IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "F", MUMBAI

BEFORE SHRI S. RIFAUR RAHMAN, HON'BLE ACCOUNTANT MEMBER AND SHRI SANDEEP SINGH KARHAIL, HON'BLE JUDICIAL MEMBER

ITA NO. 1789/MUM/2021 (A.Y: 2013-14)

Deputy Commissioner of Income Tax Central Circle- 1(4) Room No. 902, 9th Floor Pratishtha Bhavan, Old C.G.O. Bldg, (Annexe) M.K. Road, Mumbai- 400020	*v.*	M/s. Ultratech Cement Ltd., Ahura Centre, B- Wing 2nd Floor, Mahakali Caves Road Andheri (E), Mumbai- 400093 **PAN: AAACL6442L**
(Appellant)		**(Respondent)**

ITA NO. 222/MUM/2022 (A.Y: 2014-15)

Jt. Commissioner of Income Tax (OSD) Central Circle- 1(4) Room No. 902, 9th Floor Pratishtha Bhavan Old C.G.O. Bldg, (Annexe) M.K. Road, Mumbai- 400020	*v.*	M/s. Ultratech Cement Ltd. Ahura Centre, B- Wing 2nd Floor, Mahakali Caves Road Andheri (E), Mumbai- 400093 **PAN: AAACL6442L**
(Appellant)		**(Respondent)**

ITA NO. 1466/MUM/2021 (A.Y: 2013-14)
&
ITA NO. 220/MUM/2022 (A.Y: 2014-15)

M/s. Ultratech Cement Limited Ahura Centre, B-Wing, 2nd Floor Mahakali Caves Road Andheri (E), Mumbai- 400093 **PAN: AAACL6442L**	*v.*	DCIT, Central Circle- 1(4) [ACIT, CC] Room. No 902, 9th Floor Pratishtha Bhavan Old C.G.O. Bldg, (Annexe) Maharishi Karve Road Mumbai- 400020
(Appellant)		**(Respondent)**

Assessee Represented by	**:**	**Shri. Nitesh S. Joshi**
Department Represented by	**:**	**Shri. Ankush Kapoor**
Date of Conclusion of Hearing	**:**	**01.05.2023**
Date of Pronouncement	**:**	**28.06.2023**

O R D E R

PER S. RIFAUR RAHMAN (AM)

1. These appeals filed by the assessee as well as the Revenue against the findings of the Learned Commissioner of Income-tax (Appeals)-47, Mumbai [hereinafter in short "Ld.CIT(A)"], relate to Assessment Years 2013-14 and 2014-15 in the matter of order passed u/s. 143(3) r.w.s. 147 of the Income-tax Act, 1961 (In short 'Act').

2. Since the issues raised in the appeals of both the assessment years are identical, for the sake of convenience, these appeals are clubbed, heard and disposed off by this consolidated order. At the outset, we proceed to adjudicate the issues raised in the appeals for the A.Y. 2013-14 as the lead Assessment year.

ITA No. 1466/MUM/2021 (A.Y. 2013-14) - (ASSESSEE APPEAL)

3. Grounds raised by the assessee are as under: -

1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [LD.CIT(A)] erred in confirming the order passed by the learned Asst. Commissioner of Income-tax, Central Circle 1(4), Mumbai (DCIT) under section 143(3) r.w.s. 147 of the Income-tax Act, 1961 (IT Act).

2. On the facts and in the circumstances of the case and in law, the learned LD CIT(A) erred in confirming that the reassessment was validly carried out by DCIT, despite the following:

- *Four years had elapsed from the end of relevant assessment year and having disclosed fully and truly all material facts necessary for assessment, no reassessment proceedings is permissible under the law*

- *No fresh facts or new material has been brought on record evidencing escapement of income,*

- *Reassessment based on same set of facts as existing in the original assessment, is nothing but mere change of opinion which is not permitted*

- *Review of own assessment order is not permissible in the reassessment proceedings*

- *Reassessment proceedings based on audit objection is not sustainable*

3. On the facts and in the circumstances of the case and in law, the learned LD CIT(A) erred in upholding the disallowance made by DCIT in respect of the deduction claimed by assessee (being successor to amalgamating company) amounting to Rs.27,05,29,884 u/s 35DD of the IT Act pertaining to the amalgamation expenses incurred by the amalgamating company. The Learned LD CIT(A) erred in not appreciating that there is no restriction u/s35DD for claiming such expenses and upon amalgamation, all assets and liabilities including any unexpired tax claim of amalgamating company were succeeded by assessee and assessee becomes eligible/ liable (as the case may be) for the same.

