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

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

ITA No.222/Bang/2019
Assessment year: 2011-12

Shri M J Aravind, Nirvana, 329, 18th Cross, Ideal Homes Layout, Phase I, Rajarajeshwari Nagar, Bangalore – 560 098. **PAN: ACBPA 0889J**	Vs.	The Assistant Commissioner of Income Tax, Circle 2(3)(1), Bangalore.
APPELLANT		RESPONDENT

Appellant by	:	Shri Narendra Sharma, Advocate
Respondent by	:	Shri Priyadarshi Mishra, Addl.CIT(DR)(ITAT), Bengaluru.

Date of hearing	:	23.02.2022
Date of Pronouncement	:	25.02.2022

O R D E R

Per Chandra Poojari, Accountant Member

This appeal by the assessee is directed against the order of the CIT(Appeals), Bengaluru-2, Bengaluru dated 28.11.2018 for the assessment year 2011-12 on the following grounds:-

"1. On the facts and circumstances of the case, the learned Commissioner of Income Tax (Appeals) erred in confirming invoking the provision of section 148. The assessee reiterates that the proceedings under section 148 read with section 147 are bad in law and the entire assessment needs to be quashed.

2 On the facts and circumstances of the cases, the learned Commissioner of Income Tax (appeals) has erred in not accepting the contentions of the assessee that various expenses incurred by the assessee viz., PMS charges, professional fees, salary is integral to the investment activity undertaken by him and to earn the income returned in the return of income for the previous year. In view of this, the assessee believes that the expenses claimed under Section 57 of Rs.13,76,320/- as a deduction from the total income is fully justifiable.

2.1 Commissioner of Income Tax (Appeals) has also not appreciated the fact that certain class of assets may not earn income in a certain year viz., investment in unlisted equities and foreign investments and that this fact will not hamper the allowability of the expenditure incurred to manage and maintain the portfolio. Since some of the income may be exempt under the Income Tax Act, the assessee has voluntarily disallowed expenditure to an extent of income not includible in total income as computed below:

Investments	**Amount in**
Investments as on 01/04/2010	50,15,68,755
Investments as on 31/03/2011	53,89,78,639
Average Investments	52,02,73,697
0.5% of Average Investments u/s 14A (foreign securities and unlisted securities from which no income has been earned has been excluded)	26,01,368

2.2 The above amount of Rs. 26,01,368/- is the amount computed under section 14A of the Income Tax Act, 1961. While claiming the deduction u/s 57, the above amount has been reduced as under:

Total Direct Expenses	44,64,110
Less : 0.5% of average investment	26,01,368
Expense claimed under section 57 Amount restricted to the income under the head Income From Other Sources	18,62,742 13,76,320

2.3 The amount of Rs. 13,76,320/- has been claimed as deduction to the extent of Income shown under the head Income from Other Sources.

In view of above grounds, the assessee believes that the expenses claimed under Section 57 as a deduction from the total income is fully justifiable and learned Commissioner of Income Tax (Appeals) has erred in disallowing the said claim under Section 57.

3. Without prejudice to the foregoing contentions even assuming but without admitting that the action of the learned Commissioner of Income Tax (Appeals) upholding the disallowance to be in order, The learned commissioner ought to have either considered an appropriate sum as cost of acquisition of securities for the purposes of computation of capital gains in the event of sale or as expenditure incurred wholly and exclusively in connection with the transfer of securities during the year thereby entitling the assessee relief under section 48 of the Income Tax Act, 1961. The assessee also wishes to state that the expenses claimed are clearly outgoings and in the most unlikely event of your honor not considering the claim as above the said amount have to be capitalized on the various investments that he is holding so that the necessary claim can be made when the said investment are transferred and tax liability arises in accordance with the scheme of the Act."

2. Ground Nos.1 & 2 are with regard to reopening of assessment. The facts of the issue are that the assessee filed return of income originally on 28.7.2011 declaring total income of Rs.2,60,49,071 claiming a refund of Rs.6,73,071. The scrutiny assessment u/s 143(3) completed on 08/01/2014 accepting the returned income. On further verification it was noticed that the following income were not offered to tax:

1. Interest and Dividend income earned from the Foreign Companies situated outside India.
2. Difference in credits made to capital account.
3. Interest income from Woodstock Ambience Pvt. Ltd.

