.

While assessment as exemption was withdrawn, all the receipts have to be taken as Income. Marketing Fund which is part of receipt for that year was not taken into Income & Expenditure Account. Based on this assessee was show caused on 03.11.2017.

Further, reminder letter was sent to reply to the show cause on 20.11.2017

Assessee replied to the show-cause notice dated 20.11.2017 wherein he mentioned about letter dated 10.11.2017 as follows:

"In this connection, under instructions from the assessee, we re-iterate that there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of income of the appellant. All the material facts with respect to each of the aforesaid three issues, as discussed hereinbefore, were, at all times, before the assessing officer during the course of original assessment proceedings under section 143(3) of the Act. Being, so, the notice dated 20.03.2017 issued by your goodself under section 148 of the Act as well as the proceedings initiated pursuant thereto are wholly without jurisdiction, void ab initio and are liable to be dropped.

However, on merits, we submit as under:

- *An amount of defined % age is allocated out of revenues every year to the marketing fund Reserve account. As per the accounting norms, the allocation to Marketing Reserve is reflected as " appropriation towards the marketing fund" and the actual application of the funds so appropriated is shown as utilization of funds under Marketing fund account which forms part of Reserve Funds and is reflected in Balance Sheet.*
- *Following this practice, amount of Rs. 2,49,09,186/- was allocated to Marketing Reserve during the Financial Year 2009-10 (Assessment Year 2010-11) and shown under the head "Appropriation towards the Marketing Fund" in Income & Expenditure Account. The amount of Rs. 2,21,08,741/- actually utilized towards the marketing activities during this year is shown as utilized during the year in the Marketing Fund Account under Reserve Fund forming part of the Balance Sheet.*
- *Since, the expenditure on marketing activities is routed through the Marketing Fund Account, the amount of Rs. 2,21,08,741/- was spent through this Marketing Fund account*

(Refer Schedule II) and thus not included in Expenditure section of the Income and Expenditure Account.

- *The amount actually utilized/spent for marketing activities (Rs. 2,21,08,741) has been correctly shown as application of Income in computation of Income also in following manner:*

- *Total application of income towards the objects of company* *Rs. 13,65,61,463/-*

(this amount is prior to appropriation towards marketing fund and therefore does not include this appropriation of Rs. 2,49,09,186/-)

Less: Additions for leave encashment, loss on sale/write of assets *Rs. 6,30,622/-*

Add: Additions to fixed assets *Rs. 3,29,750/-*
Utilization of Marketing fund *Rs. 2,21,08,741/-* *Rs. 2,24,38,491/-*
(This is the amount actually utilized for marketing activities and taken from the marketing Fund Account which forms part of Balance Sheet)

Total Application of funds as per computation of Income *Rs. 15,83,69,332/-*

In view of the above, you would agree that all the facts and numbers have been stated correctly in the computation of Income and same was duly verified by the then learned AO in the original assessment."

10. The assessment u/s 143 (3) was completed and it was noticed that assessee is hit by the proviso to Sec 2(15). Therefore, assessing officer denied the benefit of section 11(4A) to the assessee and taxed the whole of the surplus of Rs. 10,08,67,924/- generated from business activity under section 164. Further, it was also noticed that as per the Income and Expenditure account of the assessee actual surplus was Rs. 12,57,77,110/-. An amount of Rs. 2,49,09,186/- was appropriated towards 'Marketing Fund' in the balance sheet which was not an allowable expense.

11. With these remarks, income is computed as below

Income as per order u/s 250/143(3)	**Rs. 0 /-**
Add:	
Marketing Fund	Rs. 2,49,09,186/-
Total Taxable Income	**Rs. 2,49,09,186/-**

The Income of the assessee is assessed at Rs. 2,49,09,186/-. Tax to be charged at Maximum marginal rate (MMR). The Ld. CIT(A) has allowed the appeal of the assessee against order u/s 143(3) of I.T.Act,1961 and revenue has filed an appeal against the order of CIT(A) before the Hon'ble ITAT on 03.05.2016 which is still pending. If the appeal before the ITAT is decided in favour of revenue, then tax on income assessed u/s 143(3) shall be recoverable. Therefore, the income assessed u/s 147 r.w.s. 143(3) is charged at Maximum Marginal Rate (MMR).

Issue necessary challans/demand notice and forms. Penalty proceeding u/s 271(1)(c) of the Act are being separately initiated.

DCR-71|18

(Kunal Kishor)
Asstt. Commissioner of Income tax (E)
Circle-2(1), New Delhi

Copy to assessee.

Asstt. Commissioner of Income Tax (Exemptions), Circle-2(1)
Room No. 2408, 24th Floor, E-2 Block,
PratyaKar Bhawan, Civic Centre
J.L. Nehru Marg, New Delhi-110002

-Sd-

Asstt. Commissioner of Income tax (E)
Circle-2(1), New Delhi

CERTIFIED TRUE COPY

Dy. Commissioner of Income Tax
(Exemptions), Circle-2(1)
Room No. 2408, 24th Floor, E-2
Prtyaksh Kar Bhawan, Civic Centre,
J.L. Nehru Marg, New Delhi-110002

(C) Aggrieved, the assessee filed appeal before the Ld. CIT(A). Vide impugned appellate order dated 27.09.2018 of the Ld. CIT(A) deleted the aforesaid addition of Rs.2,49,09,186/-. The relevant portion of the aforesaid impugned appellate order dated 27.09.2018 of the Ld. CIT(A) is reproduced as under:

"2. Facts of the Case

2.1 The facts of the case are that return of income was filed on 29.09.2010. Assessment under section 143(3) was completed on 12.03.2013 at an income of Rs. 10,08,67,924/- denying exemption under section 11 and 12. The case was re-opened under section 147 since it came to notice that assessee actual surplus was Rs. 12,57,77,110/- instead of Rs. 10,08,67,924/-. It was noted that an amount of Rs. 2,49,09,186/- had been appropriated towards "Marketing Fund" in the balance sheet which was not an allowable expense.

2.2 In view of these facts the reason to believe were recorded that income of Rs. 2,49,09,186/- had escaped assessment for the assessment year 2010-11 and after obtaining approval from competent authority, the case was re-opened and notice under section 148 was issued to the assessee on 20.03.2017 which was duly served upon the assessee. In response to notice under section 148 the assessee filed its objections to the issuance of notice and also requested to provide the reasons to believe for the reopening of the assessment for the assessment year 2010-11 in the case. The objections filed by the assessee were disposed of vide letter dated 16.10.2017 and 03.11.2017 and a copy of reasons to believe for the reopening the assessment were also provided to the assessee. The assessee acknowledged that ITR filed in assessment year 2010-11 be treated as return of income. Notice under sections 142(1) and 143(2) was issued on 27.07.2017 and 11.09.2017.

2.3 The assessee society is registered under section 12A vide order dated 31.03.2009 and also approval for the purpose of section 80G(5)(vi) vide order dated 28.09.2011. The main objects of the assessee company in brief are:

i. To protect and promote the interest of Internet Services providers of India in a manner that the interest of the interest of the Internet consumers at large is protect ted and they are benefited.

ii. To set up national level, interest peering points for interconnecting Internet Services
Provider all over India.

iii. To enable routing and Exchange of domestic Internet traffic within the country.

iv. To improve the quality of Internet Services and save foreign exchanges.

v. To carry on Internet Domain Name Operations and Related Activities which includes.

a) Set up In Network information Centre (INNIC) as an autonomous unit for In Domain registration.
b) Operate IN Registry as a Non-for-Profit organization.
c) IN Registry will function as an autonomous body, accountable to the Government on all policy matters and its satisfactory implementation.
d) Maintain IN domain name and ensure its popularity, operational stability, reliability and security.
e) Carry out the registration of the domain name through Registrars to be appointed by it.
f) Implement effective Dispute Resolution Policy.