4. On the facts and in the circumstances of the case and in law, the learned LD CIT(A) erred in treating following expenditure incurred on installing assets/contributing for installing assets on the premises of third party for which it does not get any ownership, as deferred revenue expenditure and allowing equal amount of deduction over a period of five years beginning from the assessment year under consideration:

- *Installation of fenders at Jetty not owned by the assessee amounting to Rs. 1,12,18,870*

- *Setting up of fly ash handling system at Bellary Thermal Power Station under Karnataka Power Corporation Limited amounting to Rs. 1,57,09,226*

- *Civil pavement work etc. at Truck Tailor Yard amounting to Rs. 1,83,62,648 on land owned by Cement Transport association*

He erred in not appreciating that there is no provision in the IT Act whereby any expenditure can be treated as deferred revenue expenditure

5. On the facts and in the circumstances of the case and in law, the learned LD CIT(A) erred in upholding the disallowance made by learned DCIT in respect of expenditure incurred on purchase of IPL tickets, meet and greet expenses amounting to Rs.2,40,88,814 despite the fact that such expenditure was incurred to promote the appellant Company's business amongst the dealers/selling agents/business associates, which ultimately results in overall revenue growth of the Appellant.

ITA NO. 1789/MUM/2021 (A.Y. 2013-14) - (REVENUE APPEAL)

4. The grounds taken by the Revenue are as under:

1. Whether on the facts and in the circumstances of the case and in law, the Ld. LD CIT(A) was justified in not treating the expenditure of Rs.9,30,09,475 as capital expenditure when the assessee did not prove during the assessment proceedings that the expense incurred in ownership of such assets and therefore, the decision of Hon'ble Bombay High Court in CIT vs. Excel Industries Limited (1980) 122 ITR 995 is not applicable to the assessee.

2. Whether on the facts and in the circumstances of the case and in law, the Ld. LD CIT(A) was justified in not treating the expenditure of Rs.1,14,72,860 as capital expenditure, when the

same was of the nature of Rehabilitation and Resettlement (R&R) cost associated with land acquisition and therefore is capital expenditure and Rehabilitation and Resettlement (R&R) cost are inseparable and compulsory part of Government policies related to land acquisition and thus the assessee cannot claim them separately as revenue expenditure.

3. Whether on the facts and in the circumstances of the case and in law, the Ld. LD CIT(A) was justified in treating the expenditure of Rs.4,52,90,744 as deferred revenue expenditure over a period of five years when the learned LD CIT(A) himself held such expenditure to be in capital in nature and when there is no provision of deferred revenue expenditure under the Income- tax Act, 1961.

5. The first issue to be decided in the present appeal of the assessee is about the validity of reassessment.

6. Briefly the relevant facts are, the assessee filed its original Return of Income for AY 2013-14 on 29.11.2013 declaring total income at ₹.24,79,55,22,648. The return of income was revised on 30.12.2014 wherein the total income was revised at ₹.25,21,89,14,140.

7. For the said year, proceedings u/s 153C r.w.s. 153A were initiated against the assessee. An order dated 29.03. 2016 was passed u/s.153C r.w.s. 144C(3) r.w.s. 143(3) of the Act assessing the total income at ₹.30,84,36,71,563. Being aggrieved, the assessee filed an appeal before the Ld. Commissioner of Income Tax (Appeals) against the disallowances and claims rejected by the Assessing Officer in the

assessment. The Ld CIT(A) decided the appeal vide his order dated 20.02.2018 allowing substantial relief on various grounds raised by the assessee.

8. The assessee as well as the revenue filed appeal before the ITAT, Mumbai against the order of the Ld CIT(A). The Coordinate Bench vide order dated 14.12. 2021 has disposed-off the appeal filed by the assessee as well as the Revenue. Both the assessee and the revenue have filed appeal before the Hon'ble Bombay High Court against the said order of the Tribunal and same is pending disposal.

9. While the appeal was being taken up for hearing by the ITAT, Mumbai, the Assessing Officer in the interim issued notice dated 31.03.2019 u/s. 148 of the Act and provided reasons for reopening the assessment on 30.04. 2019. The relevant extract of reasons provided by the Assessing Officer is reproduced below: -

> *"In the instant case under consideration, the expenses claimed as allowable u/s 35DD of the Act, are inclusive of the expenses incurred by M/s SCL for the purpose of its demerger from M/s GIL Therefore, the assessee's claim of deduction to the extent of Rs.27,05,29,884/- is not correct and accordingly not allowable u/s35DD of the Act, for the following two reasons:*
>
> > *iii) The expenses to the tune of Rs.27,05,29,884/- (being 1/5 of the demerger expenses) were incurred by M/s SCL*

iv) The said expenses were incurred by M/s SCL for the purpose of its demerger from M/s GIL.

In light of the scope set out in the provisions of 35DD of the Income Tax Act, 1961, M/s SCL which has ceased to exist consequent upon its merger with the Assessee company, the demerger expenditure incurred by the SCL towards its demerger from M/s GIL, two years prior to the amalgamation, does not survive statutorily to enjoy the benefits allowable u/s 35DD of the Act. Thus, the assessee has availed undue deduction u/s 35DD of the Income Tax Act, 1961, in respect of this amount of Rs, 27,05,29,884/-, in contravention to the specific provisions of section 35DD of the Income Tax Act, 1961, thereby causing escapement of income to that extent.

