आयकर अपीलीय अधिकरण, हैदराबाद पीठ

IN THE INCOME TAX APPELLATE TRIBUNAL

Hyderabad ' A ' Bench, Hyderabad

Before Shri R.K. Panda, Accountant Member

AND

Shri Laliet Kumar, Judicial Member

ITA No.930/Hyd/2016		
Assessment Year: 2006-07		
The Asst. Commissioner of Income Tax, Circle 17(1), Hyderabad.	Vs.	M/s. ECI Engineering & Construction Co., Ltd., Hyderabad. PAN : AAACE74411G
(Appellant)		(Respondent)
ITA 968/Hyd/2016		
Assessment Year 2006-07		
M/s. ECI Engineering & Construction Co., Ltd., Hyderabad. PAN : AAACE74411G	Vs.	The Asst. Commissioner of Income Tax, Circle 2(2), Hyderabad.
(Appellant)		(Respondent)
Assessee by:	Shri K.C. Devdas	
Revenue by:	Shri K.P.R.R. Murthy.	
Date of hearing:	27.03.2023	
Date of pronouncement:	15.05.2023	

O R D E R

PER LALIET KUMAR, J.M.

These two appeals filed by the assessee and the Revenue, respectively, are directed against the order of Commissioner of Income Tax (Appeals) – 5, Hyderabad dated 30.03.2016 for the assessment year 2006-07.

2. The abridged grounds raised by the assessee in ITA No.968/Hyd/2016 read as under :

> *"1. The order of ld.CIT(A) - 5 is erroneous in law in facts and in law.*
>
> *2. The ld.CIT(A) erred in upholding the decision of the Ld.AO in treating sale of partly paid up shares as fully paid and confirming the addition of Rs.50,14,625/- as long term capital gain.*
>
> *3. The ld.CIT(A) erred in confirming the addition of Rs.27,69,422/- towards difference in interest.*
>
> *4. Further, the ld.CIT(A) failed to observe that the notes to financial statements clearly mentioned the interest income which pertained to the previous year and accordingly erred in upholding the action of the Ld.AO in assessing the difference in interest of Rs.27,69,422/-.*
>
> *5. The ld.CIT(A) erred in confirming the addition of difference of prior period income of Rs.1,26,71,371/-."*

2.1. The assessee had further filed the additional grounds of appeal, which read as under :

> *"1. The ld.CIT(A) erred in upholding the reassessment proceedings when there was no failure or omission on part of the appellant to disclose fully and truly, all material facts while completing the original assessment u/s 143(3) of the Income Tax Act.*
>
> *2. The ld.CIT(A) erred in upholding the decision of the Ld.AO in treating sale of partly paid up shares as fully paid and confirming the addition of Rs.50,14,625/- as long term capital gain.*
>
> *3. The ld.CIT(A) erred in confirming the addition of Rs.27,69,422/- towards difference in interest.*
>
> *4. Further, the ld.CIT(A) failed to observe that the notes to financial statements clearly mentioned the interest income which pertained to the previous year and accordingly erred in upholding the action of the Ld.AO in assessing the difference in interest of Rs.27,69,422/-.*
>
> *5. The ld.CIT(A) erred in confirming the addition of difference of prior period income of Rs.1,26,71,371/-."*

3. The grounds raised by the Revenue in ITA No.930/Hyd/2016 read as under :

> *"1. The order of ld.CIT(A) is erroneous in law and on facts of the case.*
>
> *2. The ld.CIT(A) erred in deleting the disallowance of depreciation on discarded assets of Rs.21,25,929/-.*
>
> *3. The ld.CIT(A) erred in deleting the addition of Rs.1,42,37,594/- made by the Assessing Officer on account of assets discarded or written off.*
>
> *4. The ld.CIT(A) erred in simply accepting the contention of the assessee and in not passing a speaking order on the issue of deletion of addition of Rs.1,42,37,594/- an expenditure claimed towards assets discarded / written off under prior period expenditure."*

4. The brief facts of the case are that assessee is a company engaged in the business of civil contracts, filed its return of income for A.Y. 2006-07 on 23.11.2006 declaring total income of Rs.7,79,88,094/-. The return of income was processed u/s 143(1) of the Act on 10.03.2008 and thereafter, the assessment was completed u/s 143(3) of the Act by making disallowance of Rs.52,00,000/- and Rs.12,08,208/- on account of disallowance u/s 40(a)(ia) of the Act. Thus, the income of the assessee was computed at Rs.8.43,96,302/-. In the assessment order, the Assessing Officer in para 4 has mentioned as under :

> *"4. It is noticed from the Annexure-13 to the Tax Audit Report submitted during the course of assessment proceedings, there is a shortfall in Tax Deduction at source to the extent of Rs.27,112/- under the head Hire Charges for Machinery."*

4.1. Subsequently, case was taken up for scrutiny u/s 148 of the Act. The ld.AR had submitted that the Assessing Officer had issued notice u/s 148 of the Act on 28.03.2012. The said notice, provides as under :

OFFICE OF THE
DEPUTY COMMISSIONER OF INCOME TAX
CIRCLE -2(2), HYDERABAD

NOTICE UNDER SECTION 148 OF THE INCOME TAX ACT, 1961

F.No.DCIT-2(2)/AAACE4411G/2011-12 Dated: 28-03-2012

To
The Principal Officer,
M/S ECI Engineering and Construction Company Ltd.,
Plot.No.A-12 & 13, Manikonda Village,
R.R.Dist, Hyderabad - 500089.

Where as I have reason to believe that *your income/* ~~*the income of .....in respect of which you are assessable,*~~ chargeable to tax for the A.Y. **2006-07** has escaped assessment with in the meaning of section 147 of the Income tax Act, 1961.

I, therefore, propose to *assess/*~~*re-assess*~~ *the income/*~~*re-compute loss/depreciation allowance*~~ for the said assessment year and I hereby require you to deliver to me with in 30 days from the date of service of this notice, a return in the prescribed form of your income ~~/ the income of ..... in respect of which you are assessable~~ for the said assessment year.

~~This notice is being issued after obtaining the necessary satisfaction of the Commissioner of Income tax – II, Hyderabad /the Central Board of Direct Taxes.~~

Seal

(V.RAMA MOHAN)
Deputy Commissioner of Income Tax,
Circle – 2(2), Hyderabad.

(V. RAMA MOHAN)
Deputy Commissioner of Income Tax

4.2. The Assessing Officer had mentioned the following reasons for belief on 19.03.2011 that the income has escaped the assessment while issuing notice u/s 148 of the Act.

Reasons for the belief that Income has escaped assessment.

(i) As per the computation on Long Term Capital Gains the assessee had sold 29000 shares Rs.7/- per share and 28,65,500/- shares @ 5.25 per share on 31.07.2005 and claimed the profit on sale of investment of Rs.64,47,895/- as exempt u/s 10(38) on the reason that the shares are listed shares and that Securities Transaction Tax (SIT) has already been deducted. Though in, its letter Dt: 16.04.2008, the assessee stated that the details of STT paid would be provided separately, the same have not been found on record. Further, under the current circuit breaker norms of Stock Exchanges, it is not possible that the prices Rs.5.25 and Rs.7.00 could be quotations on the same day i.e.. 31.07.2005. In view of the same the transaction appears to be an off-market negotiated transaction. Since SIT will not be deducted in off-market transaction, the sale would attract capital gains tax.

(ii) As the details of STT are not on record, the exemption u/s 10(38) of .64,47,895/- requires to be disallowed.

(iii) Assessee claimed depreciation on discarded assets amounting to 21,25,929/ Depreciation is allowable only when the asset is owned and put to use by the assessee. In the instant case, since assets are discarded and not put to use the assessee is not entitled to depreciation.