4. The disallowance u/s 14A r.w.r. 8D.

3. Hence it was proposed to reopen the assessment recording the following reasons:-

1. Interest income of Rs.17,63,930/- from Woodstock Ambience Pvt. Ltd., received during the year was not offered to tax. As per Mercantile System of Accounting, the same is to be offered to tax in the AY 2011-12.
2. Interest and Dividend income earned from the Foreign Companies situated outside India amounting to Rs.18,74,832/- was not offered to tax.
3. The assessee has credited a sum of Rs.6,09,28,779/- to the capital account as net profit during the year. The assessee has declared Rs.2,64,12,410/- to tax after claiming deduction u/s 10 of the Act. It is not clear from the Financial Statements and documents available on record as there is no clear break up for the amount credited vis-à-vis and the amount declared. The AO is required to examine/verify, remedial action to be token if any difference found and the same has to be brought to tax.
4. The disallowance u/s 14A r.w.r. 8D is as under:

Investments in Equity Shares		20,11,77,498
Investments in Mutual Fund		17,18,92,695
IIFCL		16,59,08,446
TOTAL		53,89,78,639
Disallowance u/s 14A	=	53,89,78,639 x 0.5%
	=	Rs.26,94,893

Totaling to **Rs.63,33,655**/-."

4. After obtaining approval from the Addl. CIT dated 11.3.2016, notice u/s. 148 of the Income-tax Act, 1961 [the Act] dated 24.3.2016 was issued and duly served on the assessee on 26.3.2016. The assessee requested to consider the original return filed as return of income filed pursuant to notice u/s. 148. Due to change of incumbent, an intimation u/s. 129 dated 8.8.2016 of the Act has been issued to the assessee posting the case for hearing on 29/08/2016. The assessee has not responded to the notice.

Since the assessment was getting time barred a letter dated 21/11/2016 giving a final opportunity, was issued posting the case for hearing on 28/11/2016. The ld. AR for the assessee appeared and submitted as follows in respect of the reasons recorded for reopening the assessment:-

1. Interest income from Woodstock Ambience Pvt. Ltd.

During the FY:2010-11 relevant to the AY:2011-12 it was observed that as per 26AS the assessee has earned interest income of Rs.17,63,930/- on which TDS has been deducted and deposited by the deductor. The assessee during the assessment proceedings stated the same has been offered to tax in the AY:2012-13 in accordance with the cash system of accounting. It is noticed that as per 26AS entries same ought to have been offered to tax for AY:2011-12. Further, corresponding credit of TDS on the income in question also has been claimed by the assessee. Hence, the AR Was asked to explain the reason for claiming the interest income in the AY:2012-13 instead of AY:2011-12.

The AR in his submission dated 19/12/2016 explained that he has not received any interest income in FY:2010-11 relevant to AY:2011-12 from M/s Woodstock Ambience Pvt. Ltd. The said interest accrued only during FY:2011-12 (AY:2012-13) and furnished the income tax computation and copy of return of income filed with copies of relevant bank statements. He further submitted that the assessee is following cash system of accounting and there is no change in system of accounting.

The AO examined the submissions with the copies of the bank statement and was of the view there is no change in system of accounting and the interest part is accounted as in FY:2011-12 relevant to the AY:2012-13. He verified the same and accepted the submissions of the assessee.

2. Interest and Dividend income earned from the Foreign Companies situated outside India :

The assessee has made investments in foreign securities as per schedule A of balance sheet submitted. Out of these investments the assessee has earned interest and dividend income from the foreign

companies situated outside India totaling to Rs.18,74,832/-. He has also claimed exemption u/s 10(34).

The assessee AR was asked why the same should not be treated as global income and brought to tax as per the provisions of Sec.5(1)(c)of the Income tax Act. as the same cannot be allowed as exempt income even u/s 10(34) as the investments made are in non domestic companies situated in Emirates of Abu Dhabi, State of Quatar. Further, it was also brought to the notice of the AR that as per Article 10 & 11 of DTAA of quatar and UAE-Abu Dhabi with Govt. of India which clearly states that "Dividends and interest paid by a company which is a resident of a Contracting State to a resident of the other Contracting State may be taxed in that other State respectively'.

The assessee in reply has furnished the details of the said income and stated that the income of Rs.18,74,832/- has been offered to tax under income from other sources along with computation of income and relevant details. After examining the details furnished, the submission made by the assessee was accepted by the AO.