It is further observed from the assessment records that the assessee, from its computation of total income, has deducted an amount of Rs. 14,97,73,078/- being Revenue Expenditure. The assessee has capitalized the aforesaid expenditure in its books of accounts; however, the same is claimed as Revenue Expenditure stating that the concerned assets are not owned by it.

As per the provision of Section 37 of the Act, any expenditure (not being expenditure of the nature described in Section 30 to 36 and not being in the nature of capital expenditure or personal expenses of the assessee), laid out or expended wholly-and exclusively for the purpose of the business or profession are allowed.

Thus, the assessee has availed undue deduction of Rs. 14,97,73,078/- in contravention to the provisions of section 37 of the Income Tax Act, 1961, thereby causing escapement of income to that extent.

Although the documents/material, suggesting escapement of income, were available on records at the time of completion of assessment u/s 143(3) r.w.s 153C of the Act, the same were remained to be examined by the AO. Therefore, 'he case can be reopened on the basis of the materials available on record which are suggesting escapement of income. In this regard, reliance can be placed on the order dated 11/08/2017of the Hon'ble ITAT pronounced in the case of M/s Mahyco Seeds Limited. In this case, similar issue has came up for adjudication before the Hon'ble ITAT and the Hon'ble ITAT upheld the action of the AO of reopening the assessment proceedings stating that "though the assessee claims to have furnished necessary details before the AO at the time of original assessment, the records clearly indicate that the AO has not examined the issue of deduction claimed towards stamp duty

paid on demerger of units which shows non application of mind by the AO to the facts in the right perspective of specific provisions of section 35DD of the Act. Therefore, we are of the considered view that there is no merit in the contention of the assessee that reopening is made on the basis of mere change of opinion. Though the assessee has relied upon a plethora of judgments in support of its arguments, all the judgments referred to by the assessee are rendered under different facts. In most of the cases, the issue has been either examined by the AO in the original assessment proceedings or the assessee has fully disclosed all material facts necessary for completing the assessment. In this. case, on perusal of the facts, we find that the assessment order is silent on the application of mind by the AO to the correct facts in the light of the specific provisions of section 35DD of the Act. Therefore, we are of the view that it is not a case of mere change of opinion and hence, we reject the legal ground raised by the assessee".

Further, Hon'ble Bombay High Court in the case of Indian Hume Pipe Company Limited v/s ACIT (2012) 348 ITR 0439) has elucidated that, for the purpose of First Proviso to Section 147 of the Income Tax Act, 1961, -

Full and true disclosure of material facts u/s 148 means disclosures must be full and true and cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with AO.

Therefore, in view of the above stated facts, I have reasons to believe that income to the tune of Rs. 42,03,02,962/- has escaped assessment within the meaning of the provisions of section 147 of the Act, for A.Y 2013-14 due to the failure on the part of the assessee to make the full and true disclosure of material facts."

10. The assessee vide letter dated 3.07.2019 filed objections against the reopening of the assessment. The Assessing Officer disposed-off the objections filed by the assessee by passing a separate order dated 17.09.2019. The relevant para of the order passed by the Assessing Officer is reproduced below:

"4.1. The assessee's contention that the notice u/s 148 dated 31.03.2019 does not meet the conditions specified in proviso to

section 147. In this regard, it is stated that section 147 of the IT Act, empowers the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. It is pertinent to mention here that, Section 147 of the Act, does not require the AO to arrive at a final conclusion that the income of the Assessee had escaped assessment. All that is required at the stage of initiation of proceedings for reassessment is for the AO to form a reasonable belief on tangible material that the income of the Assessee has escaped assessment. In Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers Pvt. Ltd.: 291 ITR 502, the Supreme Court has explained the above in the following words: - "Section 147 authorizes and permits the Assessing Officer to assess or reassess income chargeable to tax if he has reason to believe that income for any assessment year has escaped assessment. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the Assessing Officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment. The expression cannot be read to mean that the Assessing Officer should have finally ascertained the fact by legal evidence or conclusion".

4.2. It is settled position that the AO is not required to establish adequacy/sufficiency of material and escapement of income at the time of issue of notice u/s 148 of the Act. Woollen Mills Ltd. Vs. ITO [1999] (236 ITR 34) in which the court has held that there should be prima-facie some material on the basis of which the department could re-open the case and the sufficiency or correctness of the material is not a thing to be considered at this stage.

4.2.1 The reopening of assessment is valid in view of decision of Hon'ble Supreme Court in case of CIT vs. Kelvinator of India Ltd. [2010] 320 ITR 561 (SC) and Bombay high court in writ petition (L) No.3114 of 2014. Hon'ble Supreme Court in case of Kelvinator of India Ltd. (Supra) was of the view that the AO has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment.