(iv) Assessee claimed employee's remuneration and benefits amounting to .4,73,76,085I- as per schedule 12 of P&L a/c. Average salary per month works out to approx. Rs.40 lakhs. As per balance sheet under the head current liabilities, salaries,& wages (sch-8) an amount of Rs.91,01,161/- and an amount of Rs.1,35,755/- under the head PF is due, which clearly indicates that the liability is for more than two months as against normal trend of one month.

(v) The shares of Rockwell India ltd were sold at two different rates of Rs.7 & Rs.5.25 per share. The breakup is not available on record. By applying the rate at Rs.7 per share the understatement of sale proceeds of Rs.50.14, attracts long term capital gain tax.

4.3. It was submitted by the ld.AR that from the notice, it is clear that the said notice was issued without obtaining the satisfaction of the CIT-II, Hyderabad / CBDT. The contention of ld.AR was that the notice was issued as if the re-opening was done within 4 years under clause (1) of section 147 of the Act. It was the contention that if the reopening is done by the Revenue beyond a period of 4 years, then satisfaction of the Commissioner of Income Tax is necessary.

4.4. The assessee after receipt of notice u/s 148 had also received notice u/s 143(2) and 142(1) of the Act. In response thereto, assessee furnished information as called for and after examining the same, Assessing Officer had completed the assessment u/s 143(3) of the Act on 23.04.2008 with a taxable income of Rs.8,43,96,302/- interalia making certain additions / disallowances.

5. Feeling aggrieved with the order of Assessing Officer, assessee carried the matter before ld.CIT(A), who granted partial relief to the assessee. While deciding the appeal, ground no.2 raised by the assessee with respect to *"2. The action of the Assessing Officer is illegal and barred by limitation as per law"*. The ld.CIT(A) had decided ground nos.1 to 3 collectively, against the assessee, at page 17 of the order passed by the ld.CIT(A). The submissions of the assessee were reproduced hereunder : (Page 7 and 8 of the CIT order).

"A. The Appellant filed its1101 for the AY 2006-07 for an income of Rs7,79,8,09.4/- on 23-11-2006. The same is completed u/s 143(3) of the LT Act vide order dated 23-04-2008 by the DCIT, Circle 2(2). The notice u/s 148 is issued on 28-03-2012. Thus, there is a time gap of more than 4 years from the end of the relevant Assessment year and issue of notice under Sec.148. In terms of the provisions of section-147 of the I.T. Act, the Assessment is bad and illegal as it is time barred as there is no fault on the part of the Assessee to disclose filly and truly all material facts necessary for his assessment.

B. Without prejudice to the above, it is submitted that the A.O has issued the notice u/s 148 only due to the change of opinion and nor based on any new information that has come to his notice subsequently. There is no information or reason with the AO to believe that income has escaped assessment. In this regard, reliance is placed on CIT v. Munjal Showa Ltd. (2012). 205 Taxman 351 (Delhi)(HC) where in it has been held that Reassessment due to the change of opinion when there is no failure on part of Assessee in disclosing the full facts is not valid.

C. The A0 has no information on record to show that income chargeable to tax has escaped assessment due to the failure of the Assessee to disclose fully and truly all the material facts necessary for the Assessment. The Assessee has submitted all the facts and information to the A.O at the time of making original Assessment.

Synopsis of the arguments of the appellant is as follows :

1. There is no fault on the part of the Assessee, as it had disclosed fully and truly all material facts necessary for its assessment.

2. The AO had issued the notice u/s 148 only due to the change of opinion, and not based on any new information that has come to his notice. The appellant placed reliance on CIT Vs. Munjal Showa Ltd. (2012) 205 Taxman 351 (Delhi)(HC) where in it was held that reassessment due to change of opinion when there is no failure on part of Assessee in disclosing the full facts is not valid.

3. AO has no information on record to show that income chargeable to tax has escaped assessment due to the failure of the Assessee to disclose fully and truly all the material facts necessary for the assessment.

4. What prompted the Assessing Officer to issue the notice u/s 148 is the Audit objection raised by the AG office auditors. It was claimed that it is a settled law that audit objections cannot be the ground to issue the notice u/s 148."

5.1. The ld.CIT(A) though had noted down the objections raised by the assessee and submissions of the assessee, however, without any elaborate reasonings had dismissed the grounds of the assessee by reasoning given vide 6.10 and 7 of his order (at page 16 and 17). The ld.CIT(A) had partly granted the relief to the assessee and partly confirmed the addition made by the Assessing Officer.

6. Feeling aggrieved with the order of ld.CIT(A), both the assessee and Revenue are now in appeal before us.

6.1 **First we will deal with the appeal of assessee in ITA No.968/Hyd/2016.**

7. Before us, ld. AR had submitted that the additional grounds raised by the assessee are required to be admitted as the additional grounds go to the root of the matter and are legal in nature. He relied upon the decision of Hon'ble Supreme Court in the case National Thermal Power Co. Ltd., Vs., CIT [229 ITR 383] (SC); as considered in Tribunal's Special Bench's decision All Cargo Global Logistics Ltd., Vs. DCIT (2012) [137 ITD 217](SB) (Mumbai) wherein it was held that the Tribunal can very well entertain a new ground going to root of the mater.

8. Per contra, ld. LD. DR objected for admission of additional grounds of appeal filed by the assessee and to substantiate his case, he relied upon the decisions in the case of Brooke Bond India Ltd. Vs. CIT – (1991) 59 Taxman 82 (CAL) as well as CIT Vs. Begum Noor Banu – (1993) 69 Taxman 565 (Andhra Pradesh.) and further submitted that the additional grounds raised by the assessee cannot be entertained. In support

of his case, he also filed the following written submissions, which are to the following effect :

"1. Most respectfully submitted that the Appellant has raised Additional Grounds regarding reassessment proceedings U/s 147 of the I T Act. In this regard, the comments of the Assessing Officers were called for. The report of the Assessing Officer, vide his letter bearing F No. CC-2(3)/ ECI Engg/2022-23 dated 18.10.2022 has been received which has been duly forwarded by the Range Head vide his letter bearing F No. JCIT/CR-2/HYD/2/ITSC/2022-23 dated 26/10/2022 (Copies of both are enclosed herewith as Annexure I.

2. At the outset, it is pointed out that these grounds regarding reassessment have been raised by the Assessee for the first time before the Hon ITAT and it was neither raised before the AO nor before the TA CIT (A). Therefore, the Additional Grounds of Appeals filed on 11.01.2017 are not admissible. Reliance is placed on the following decisions in this regard:

> Brooke Bond India Ltd (1991) 59 Taxmann 82 (Cal)
> Begum Noor Banu (1993)69 Taxmann 565 (AP)

3. Without prejudice to the above, it is to submit that it becomes clear from above report of the AO that the approval of the CIT for the issue of Notice U/s 148 of the IT Act was obtained on 27.03.2012. From the records, it is seen that the Proforma proposal for re-opening of assessment was submitted by the Additional CIT, vide his letter dated 26.03.2012 (In the Form for recording reasons thereof, it appears that the date has been inadvertently typed as 19.03.2011 instead of 19.03.20 12). Copies of the Proforma, the said forwarding letter of the Addl. CIT, communication of the approval by the ITO (HQ) dated 27.03.20 12 and a copy of the Notice U/s 148 of the IT Act dated 28.03.2012 are enclosed herewith as Annexure II

4. The Assessee has claimed LTCG as exempt U/s 10(38). In this regard, the Assessee vide his Letter dated 16.04.2008 has fraudulently claimed before the AO, during the original assessment proceedings that STT has been paid with regards to the said LTCG and the details there of will be provided to the Department separately. This is a clear case of falsity to avoid payment of taxes (copy enclosed as Annexure III).

5. In view of the fraudulent claim as above, it is clearly established beyond doubt that the Assessee has not only failed to disclose fully and truly all material facts necessary for its assessment, but also has made fraudulent false claims in order to mislead the Revenue. This fact came to light during the proceedings u/s 143(2) r.w.s. 147 of the IT Act, wherein the Assessee, vide its letter dated 27.11.2012, has stated as below (copy enclosed as Annexure IV). "TI-LB transaction was between the promoters as private parties and the shares were not sold in stock exchange as they were not traded as on that date. As such, we inform you that no STT is paid on these shares. Consequently,

the shares are liable to Long Term Capital gains, and we offer the LTCG from the transfer of these shares as per the recomputation statement enclosed as Annexures - A".