2.4 Assessment under section 143(3) was completed on 12.03.2013 at an income Rs. 10,08,67,924/- as it was held that the assessee was hit by proviso to section 2(15), the benefit of exemption under section 11 and was denied to the assessee. The entire surplus of Rs. 10,08,67,924/- generated from business activity was taxed under section 164. It was noticed that an amount of Rs. 2,49,09,186/- had been appropriated towards ' Marketing Fund' in the balance sheet which was not an allowable expense. It was also noted that marketing fund was shown in balance Sheet and not in Income & Expenditure Account. It was further noted that since exemption was withdrawn, all the receipts have to be taken as income and Marketing Fund, which was part of receipt for that year, had not been taken into the Income & Expenditure Account. In this regard, the assessee, inter alia, submitted as under:

> - *An amount of defined % age is allocated out of revenues every year to the marketing fund Reserve account. As per the accounting norms, the allocation to Marketing Reserve is reflected as "appropriation towards the marketing fund" and the actual application of the funds so appropriated is shown as utilization of funds under Marketing find account which forms part of Reserve Funds and is reflected in Balance Sheet.*

-Following this practice, amount of Rs. 2,49,09,186/- was allocated to Marketing Reserve during the Financial Year 2009-10 (Assessment Year 2010-11) and shown under the head "Appropriation towards the Marketing Fund" in Income & Expenditure Account. The amount of Rs. 2,21,08,741/- actually utilized towards the marketing activities during this year is shown as utilized during the year in the Marketing Fund Account under Reserve Fund forming part of the Balance Sheet.

-Since, the expenditure on marketing activities is routed through the Marketing Fund Account, the amount of Rs.2,21,08,741/- was spent through this Marketing Fund Account.
-(Refer Schedule II) and thus not include in Expenditure section of the Income and Expenditure
-The amount actually utilized/spent for marketing activities (Rs. 2,21,08,741) has been correctly shown as application of Income in computation of Income also in following manner:

-Total application of income towards the objects of company Rs. 13,65,61,463/-
(this amount is prior to appropriation towards marketing fund and therefore, does not include this appropriation of (Rs.2,49,09,186/-)
Less, Addition to fixed assets Rs.3,29,750/-
Utilization of Marketing fund Rs.2,21,08,741/- Rs.2,24,38,491/-
(This is the amount actually utilized for marketing activities and taken from the marketing Fund Account which forms part of Balance Sheet)
Total Application of funds as per computation of Income
Rs.15,83,69,332/-

In view of the above, you would agree that all the facts and numbers have been stated correctly in the computation of Income and same was duly verified by the then learned AO in the original assessment."

2.6 The contention of the assessee was not accepted and the said amount was added back. Income was assessed at Rs. 2,49,09,186/-. Aggrieved by the order, this appeal has been filed.

3. Submissions made by the appellant are reproduced below:

"FACTS:

-The appellant had filed Income Tax Return for the year under reference declaring Rs. Nil income on 29.09.2010.

-Thereafter, case was selected for scrutiny and assessment was completed u/s 143(3) of the Income Tax Act, 1961 on 12.03.2013 at an income of Rs.10,08,67,924/- denying exemption u/s 11 & 12 of the Income Tax Act, 1961.

- Against the said order, appellant had filed appeal before learned CIT(A) and learned CIT(A) has allowed the appeal in favour of the appellant vide order dated 23/02/2016, which is totally ignored by the learned AO.

-The learned Assessing Officer, thereafter on receipt of Audit Objection, re-opened the case under section 147 of the Income Tax Act, 1961 more so when necessary ingredients of that section are missing.

-The following reasons recorded for reopening the proceedings under Section 147 of the Act have been communicated to the appellant:

"The assessment of M/s National Internet Exchange of India for AY 2010-11 was completed u/s 143(3) of the Income Tax Act, 1961 on 12.03.2013 at an income of Rs. 10,08,67,924/- denying exemption u/s 11 & 12 of the I T Act. Later on, it has been noticed that assessee's actual surplus was Rs. 12,57,77,110/- instead of Rs. 10,08,67,924/-. An amount of Rs. 2,49,09,186/- was appropriated towards 'Marketing Fund' in the Balance Sheet which was not an allowable expenses.

In view of the facts stated above, I have reason to believe that income of Rs. 2,49,09,186/- has escaped assessment for the AY 2010-11 within the meaning of Section 147 of the I T Act, and it is fit case to reopen u/s 147 of the I T Act 1961."

-On perusal of the aforesaid, it is noticed that assessment of appellant was reopened on account of marketing fund of Rs. 2,49,09,186/- which is not an allowable expenses as per learned AO.

-At the time of assessment proceedings, it was submitted before the AO that though original assessment has already been done u/s 143(3) of the Act, reassessment proceedings has been issued after the expiry of a period of 4 years from the end of the relevant assessment year, and no reasons have been recorded pointing to any failure on the part of the appellant to fully and truly disclose all material facts necessary for assessment. Hence, reassessment proceedings initiated may kindly be dropped. Thereafter, detailed submission on merits was also submitted before him stating that in computation of income , total receipts and total expenditures were

considered and appropriation towards Marketing Fund was made from excess of income over expenditure i.e. Net Surplus and utilization was made from that appropriation only as reflected in Balance Sheet.

-However, AO did not accept the contention of AO and had passed order u/s 147/143(3) of the Income Tax Act, 1961 by making addition of Rs.2,49,09,186/- on account of Marketing Fund.

SUBMISSION:

1. That the learned Assessing officer has erred in law and on facts of the case in framing assessment u/s 143(3) read with section 147 of the Income Tax Act, 1961.

*In this connection, under instructions from the appellant, we submit as under:
The order passed u/s 143(3/147 of the Act by the AO is without jurisdiction and bad in law, due tothe following reasons:*

-Books, of accounts of the appellant have already been examined by the Assessing Officer in the original assessment. The reassessment done is nothing but a mere re-appreciation of materials/information already on record and are, accordingly based on mere change of opinion, which is clearly impermissible.

-The notice for reassessment proceedings was issued after the expiry of a period of 4 years from the end of the relevant assessment year, and no reasons have been recorded pointing to any failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment, as required by the proviso to Section 147 of the Act.

-The order passed by learned Assessing Officer is bad in law as the impugned notice U/sl48 has been issued after the expiry of four years from the end of the relevant assessment year without satisfying the condition stipulated in proviso to section 147 of the Income Tax Act Act,1961.
-Audit Objection cannot be the basis for reopening of assessment

It is respectfully submitted that under the provisions of Section 147 of the Act, as applicable from 01.04.1989, the Assessing Officer has the power to reopen the assessment where the assessing officer has 'reasons to believe' that income chargeable to tax has escaped assessment. It is respectfully submitted that it is a well settled proposition of law that proceedings under section 147 of the Act cannot be initiated on a mere change of opinion to

merely reexamine any issue on the basis of information/ material already available to the assessing officer at the time of completion of original assessment as explained hereunder:

Section 147 of the Act reads as under:

*"**147. Income escaping assessment***

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

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

It is submitted that the provisions of Section 147 of the Act, as applicable from 01.04.1989, clothe the assessing officer with wide powers to reopen the assessment, if the assessing officer has reason to believe that income chargeable to tax has escaped assessment. Such power is, however, not unfettered, but is circumscribed. For instance, howsoever widen the scope for taking action under section 147 of the Act may be, it does not confer jurisdiction to reopen a completed assessment on change of opinion on the interpretation of a particular provision, earlier adopted by the assessing officer. The assessing officer is not permitted under Section 147 of the Act to review the earlier order suo motu, in absence of there being any material to come to a different conclusion, apart from just having second thoughts about the inferences drawn earlier.