3. Difference in credits made to capital account of the assessee:

It was observed that the assessee has credited a sum of Rs.6,09,28,779/- to the capital account as net profit during the year. The assessee has declared Rs.2,64,12,410/- to tax after claiming deduction u/s 10 of the Act. The AR was asked to explain the same and reasons for the difference.

From the break up credits to various schedules furnished by the assessee, the AO observed no mismatch is noticed.

4. The disallowance u/s 14A r.w.r. 8D:

According to the AO, during the year under consideration the assessee has made huge investment in the mutual funds and shares. Disallowance was to be made u/s 14A rwr 8D i.e average investments works out to Rs.53,89,78,639/- and 14A disallowance i.e 0.5% of average investments works out to Rs,26,94,893/- as follows:-

Investments inequity shares:	Rs.201177498/-
Investments in mutual funds:	Rs. 171892695/-
IIFCL	Rs.165908446/-
Total	Rs.538978639/-

The AR was asked to furnish the details of the same. The AR submitted that the 14A disallowance is not warranted as the expense of Rs.13,76,320/- has been claimed u/s 57. Further, he stated that the same amount has been claimed has deduction under income from other sources.

However, the assessee's claim was not accepted and the AO disallowed the expenses and brought it to tax.

2. Thus the assessment was completed u/s. 143(3) r.w.s. 147 by the AO determining total income of Rs.2,77,88,730 granting refund of Rs.1,72,940. The contention of the ld. AR is that during the course of original assessment, the assessee filed various documents along with balance sheet and computation of income with respect to various provisions of the Act including section 14A. Therefore what was disclosed was fully disclosed and nothing more was required to be done and accordingly the AO completed the assessment after considering all the issues raised in the reasons recorded in the original assessment. According to the ld. AR in the notice u/s. 148 dated 24.3.2016 issued there was no allegation that there was any failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment. Later, the AO took up the same issues that was considered in the original assessment for reopening the assessment. Further, the same issues were taken up in the rectification proceedings u/s. 154 initiated by the AO by notice dated 15.12.201, however no order has been passed u/s. 154 by the AO. Being so, the reopening of assessment is only on account of change of opinion on the basis of same facts and figures which were available during the original assessment proceedings. Especially the reasons recorded do not indicate any material which came on record after the

original assessment proceedings prior to the issue of notice u/s. 148. Thus, he submitted that the AO on perusal of same record available with during original assessment came to a different conclusion and reopened the assessment which is nothing but change of opinion which cannot be permitted. For this purpose, he relied on the following judgments:-

- CIT v. Bharatiya Reserve Bank Note Mudran Pvt. Ltd. in ITA No.433/2011 order dated 11.8.2021 (Kar.).
- Sri Jagannath Promoters & Builders v. DCIT [2021] 133 taxmann.com 270 (Ori.)
- Vishwanath Engineers v. ACIT [2014] 45 taxmann.com 15 (Guj)
- Jainam Investments v. ACIT, [2021] 131 taxmann.com 327 (Bom)

5. On the other hand, the ld. DR submitted that in the present case, income liable to tax has escaped assessment in the original assessment due to oversight and inadvertence or mistake, therefore the AO exercised jurisdiction u/s. 147 of the Act to reopen the assessment. For reopening the assessment, it is not necessary that the information must be derived from external source of any kind or there must be disclosure of income on important matter subsequent to the original assessment. According to him, reassessment is also possible if the information obtained from proper investigation from the material on record or from enquiry or reasons into facts or law. He submitted that the assessee cannot take advantage of any lapse on the part of the AO.

6. The ld. DR submitted that in the instant case the AO did not form any opinion on the issues raised in reopening the assessment, as such he issued notice u/s. 154 of the Act. Later he came to know that the issues cannot be rectified u/s. 154, as such he rightly invoked the provisions of section 147 of the Act and issued notice u/s. 148 of the Act so as to bring

income escaping assessment into the tax net. He relied on the orders of lower authorities.

7. We have heard both the parties and perused the material on record. In the present case the AO raised the issues of Interest and Dividend income earned from the Foreign Companies situated outside India, difference in credits made to capital account, Interest income from Woodstock Ambience Pvt. Ltd. and disallowance u/s 14A r.w.r. 8D. The contention of the ld. AR is that these issues were already considered by the AO in the original assessment and the AO cannot reopen the assessment on the same issues on change of opinion.