So, the Assessee itself has offered the said LTCG for taxation vide their above referred letter dated 27.11.2012.

6. In view of the above, it is not only a case of fraudulent claims, but also of falsity, of shifting stands and misrepresentation of facts before the Revenue Authorities to evade the taxation. Reliance is placed on the following decisions in this regard:

> Phoolchand Bajrang Lal and others Vs. Income Tax Officer (1993) 203 ITR 456 SC

7. It is clear from above mentioned AO's report and the Additional CIT's comments thereon, that there is no change of opinion, but it is a fraudulent claim of exemption U/s 10 (38), for which the assessee itself had later admitted the mistake and offered the LTCGs for taxation. So, the raising of such frivolous and inadmissible additional grounds of appeal is a deliberate act to avoid payment of due taxes. The said report also makes it clear that the issue of Notice U/s 148 is within the purview of provisions contained in section 151 of the IT Act and after due approval of the CIT-il, Hyderabad. In this context, it may be pointed out that the Assessee has not approached with clean hands neither before the assessing officer nor before appellant authorities, including the Hon'ble ITAT."

9. We have heard the rival contentions of the parties and perused the material available on record. In fact, whether the Assessing Officer can reopen the assessment without the satisfaction of the Commissioner of Income Tax, in case if reopening is made beyond a period of 4 years, is a jurisdictional ground. Similarly, whether there was any satisfaction in the eyes of law, recorded by the ld.CIT vide note dt.19.03.2011 was also a question of law as the proposal was mooted by the ACIT only on 26.03.2012. Therefore, both the additional grounds raised by the assessee are legal in nature and therefore, are required to be admitted. Suffice to say, Hon'ble Apex Court's landmark decision in National Thermal Power Co. Ltd., Vs., CIT [229 ITR 383] (SC); as considered in Tribunal's Special Bench's decision All Cargo Global Logistics Ltd., Vs. DCIT (2012) [137 ITD 217](SB) (Mumbai), holds that the Tribunal can very well entertain a new

ground going to root of the matter so as to determine correct tax liability of a taxpayer provided all the relevant facts are already on record. Respectfully, following the decisions cited supra, we accept that the assessee's petition seeking to raise additional grounds. Further, as the additional grounds raised by the assessee are legal in nature and directly emanate from the order contested, the same are required to be admitted.

10. Both the decisions relied upon by the ld. DR deals with the issue of admission of additional grounds covering a new item for the first time before the Tribunal which has not been disputed at the earlier stage, namely, either before the Assessing Officer or before the ld.CIT(A). In the case of **Begum Noor Banu** (supra), the assessee's land was acquired by the Government and compensation was awarded and on reference, the compensation was annulled by the first appellate authority and the ld.CIT(A). The assessee in that case had filed the return of income declaring enhanced compensation and also declared the capital gain and interest amount to a tune of Rs.72,026/- and thereafter, the Assessing Officer had computed total income of the assessee. The ITO in the said case had mentioned that the capital gain is strictly speaking was chargeable in the fiscal year in which the land was acquired but since the assessee had declared gain in the assessment year under consideration, therefore, the Assessing Officer has computed the income accordingly. On appeal, the assessee has not raised any ground of capital gain before the 1st appellate authority and thereafter, for the first time, the assessee had raised the ground before the Tribunal. The Tribunal has allowed the raising of the additional ground. The hon'ble jurisdictional High Court after considering the various judgments and the facts of the said case, had held that the Tribunal has no power to admit a new additional ground which deals with the new claim of the assessee. In view of the above, the judgment relied

upon the by the Revenue in the case of Begum Noor Banu (supra) is not applicable. Similar are the facts in the case of Brooke Bond India Ltd (supra). Hence, the decisions relied upon by the Revenue are not applicable to the facts of the case. **In view of the above, the additional grounds raised by the assessee are admitted.**

11. Now we will deal with the additional grounds raised by the assessee.

ADDITIONAL GROUND NO.1

11.1 In the present case, the assessee has filed the original return of income on 23.11.2006 admitting total income of Rs.7,79,88,094/- and the return of income was processed by the CPC on 10.03.2008 and the assessment was completed u/s 143(3) of the Act on 23.04.2008 with taxable income of Rs.8,43,96,302/-. Thereafter, the Assessing Officer had issued notice u/s 147 / 148 of the Act to the assessee.

11.2 Before us, ld. AR has submitted that the re-opening of the assessment was taken place beyond a period of 4 years and the Assessing Officer has not recorded that there was any omission or failure on the part of the assessee to disclose fully and truly all the material facts for the completion of assessment. It was further submitted that notice for re-opening was issued on 20.03.2012 and however, for the reasons to re-open the assessment were mentioned as under :

Reasons for the belief that Income has escaped assessment.

(i) As per the computation on Long Term Capital Gains the assessee had sold 29000 shares Rs.7/- per share and 28,65,500/- shares @ 5.25 per share on 31.07.2005 and claimed the profit on sale of investment of Rs.64,47,895/- as exempt u/s 10(38) on the reason that the shares are listed shares and that Securities Transaction Tax (SIT) has already been deducted. Though in, its letter Dt: 16.04.2008, the assessee stated that the details of STT paid would be provided separately, the same have not been found on record. Further, under the current circuit breaker norms of Stock Exchanges, it is not possible that the prices Rs.5.25 and Rs.7.00 could be quotations on the same day i.e.. 31.07.2005. In view of the same the transaction appears to be an off-market negotiated transaction. Since SIT will not be deducted in off-market transaction, the sale would attract capital gains tax.

(ii) As the details of STT are not on record, the exemption u/s 10(38) of .64,47,895/- requires to be disallowed.

(iii) Assessee claimed depreciation on discarded assets amounting to 21,25,929/ Depreciation is allowable only when the asset is owned and put to use by the assessee. In the instant case, since assets are discarded and not put to use the assessee is not entitled to depreciation.

(iv) Assessee claimed employee's remuneration and benefits amounting to .4,73,76,085I- as per schedule 12 of P&L a/c. Average salary per month works out to approx. Rs.40 lakhs. As per balance sheet under the head current liabilities, salaries,& wages (sch-8) an amount of Rs.91,01,161/- and an amount of Rs.1,35,755/- under the head PF is due, which clearly indicates that the liability is for more than two months as against normal trend of one month.

(v) The shares of Rockwell India ltd were sold at two different rates of Rs.7 & Rs.5.25 per share. The breakup is not available on record. By applying the rate at Rs.7 per share the understatement of sale proceeds of Rs.50.14, attracts long term capital gain tax.