The power to reopen an assessment has been conferred by the legislature not with the intention to enable the Assessing Officer to reopen the final decision made against the Revenue in respect of questions that directly arose for decision in earlier proceedings. If that were not the legal position, it would result in

placing an unrestricted power of review in the hands of the assessing authorities depending on their "changing moods".

It is settled law that 'reason to believe' can never be the outcome of a change of opinion. It is essential that before any action is taken by the assessing officer he should substantiate his satisfaction. Thus, where the reasons recorded by the Assessing Officer disclose no more than mere change of opinion, the reassessment proceedings are liable to be quashed.

Applying the aforesaid settled legal position to the facts of the present case, it will kindly be noticed that the reassessment proceedings initiated in the present case is clearly based on mere change of opinion, which is not permissible in law. The assessee company had fully and truly disclosed all the material facts necessary for assessment of income for the year under reference and the same were duly examined by the Assessing Officer. Thus, in the absence of any new/ fresh material coming on record in respect of the aforesaid issue, the reassessment proceeding is, it is submitted, nothing but an attempt to re-appraise the material already available on record, which is not permissible in law.

*The Supreme Court in the case of **CIT** v. **Foramer France: 264 ITR 567,** affirmed the decision of the Allahabad High Court in the case of **Foramer France** v **CIT: 247 FFR 463,** wherein it was, inter alia, held by the Court in the context of the provisions of section 147/148 of the Act, as amended with effect from 1.4.1989, that reassessment cannot be based on a mere change of opinion and that the law that an assessment could not be reopened on a change of opinion was the same before and after the amendment by the Direct Tax Laws (Amendment) Act, 1987.*

*Kind attention is invited to the decision of the Hon'ble jurisdictional **Delhi High Court** in the case of **CFT v. Kelvinator India Ltd: 256 ITR 1 (FB),** where a Full Bench of the Court held that Section **147** of the Act did not postulate conferment of power upon the assessing officer to initiate reassessment proceedings upon mere change of opinion.*

In that case, the assessee had, in the revised return of income, withdrawn the disallowance in respect of expenditure on rent and depreciation of the guest house, on the ground that since rent and depreciation were allowable under sections 30 and 32 respectively, the same could not be disallowed under section 37(4) of the. Act. The assessing officer, in the original assessment, accepted the withdrawal of disallowance of guest house expenses as submitted in the revised return of income. Thereafter, notice under Section 148 of the Act was issued to disallow expenditure on maintenance of guest house inclusive of rent and

depreciation. Counsel for the Revenue submitted before the Full Bench of the High Court that the reassessment was based on the information derived from the tax audit report, forming part of record, which had not been noticed by the Assessing Officer passing the original assessment.

Repelling the contention put forth by the counsel for the Revenue, their Lordships of the Delhi High Court observed as under:

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

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

The Court also took into account CBDT Circular No.549 dated 31.10.1989, explaining the scope of amended section 147 of the Act as under:

"7.2 *Amendment made by the Amending Act, 1989 to reintroduce the expression "reason to believe" in section 147* **-** *A number of representations were received against the omission of the words "reason to believe" from section 147 and their substitution by the "opinion" of the Assessing Officer. It was pointed out that the meaning of the expression, "reason to believe" had been explained in a number of*

court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression "has reason to believe" in place of the words "for reasons to be recorded by him in writing, is of the opinion". Other provisions of the new section 147, however, remain the same." (Emphasis supplied).

The Court, at page **27** *of the judgment, observed:*

"From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under what circumstances the amendments had been carried out, i.e. only with a view to allay the fears that the omission of the expression "reason to believe" from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion.

It is, therefore, evident that even according to the Hon'ble CBDT a mere change of opinion cannot form the basis for reopening a completed assessment"

The aforesaid decision of the Delhi High Court has been affirmed by the Supreme Court in CIT v. Kelvinator of India Ltd.: 320ITR 561. *The relevant observations of the Court are as under:*

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. ***Therefore, post-1st April.*** *1989,* ***power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid. Section 147 would give arbitrani powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion'1, which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on***

behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open. provided there is "tangible material" to come to the conclusion that there is escapement o f income from assessment. Reasons must have a live link with the formation o f the belief.

Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We *quote herein below the relevant portion of Circular No.549 dated 31st October, 1989, which reads as follows:*

"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression reason to believe' in Section 147.-A number of representations were received against the omission of the words reason to believe' from Section 147 and their substitution by the opinion' of the Assessing Officer.

It was pointed out that the meaning of the expression, reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion.

To allay these fears, the Amending Act, 1989, has again amended section 147 to reintroduce the expression has reason to believe' in place of the words for reasons to be recorded by him in writing, is of the opinion'.

Other provisions of the new section 147, however, remain the same."

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

Recently, in the case of ITO **Vs** ***TechSpan India Pvt. Ltd. [20181 92 taxmann.com 361 (SC), Hon'ble Apex Court has held that:***

> **-** *The language of section 147 makes it clear that the Assessing Officer certainly has the power to reassess any income which has escaped assessment for any assessment year subject to the provisions of sections*

148 to 153. However, the use of this power is conditional upon the fact that the Assessing Officer has some reason to believe that the income has escaped assessment. The use of the words 'reason to believe' in section 147 has to be interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the Assessing Officer who may even initiate such re-assessment proceedings merely on his change of opinion on the basis of same facts and circumstances which have already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the Assessing Authorities to re-assess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.

- *Section 147 does not allow the re-assessment of an income merely because of the fact that the Assessing Officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the Assessing Officer the power of review and section 147 confers the power to reassess and not the power to review.*

-*To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The word change of opinion implies formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.*

-*The fact in controversy in this case is with regard to the deduction under section 10A which was allegedly allowed in excess. The show cause notice dated 10-2-2005 reflects the ground for reassessment in the present case, that is, the deduction allowed in excess under section 10A and, therefore, the income has escaped assessment to the tune of Rs. 57,36,811. In the order in question dated 17-8-2005, the reason purportedly given for rejecting the objections was that the assessee was not maintaining any separate books of account for the two categories, i.e., software development and human resource development, on which it has declared income separately. However, a bare perusal of notice dated 9-3-2004 which was issued in the original assessment proceedings under section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 9- 3-2004 was that the assessee was not maintaining any separate books of account for the said*

two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under section 10A was well considered in the original assessment proceedings itself. Hence, ***initiation of the re-assessment proceedings under section 147 by issuing a notice under section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under section 10A was allowed in excess, was based on nothing but a change o f opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings.***

The Delhi High Court has, in the case of CIT v. Eicher Ltd.: 294 ITR 310 following the earlier decisions reiterated that reassessment based on mere change of opinion, where material facts are already on record, is bad in law. The Court observed as under:

"15. In Han Iron Trading Co. vs. Commissioner of Income Tax (2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court observed that an assessee has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the assessing officer do not find mention in the assessment order and only such points are taken note of on which the assessee's explanations are rejected and additions/disallowances are made. We *agree.*

16. Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the assessing officer at the time when the original assessment was made and the assessing officer applied his mind to that material and accepted the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, the assessment needed to be reopened. On the other hand, if the assessing officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse.