4.3 The assessee's contention with respect to the deductions claimed under section 35DD and under section 37 of the IT Act is also not acceptable on the grounds that although the documents/material, suggesting escapement of income, were available on records at the time of completion of assessment u/s 143(3) r.w.s 153C of the Act, the same were remained to be examined by the AO. Therefore, the case can be reopened on the basis of the materials available on record which are suggesting

escapement of income. In this regard, reliance can be placed on the order dated 11/08/2017 of the Hon'ble ITAT pronounced in the case of M/s Mahyco Seeds Limited. In this case, similar issue has came up for adjudication before the Hon'ble ITAT and the Hon'ble ITAT upheld the action of the AO of reopening the assessment proceedings stating that "though the assessee claims to have furnished necessary details before the AO at the time of original assessment, the records clearly indicate that the AO has not examined the issue of deduction claimed towards stamp duty paid on demerger of units which shows non application of mind by the AO to the facts in the right perspective of specific provisions of section 35DD of the Act. Therefore, we are of the considered view that there is no merit in the contention of the assessee that reopening is made on the basis of mere change of opinion. Though the assessee has relied upon a plethora of judgments in support of its arguments, all the judgments referred to by the assessee are rendered under different facts. In most of the cases, the issue has been either examined by the AO in the original assessment proceedings or the assessee has fully disclosed all material facts necessary for completing the assessment. In this case, on perusal of the facts, we find that the assessment order is silent on the application of mind by the AO to the correct facts in the light of the specific provisions of section 35DD of the Act. Therefore, we are of the view that it is not a case of mere change of opinion and hence, we reject the legal ground raised by the assessee". Further, Hon'ble Bombay High Court in the case of Indian Hume Pipe Company Limited v/s ACIT [(2012) 348 ITR 0439] has elucidated that, for the purpose of First Proviso to Section 147 of the Income Tax Act, 1961, - Full and true disclosure of material facts u/s 148 means disclosures must be full and true and cannot be garbled or hidden in the crevices of the documentary material which has been filed by the assessee with AO.

4.3.1 The assessee in its return of income, filed for A.Y.2013-14, had claimed deduction of Rs. 45,04,25,465/- u/s 35DD of the Act. The said deduction was claimed by the assessee as being on account of the expenditure incurred towards merger of M/s Samruddhi Cement Limited (hereinafter referred to as SCL) with the assessee company. The assessee's claim was not disturbed while passing the assessment order u/s 143(3) r.w.s 153C of the IT Act. However, on examination of the assessment records, it is seen that the deduction of Rs.45,04,25,465/- claimed u/s 35DD of the Act, is comprised of Rs.17.99 crores relating to the amalgamation of M/s SCL with the assessee company M/s UCL and Rs.27.05 crores relates to the one-fifth amortized expenditure for demerger from M/s Grasim Industries Limited (hereinafter referred to as GIL), in the Assessment Year 2010-11. M/s SCL, on demerger from M/s

GIL had availed of two amortized amounts of Rs.27.05 crores, being one-fifth of the expenditure incurred for demerger and amalgamation thereafter with the Assessee Company M/s UCL, on which Rs.1 crore has been claimed (Rs.27.05 crores is inclusive of Rs.20 lakhs viz. 1/5th of Rs.1 crore). In effect the Assessee Company i.e. UCL has claimed apportioned amortized expenditure of Rs.27.05 crores relating to the demerger of SCL from GIL, and further expenditure incurred for amalgamation of SCL with UCL, after two years.

4.3.2 Section 35DD of the Act, was inserted by the Finance Act, 1999 (which is effect from 01/04/2000) to provide for amortization of expenditure incurred for the purpose of amalgamation and demerger. It reads as under – Amortisation of expenditure in case of amalgamation or demerger. 35DD. (1) Where an assessee, being an Indian company, incurs any expenditure, on or after the 1st day of April, 1999, wholly and exclusively for the purposes of amalgamation or demerger of an undertaking, the assessee shall be allowed a deduction of an amount equal to one-fifth of such expenditure for each of the five successive previous years beginning with the previous year in which the amalgamation or demerger takes place. (2) No deduction shall be allowed in respect of the expenditure mentioned in sub-section (1) under any other provision of this Act. A plain reading of the provision of the above Section of the Income Tax Act, 1961, provides for any expenses incurred towards amalgamation or demerger shall only be available to the Assessee company which actually incurs these expenses on this account and it is not available to the successor company, like 35D of the Income Tax Act, 1961, wherein such eligibility has been expressly provided for. By contrast, in the provisions of Section 35DD of the Income Tax Act, 1961, there is a complete absence of provision for such benefit. Therefore, by applying the Principles of General Clauses Act, until and unless provided for specifically by the Act, the absence of such provisions, disentitles the Assessee Company to avail the benefit on this account.

4.3.3 In the instant case under consideration, the expenses claimed as allowable u/s 35DD of the Act, are inclusive of the expenses incurred by M/s SCL for the purpose of its demerger from M/s GIL. Therefore, the assessee's claim of deduction to the extent of Rs.27,05,29,884/- is not correct and accordingly not allowable u/s 35DD of the Act, for the following two reasons:- The expenses to the tune of Rs. 27,05,29,884/- (being 1/5 of the demerger expenses) were incurred by M/s SCL. 1. The said expenses were incurred by M/s SCL for the purpose of its demerger from M/s GIL.