12. From the basis of the above said reasons, it was the contention of the ld. AR that the proposal given by the Assessing Officer was a revised proposal which is clear from the form / format by the Assessing Officer for seeking approval from the ld.CIT. Further, it was submitted that the ld.CIT had accorded the approval without satisfying himself and the approval as per

record was accorded on 31.03.2011. It was submitted that if the re-opening is to be made within 4 years, then the satisfaction of the Commissioner of Income Tax is not required before reopening of the assessment. However, if the reopening is made after a period of 4 years, then the satisfaction of the CIT is required thereby concluding that the assessee had failed to disclose truly and correctly material facts at the time of assessment. It was submitted that it is incumbent and necessary for the Assessing Officer to mention that the assessee had failed to disclose fully and truly all the material facts. He had drawn our attention to the decisions of Hon'ble Mumbai High Court in the case of Bhor Industries Vs. ACIT reported in 267 ITR 161 and also jurisdictional High Court in the case of PCIT Vs. Lanco Hills Technol Park (I.T.T.A No.326 of 2022) decided on 13.12.2022 whereby both the High Courts have held as under :

> *"7. Revenue preferred appeal before the Tribunal against the aforesaid order of CIT(A) dated 30.03.2019. By the order dated 07.09.2021, Tribunal dismissed the appeal of the revenue by upholding the order of CIT(A). Tribunal held as follows:*
>
> > *"4. We have heard rival pleadings and perused the case file. We note first of all that the Assessing Officer recorded the following reasons for forming his opinion that the assessee's taxable income had escaped assessment:*
> >
> > *"it is gathered from the information available with this office that the assessee was debited an amount of Rs.113,19,93,808/ - towards 'Reversal on account of cancellation and price revision; and finally reported a book loss of Rs.38,28,51,371/-. The reduction of Rs.113,19,93,828/ - towards Reversal on account of cancellation and price revision 'from the Profit and Loss Account for the year ended 31.03.2010 is irregular, the same need to be brought to tax. In view of the above, I have reason to believe that income has escaped assessment as per the provisions of section 147 of the IT Act."*
> >
> > *5. There is hardly any dispute that we are in Assessment Year 2010-11 wherein the Assessing Officer had frErled his section 143(3) regular assessment on 27.12.0 12 followed by recording of the foregoing reasons culminating in issuance of section 148 notice dt.31.3.2015. This impugned reopening therefore has been it i :fated beyond the specified period of four years from t1 E e-id of the relevant assessment year in light of*

section 147(1) 1st proviso. The said proviso stipulates that such a reopening would only be initiated if it is found that the assessee had not disclosed all the relevant particulars "fully" and "truly" before the Assessing Officer in the first round. Learned CIT-DR to dispute that the Assessing Officer's sole reopening reason has placed reliance on the assessee's books only regarding "reversal on account of cancellation and price revision. (supra)". We therefore quote Hon'ble Bombay High Cou:-:'s landmark decision in Hindustan Lever Limited Vs. R.B. Wadekar (2014) 268 ITR 332 (Born) that an Assessing Officer's reopening reasons have to be read on standalone basis; as it is, without any scope of further m:rovement at a later stage by way of addition, deletio:a or- substitution therein. We thus quote that to conclude that the impugned reopening has been rightly quashed by the CIT(A) as a mere change of opinion only. All this, renders the latter issue on merits as academic. No other argument has been pressed before us."

8. Thus, according to the Tribunal, the reopening was initiated beyond the specified period of four years from the end of the re levant assessment year. In the light of Section 147(1) first proviso of the Act, Tribunal further noted that reopening of assessment is only permissible if the assessee had not disclosed all the relevant particulars fully and truly before the assessing officer. Relying on a decision of the Bombay High Court in Hindustan Lever Limited v. R.B.Wadekarl, Tribunal held that assessing officer's reopening reasons have to be read on a standalone basis, without any scope for further improvement at a later stage by addition or deletion or substitution. Therefore, Tribunal held that CIT(A) was justified in taking the view that reopening of assessment was on account of mere change of opinion.

9. We are in agreement with the views expressed by the Tribunal.

10. The fact that the reopening of assessment was ordered on mere change of opinion has been upheld by two lower appellate authorities. It is evident that respondent had disclosed fully and truly all material facts to the assessing officer during the assessment proceeding on the basis of which assessment order dated 27.12.2012 was passed under Section 143(3) of the Act. By .change of opinion holding that reduction of Rs.113,19,93,808.00 towards reversal on account of cancellation and price revision and deducting the same from the profit and loss account was irregular thereby having reason to believe that taxable incorrect had escaped assessment, the concluded assessment could not have been reopened. At the stage of third round of appeal we do not find any substantial question of law for interference by the High Court under Section 260A of the Act. We are, therefore, of the view that there is no merit in this appeal."

In view of the decisions cited hereinabove, it is clear that unless there is a failure on the part of the assessee to disclose fully and truly all the material facts, the re-opening made by the Assessing Officer cannot be said to be in accordance with law.

13. It was further submitted that the ld.CIT(A) and the Addl. Commissioner both have not applied their mind and have recorded the satisfaction without any application of mind in as much as the date for seeking the approval the ACIT / CIT was mentioned as 19.03.2011 i.e., within the period of 4 years, whereas, the proposal for seeking the approval was only mooted by the ACIT on 26.03.2012. In the light of the above, it was submitted that since the re-opening was made beyond a period of 4 years, it is necessary and mandatory for the Commissioner of Income Tax and Assessing Officer to satisfy themselves that there was a failure on the part of the assessee to fully and truly disclose all the material facts. It was also the contention of the assessee that during the assessment proceedings before the Assessing Officer in first round, the assessee has disclosed the material information about the long term capital gain. The Assessing Officer after noticing the contention of the assessee had asked the assessee to provide the details of STT paid on the share. Thereafter, no addition was made in the hands of the assessee on account of long term capital gain by the Assessing Officer. It was the submission of the assessee by the ld.AR that once the assessee had disclosed all the information to the Assessing Officer, then it is for the Assessing Officer to use his power under the Act for making the additions in the hands of the assessee. Further, it was submitted that the additions were made on account of the Audit Objections. It was the submission of the

ld.AR that no reopening can be made based on the audit objections. The same audit report was available with the official of the Revenue at the first instance which was duly referred by him in Para 4 of his order and therefore, no addition can be made based on the same audit report.

14. The ld.AR had also filed the following submissions in support of his case.

> *"1. The above appeal preferred by the Appellant and the Department bearing ITA No. 968/Hyd/2016 and ITA No. 930/Hyd/2016 respectively relates to the AY 2006-07 were heard on 07th April, 2021.*
>
> *2. One of the grounds raised was relating to reopening of assessment U/s.147 by virtue of notice U/s. 148 of the Act issued on 28/03/2012.*
>
> *3. The Appellant submits that since the reopening of the assessment was beyond the period of four years, there was no omission or failure on the part of the Appellant to disclose fully and truly all the material facts necessary for the completion of assessment.*
>
> *4. The original assessment U/s. 143(3) was completed on 23/4/2008.*
>
> *5. One of the grounds raised by the Appellant was that the notice U/s. 148 was issued without obtaining necessary sanction of the Commissioner of Income Tax, as this sentence was struck down by the Assessing Officer in the notice issued U/s. 148 on 28/03/2012. The Appellant pleaded for the sanction accorded by the Commissioner in relation to the facts called for and the Learned Departmental Representative was asked to furnish a copy, which was done. On a perusal of the Form for recording the reasons in initiating the proceedings U/s. 147 of the Act, for obtaining the approval, of the CIT given on 19th March, 2011 reveals the following:-.*
>
> *(i) The proposal itself is a "revised proposal" as could be seen from the "Head Note" of the "Form of approval".*
>
> *(ii) The Pr. CIT noted that he was satisfied that the recording of reasons of the proposals that were put to him arose out of remedial action to be taken within four years from the end of the AY 2006-07 which fell on 31st March, 2011, notwithstanding the fact that the original assessment was completed U/s. 143(3) of the IT Act, 1961.*

(iii) The Pr. Commissioner while sanctioning the approval for reopening of the assessment was being issued within the period of four years from the end of the Assessment Year i.e., AY 2006-07.

(iv) The assessment year in question is 2006-07 and the period of four years ends on 31/3/2011 as the original assessment was completed on 23/04/2008. However, the notice was issued on 28/03/2012 which is beyond four years from the end of Assessment Year 2006-07.

6. In view of the above facts, the Appellant submits that while the sanction of the Commissioner of Income Tax was accorded on 19/03/2011, the Commissioner of Income Tax was fully aware of the fact that the complete facts in relation to the issues arising out of assessment were completely disclosed during the course of assessment proceedings as seen from the wordings recorded at para 10 of Form of Approval.

7. Therefore, the Appellant submits that the sanction accorded by the Commissioner of Income Tax on 19/03/201.1 was on an application of mind that the reopening of the assessment was within four years. Further, the Form also states that it is a revised proposal (Please see Head Note).