17. In so far as the present appeal is concerned, we find that the assessee had placed all the material before the assessing officer and where there was a doubt, even that was clarified by the assessee in its letter dated 8th November,

1995. If the assessing officer, while passing the original assessment order, chose not to give any finding in this regard, that cannot give him or his successor in office a reason to reopen the assessment of the assessee or to contend that because the facts were not considered in the assessment order, a full and true disclosure was not made. Since the facts were before the assessing officer at the time of framing the original assessment, and later a different view was taken by him or his successor on the same facts, it clearly amounts to a change of opinion. This cannot form the basis for permitting the assessing officer or his successor to reopen the assessment of the assessee.

18. In sum and substance, this was the decision rendered by the Tribunal and we do not find any fault in the view taken. Consequently, we are of the view that since the case is one of a mere change of opinion, that does not justify the assessing officer's reopening the assessment of the assessee."

Kind attention is also invited to the following cases, where it has been held that proceedings under Section 147/148 of the Act initiated without any new information/material coming to the possession of the Assessing Officer are beyond jurisdiction in terms of that section and are, accordingly, liable to be quashed/set aside.

Manjusha Estate (P) Ltd. v. ITO: 314 ITR 263 (Guj) -SLP dismissed by SC ***Jal Hotels Co. Ltd. Vs ADIT: 184 Taxman 1 (Del.)***
-CIT v Feather Foam Ent (P) Ltd.: 296 ITR 342 (Del.)
-CIT v. Goetze Ltd: 321 ITR 431 (Del)
-Satnam Overseas v. Addl. CIT: 228 CTR 121 (Del)
-Jindal Photofilms Ltd. v. DCIT: 234 ITR 170 (Del.)
-IL&FS Investment Managers Ltd. vs. ITO: 298 ITR 32 (Bom)
-CIT v. Chakiat Agencies (P) Ltd.: 314 ITR 200 (Mad.)
-Berger Paints India Ltd. Vs. JCIT: 245 ITR 645 (Cal)
-Mercury Travels Ltd. v. DCIT: 258 ITR 533 (Cal)
-Siemens Information System ltd v ACIT, Mumbai: 295 ITR 333 (Bom.)
-Bimal Chimanlal Shah v. DCIT: 2010-TIOL-l 7-HC-GUJ-IT Bhavesh Developers v. Assessing Officer: 2010-TIOL-90-HC-MUM-IT Berger Paints India Ltd v. ACIT: 322 ITR 369 (Cal)
-Aventis Pharma Limited v. ACIT: 323 ITR 570 (Bom.)
-HK Buildcon Ltd. vs. ITO: 2010-TIOL-254-HC-AHM-IT [Special Civil Application No. 184 of 2010 (Guj)]
-ICICI Prudential Life Insurance Company Limited vs. ACIT: Writ Petition No. 2471, 2470 and 2472 of2009 (Bom)
-Haryana Acrylic Manufacturing Company Ltd. Vs *CIT [2009] 308 ITR 38 (Del.)*

Re (2): Embargo under the proviso to section 147

*Furthermore, **it is also settled law that where reassessment proceedings are sought to be initiated for any assessment year beyond a period of 4 years from the end of such assessment year, the proviso to the Section 147 places further fetters on the powers of the assessing officer by providing that reassessment proceedings cannot be initiated unless the income has escaped assessment by reason of the failure of the assessee to disclose fully and truly all material facts necessary for assessment.** The said proviso reads as under:*

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

*In terms of the above proviso, proceedings to reassess the income of an assessee in respect of any assessment year can be initiated after the expiry of a period of four years from the end of such assessment year only where income chargeable to tax has escaped assessment for such assessment year **"by reason of the failure on the part of the assessee ... to disclose fully and truly all material facts necessary for his assessment for that assessment year".***

In other words, reassessment proceedings can be initiated after a period of 4 years only where income chargeable to tax has escaped assessment by reason of the failure of the assessee to disclose fully and truly all material facts for assessment of income.

*It is submitted that the **Courts have held reassessment proceedings initiated beyond four years from the end of the relevant assessment year to be invalid in terms of the proviso to section 147 of the Act, where there was no failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment.***

*Your goodselfs attention is invited to the case of **CIT v. Shri Tirath Ram Ahuja (HUF): 306 ITR 173 (Del.),** where the Hon'ble High Court of Delhi examined the validity of the reassessment proceedings initiated after the expiry of the period of 4 years stipulated by the proviso to Section 147 of the Act. In that case, the original assessments for the assessment years 1991-92, 1992-93 and 1993-94 were completed under Section 143(3) of the Act. Subsequently, the assessing officer came to knew that the rateable value of a property owned by the assessee had been determined at Rs. 10,28,900 by the Municipal Corporation of Delhi*

("MCD") against Rs.3,61,000 declared by the assessee. On that basis, the assessing officer reopened the assessment of the assessee, after a period of 4 years had expired since the end of the relevant assessment years.

The assessee challenged the reassessment proceedings inasmuch as the statutory period of 4 years had expired and the assessing officer had failed to allege/ substantiate that escapement of income, if any, was attributable to the failure of the assessee to disclose truly and fully all material facts. The plea of the assessee was allowed by the CIT (A) and the Tribunal. Aggrieved, the Revenue filed appeals before the High Court. Dismissing the Revenue's appeal and quashing the reassessment, the Court held as under:

"*However, where an assessment under section 143(3) of the Act or this section has been made for the relevant assessment year and the initiation is taking place after the expiry of four years from the end of the relevant assessment year, the proviso to section 147 of the Act would be attracted and no action can be taken under section 147 of the Act unless such income has escaped assessment by reason of the omission or failure on the part of the assessee to make a return under section 139 of the Act or failure to file a return in response to a notice under section 142(1) or section 148 of the Act, or to disclose fully and truly all material facts necessary for his assessment for that year.*

From the narration of the facts given above, it is clear that the returns for all the three assessment years had been filed by the assessee and there was no failure to file returns and further during the course of assessment for the assessment years, all material facts had been disclosed fully and truly and assessment was completed under section 143(3) of the Act after scrutiny. As *the assessee can be fastened with the duty to disclose such facts or materials as are in existence at the relevant time and which are known to him, the initiation under section 147 of the Act based on the order of the Municipal Corporation of Delhi regarding the rateable value was dated March 31, 1994, which was not available at the time of the original assessment, cannot be sustained. Therefore, the action of reassessment was taken on the basis of subsequent material which was not in existence at the time of original assessment, was not justified.*

Further, it is only when the case falls under the proviso to section 147 of the Act that the question of nondisclosure of material facts would become relevant. ***In such cases, if the assessee has made full disclosure o f material facts, then even if such income has escaped assessment, no action can be initiated by the Assessing Officer under section 147 of the Act.*** *However, where the said period of four years has not expired, the conduct of the assessee regarding disclosure of material facts need not be the basis for initiating the proceedings and they can be commenced if the Assessing Officer has reason to*

believe that the income has escaped assessment notwithstanding that there was full disclosure of material facts on record."

In coming to the conclusion that recourse to reassessment proceedings was impermissible in view of the fact that the escapement of income was not attributable to the failure of the assessing officer to disclose fully and truly all material facts necessary for assessment, the Court held as under:

"17. Let us now examine the provisions of section 147 as applicable to the present case. It has been pointed out above that the present case, being a case of re-opening of an assessment after four years (but before six years) from the end of the assessment year in question, would be governed by the proviso to section 147. ...