8. We have carefully gone through the assessment order u/s. 143(3) of the Act dated 8.1.2014. There is no discussion by the AO with regard to the issues raised in the reasons recorded for reopening the assessment, though assessment was completed u/s. 143(3) of the Act. The contention of the ld. AR is that the AO already applied his mind on the impugned issues raised in the reassessment, that cannot be considered for reopening the assessment. The ld. AR submitted that the assessee categorically replied vide his letter dated 30.12.2013 on the disallowance u/s. 14A r.w. Rule 8D that assessee has not incurred nor debited any expenditure to P&L account, hence the question of disallowance does not arise. On the basis of the said reply of the assessee, the AO had not made any addition relating to section 14A and passed the order u/s. 143(3) on 8.1.2014 not making any addition. Later the AO issued notice u/s. 148 by recording the reasons with regard to four items as follows;-

1. Interest and Dividend income earned from the Foreign Companies situated outside India.
2. Difference in credits made to capital account.
3. Interest income from Woodstock Ambience Pvt. Ltd.
4. The disallowance u/s 14A r.w.r. 8D.

5. However, in the final assessment order passed u/s. 143(3) r.w.s. 147 dated 28.12.2016, the AO has not made any addition with regard to first three issues and only made addition on disallowance u/s 14A r.w. Rule 8D at Rs.13,76,320. Now the contention of the ld. AR is that it is only a change of opinion and this issue was discussed in the original assessment proceedings and after considering the reply of the assessee on this issue, the AO has made any addition there. Considering the same issue amounts to change of opinion as held by the Supreme Court in the case of *CIT v. Kelvinator of India Ltd., 320 ITR 561 (SC)* that section 147 would not give arbitrary power to the AO to reopen the assessment on the basis of mere change of opinion which cannot be *per se* reason to reopen. It was also held that there is a difference between power to review and power to reassess. The AO has no power to review, but he has power to reassess. But reassessment is to be made based on fulfilling certain pre-conditions and "if the concept of change of opinion" is removed in the garb of reopening of assessment, review would take place. We must treat the "concept of change of opinion" as an in-built test to check the abuse of power by the AO. Hence after 1st April, 1989, AO has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. However, before us, the ld. DR strongly relied on the judgment of the Karnataka High Court in the case of *CIT v. Rinku Chakraborty [242 CTR 425 (Kar)* where it is held as follows:-

> "20. From the aforesaid judgments it is clear that, though the word 'opinion' is deleted and is now substituted by the words 'reason to believe', the concept of change of opinion is not obliterated w.e.f. 1st April, 1989 after substitution of s. 147 of the IT Act, 1961 by the Direct Tax Laws (Amendment) Act, 1987. However, where in the original assessment the income liable to tax has escaped assessment due to oversight and in advertance or a mistake committed by the ITO, the ITO has the jurisdiction to reopen the original assessment. It is not necessary that for such reopening of such assessment the information is to be derived

from external source of any kind or disclosure of new and important matters subsequent to the original assessment. Even if the information is obtained from the record of the original assessment after a proper investigation from the materials on record or the facts disclosed thereby or from any enquiry or research into facts or law, reassessment is permissible. Income may escape assessment as a result of lack of vigilance of the ITO or due to perfunctory performance of his duties without due care and caution. Even in a case where a return has been submitted to the ITO who erroneously fails to tax a part of the assessable income, it is a case of the said part of the income as having escaped assessment and the AO has jurisdiction under s. 147 to reopen the assessment and bring to tax the income that has escaped assessment. A taxpayer cannot be allowed to take advantage of any of those lapses, as ultimately if such a advantage is allowed, it would be prejudicial to the interests of the Revenue and public interest.

21. In the instant case, it is no doubt true the assessees have furnished the requisite information about the receipt of Rs. 6,60,000 from the company as loan. The AO at the time of the block assessment has taken note of the same. But, he did not form any opinion so far as the levy of tax on that income is concerned. It has escaped assessment. It is only when looking into the books of the company where the said amount was shown as loan to the assessee, the AO has opened his eyes. He has realised the mistake committed. He was satisfied that he has not brought to tax the said income in the block assessment order passed. It is not a case of change of opinion as he had not formed any opinion on this aspect at the time of block assessment. It was a case of an omission to form an opinion. Once he realised the mistake, he has initiated proceedings under s. 147.