8. Further, the notice U/s. 148 was issued on 28/03/2012 which falls beyond the period of four years from the end of the assessment year 2006-07 triggering the proviso to section 148 whether there was any failure on the part of the Appellant to furnish all material facts for completion of the assessment.

9. The Appellant further states that no sanction was obtained for issue of notice on 28/03/2012 which fell beyond the period of four years from the end of the Assessment Year 2006-07.

10. The Appellant prays that the aforesaid facts may kindly be taken on record for adjudication as the Hon'ble Tribunal deems fit as it arises out of the records of the Department governing sanction for issue of notice u/s 148 of the I.T. Act, 1961."

15. Ld. AR had also relied upon the decision of Tribunal in the case of GMR Air Cargo and Aerospace Engineering Limited ITA 183/Hyd/2020 decided on 14.09.2022 wherein our specific attention was drawn to Para 11.1 to 25 to the following effect :

11.1 Referring to provisions of section 114(a) of the Indian Evidence Act, he submitted that all statutory officers are deemed to have performed their duty as expected of them. He submitted that since the AO had passed the original order u/s. 143(3) on 7.12.2010 on the basis of the return of income filed along with the

audited accounts and there is absolutely no failure on the part of the assessee to disclose fully and truly all material facts, therefore in view of the proviso to section 147 of the I.T.Act, the assessment could not have been reopened beyond the period of four years form the end of the relevant assessment year. He submitted that by merely mentioning that there is failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment is not sufficient. The AO has to bring on record some tangible material to show as to which part of the income was not disclosed fully and truly by the assessee so as ITA 183/Hyd/2020 to invoke the provision of section 148 beyond the period of four years.

11.2 Referring to the decision of Hon'ble Supreme Court in the case of ITO vs Kayathwal Estate Pvt.Ltd reported in 442 ITR 507, he drew the attention of the Bench to the following observation of the Hon'ble Supreme Court:-

"1. Having heard Shri Balbir Singh, learned ASG and in the facts and circumstances of the case more particularly at the time of Scrutiny Assessment under section 143(3), the Assessing Officer had asked for the details regarding the unsecured loan taken byI the Assessee during the year under consideration and the Assessee furnished the details as asked for and thereafter, after perusing the details so furnished by the Assessee, the Assessing Officer passed an order under section 143(3) of the Act. Therefore, it cannot be said that there was any suppression on the part of the Assessee in not disclosing true and correct facts. It is required to be noted that even the re-assessment proceeding were initiated beyond the period of four years. Under the circumstances, the High Court is absolutely justified in quashing the re-assessment proceedings and the notice under section 148 of the Income tax Act. No interference of this Court is called for in exercise of powers under article 136 of the Constitution of India.

2. With this, the Special Leave petition stands dismissed. of.

3. Pending application(s), if any, shall stand disposed of."

12. Referring to the following decisions, he submitted that no notice u/s. 147 can be issued after the expire of four years from the end of the assessment year unless there is a failure on the part of the assessee to disclose fully and truly all material necessary for the assessment.

i. ACITv.Rajesh Jhaveri Stock Brokers(P.) Ltd.[2007] 291 ITR 500 (SC) ii. CITv.Foramer Finance (264 ITR 566) (SC) iii. Prashant Joshi vs. ITO (189 taxman 1) iv. RPG Transmission (359 ITR 673) (Mad HC) v.Kotarki Constructions(P.) Ltd. vs ACIT(89 taxmann.com 265)(Kar.HC) vi. Bombay Presidency Golf Club Ltd. vs. ITO (332 ITR 226) (Bom.) vii.CIT vs. Hewlett-Packard Globalsoft(P.) Ltd. (380 ITR 386 (Karn.HC) viii. Viren Sureshchandra Shah v. ACIT (63 taxmann.com 104) (Guj.HC) ix. Titanor Components Ltd. vs. ACIT(343 ITR 183) (Bom.) x. Voltas Ltd. v ACIT (2012) 349 ITR 656(Bom.) ITA 183/Hyd/2020.

13. Referring to the following decisions, he submitted that reopening u/s. 147 of the I.T.Act in absence of fresh tangible material / failure on the part of the assessee to disclose fully and truly all material which are necessary for the assessment is bad in law and void.

i. CIT v. Chaitanya Properties (P.) Ltd (240 Taxman 659 (Kar.HC) ii. Jal Hotels Co. Limited v. ACIT (184 Taxman 1) (Del.HC) iii. Legato Systems (India) Pvt. Ltd v. DCIT (187 Taxman 294) (Del.HC) iv. Purity Techtextile (P.) Ltd. v. ACIT (325 ITR 459/189 Taxman 21) (Bom.HC) v. Asteroids Trading & Investment P. Ltd. v. DCIT (308 ITR 190), (Bom.HC) vi. Heavy Metal and Tubes Ltd. v. DCIT 364 ITR 609) (Guj.HC) vii. Gowri Gopal Hospital (P.) Ltd. v. Income-tax Officer [2015] 55 taxmann.com 335 (Hyderabad - Trib.) viii. CIT, Patiala v. State Bank of Patiala [2016] 70 taxmann.com 36 (SC)

14. Referring to the following decisions, he submitted that reopening based on mere change of opinion is bad in law.

i. CIT v. Kelvinator of India Ltd. (FB) (256 ITR 1) (Del.HC) ii. CIT v. Kelvinator of India Ltd (320 . ITR 561) (SC) iii. ACIT vs. ICICI Securities Primary . Dealership Ltd. (348 ITR 299) (SC) iv. Ganga Saran & Sons (P.) Ltd. v. ITO 1 [(1981) 130 ITR 1] (SC) v. Kohinoor Hatcheries (P.) 1 Ltd. v. Deputy Commissioner of Income-tax [2016] 76 taxmann.com 150 (AP.HC) vi. OHM Stock Brokers (P.) Ltd. v. 1 CIT (351 ITR 443) (bom.HC) vii. Runwal Realty (P.) Ltd.v.DCIT 1 (107 taxmann.com 284) (bom.HC) viii. Arvind Remedies (378 ITR 547) (Mad.HC) ix. Indian Bank(63 taxmann.com 145)(Mad HC) x. Godrej Agrovet Ltd. v. DCIT[2015] 56 taxmann.com 141(Bom.HC) xi. Paladiya Brothers & CO.v.ACIT[2015] 61 tamxann.com 26(Guj.) xii. NTPC Ltd. DCIT[2013] 32 taxmann.com 343 (Del.) xiii. Sita Wrold Travel (India) Ltd. v.CIT(274 ITR 186)(Del.HC)

15. Referring to the following decisions, he submitted that in absence of formation of belief that income has escaped assessment, reopening is bad in law.

i. ITO v. Lakhmani Mewal Das (103 ITR 437) (SC) ii.Dass Friends Builders(P.) Ltd. vs.DCIT (153 taxmann 282) (Alh.HC) iii.TTK Prestige Ltd. v. DCIT (97 taxmann.com 112) (Kar.HC) ITA 183/Hyd/2020 iv. Known Agro Foods(P.) Ltd. vs. ACIT 375 ITR 460 (Del.HC)

16. So far as, the merit of case is concerned, the ld. Counsel for the assessee submitted that even on merit also the amount has to be allowed as expenditure u/s. 37 of the I.T.Act. For the above proposition, he relied on the following decisions:-

i.ACIT vs.L.S.Cable(P) Ltd. 88 taxmann.com 616 (Del.HC) ii.Reliance Gems & Jewels Ltd. vs. DCIT3(3), Mumbai (ITA No.3855/Mum/2013) dated 28.10.2015(ITAT,Mumbai) iii.CIT vs. E-Funds International India(2007) 162 Taxman 01(del.) iv. CIT vs. ESPN Software India Pvt.Ltd. (301 ITR 368) (Del.HC) v. CITvs. Aspentech India(P.) [2010] 187 taxman 25(Delhi) vi. Bombay Steam Navigaiton co.Pvt Ltd. (56 ITR 52) (SC) vii. Empire Jute Co.Ltd. vs. CIT (124 ITR 1) (SC)