19. Examining the proviso [set out above], ***we find that no action can be taken under section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:***

(a) an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year; and
(b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee:

- *(i) to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148; or*
- *(ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.*

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148. This is clearly not the case here because the assessee did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. ***If it is also found that the assessee had disclosed fully and truly all material facts necessary for its assessment, then no action under section 147 could have been taken after the four year period***

indicated above. So, the key question is whether or not the assessee had made a full and true disclosure of all material facts.

20. ***In the reasons supplied to the assessee, there is no whisper, what to speak of any allegation, that the assessee had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above.*** *The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly.* ***This is a necessary condition*** *for* ***overcoming the bar set up by the proviso to section*** *147. If* ***this condition is not satisfied, the bar would operate and no action under section*** *147* ***could be taken. We have already mentioned above that the reasons supplied to the assessee does not contain any such allegation Consequently, one of the conditions precedent for removing the bar against taking action a fter the said four year period remains unfulfilled.*** *In our recent decision in Wei Intertrade (P.) Ltd.'s we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our viewpoint, we hold that the notice dated 29-3-2004 under section 148 based on the recorded reasons as supplied to the assessee as well as the consequent order dated 2-3-2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above." (Emphasis supplied).*

In the case of CIT ***v. Indian Farmers Fertilizer Cooperative Ltd 171 Taxman 379, the Hon'ble High Court of Delhi,*** *noting that for the assessment year 1992-93 (in respect of which the statutory period of 4 years expired on 31.03.1997), notice under Section 148 was issued on 20.11.1997, but the reasons recorded for issuing such notice contained no allegation of any failure on the part of the assessee to disclose all material facts, dismissed the appeal of the Revenue, observing as under:*

"3. The proviso to section 147 of the Act is that no action shall be taken after the expiry of four years from the end of the relevant assessment year unless certain conditions are met. One of the conditions is that there must be failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment.

5. The reasons for reopening the assessment have been recorded in the order passed by the Tribunal. There is no allegation whatsoever therein that the assessee had failed to disclose fully or truly all material facts necessary for the assessment for the relevant assessment year. The Tribunal accordingly came to the conclusion that the action initiated by the revenue under section 147/148 was barred by limitation. ...

6. We find that this is a pure question of fact. In our opinion, the facts that have been referred hereinabove, there is no perversity in the conclusion arrived at by the Tribunal." (Emphasis supplied).

Reverting to the facts of the present case, the assessment year in question is the Assessment Year 2010-11. The income for the said assessment year was originally assessed vide order dated 12.03.2013 passed under Section 143(3) of the Act. The statutory period of 4 years, within which reassessment proceedings under Sections 147/148 conld have been initiated without triggering the provisions of the proviso to Section 147 of the Act, expired on 31.03.2015. Undisputedly, the captioned notice under Section 148 of the Act proposing to initiate the present reassessment proceedings was issued on 20.03.2017, i.e. after the expiry of the said period of 4 years.

As would be appreciated, the statutory period of 4 years had expired before the impugned notice under Section 148 of the Act was issued. Being so, the provisions of the proviso to Section 147 of the Act are clearly attracted to the present case.

It is respectfully submitted that all necessary material facts were fully and truly disclosed by the assessee at the time of original assessment proceedings under section 143(3) of the Act.

Thus, applying the aforesaid legal position that where the original assessment has been completed under section 143(3), re-assessment proceedings beyond the period of four years from the end of the relevant assessment year cannot be sustained unless there is a clear, visible failure on the part of the assessee to disclose fully and truly all material facts, it will kindly be appreciated that the present proceedings are clearly barred by limitation prescribed in proviso to section 147 of the Act.

Further, it has also been repeatedly held that alleged failure on the part of the assessee must be recorded by the Assessing Officer in the reasons recorded by the Assessing Officer for initiating reassessment proceedings. The reasons recorded by the Assessing Officer must, it is

respectfully submitted, state both the factum of failure of the assessee to fully and truly disclose all material facts as well as the manner in which such failure was occasioned.

Reference in this regard is placed on the above cited decisions of jurisdictional High Court of Delhi in the cases ofShri Tirath Ram Ahuja (supra), Haryana Acnylic Manufacturing Company (supra) and Indian Farmers Fertilizer Cooperative Ltd (supra).

The ***Bombay High Court in the case of Hindustan Lever Limited: 268 TTR 332*** *has categorically observed that the reasons recorded by the Assessing Officer should specify the failure on the part of the assessee to disclose the necessary facts. Their Lordships observed that it is for the Assessing Officer to reach conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment and he has to put his opinion/ conclusion on record in black and white.*

Further, in the case of ***Fenner (India) Ltd. v. DCIT 241 ITR 672, the Madras High Court,*** *while dealing with the proviso to Section 147 of the Act, held as under:*

"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason o f the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment.

To the same effect are the decisions in the following cases:
-Jashan Textile Mills (P) Limited: 284 ITR 542 (Bom.)
-German Remedies Ltd V. DCIT: 287 ITR 494 (Bom.)
-Babu Lai Jug Raj & Co V. ITO: 289 ITR 115 (Raj.)
-Berger Paints India Ltd. v. JCIT: 245 ITR 645 (Cat.)
-Vishwanath Prasad Ashok Sarrafvs. CIT in W.P No. 51 of2004 (Allah)
-Bhagwati Sahakari Sakhar Karkhana Ltd. v. DCIT: 269 ITR 186 (Bom)
-Durga Prashad Coyal V. ITO: 98 ITD **227** *(Asr.) (SB)*

It is submitted that in the reasons recorded for initiating the present reassessment proceedings, no failure on the part of the appellant in fully and truly disclosing all material facts necessary for assessment of income has been pointed out.

It has been held by the jurisdictional Delhi High Court in the decision in the case of ***CIT v. SIL Investments Limited 2010-TIOL-327-HC-DEL-IT, rendered in ITA No. 700/2010 and 701/2010 on 07.05.2010,*** *where the High Court,*

while examining the validity of reopening the assessment of the asses see therein on the basis of a subsequent retrospective amendment in law, held as under:

"4. We *have heard the counsel for the Revenue and have also examined the orders passed by the authorities below. It is clear that for invoking the proviso to Section 147 beyond the period of four years, there must be failure on the part of the assessee to either make a return under Section 139 or in response to a notice under Section 147/ 148 or to disclose fully and truly all material facts necessary for the assessment for that assessment year. Insofar as the filing of the return is concerned, that is not in dispute and, therefore, the focus is entirely on whether the assessee had failed to disclose fully and truly all material facts necessary for the assessment. The Tribunal, on an examination of the material on record, concluded that all the relevant facts were available on record and that it could not be said that at the time when the assessee filed the return, he had failed to disclose fully and truly all material facts necessary for the assessment because the amendment which was introduced retrospectively was not there at all. The Tribunal also observed, and in our view rightly so, that* ***the law cannot contemplate the performance of an impossible act. It was not expected of the assessee to foresee or forecast a future amendment which was to be brought into effect retrospectively. Therefore, The Tribunal has rightly concluded that the proviso to Section 147 could not be invoked merely because there was an amendment in the future which was introduced retrospectively and covered the period*** *in* ***question.*** *The Tribunal has correctly appreciated the law and applied the same to the undisputed facts.* **We** *see no reason to interfere with the impugned order as no substantial question of law arises for our consideration. However, we make it clear that we have only examined the jurisdictional issue qua validity of the Section 147 proceedings and have not examined the merits of the matter.*

The appeals are dismissed."