22. As held by the apex Court in all these cases the principle that is to be kept in mind is that the taxpayer should not be allowed to take advantage of an oversight or a mistake committed by the taxing authority. It is not in dispute that these assessees are directors of the company holding more than 10 per cent share and therefore, in terms of s. 2(22)(e) any amount paid by the company to such directors constitutes deemed dividend and is liable to tax. In fact these directors had not filed returns. They filed returns

> only after the proceedings were initiated under s. 147. Though they disclosed this income in the said return, the AO did not apply his mind properly to the said income and therefore, by a mistake or by oversight, he failed to assess the said amount and impose any tax. Under law, the assessee is liable to pay tax if the said payment is made out of the accumulated profit of the company. Therefore, in the facts of the case, we are satisfied that the AO was justified in initiating proceedings under s. 147 of the Act for reopening the assessment to bring to tax income that has escaped assessment. Therefore, the second substantial question of law is answered in favour of the Revenue and against the assessee."

6. However, this was not a good law in view of the judgment of Full Bench of Karnataka High Court in *Dell India Pvt. Ltd. v. Jt. CIT, LTU & Anr. [432 ITR 212 (Karn)(FB)* wherein it was held as under:-

> "12. We have given careful consideration to the submissions. We are dealing with a reference to a larger bench where we have been called upon to decide the questions formulated by a Division Bench of this Court. The first two questions revolve around the issue whether the Division Bench of this Court in the case of Rinku Chakraborthy (supra) has laid down the correct law. We must, therefore, refer to the decision in the case of Rinku Chakraborthy (supra). This was a case where the Tribunal had interfered with proceedings initiated in accordance with Section 147 of the said Act. The Tribunal held that reopening of an assessment on the basis of a mere change of opinion was not justified. The submission before the High Court was that it was not a case of change of opinion by the Assessing Officer, but it was a case of an income escaping the assessment. In paragraph 17 of the said decision, the Division Bench held thus:
>
> > '17. It is in this background, it is necessary to look into the judgment of the Apex Court, where the scope of reassessment has been explained. The leading case on the point is Kalyanji Mavji & Co. v. CIT 1976 CTR (SC) 85 : [1976] 102 ITR 287 (SC). The Supreme Court dealing with s. 34(1)(b) of 1922 Act, has held as under:

"*On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of s. 34(1)(b) to the following categories of cases*:

(1) where the information is as to the true and correct state of the law derived from relevant judicial decisions;

(2) where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the ITO. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;

(3) where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;

(4) where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law.

If these conditions are satisfied then the ITO would have complete jurisdiction to reopen the original assessment. It is obvious that where the ITO gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which form part of the original assessment, s. 34(1)(b) would have no application."

(emphasis supplied)

Based on the said decision of the Apex Court, this Court held that:

(a) Where in the original assessment, the income liable to tax escapes assessment due to oversight or inadvertence or a mistake committed by Assessment Officer, the jurisdiction to reopen the original assessment vests in the Assessment Officer.

(b) A tax payer should not be allowed to take advantage of an oversight or mistake committed by Assessment Officer.'

13. Thus, what is held in the case of Rinku Chakraborthy (supra) is clearly based on the decision of the Apex Court in the case of Kalyanji Mavji & Co. (supra) and in particular what is held in clause (2) highlighted above.

In paragraph 13 of the decision of Kalyanji Mavji& Co. (supra) it was held thus:

> '13. On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of section 34(1)(b) to the following categories of cases:
>
> "(1) Where the information is as to the true and correct state of the law derived from relevant judicial decisions;
>
> (2) *Where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority*;
>
> (3) Where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
>
> (4) Where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law."
>
> If these conditions are satisfied then the Income-tax Officer would have complete jurisdiction to reopen the original assessment. It is obvious that where the Income Tax Officer gets no subsequent information, but merely proceeds to reopen the original assessment without any fresh facts or materials or without any enquiry into the materials which

> form part of the original assessment, section 34(1)(b) would have no application.'
>
> (emphasis supplied)