17. The ld. DR on the other hand heavily relied on the orders of the AO and CIT(A). So far as the validity of reassessment is concerned, he submitted that the AO in the original assessment order has neither discussed nor there was an opinion with respect to issue related to prior period expenditure as project expenses written off during the relevant assessment year and therefore the reassessment proceedings initiated in respect of this issue is not mere change of opinion and therefore, such reopening of assessment being in accordance with law has to be upheld. He also relied on the following decisions to the proposition that the reassessment proceedings initiated by the AO are valid.

i.Innovative Foods Ltd. vs. Union of India [2018] 96 taxmann.com 250(Ker.HC) ii.Instnat Holdings Ltd. vs. DCIT [2014] 44 taxmann.com 386(ITAT,Mumbai) iii.CIT vs. Nova Promoters & Finlease(P.) Ltd.[201] 18 taxmann.com 217(Del.HC)

18. So far as the disallowances of the project expenses written off as revenue expenses is concerned, the ld. DR submitted that the pre-operative expenses is capital expenditure in nature and ITA 183/Hyd/2020 therefore, the same cannot be allowed as deduction. For the above proposition, he relied on the following decisions:

i. CIT v. Omer Khayyam Wineries (P.) Ltd. [1979] 120 ITR 859 (AP.HC) ii.Eimco K.C.P.Ltd. vs CIT [2000] 109 taxman 151(SC) (SC) iii. CIT vs. Mohan Steel Ltd. [2005] 273 ITR 479 (Alahabad HC) iv.MAC Industrial Products Ltd. ACIT,CC [2006] 101 ITD 191 (ITAT, Chennai) v.CIT vs. Reinz Talbros (P.) Ltd. [2001] 119 taxman 739 (Del.HC)

19. He accordingly submitted that the order of the ld.CIT(A) being in accordance with law has to be upheld and the grounds raised by the assessee should be dismissed.

20. We have considered the rival arguments made by both the sides, perused the orders of the AO and Ld.CIT(A) and paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the AO in the instant case completed the assessment u/s. 143(3) on 27.03.2010 determining the total loss at Rs.3,19,03,542/- as against the returned loss of Rs.3,56,28,560/- by disallowing depreciation of Rs.37,25,018/-. Subsequently, the AO issued notice u/s. 148 on 27.03.2014 after recording the reasons for reopening and such reasons have already been reproduced in the preceding paragraph. It is the submission of the ld. Counsel for the assessee

that the assessment has been reopened beyond a period of four years from the end of the relevant assessment year and there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment and therefore, in view of the proviso to section 147 of the I.T.Act, the AO cannot reopen the assessment beyond a period of four years from the end of the relevant assessment year. It is his submission that mere mentioning of failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment is not sufficient in absence of any tangible ITA 183/Hyd/2020 material before the AO to substantiate or to show as to which part of the income or which facts necessary for completion of the assessment were not disclosed by the assessee. Therefore, according to the ld. AR, the reassessment proceedings initiated by the AO are not in accordance with law and has to be quashed.

21. We find sufficient force in the above arguments advanced by the ld. Counsel for the assessee. A perusal of the profit and loss account, copy of which is placed at page 44 of the paper book clearly shows that the assessee has claimed project expenses written off at Rs.84,97,952/- as expenditure. Similarly, perusal of Schedule-D forming the part of balance sheet, copy of which is placed at page 47 of the paper book, shows that the assessee, after deducting the project expenses written off at Rs.84,97,952/- has allocated the amount of Rs.1,9616,399/- to various capital assets. Thus, a perusal of the above details in the audited accounts filed along with the return of income clearly shows that assessee has disclosed all the material fact necessary for completion of the assessment and there was no failure on the part of the assessee to disclose any material facts necessary for completion of the assessment. Under these circumstances, we have to see as to whether the reopening of the assessment beyond a period of four years from the end of the relevant assessment year in absence of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completion of the assessment can be made when the initial assessment was completed u/s. 143(3) of the I.T.Act, 1961.

22. We find the Hon'ble Supreme Court in the case of ACIT vs ICICI Securities Primary Dealership Ltd reported in 320 ITR 561 has held that where accounts had been furnished by assessee when called upon and thereafter assessment was completed u/s. 143(3), subsequently on a mere re-look of said account earlier ITA 183/Hyd/2020 furnished by assessee it is not permissible u/s. 147 to reopen assessment of assessee on ground that income has escaped assessment

23. We find the Hon'ble Madras High court in the case of CIT vs. RPG Transmission Ltd. reported in 359 ITR 653 has held that reopening was not justified where AO had actually before him all relevant material at the time of original assessment itself. The relevant observation of the Hon'ble High Court at para 30 of the order reads as under:-