Further, in the present case under consideration, opinion formed by the learned AO at the time of recording reasons was only based on Audit Objection received by him (copy of notice issued u/s 154/155 is enclosed herewith for your reference).

Here, we may bring to your kind notice that Audit Objection cannot be the basis for reopening o f assessment.

The above view is supported by the following judgements:
-Indian *&* ***Eastern Newspaper Society*** *Vs.* ***CIT*** *(1979) 119****ITR*** *996* ***(SC)***

Section 147(b) of the Income-tax Act, 1961 - Reassessment - Information - Assessee-society let out on rent some portions of building to its members and to outsiders - Income assessed as income from business

- Internal audit party of Income-tax department opined such income assessable as income from house property - ITO reopened assessment under section 147(b) - AAC held that section 147(b) not applicable but tribunal sustained reopened proceedings - Case referred by tribunal to supreme court under section 257 - Whether view expressed by internal audit party on a point of law could be regarded as "information" for purposes of initiating proceedings under section 147(b) - Held no

- ***CIT v. Raian N. Aswani** (2018) 403 **ITR** 30 **(Bom)(HC)***

Section 80-IB, read with section 148, of the Income-tax Act, 1961 - Deductions - Profits and gains from industrial undertakings other than infrastructure development undertakings (Reassessment) - Assessment year 2004-05 - Assessee was granted deduction under section 80-IB in respect of duty drawback incentive during original assessment - Subsequently, audit party examined assessment order and raised objection to effect that deduction under section 80-IB could not be allowed in respect of duty drawback incentive - Thereupon, Assessing Officer issued a reassessment notice - It was noted that reasons recorded by Assessing Officer to reopen assessment were identical to audit objections - There was no material on record to even remotely suggest that Assessing Officer had any independent application of mind (without being influenced by audit report) - Whether impugned reassessment notice was unjustified for Assessing Officer having not formed his independent belief, therefore, same was to be quashed - Held, yes [Paras 6 and 7][In favour of assessee]

- ***Adani Exports vs. DCIT** (1999) 240 **ITR** 224 (Guj) **(Asst** yr 1993-94)*

Section 148 of the Income-tax Act, 1961 - Income escaping assessment - Issue of notice for – Assessment year 1993-94 - Whether so far as 'belief within meaning of section 147 is concerned, Assessing Officer has no authority to surrender or abdicate his function to his superiors, nor superiors can arrogate to themselves such authority - Held, yes - Whether, therefore, notice issued under section 148 was to be quashed where Assessing Officer did not believe that income had escaped assessment but had suggested to his superiors that in event of his view being unacceptable remedial action under section 147 or 263 might be taken and on CBDT's instructions had issued impugned notice - Held, yes

In view of the aforesaid legal position, it is submitted that since there was no failure on the part of the appellant company to fully and truly disclose

necessary material facts and that since an audit objection cannot be the basis of re-opening of assessment proceedings, the provisions of the proviso to Section 147 of the Act clearly bar the present reassessment proceedings.

Therefore, it is respectfully submitted that in the present case, there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment of income of the appellant. All the material facts with respect to the issue under consideration, as discussed hereinbefore, were, at all times, before the Assessing Officer during the course of original assessment proceedings under section 143(3) of the Act.

*In view of the above, your goodself would agree that notice dated 20.03.201***7** *issued under Section 148 of the Act as well as the order passed u/s 147/143(3) pursuant thereto for the year under reference are wholly without jurisdiction, void ab initio and are liable to be quashed.*

2. That the learned Assessing o fficer has erred in law and on the facts and circumstances of the case by not giving the exemption u/ 11 & 12 of the Income Tax Act, 1961 and in making addition of Rs. 2,49,09,186/- on account of appropriation towards Marketing fund in the balance sheet which according to him was not an allowable expense which is prejudicial to interest of the appellant and against the principles of consistency/ and principles of natural justice.

In this connection, we submit as under:

Deniel of Exemption u/s 11 & 12 of the Income Tax Act, 1961 by the AO:

The then learned AO, at the time of passing original assessment order u/s 143(3) of the Income Tax Act, 1961 denied the benefit of exemption u/s 11 & 12 of the Act to the appellant.

Against the said order, appellant had filed appeal before learned CIT(A) and learned CIT(A) has allowed the appeal in favour of the appellant vide order dated 23/02/2016 (Copy enclosed)

Thereafter, appeal filed before Hon'ble ITAT by the department was dismissed vide order dated 26.12.2017 wherein it was held that the activities of the appellant are not in the nature of business and allowed exemption u/s 11 of the Act to the appellant (copy enclosed)

On Merits:

- An amount of defined % age is allocated out of revenues every year to the marketing fund Reserve account. As per the accounting norms the allocation to

Marketing Reserve is reflected as "appropriation towards the marketing fund" and the actual application of the funds so appropriated is shown as utilization of funds under Marketing fund account which forms part of Reserve Funds and is reflected in Balance sheet.

-Following this practice, amount of Rs.2,49,09,186/- was allocated to Marketing Reserve during the Financial Year 2009-10 (Assessment Year 2010-11) and shown under the "Appropriation towards the Marketing Fund" in Income & Expenditure Account.

-The amount of Rs. 2,21,08,741/- actually utilised towards the marketing activities during this year is shown as utilised during the year in the Marketing Fund Account under Reserve Fund forming part of the Balance Sheet.

-Since the expenditure on marketing activities is routed through the Marketing Fund Account, the amount of Rs.2,21,08,741/- was spent through this Marketing Fund account (Refer Schedule II) and thus not included in Expenditure section of the Income and Expenditure Account (i.e. not considered as application of income).

-The amount actually utilised/spent for marketing activities (Rs. 2,21,08,741/-) has been correctly shown as application of Income in computation of Income also in following manner:

Total Application of income towards the objects of company: Rs.13,65,61,463/-
(this amount is prior to appropriation towards marketing fund and therefore does not include this appropriation of Rs.2,49,09,186/-)

Less: Additions for leave encashment, loss on sale/write of assets
Rs. 6,30,622/-

Add: Addition to fixed assets Rs.3,29,750/-
Utilisation of Marketing Fund Rs.2,21,08.741/-
(this is the amount actually utilized for marketing activities and taken from the marketing Fund Account which forms part of Balance Sheet)

Total Application of funds as per computation of Income Rs.15,83,69,332/-

In view of the above, you would agree that all the facts and numbers have been stated correctly in the computation of Income and same was duly verified by the then AO in the original assessment.

Being registered u/s 12AA of the Income Tax Act, 1961, your lordship would agree that appellant had rightly claimed exemption u/s 11 of Income Tax Act, 1961 and accordingly, considered utilization expenses incurred out of marketing fund as application of income in the computation of income.

Principles o f Consistency:

It is pertinent to mention here that in the earlier years also the Marketing Fund expenditure has been claimed consistently by the appellant company and the same has been accepted by the Department including in scrutiny assessments done in earlier years and in subsequent years i.e Assessment Years 2009-10 , 2011-12 & 2012-13. The learned AO has totally ignored the principle of consistency while passing order u/s 147/143(3) of the Income Tax Act, 1961 for the year under reference.