14. In the case of Indian and Eastern Newspaper Society (supra), one of the issues which arose for consideration was whether reassessment is justified on the basis of an error found by the Assessing Officer on the reconsideration of the same material, which was before him when he made the original assessment. Another issue before the Apex Court was whether a view expressed by an internal auditor of the Income-tax Department on a point of law can be regarded as an information within the meaning of clause (b) of section 147 of the said Act. The Apex Court considered its several earlier decisions and in paragraph 14 of the said decision, the Apex Court held thus:

> "14. Now, in the case before us, the Income-tax Officer had, when he made the original assessment, considered the provisions of sections 9 and 10. Any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. *The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under section 147(b). Reliance is placed on Kalyanji Mavji & Co. v. CIT, where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income-tax Officer must fall within Section 34(1)(b) of the Indian Income-tax Act, 1922. It appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants insofar as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income-tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kumar Kamal Singh v. CIT, CIT v. Raman & Co. and Bankipur Club Ltd. v. CIT and we do not believe that -the law has since taken a different course. Any*

> *observations in Kalyanji Mavji & Co. v. CIT suggesting the contrary do not, we say with respect, lay down the correct law."*
>
> (emphasis supplied)

15. Hence, Apex Court expressly held that the law laid down by a Bench of two Hon'ble Judges of the Apex Court in the case of Kalyanji Mavji & Co. (supra) was not correct. The Apex Court after noticing the view taken in its earlier decision in the case of Kalyanji Mavji & Co. (supra) expressly held that an error discovered on reconsideration of the same material does not give the Income-tax Officer the power to reopen a concluded assessment.

16. At this stage, we may make a useful reference to a subsequent decision of the Apex Court in the case of CIT v. Kelvinator of India Ltd. (supra). It is a decision of the Bench of three Hon'ble Judges. In paragraphs 3.1 and 3.2 of the said decision, the Apex Court has quoted Section 147 which existed prior to 1st April 1989 and after 1st April 1989. Paragraphs 3.1 and 3.2 of the said decision read thus:

'3.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to 1-4-1989, section 147 of the Act, reads as under:

> "147. Income escaping assessment.- If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion 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)."

3.2 After the Amending Act, 1989, section 147 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 recomputed 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)."
>
> (emphasis supplied)

We are concerned with the provision of section 147 as amended with effect from 1st April 1989. In paragraph 4 of the said decision, the Apex Court held thus:

> '4. On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in section 147 of the Act (with effect from 1-4-1989), they are given a goby and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. *Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment,*

> *review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. Hence, after 1-4-1989, assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment.* Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.

"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 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)

17. Thus, what is held by the Apex Court is that when a power under section 147 is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of the Assessing Officer. Further, it is held that after 1st April 1989, the Assessing Officer has power to reopen provided there is a tangible material to come to the conclusion that there is escapement of income from assessment. The Apex Court held

that mere change of opinion on consideration of the same material is no ground to invoke section 147 of the said Act.

18. As noted earlier, the decision in the case of Rinku Chakraborthy (supra) is based only on what is held in clause (2) of paragraph 13 of the decision in the case of Kalyanji Mavji & Co. (supra). The decision rendered in the case of Kalyanji Mavji & Company (supra) was by a Bench of two Hon'ble Judges. Subsequently, a larger Bench of three Hon'ble Judges in the case of Indian & Eastern Newspaper Society (supra) has clearly held that oversight, inadvertence or mistake of the Assessing Officer or error discovered by him on the reconsideration of the same material does not give him power to reopen a concluded assessment. It was expressly held that the decision in the case of Kalyanji Mavji & Co. (supra), on this aspect does not lay down the correct law. The decision in the case of Rinku Chakraborthy (supra) is based solely on the decision of the Apex Court in the case of Kalyanji Mavji & Co. (supra) and in particular what is held in clause (2) of paragraph 13. The said part is held as not a good law by a subsequent decision of the Apex Court in the case of Indian and Eastern Newspaper Society (supra).

19. Therefore, in the light of law laid down in the case of Indian and Eastern Newspaper Society (supra), the first question will have to be answered in the negative by holding that the decision in the case of Rinku Chakraborthy (supra) does not lay down correct position law to the extent to which it follows what is held in clause (2) of paragraph 13 of the decision of the Apex Court in the case of Kalyanji Mavji & Company (supra). The second question will have to be answered in the affirmative. In view of the consistent decisions of the Apex Court holding that "reason to believe" in the context of section 147 of the Income-tax cannot be based on mere change of opinion of the Assessing Officer, the third question will have to be answered in the negative. In fact, in view of settled law, framing of question No. 3 was not warranted at all.