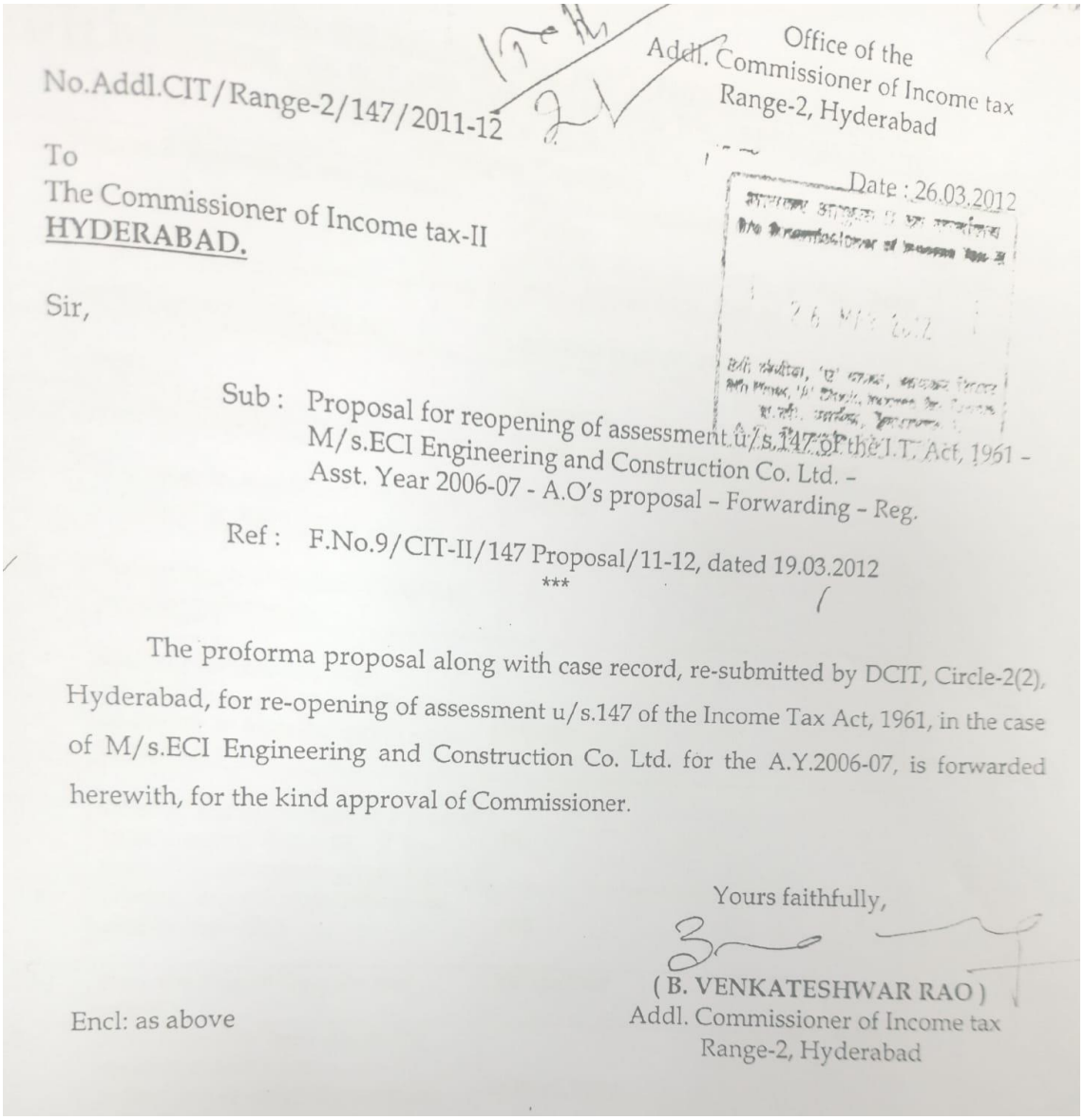
" 30. We have carefully examined the assessment orders and we Find that the reasons recorded by the Assessing officer goes into various details while coming to the conclusion that the income has escaped assessment and, in our opinion, the said material and details were already available with the Assessing officer at the time of initial assessment and it does not appear to be something which has been gathered afresh or that which came to the notice of the Assessing Officer after the completion of original assessment. The payment of license fee to RPG Enterprises Ltd. was not a new fact which has emerged. on the contrary in the original returns that were filed. the factum of payment of licence fee to RPG Enterprises Ltd. was clearly disclosed and, therefore. it appears that the Assessing Officer had a mere relook at the same facts, which, in our considered opinion, is against the dictum of the apex court and the principles that emerge therefrom. An analysis of the orders of the commissioner of Income-tax ("'Appeals) as well as the Tribunal would show that the Assessing officer had actually before him all the relevant materials at the time of the original assessment itself and, therefore, the finding of fact recorded by the Commissioner of Income-tax ("'Appeals) as well as the Tribunal docs not call for any interference and we find that the reassessment was merely a relook of the earlier assessment with a change of opinion and, therefore, the reasons by which the ""Assessing Officer reopens the assessment are actually vague and fanciful. We also find that the Commissioner of Income-tax (Appeals) while dealing with the appeals arising out of the assessment had considered at length the Assessing officer's finding and came to a conclusion that the reasoning assigned by the Assessing Officer arc not sufficient and, hence, the reopening of the assessment was bereft of materials to come to a conclusion that there were reasons to believe that the income has escaped assessment. Therefore, the order of the Commissioner of Income-tax (Appeals) overturning the order of Assessing Officer is, in our opinion, correct. We have also given our anxious consideration to the order of the Tribunal which has considered the issue at length and essentially the judgments in this regard. We are of the considered opinion that the Tribunal has correctly appreciated the finding of the Commissioner of Income- tax (Appeals) and applied the law in this ITA 183/Hyd/2020 regard in coming to such a conclusion. Arguments were advanced to the effect that it was a concurrent finding of facts by the commissioner of Income-tax (Appeals) and the Tribunal and. therefore, no substantial question of law arises for consideration and we are, in the facts and circumstances of the case, in agreement with the findings of the' Tribunal and the Commissioner of Income-tax (Appeals), which are essentially final fact finding authorities. It is not as if this court in exercise of its power under section 260A of the Act cannot examine the correctness of such concurrent findings. It is, however, to be borne in mind that while examining the orders of the Tribunal and the Commissioner of Income tax (Appeals) when it is found that the findings were perverse or contrary to the law in this regard, we would have no hesitation to interfere. However, from an overall conspectus of the facts and law that emerges from the judgments referred to supra, we find no reasons to interfere with the findings of the Tribunal, which in turn confirmed the findings of the commissioner of Income-tax(Appeals). We,

therefore, answer these substantial questions of law in favor of the assessee and against the Revenue."

24. The various other decisions relied on by the ld. Counsel for the assessee in the paper book also supports his case to the proposition that the reopening of the assessment in the instant case beyond a period of four years from the end of the relevant assessment year is not valid in absence of failure on the part of the assessee to disclose all material facts necessary for completion of the assessment.

25. In view of the above, we hold that the reopening of assessment beyond a period of four years from the end of the relevant assessment year is not in accordance with law. Mere mentioning of the words failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment by the AO, in our opinion is not sufficient in absence of showing which part of the material was not disclosed by the assessee. This view of ours finds support from the decision of Hon'ble Bombay High court in the case of Hindustan Lever Ltd. vs R.B.Wadker reported in 268 ITR 332 where the Hon'ble High Court has held that the AO must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year to establish the ITA 183/Hyd/2020 vital link between the reasons and evidence. We, therefore, hold that the initiation of reassessment proceedings by the AO in the instant case is not in accordance with law and therefore, the same has to be quashed. Accordingly, we quash the reassessment proceedings and the grounds raised by the assessee on this issue are allowed."

16. Per contra, ld. DR had submitted that there was a typographical mistake on the part of the Assessing Officer whereby he had wrongly mentioned the date of signing the revised proposal on 19.03.2011 and it was the submission of ld. DR that it should have been 19.03.2012 and to buttress the above said contention, he has drawn our attention to the covering letter dt.26.03.2012, which is as under :



Office of the
Addl. Commissioner of Income tax
Range-2, Hyderabad

No.Addl.CIT/Range-2/147/2011-12

Date : 26.03.2012

To
The Commissioner of Income tax-II
HYDERABAD.

Sir,

Sub : Proposal for reopening of assessment u/s.147 of the I.T. Act, 1961 – M/s.ECI Engineering and Construction Co. Ltd. – Asst. Year 2006-07 - A.O's proposal – Forwarding – Reg.

Ref : F.No.9/CIT-II/147 Proposal/11-12, dated 19.03.2012

***

The proforma proposal along with case record, re-submitted by DCIT, Circle-2(2), Hyderabad, for re-opening of assessment u/s.147 of the Income Tax Act, 1961, in the case of M/s.ECI Engineering and Construction Co. Ltd. for the A.Y.2006-07, is forwarded herewith, for the kind approval of Commissioner.

Yours faithfully,

(B. VENKATESHWAR RAO)
Addl. Commissioner of Income tax
Range-2, Hyderabad

Encl: as above

17. It was submitted that the proposal for re-opening was approved and communicated by the ITO, Head Quarters to the ITO on 17.03.2012. It was submitted that on account of typographical mistake, the re-assessment cannot be set aside. It was submitted that the Assessing Officer has rightly re-opened the assessment.

18. We have heard the rival submissions and perused the material on record. In the present case, the ACIT vide letter dt.26.03.2012 had forwarded the proposal dt.19.03.2012 to the CIT-II vide letter dt.26.03.2012. The letter of the ACIT is reproduced hereinbelow. Along with the letter, ACIT also enclosed

the Form for recording the reasons for initiating proceedings u/s 147 of the I.T. Act for obtaining the approval of the CIT, which is as under :

FORM FOR RECORDING THE REASONS FOR INITIATING PROCEEDINGS U/S 147 OF THE INCOME TAX ACT AND FOR OBTAINING THE APPROVAL OF THE COMMISISONER OF INCOMETAX.