The principle of consistency laid down by the ***Hon'ble Apex court in the case of Berger Paints India Ltd. Vs CIT - 266 ITR 99(SC), CIT Vs J.K.Charitable Trust - 308 ITR 161(SC) and C K Gangatharan Vs CIT - 304 ITR 61 (SC)*** *would guide us that once the similar proposition has been accepted by the Revenue in past, then it is not open to it to challenge a similar finding and deviate from its earlier stand.*

The above view also finds support from the following judgments:
Rs. 13,65,61,463/-

Rs. 6,30,622/-

Rs. 3,29,750/- Rs. 2,24,38,491/-

Radhasoami Satsang Vs.CIT 193 ITR 321 (S.C)

The Hon'ble Supreme Court observed that in the absence of any material change, a different view that taken in earlier years could not be taken. Held as under:-

"We are aware of the fact that, strictly speaking, res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but whose a fundamental aspect permeating through the different assessment years has been found as fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year.
On these reasoning, in the absence of any material change justifying the Revenue to take a different view of the matter and, if there was no change, it was in support of the assessee-we do not think the question should have been reopened and contrary to what had been decided by the Commissioner of

Income-tax in the earlier proceedings, a different and contradictory stand should have been taken."

CIT vs Neo Poly Pack (P) Ltd., 245ITR 492 (Del):

Held that "the doctrine of res judicata does not apply to income tax proceedings since each assessment year is independent of the other but where an issue had been decided consistently in a particular manner for earlier assessment years, for the sake of consistency the same view should continue to prevail for subsequent years unless there is material change in the facts/ Since in the instant case there was no single distinguishing feature prompting a different view the income was liable to be assessed as business income."

CIT vs Girish Mohan Ganeriwala (2003), 260 ITR 407 (P &H):
Held at para 2 of the order that "It is not in dispute that the Department in the previous assessment year had treated such transactions in the hands of the assessee as his income from capital gains. The finding in the previous years, no doubt, do not operate as res judicata but that does not mean that in every subsequent year it is open for the AO to take a different view in the matter. Of course, he can take a different view if some fresh material is placed before him. The CIT (A) and also the Tribunal have found that no fresh material is placed before the A.O."

CWT vs R.K.K.R. International (P) Ltd -145 Taxman 322 (Del)
Section 7, read with section 27A, of the Wealth-tax Act, 1957 - Valuation of assets Immovable property - *Assessment Year 1985-86 - Assessee company along with two other companies purchased a property and let it out to their director - Valuation adopted by Wealth-tax Officer was challenged believe Commissioner (Appeal's) who calculated value of property on basis of annual letting value of property* - *On revenue's appeal Tribunal on basis of its earlier basic orders made in respect of same assessee and other two co-owners, directed Wealth* - *tax Officer to value said property on basis of its municipal valuation - Revenue filed appeal against Tribunal's order* - *It was found that basic orders of Tribunal were neither challenged by revenue in earlier assessment years nor in subsequent years and no appeals were filed in respect of other two co-owners for your under consideration - Whether since revenue had accepted basic orders of Tribunal, it could not be permitted to randomly challenge a subsequent order in respect of assessee or in respect of random assessment year without any just cause having been shown for such departure by revenue-Held, yes*

In view of the above submissions, you would agree that based on the same set of facts as in earlier years in respect of expenditure claimed by the appellant, Consistency in the method followed and accepted in the

past and future also, not objected to by the higher authorities in the tax department need not be changed merely because the AO changes his perception only on the basis of audit objection received, without there being factors coming in.

Thus, we request your lordship to allow the appeal in favour of the appellant."

4. Determination

4.1 Grounds of appeal nos. 1, 4, 5 and 6 challenge the addition of Rs. 2,49,091,186/- as against Nil income by making an addition apart the amount on account of appropriation towards marketing fund in the balance sheet and not allowing exemption under section 11 and 12.

4.1.1 The Assessing Officer observed that in the proceedings under section 143(3), the benefit of exemption under section 11 had been denied by holding that the assessee is hit by the proviso to section 2(15) and the surplus of Rs. 10,08,67,924/- generated from the business activity was taxed. Subsequently, it was noticed that the actual surplus was Rs. 12,57,77,110/- and an amount of Rs. 2,49,09,186/- had been appropriated towards the marketing fund which was not an allowable expense. Accordingly, the same was added back to the income. The appellant has submitted that an amount equivalent to a defined percentage is allocated out of the revenues every year to the marketing fund reserve account which is reflected as appropriation towards the marketing fund and the actual application of the funds so appropriated is shown as utilization of funds under the marketing fund account which forms part of the Reserve Fund and is reflected in the Balance Sheet. Accordingly the said amount was allocated to the market reserve and the amount actual utilized/spent has been shown as application of income in the computation of income also. It is also been submitted that total application considered at Rs. 13,65,61,463/- is prior to appropriation towards the marketing funds and does not include the amount appropriated on account of marketing fund.

4.1.2. I have considered the impugned order and the submissions of the appellant. From the Income and Expenditure Account it is seen that the total expenditure incurred is Rs. 13,65,61,463/- after which leaves a surplus of Rs. 12,57,77,110/-. From this amount, appropriation has been made towards marketing fund and the balance surplus has been transferred to the Reserve Fund. From this it is clear that the said appropriation is a below the line adjustment. Ever otherwise as is apparent from the submissions made that Rs. 13,65,61,463/- is the amount applied towards charitable purposes and the said submission was also made during the assessment proceedings. The said fact has not been refuted by the Assessing Officer in the assessment order.

Even otherwise exemption had been allowed to the assessee by the CIT-(A) and the same was upheld by the Hon'ble ITAT Delhi in ITA Nos. 2468 & 2469/Del/2016 for assessment years 2010-11 and 2012-13. It is also noted that the Hon'ble Delhi High Court in ITA No. 521/2017 vide order dated 09.01.2018 in appellant's own case for assessment year 2009-10 have upheld the order of the Ld. CIT-(A) and held that the assessee is entitled to under section 11.

4.1.3 In view of the discussion above the addition made is deleted. Grounds of appeal nos. 1, 4, 5 and 6 are **allowed.**

4.2 **Grounds of appeal nos. 2 and 3** challenge the reopening of assessment under section 147. Since the addition made has been deleted on merits as discussed above, these grounds are not being adjudicated.

4.3 **Ground of appeal no.** 7 states that the appellant pray for leaves to add, alter, amend or delete the above ground of appeal either before or at the time of hearing. Since no such option has been exercised during the appellate proceedings, this ground of appeal is academic in nature and is considered to be a dismissed ground for statistical purposes.

5. In the end result, the appeal is **PARTLY ALLOWED.**"

(D) The present appeal before us has been filed by Revenue against the aforesaid impugned appellate order dated 27.09.2018 of the Ld. CIT(A). In the course of appellate proceedings in Income Tax Appellate Tribunal ["ITAT", for short], the assessee filed copies of the following orders:

(i) DCIT (E) vs. National Internet Exchange of India in ITA No.2468 & 2469/Del/2016 (Delhi Tribunal)

(ii) CIT (Exemptions) vs. National Internet Exchange of India in ITA 145/2019 & CM Appl.6499/2019 (Delhi High Court)

(iii) CIT(Exemptions) vs. National Internet Exchange of India in ITA 521/2017 & CM No.815/2018 (Delhi High Court).