4.3.4 In light of the scope set-out in the provisions of 35DD of the Income Tax Act, 1961, M/s SCL which has ceased to exist

consequent upon its merger with the Assessee company, the demerger expenditure incurred by the SCL towards its demerger from M/s GIL, two years prior to the amalgamation, does not survive statutorily to enjoy the benefits allowable u/s 35DD of the Act. Thus, the assessee has availed undue deduction u/s 35DD of the Income Tax Act, 1961, in respect of this amount of Rs. 27,05,29,884/-, in contravention to the specific provisions of section 35DD of the Income Tax Act, 1961, thereby causing escapement of income to that extent.

5. In view of the facts of the case and the prevailing judicial rulings on the above issues, the assessee's case has been reopened correctly in accordance with the provisions of section 147 of the Act."

11. The assessee filed a rebuttal to the order passed by the Assessing Officer vide letter dated 01.10.2019. Subsequently, it also furnished details sought by the Assessing Officer for the reassessment proceedings. After considering the details filed, the Assessing Officer passed an order u/s. 143(3) r.w.s. 147 dated 24.12.2019 by disallowing the claim of the assessee u/s. 35DD of the Act, expenditure incurred by the assessee towards assets not owned but claimed as revenue expenditure and expenses incurred for purchase of IPL tickets, meet and greet expenses.

12. Aggrieved, the assessee challenged the reassessment order before the Ld.CIT(A) both on merits as well as on the validity of reopening. The Ld CIT(A) upheld the action of the Assessing Officer on validity of reopening as well as on issues related to disallowance of claim u/s 35DD

and expenditure incurred for IPL ticket purchase and meet and greet. As regard the expenditure incurred on assets not owned but claimed as revenue expenditure, the Ld.CIT(A) has partly allowed assessee's appeal by directing to treat few expenditures as purely revenue expenses and few other as deferred revenue expenses to be spread over a period of five (5) years.

13. Aggrieved by the order of the Ld.CIT(A), the revenue as well as the assessee both are in appeal before us.

14. Considered the rival submissions and material placed on record. At the outset, we find that the notice issued u/s.148 is dated 31.03.2019 which is admittedly issued beyond a period of four years from the end of the relevant assessment year. Hence, the proviso to Section 147 would come into operation requiring the Assessing Officer to prove that there has been failure on the part of the assessee to make full and true disclosure of the material facts. Any failure on account of assessee in making full and true disclosure needs to be clearly stated in the reasons recorded for reopening by the tax authorities. The Ld.AR of the assessee has emphasised that the reasons recorded by the Assessing Officer nowhere indicates any failure committed by the assessee with regard to

disclosure of full and true facts in the course of original assessment proceedings. Accordingly, it was urged that the reassessment order should be held as bad in law and should be quashed on this count itself.

15. The Ld.AR invited the attention of the Bench towards Computation of Total Taxable Income and notes to the return of income filed with the Assessing Officer immediately after filing original return of income. In the notes so filed, the assessee has categorically provided a detailed working and explanation relating to the amount claimed as deduction u/s. 35DD of the Act. The relevant extract of notes to the original return of income is reproduced below: -

> *"Erstwhile SCL had incurred expenses on demerger (Stamp duty etc.) of Rs.131,16,29,000/- during FY 2009-10, adjusted out of general reserve. The erstwhile Company has claimed 1/5th deduction of such expenditure for each of the two-consecutive year/period (FY 09-10 & FY 10-11) before it got amalgamated with the Assessee Company.*
>
> *Further in relation to demerger, the erstwhile SCL had also incurred expenditure amounting to Rs.2,50,80,368/- during FY 09-10 & Rs. 59,40,049 during FY 10-11, which was debited to P&L account, the erstwhile company has disallowed the said expenditure in its Return of Income pertaining to above periods.*
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> *Out of aforesaid expenditure of Rs.2,50,80,368/-, erstwhile SCL had already claimed deduction of 1/5th of such expenditure, for two consecutive years, i.e. (for FY 09-10 and FY 10-11 of Rs.1,00,32,147/-) before it got amalgamated with Assessee Company.*
>
> *Further, out of the expenditure of Rs.59,40,049/- erstwhile SCL had already claimed deduction of 1/5th for one year i.e. (for FY 10-11 of Rs. 11,88,010/-) before it got amalgamated with Assessee Company.*

Based on the above facts, the Assessee Company has claimed the rest of the deduction of Demerger Exp. (1/5th each year) from second / third year onwards…."

16. Further, Ld.AR brought to our notice the revised return of income filed by the assessee wherein the claim of deduction u/s. 35DD of the Act was revised. The assessee had again filed notes to return of income with regard to such revised claim along with the basis for making such additional claim vide letter dated 31.12.2014.

17. With regard to assets not owned but claimed as revenue expenses being the second issue raised in the reasons recorded for reopening the assessment, the Ld.AR pointed out that during the course of original assessment proceedings, the Assessing Officer had raised a specific query vide notice dated 28.12.2015 issued u/s 142(1) of the Act asking the assessee to provide the details and show cause why the expenses should be allowed. A detailed response was filed by the assessee vide letter dated 8.02.2016 to substantiate its claim.