20. We make it clear that we have not made any adjudication on the controversy on the merits of Writ Appeal and now the Appeal will have to be placed before concerned Division Bench for deciding the same on merits in the light of what we have held above. The questions whether a case for reopening of the

> assessment in accordance with section 147 of the said Act is made out and whether a Writ Court ought to interfere with the impugned notice, are left to be decided by a Division Bench."

7. In view of the above discussion, we are of the opinion that in the present case, the AO wanted to review his own earlier order in the garb of reopening the assessment u/s. 147, which is nothing but change of opinion on the issue which was concluded by him by taking a decision in favour of the assessee in the original assessment. Accordingly, we are of the opinion that reopening of assessment in this case is bad in law. Accordingly, we annul the reopening of assessment.

8. The assessee also raised some other issues with regard to procedure adopted by the AO for reopening the assessment. These grounds are not emanating from either the order of the CIT(Appeals) or from the grounds of appeal raised before us. Hence we are not commenting on the same.

9. Without prejudice to the above, on merits, the assessee has raised ground No.2.1 to 2.3. These issues are decided against the assessee by the order of the Tribunal in ITA No.1991/B/2016 dated 20.4.2018 in assessee's own case for the AY 2012-13 wherein it was held as under:-

> "8. As per the provisions of section 57(iii) of IT Act, any expenditure not being in the nature of capital expenditure laid out or expended wholly and exclusively for the purpose of making or earning such income under the head 'income from other sources' is allowable. In addition to that, in respect of income excluding exempt income being interest on securities, any reasonable sum paid by way of commission or remuneration to banker or any other person for the purpose of realising such dividend or interest on behalf of the assessee is allowable as per clause (i) of section 57. Apart from these two clauses i.e. clause (i) & (iii), other clauses of section 57 are not applicable in the present case. The assessee's claim is this that as per section 14A of IT Act, ½% of the investments has to be disallowed and the balance has to be

allowed and the assessee computed the disallowance in that manner and claimed balance amount as deduction. In this regard, we observe that section 14A comes into picture in respect of those expenses which are otherwise allowable and therefore, the assessee has to first establish this that the expenses claimed by the assessee is allowable under any provisions of the law. For that, the assessee has to show that the claim of the assessee is allowable u/s. 57 of IT Act because the expenses are incurred in earning of income from other sources. As per the details of the expenses claimed by the assessee, it is available on table 2 of written submissions filed by the assessee before the CIT(A) as reproduced above, it is seen that there is no claim regarding any expenses specified in clause (i) of section 57 i.e. commission or remuneration to banker or any other person for the purpose of realising dividend or interest income because the assessee has claimed deduction on account of PMS charges, Salaries, Professional charges, vehicle maintenance, travel, computer maintenance, printing and stationery, telephone charges and bank charges. Hence no deduction is allowable in the present case under clause (i) of section 57.

9. Regarding the allowability of deduction under clause (iii) of section 57, it has to be established by the assessee that expenditure has been exclusively laid out or expended wholly and exclusively for the purpose of making or earning such income taxable under the head 'income from other sources' and a categorical ITA No. 1991/Bang/2016 finding has been given by CIT (A) in para no. 6.2 of his order as reproduced above that no such detail was furnished by the assessee. Before us also, the assessee has made general arguments and has submitted general details but no specific details were furnished before us also. Hence, we hold that no deduction is allowable u/s 57 (iii).

10. Now we examine the applicability of two judgments on which reliance have been placed by ld. AR of assessee. First judgment is the judgment of Hon'ble Apex Court rendered in the case of CIT Vs. Rajendra Prasad Moody (supra). In our considered opinion, this judgment does not help assessee in the absence in the absence of any details as required u/s. 57(iii) of IT Act because the disallowance was not made by the AO and confirmed by CIT (A) by holding that since no income is earned in the present year,

deduction is not allowable in respect of this expenditure which are spent for earning some income taxable under the head "Income from other Sources" but income could not be earned in the present year. The reason for disallowance made by the AO and confirmed by CIT(A) is this that the assessee has not furnished necessary details and hence, this judgment renders no help to the assessee in the present case.