(D.1) At the time of hearing before us, both sides (Ld. Senior Departmental Representative for Revenue as well as the Representative of the assessee company) were in agreement that the issue in the present appeal before us is squarely covered in favour of the assessee by aforesaid order dated 26.12.2017 of the Co-ordinate Bench of ITAT Delhi passed in assessee's own case in identical facts and circumstances. Both sides were also in agreement that the issue in dispute is also squarely covered in favour of the assessee by the aforesaid order date 09.01.2018 passed by the Hon'ble Delhi High Court in assessee's own case in identical facts and circumstances. The relevant portions of the aforesaid orders are reproduced as under:

(D.1.1) Order dated 09.01.2018 of Hon'ble Delhi High Court:

> *"1. The Revenue's appeal under Section 260A of the Income Tax Act, 1961 impugns decision of the Income Tax Appellate Tribunal (ITAT). The ITAT had for A.Y. 2009-10 upheld the order of the CIT(A). The Appellate Commissioner had set aside the findings of the AO, bringing to tax Rs.11,39,72,556/- on the ground that such receipts were essentially commercial in nature and did not fall within the description of charitable activity.*

2. The assessee is a Section 25 Companies Act entity and was granted registration under Section 12A of the Act for A.Y. 2004-05 onwards. It is engaged in general public utility services. What attracted the adverse attention of the AO was the aggregate of the subscription fee and the fee charged by the assessee towards various services provided for, by it. The AO felt that these were in the nature of commercial activity and fell outside the charitable objects, for which it was established.

3. The CTT(A) after considering the objects, was of the opinion that the assessee had been incorporated without any profit motive. He also concluded that the nature of services provided by the assessee were of a general public utility and that the services provided, were towards membership and connectivity charges, only incidental to the main objects of the assessee. The ITAT confirmed these findings.

4. It is contended by the Revenue that the assessee provides services for which it charges users on a commercial basis and therefore, cannot fall within the charitable object, for which it was established. On the other hand, the assessee contends that the reasoning of the CIT(A) and the ITAT are sound and do not call for interference.

5. We notice that both the appellate authorities have concluded that the assessee's objects are charitable; it provides basic services by way of domain name registration, for which, it charges subscription fee on annual basis and also collects connectivity charges. In addition, we notice that the assessee is the only nationally designated entity entitled to allocate domain names to its applicants who seek it in India. Apparently, it is' also an affiliate national body of the ICAMM and authorized to assign ".in" registration and domain names in terms of Central Government's letter dated 20.11.2004. In that sense, the assessee (though not a statutory body) is carrying on regulatory work. It's case would therefore be a fortiori on a different footing than Chamber of Commerce, and other such trade bodies, set up not for profit basis but should have been held to be charitable organizations such as Bureau of Indian Standards, ICAI Accounting Research Foundation, etc. [Bureau of Indian Standards v. Director General of Income Tax (Exemption) 2012 TOIL 928 (Del); ICAI Accounting Research Foundation v. Director General of Income Tax (Exemption) 321 ITR 73 (Del)].

6. Having regard to these facts and the conclusions of the lower appellate authorities, no question of law arises. The appeal is therefore dismissed."

(D.1.2) Order dated 26.12.2017 of the Co-ordinate Bench of ITAT Delhi:

> *"3. Briefly stated facts are that National Internet Exchange of India (NIXI) was formed in 2003 by the Government of India under the Ministry of communication and Information Technology for the purpose of promotion and growth of internet services for the public. It is registered u/s 25 of the Company's Act; on the basis of no profit no loss. The assessee is also registered u/s 12AA(1) of the Income Tax Act, 1961 (for short called as the "Act") vide order dated 31.03.2009. The AO stated in the Assessment Order that the assessee is doing activities on commercial lines which are in the nature of business. Hence, the assessee is hit by the proviso to section 2(15). The whole of surplus was brought to tax by withdrawing exemption under section 11.*
>
> *4. In appeal Ld. CIT (A) followed the orders of the Tribunal in assessee's own case for the assessment years 2004-05 and 2009- 10 and also the decision of the Hon,ble Jurisdictional High Court in India Trade Promotion Organization vs. DGIT (E), 53 Taxmann.com 404 (Delhi) 2015 (order dated 22.01.2015) and held since the assessee has been created by the Govt. of India for the promotion and growth of internet services for the general public and as such the assessee cannot involve in any commercial or business activity. He, therefore, allowed exemption u/s 11 of the Act to the assessee. The Revenue is, therefore, in this appeal before us.*
>
> *5. Ld. DR submitted that the assessee was doing activities on commercial lines which are in the nature of business, as such, the assessee is hit by the proviso to section 2(15) of the Act, but by ignoring this fact Ld. CIT (A) granted relief to the assessee. Per contra, it is the argument of the Ld. AR that earlier also when the assessee was denied of exemption u/s 11 of the Act, the matter had reached the level of the Tribunal for the assessment years 2004-05 and 2009-10 and the Tribunal granted relief to the assessee. Further Ld. CIT (A) while following the orders of the Tribunal also followed the decision of the Hon,ble Jurisdictional High Court in the case of India Trade Promotion Organization vs. DGIT (E) (supra), therefore, such an order cannot be interfered with.*

5. We have carefully gone through the record. Absolutely there is no dispute that the assessee is formed in 2003 by the Govt. of India under the Ministry of Communication and Information Technology for the promotion and growth of internet services of public and is registered u/s 25 of the Company's Act and also registered u/s 12AA(1) of the Act. There is also no dispute that on a similar set off facts that the Tribunal in assessee's own case for the assessment years 2004-05 and 2009-10 held that the activities of the assessee are not in the nature of business. We further find that the facts of this case are very much similar to the facts involved in India Trade Promotion Organization. We, therefore, find that the Ld. CIT (A) rightly followed the binding precedent of the Hon,ble Jurisdictional High Court and also the decisions of the Tribunal in assessee's own case for the earlier years to hold that the activities of the assessee are not in the nature of the business and allowed exemption u/s 11 of the Act. We, therefore, find that the impugned order does not suffer any illegality or irregularity, as such, it cannot be interfered with. Accordingly, we find the grounds of appeal as devoid of merits and are liable to be dismissed."

(D.2) We have heard both sides and have perused the materials on record. The only issue in dispute, is pertaining to the aforesaid addition of Rs.2,49,09,186/-. Both sides are in agreement that the issue in dispute in the present appeal is squarely covered in favour of the assessee by aforesaid orders dated 26.12.2017 of Co-ordinate Bench of the ITAT, Delhi; and by aforesaid order dated 09.01.2018 of Hon'ble Jurisdictional High Court. Neither side has brought any material to draw our attention to persuade us to take a view different from the view already taken in favour of the assessee in aforesaid order dated 26.12.2017 of Co-ordinate Bench of ITAT

Delhi and order dated 09.01.2018 of Hon'ble Delhi High Court respectively. Neither side has brought any facts and circumstances of the present case before us to distinguish it from the facts and circumstances of the aforesaid order dated 26.12.2017 of Co-ordinate Bench of the ITAT Delhi and order dated 09.01.2018 of Hon'ble Jurisdictional High Court respectively.

(D.2.1) In view of the foregoing, and respectfully following aforesaid orders dated 26.12.2017 and 09.01.2018 of Co-ordinate Bench of ITAT Delhi, and Hon'ble Delhi High Court, respectively; we decide the issue in dispute before us in the present appeal in favour of the assessee; and we direct the Assessing Officer to delete the aforesaid addition of Rs.2,49,09,186/-.

(E) In the result, the appeal of Revenue is dismissed. Our order was pronounced orally in the open Court at the conclusion of the hearing in the presence of the representatives of both sides, now this written order is signed today on 09.12.2021

Sd/-	Sd/-
(KUL BHARAT)	**(ANADEE NATH MISSHRA)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated: 09.12.2021
PK/Ps

Copy forwarded to:

1. Appellant
2. Respondent
3. CIT
4. CIT(Appeals)
5. DR: ITAT

ASSISTANT REGISTRAR
ITAT NEW DELHI