18. The Ld AR also invited our attention to the fact that the Assessing Officer has himself acknowledged in the reasons recorded for reopening that the above-mentioned details of proposed additions were available

on records during the original assessment proceedings. The relevant extract of the reasons is reproduced below:

> *"Although the documents / materials, suggesting escapement of income, were available on records at the time of completion of assessment u/s 143(3) r.w.s. 153C of the Act, the same were remained to be examined by the AO. Therefore, the case can be reopened on the basis of the materials available on record which are suggesting escapement of income…."*

19. Admittedly, we observe that on both the issues for which additions were proposed by the Assessing Officer as per the reasons recorded for reopening, the relevant information / documents / submissions were furnished by the assessee and the same were available with the Assessing Officer at the time of concluding the original assessment proceeding for the subject year. Hence, the Revenue has not been able to prove any failure on the part of the assessee to disclose fully and truly all materials facts during the course of original assessment proceedings for conclusion of assessment on the issues raised in the reasons recorded for reopening. In the instant case, the reopening has been initiated beyond a period of four years from the end of the relevant assessment year. Hence, the requirement as per proviso to Section 147 of the Act applied in the instant case.

20. Further, in the case of New Delhi Television *v.* DCIT [(2020) 116 taxmann.com 151 (SC)], has held that reopening of the assessment beyond four years is bad in law when the tax payer has disclosed the facts at the time of original assessment proceedings and the Assessing Officer did not draw any adverse inference regarding the same. The observations of the Hon'ble Supreme Court is as under:

> *"24. Coming to the second question as to whether there was failure on the part of the assessee to make a full and true disclosure of all the relevant facts, the case of the assessee is that it had disclosed all facts which were required to be disclosed.*
>
> *25. The revenue has placed reliance on certain complaints made by the minority shareholders and it is alleged that those complaints reveal that the assessee was indulging in round tripping of its funds. According to the revenue the material disclosed in these complaints clearly shows that the assessee is guilty of creating a network of shell companies with a view to transfer its untaxed income in India to entities abroad and then bring it back to India thereby avoiding taxation. We make it clear that we are not going into this aspect of the matter because those complaints have not seen light of the day either before the High Court or this Court and, therefore, it would be unfair to the assessee if we rely upon such material which the assessee has not been confronted with.*
>
> *26. Even before the assessment order was passed on 03.08.2012, the assessing officer was aware of the entities which had subscribed to the convertible bonds. This is apparent from the communication dated 08.04.2011. The case of the revenue is that the assessee did not disclose the amount subscribed by each of the entities and furthermore the management structure of these companies. We are not in agreement with this submission of the revenue. It is apparent from the records of the case that the revenue was aware of the entities which subscribed to the convertible bonds. It has been urged that these are bogus companies, but we are not concerned with that at this stage. The issue before us is whether the revenue can take the benefit of the extended period of limitation of 6 years for initiating proceedings under the first proviso to Section 147 of the Act. This can only be done if the revenue can show that the assessee had failed to*

disclose fully and truly all material facts necessary for its assessment. The assessee, in our view had disclosed all the facts it was bound to disclose. If the revenue wanted to investigate the matter further at that stage it could have easily directed the assessee to furnish more facts.

27. The High Court held that there was no "true and fair disclosure" in view of the law laid down by this Court in Phool Chand's case (supra), and the judgment of the Delhi High Court in Honda Siel Power Products Limited vs. Deputy Commissioner Income Tax and Another. We have already referred to the judgment in Phool Chand's case (supra), wherein it was held that where the transaction of a particular assessment year is found to be a bogus transaction, the disclosures made could not be said to be all "true" and "full".

Relying upon the said judgment the High Court held that merely because the transaction of convertible bonds was disclosed at the time of original assessment does not mean that there is true and full disclosure of facts.

28. We are unable to agree with this reasoning given by the High Court. The assessee as mentioned above made a disclosure about having agreed to stand guarantee for the transaction by NNPLC and it had also disclosed the factum of the issuance of convertible bonds and their redemption. The income, if any, arose because of the redemption at a discounted price. This was an event which took place subsequent to the assessment year in question though it may be income for the assessment year. As we have observed above, all relevant facts were duly within the knowledge of the assessing officer. The assessing officer knew who were the entities who had subscribed to other convertible bonds and in other proceedings relating to the subsidiaries the same assessing officer had knowledge of addresses and the consideration paid by each of the bondholders as is apparent from assessment orders dated 03.08.2012 passed in the cases of M/s. NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. Therefore, in our opinion there was full and true disclosure of all material facts necessary for its assessment by the assessee.