[Revised Proposal]

1	Name & Address of the assessee	M/s ECI Engineering and Construction Co.Ltd. Plot No.70, Anshu Colors, 3rd floor, Road No.1, Jubilee Hills, Hyd-33.
2	PERMANENT ACCOUNT NO	AAACE4411G /E-249
3	STATUS	Company
4	DISTRICT/CIRCLE/RANGE	Circle – 2(2)/ Range-2, Hyderabad
5	Asst. year in respect of which it is proposed to issue notice u/s 147	2006-07
5A)	The quantum of Income which has escaped assessment	---
6	Whether the provisions of sec.147(a) or 147(b) or 147(c) are applicable or both the sections are applicable	147(C)
7	Whether the assessment is proposed to be made for first time. If the reply, is In affirmative please state	NO
7.a)	Whether any voluntary return had already been filed	YES
7.b)	If so, the date of filing the said return	23-11-2008
8	If the answer to item 7 is in the negative please state; a) the Income originally assessed assessment	8,43,96,302/-
8b)	Whether it is a case of under assessment. Assessment at too low rate, assessment which has been made the excessive loss or depreciation.	---
9	Whether the provisions of section 150(1) are applicable. If reply is in the affirmative, the relevant facts may be stated against item no.11 and it may also be brought out that the provisions of section 150(2) would not stand in the way of initiating proceedings u/s 147	---

10. Reasons for the belief that Income has escaped assessment:

(i) As per the computation on Long Term Capital Gains the assessee had sold 29000 shares @ 7/- per share and 28,65,500/- shares @ 5.25 per share on 31.07.2005 and claimed the profit on sale of investment of ₹.64,47,895/- as exempt u./s 10(38) on the reason that the shares are listed shares and that Securities Transaction Tax (STT) has already been deducted. Though in its letter DT: 16.04.2008, the assessee stated that the details of STT paid would be provided separately, the same have not been found on record. Further, under the current circuit breaker norms of Stock Exchanges, it is not possible that the prices ₹.5.25 and ₹.7.00 could be quotations on the same day i.e., 31.07.2005. In view of the same the transaction appears to be an off-market negotiated transaction. Since STT will not be deducted in off-market transaction, the sale would attract capital gains tax.

(ii) As the details of STT are not on record, the exemption u/s 10(38) of ₹.64,47,895/- requires to be disallowed.

(iii) Assessee claimed depreciation on discarded assets amounting to ₹.21,25,929/- . Depreciation is allowable only when the asset is owned and put to use by the assessee. In the instant case, since assets are discarded and not put to use the assessee is not entitled to depreciation.

(iv) Assessee claimed employee's remuneration and benefits amounting to ₹.4,73,76,085/- as per schedule 12 of P&L a/c. Average salary per month works out to approx. ₹.40 lakhs. As per balance sheet under the head current liabilities, salaries,& wages (sch-8) an amount of ₹.91,01,161/- and an amount of ₹.1,35,755/- under the head PF is due, which clearly indicates that the liability is for more than two months as against normal trend of one month.

(v) The shares of Rockwell India ltd were sold at two different rates of ₹.7 & ₹.5.25 per share. The breakup is not available on record. By applying the rate at ₹.7 per share the understatement of sale proceeds of ₹.50.14, attracts long term capital gain tax.

19.03.2011

(V.RAMA MOHAN)
Deputy Commissioner of Income Tax,
Circle-2(2), Hyderabad.

11. Whether the Commissioner of Income tax/
Addl. Commissioner of Income tax is satisfied
On the reasons recorded by the Assessing Officer
That this a fit case for issue of notice u/s 147

19. Assuming the contention of the ld. DR that the proposal given by the Assessing Officer was 19.03.2012 and not 19.03.2011, in that eventuality, the re-opening has been made by the Assessing Officer beyond a period of 4 years, as the assessment in the present case was completed by the Assessing Officer on 23.04.2008. The law on the reopening beyond a period of 4 years is fairly settled and it is the mandatory requirement of law that the Assessing Officer should record that there is a failure on the part of the assessee to disclose fully and truly all the material facts necessary for completion of the assessment and further the CIT should record his satisfaction and grant approval for reopening of the assessment beyond a period of 4 years. From a reading of the reasons for belief of escaping the income and reopening of the assessment which are reproduced hereinabove, it is not possible for us to decipher that the Assessing Officer has recorded that there was any failure on the part of the assessee to disclose fully and truly all the material facts. The Assessing Officer is conspicuously silent on the above said aspect.

20. Once the Assessing Officer has not mentioned that the assessee has failed to disclose fully and truly all material facts, necessary for completion of the assessment, the re-opening cannot be made in the eyes of law and we are in agreement with the decision cited by the ld. AR in the case of Bhor Industries (supra) and PCIT Vs. Lanco Hills (supra). In the light of the above, reopening made by the Assessing Officer is not in accordance with the law and the consequential assessment made by the Assessing Officer is also bad in law. Further, the Assessing Officer in the notice of reopening dt.28.03.2012 copy of which has already been reproduced at para 4.1 of the order had deleted that the notice was issued after obtaining the necessary satisfaction from the

CIT. This fact clearly shows that at the time of issuing the notice, there was no satisfaction on record by the Revenue authorities permitting the Assessing Officer to reopen the assessment beyond a period of 4 years. Had that satisfaction was available then there was no reason for the Assessing Officer to delete the above noted facts. In view of the above, a conclusion may be drawn that the reopening was made beyond a period of 4 years without recording satisfaction by the CIT.

21. There is another reason for us to allow the additional grounds raised by the assessee. In our view the satisfaction / approval reproduced hereinabove have been accorded by the authorities in a mechanical manner on 19.03.2011, without looking into the proposal dt.26.03.2011 by the ACIT and without considering the proposal of the Assessing Officer dt.19.03.2012. Firstly, there was no reason for the ACIT to recommend the case of the Assessing Officer for reopening u/s 147 of the Act. The CIT was duty bound to independently apply his mind and come to the satisfaction that the said case was a fit case for reopening of the assessment beyond a period of 4 years. There was total non-application of mind by the ACIT and also by the CIT, as both the said senior officials had failed to take cognizance of the proposal dt.19.03.2012, wrongly typed as 19.03.2011 on Page 2 reproduced hereinabove. In fact, 19.03.2011 would fall within a period of 4 years whereas 19.03.2012 would fall beyond the period of 4 years. In case of any re-assessment was made beyond a period of 4 years, then recording of satisfaction by the CIT is a must under the Income Tax Act, 1961. Section 151 of the Income Tax Act, 1961 provides that no notice shall be issued by the Assessing Officer after expiry of 4 years ***unless the Principal Chief Commissioner or the Commissioner of Income Tax is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issuing such notice.***

22. The satisfaction as contemplated under Section 151 of the Act is not an empty formality as the authorities have to apply their mind and record satisfaction. When the authorities were not oblivious to the date of proposal then it cannot be said that they have applied their mind or considered the proposal of the Assessing Officer in its right earnest. In our view, if the officers have not even seen the date when it was proposed by the Assessing Officer, the question of examining other record at the time of recording the satisfaction does not arise and hence, we can safely presume that the CIT has not applied his mind to the proposal of the Assessing Officer while recording the satisfaction. The satisfaction was recorded by authorities in a mechanical and stereotyped manner and therefore, the same is not a satisfaction in the eyes of law. In view of the above, the additional ground No.1 raised by the assessee are required to be allowed as the Assessing Officer had failed to issue notice beyond a period of 4 years after recording due satisfaction in the eyes of law.

23. Since we have allowed the additional grounds of assessee, therefore, the grounds raised by the assessee on merit have become infructuous. Accordingly, the appeal of the assessee is allowed.

24. In the result, the appeal of the assessee is allowed.

25. Now we will take the appeal of Revenue.

26. As we have already allowed the additional grounds filed by the assessee, the same renders Revenue's grounds of appeal to have become infructuous. Thus, the appeal filed by the Revenue is dismissed.

27. In the result, the appeal filed by the Revenue is dismissed.

28. To sum up, the appeal of the assessee is allowed and the appeal of Revenue is dismissed.

Order pronounced in the Open Court on 15th May, 2023.

Sd/-	**Sd/-**
(RAMA KANTA PANDA)	**(LALIET KUMAR)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Hyderabad, dated 15th May, 2023.
TYNM/sps

Copy to:

S.No	Addresses
1	M/s. ECI Engineering and Construction Company Limited, Plot No.A-12-13, Panchavati Township, Manikonda, Hyderabad – 500 089.
2	The Asst.Commissioner of Income Tax, Circle 2(2), Hyderabad.
3	The Asst.Commissioner of Income Tax, Circle 17(1), Hyderabad.
4	PCIT – 5, Hyderabad.
5	DR, ITAT Hyderabad Benches
6	Guard File

By Order