11. Reliance has been placed by ld. AR of assessee on the Tribunal order rendered in the case of East West Hotels Ltd. vs. ACIT (supra). In that case, lease rent income was to be assessed as income from other sources and the assessing officer held that expenditure allowable is restricted to only such payment, which is separately binding on the employer and legal entity, i.e., company, such as salaries, PF, ESI and other inevitable expenses. In that case, the assessee was a company and the Tribunal has followed the judgment of Hon'ble Calcutta High Court rendered in the case of CIT Vs. Ganga Properties Ltd. as reported in 199 ITR 94 in which it was held that expenditure incurred in complying with statutory obligations is deductible u/s. 57(iii) of IT Act. As per the relevant para of judgment reproduced by the Tribunal, it was noted that even if a company derives income from 'other sources', it has to maintain its establishment for complying with statutory obligations so long it is in operation and its name is not struck off the register of companies or unless the company is dissolved which means cessation of all corporate activities of ITA No. 1991/Bang/2016 the company for all practical purposes and so long as it is in operation, it has to maintain its status as a company and it has to discharge certain legal obligations and for that purpose, it is necessary to appoint clerical staff and a secretary or accountant and incur incidental expenses and therefore, such expenses incurred were wholly and exclusively for the activities to earn income and it was held that such expenses are allowable. For the same ratio, judgment of Hon'ble Bombay High Court rendered in the case of Chinai & Co. (P.) Ltd. Vs. CIT a reported in 206 ITR 616 was also followed and the judgment of Hon'ble Allahabad High Court rendered in the case of Rampur Timbur & Turnery Co. Ltd. as reported in 129 ITR 58 was also followed. Since in the present case, the assessee is not a company, these judgments of Hon'ble Calcutta High Court in the case of CIT Vs. Ganga Properties Ltd.

(supra), Hon'ble Bombay High Court in the case of Chinai & Co. (P.) Ltd. Vs. CIT (supra) and of Hon'ble Allahabad High Court in the case of Rampur Timbur & Turnery Co. Ltd. (supra) have no relevance and since, the Tribunal has followed these judgments and decided the issue in case of that assessee being a company, this Tribunal order is also not applicable in the present case. The nature of expenses in dispute in that case are noted by the Tribunal in the form of a table and from the same, it is seen that the expenses claimed in that case were regarding the personal expenses of Directors, travelling expenses of others, Motor car expenses, security charges, printing and stationery, staff welfare, flowers and plants, AGM expenses, Board meeting expenses, miscellaneous expenses, rent paid, subscription to club, Interest on purchase of car, legal expenses etc. Hence it is seen that as per the nature of expenses involved in that case, the expenses were in relation to the fulfilling the requirements of company law to have directors and to have AGM, Board meeting and to maintain the office etc. which are necessary for fulfilling the legal requirements of a company under the Companies Act. Hence we hold that this Tribunal order is also not applicable in the present case because the assessee in the present case is not a company and therefore, there is no such legal compulsion to incur the expenses which are claimed in the present case. Hence we find that the claim of assessee for allowing deduction of expenses against income from other sources is not allowable because the assessee has not established that the expenses are allowable u/s. 57(iii) of IT Act.

12. Now we deal with and decide the alternative argument of ld. AR of assessee that even if expenses are held as not allowable against income from other sources, the same should be allowed against income from capital gain in the present year or future years. Regarding this argument, we would like to observe that for computing income from capital gains, deduction is allowable u/s. 48 and expenses which can be allowed as per this section are expenses incurred wholly and exclusively in connection with transfer of asset or cost of acquisition of asset or cost of any improvement of the concerned capital asset only. The claim of expenses in the present case is not for those expenses which are incurred on account of cost of transfer of asset or cost of acquisition of asset or cost of any improvement of asset and

therefore, this alternative claim also has no merit and accordingly rejected.

13. In the result, the appeal filed by the assessee is dismissed."

10. In view of the above position, we dismiss the grounds of the assessee relating to the issue.

11. In the result, the assessee's appeal is partly allowed.

Pronounced in the open court on this 25th day of February, 2022.

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

Bangalore,
Dated, the 25th February, 2022.

/*Desai S Murthy* /

Copy to:

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

By order

Assistant Registrar
ITAT, Bangalore.