29. The fact that step up coupon bonds for US$ 100 million were issued by NNPLC was disclosed; who were the entities which subscribed to the bonds was disclosed; and the fact that the bonds were discounted at a lower rate was also disclosed before the assessment was finalised. This transaction was accepted by the assessing officer and it was clearly held that the assessee was only liable to receive a guarantee fees on the same which was added to its income. Without saying anything further on merits of the

transaction we are of the view that it cannot be said that the assessee had withheld any material information from the revenue.

30. According to the revenue the assessee to avoid detection of the actual source of funds of its subsidiaries did not disclose the details of the subsidiaries in its final accounts, balance sheets, and profit and loss account for the relevant period as was mandatory under the provisions of the Indian Companies Act, 1956. It is not disputed that the assessee had obtained an exemption from the competent authority under the Companies Act, 1956 from providing such details in its final accounts, balance sheets, etc. As such it cannot be said that the assessee was bound to disclose this to the Assessing Officer. The Assessing Officer before finalising the assessment of 03.08.2012 had never asked the assessee to furnish the details.

31. The revenue now has come up with the plea that certain documents were not supplied but according to us all these documents cannot be said to be documents which the assessee was bound to disclose at the time of assessment. The main ground raised by the revenue is that the assessee did not disclose as to who had subscribed what amount and what was its relationship with the assessee. As far as the first part is concerned it does not appear to be correct. There is material on record to show that on 08.04.2011 NNPLC had sent a communication to the Deputy Director of Income Tax (Investigation), wherein it had not only disclosed the names of all the bond holders but also their addresses; number of bonds along with the total consideration received. This chart forms part of the assessment orders dated 03.08.2012 in the case of M/s.NDTV Labs Ltd. and M/s. NDTV Lifestyle Ltd. The said two assessment orders were passed by the same officer who had passed the assessment order in the case of the assessee on the same date itself. Therefore, the entire material was available with the revenue.

32. A number of decisions have been cited as to what is meant by true and full disclosure. It is not necessary to multiply decisions, as law in this regard has been succinctly laid down by a Constitution Bench of this Court in Calcutta Discount Co. Ltd. vs. Income tax Officer, Companies District I, Calcutta and Another, wherein it was held as follows :

> *"(8)...The words used are "omission or failure to disclose fully and truly all material facts necessary for his assessment for that year". It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What facts are material, and necessary for assessment will differ from case to case. In*

every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise -- the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary facts have been provided, what other facts can be inferred from them, and taking all these together, to decide what the legal inference should be.

(9) There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income-tax Officer might have discovered, the Legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example -- "I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your purpose: My duty is done with disclosing these account books and the documents." His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, will amount to "omission to disclose fully and truly all material facts necessary for his assessment." Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them -- including particular entries in account books, particular portions of documents and documents, and other

evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

(10) Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else -- far less the assessee -- to tell the assessing authority what inferences -- whether of facts or law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences -- whether of facts or law -- he would draw from the primary facts.

(11) If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?"

A careful analysis of this judgment indicates that the Constitution Bench held that it is the duty of the assessee to disclose full and truly all material facts which it termed as primary facts. Nondisclosure of other facts which may be termed as secondary facts is not necessary. In light of the above law, we shall deal with the facts of the present case.

33. In our view the assessee disclosed all the primary facts necessary for assessment of its case to the assessing officer. What the revenue urges is that the assessee did not make a full and true disclosure of certain other facts. We are of the view that the assessee had disclosed all primary facts before the assessing officer and it was not required to give any further assistance to the assessing officer by disclosure of other facts. It was for the assessing officer at this stage to decide what inference should be drawn from the facts of the case. In the present case the assessing officer on the basis of the facts disclosed to him did not doubt the genuiness of the transaction set up by the assessee. This the assessing officer could have done even at that stage on the basis of the facts which he already knew. The other facts relied upon by the revenue are the proceedings before the DRP and facts

subsequent to the assessment order, and we have already dealt with the same while deciding Issue No.1. However, that cannot lead to the conclusion that there is nondisclosure of true and material facts by the assessee."

21. Another relevant ruling to be referred here is the decision of the Hon'ble Jurisdictional High Court in case of S.S. Landmark *v.* ITO [117 Taxmann.com 825], wherein the Hon'ble High Court has held that Assessing Officer is bound to give details as to which facts and materials were not disclosed by the assessee which led to income escaping the assessment. The relevant findings of the order is as under:

"..11. It is also to be noted, merely alleging that there is failure to disclose truly and fully all material facts necessary for assessment, would not satisfy the jurisdictional requirement unless the reasons indicate what material facts the Petitioner had failed to disclose fully and truly during the course of the regular assessment. In fact our Court in the case of Bombay Stock Exchange Ltd. v. Deputy Director of Income-Tax (Exemption) and others - /2014] 365 ITR 181 (Bom.) has observed as follows :

'In the present case, admittedly, there are no details given by the Assessing Officer (respondent no. i)asto which fact or material was not disclosed by the petitioner that led to its income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the petitioner to disclose fully and truly all material facts without giving any details thereof. This being the case, the impugned notice is bad in law and on this ground alone the petitioner is entitled to succeed in this writ petition.

In the above view also the impugned notice is without jurisdiction as the proviso to section 147 of the Act will be applicable in these facts."

22. We observe that the Assessing Officer in its reason for reopening and the Ld.CIT(A) in its order has categorically mentioned that although

the materials were available on records the same remained to be examined. In this regard, we are inclined to refer to the decision of the Hon'ble High Court of Delhi in case of IHHR Hospitality (P.) Ltd. [415 ITR 459] which had the occasion to consider a similar contention. It was observed therein as under:

> *"6. It is far too well settled that any notice under Section 147/148 is to be premised on fresh or tangible material - made available with the Revenue within the time granted or within the extended time under Section 147. The only other circumstance when it can seek recourse to the reassessment power is if material documents, having significance on the reassessment, are withheld or improperly disclosed. The duty of the AO, it has been repeatedly emphasised from the decision of the Supreme Court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 is to truly assess the income disclosed by the assessee. The corresponding duty or the responsibility of the assessee is to disclose all material facts. Once that duty is discharged, the inability of the AO to carry out the task assigned to him by the statute properly does not authorize a second opinion, based upon which the AO can issue reassessment notice.*
>
> *7. In the present case, it is plain that the reassessment notice was based upon a second opinion or revisiting of the same facts by a subsequent Assessing Officer and no more. For these reasons, the reassessment notice has to be quashed."*

23. Further, it is relevant to refer to the ruling of the Hon'ble Jurisdictional High Court in case of Tata Sons Limited *v.* DCIT [443 ITR 282,] wherein the High Court had categorically emphasised on fact that reason recorded must have findings from the Assessing Officer about non-disclosure on part of the assessee. The relevant extract of the decision is reproduced below for reference:

"13. On the aforesaid touchstone, re-adverting to the facts of the case, first and foremost, it is imperative to note that the reasons recorded for the proposed reopening are conspicuously silent on the aspect that the income escaped assessment on account of failure to make full and true disclosure of all material facts relevant for the assessment, by the assessee. An assertion that the petitioner suppressed facts is singularly lacking. What accentuates the situation is the fact that after initial scrutiny assessment under section 143(3) of the Act, 1961, the petitioner preferred an appeal before CIT [A] and thereafter pursuant to the order passed by CIT [A], the assessment was finalized on 26th April 2007. In this context, the assertion of the petitioner that it had furnished explanation and submitted documents in response to the multiple notices at the stage of initial assessment could not be controverted. To add to this, in the reasons for the proposed reopening, there is not a whisper about the non-disclosure on the part of the petitioner. Since the assessment order was sought to be reopened beyond four years and post-assessment under section 143(3) of the Act, 1961, failure to demonstrate that there was a failure on the part of the petitioner to make a true and full disclosure of all material facts, erodes the legality of the exercise of power under section 147 of the Act, 1961.

14. We find substance in the submission of Mr. Pardiwalla that the case at hand is nothing but an instance of mere change of opinion. A bare perusal of the reasons indicates that the exercise was influenced by a mere change of opinion. To start with, it is imperative to note that the Assessing Officer has commenced the recording of reasons with the expression, "On perusal of records, it is seen that 10% of the eligible profits under section 10A were not fully taxed and yet, set off of the losses of local units to the extent of Rs. 54,27,79,336/- was allowed and this resulted in short levy of tax." Evidently, this assessment of the Assessing Officer betrays an intent to question the original assessment on the strength of very same material, by substituting his view for the conclusion recorded by the Assessing Officer at the time of initial assessment.

15. The alleged escapement of the income articulated under second head "Correct computation of Business Income" also suffers from the same vice of mere change of opinion. The third head under which the income allegedly escaped assessment, under the caption, 'Excess DIT Relief' stands on a much weaker foundation. The Assessing Officer explicitly refers to the availability of two options for computation of deduction under section 10A and 80 HHE, namely, (i) exclusive method; and (ii) alternatively, profit of 10A units shall form part of calculation of 80 HHE and export

turnover of 10A is to be excluded therefrom. According to the Assessing Officer, the choice of the second method by the department resulted in escapement of income as excess DIT relief to the extent of Rs. 3,67,31,204/- had been allowed. This inference is a classic example of change of opinion as it is rooted in expediency of exercise of one option over another.

16. The conspectus of the aforesaid consideration is that the impugned notice and the consequent action is legally unsustainable as the Revenue fails to satisfy the twin tests. Firstly, there is no assertion, much less material to indicate, that the income escaped assessment on account of failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment, and, secondly, the reasons recorded by the Assessing Officer should not fall within the ambit of "mere change of opinion" on the very same material. Consequently, we are persuaded to hold that there was no material to justify the formation of a reason to believe that income escaped assessment and invoke the power under section 147 of the Act, 1961. The petition, therefore, deserves to be allowed."

24. Further, the Ld.AR also pointed out following remarks made by the Ld.CIT(A) while upholding the reassessment order:

"In the present case also, it appears that though the assessee may have submitted before the Assessing Officer, namely before DCIT Circle 2(2) Mumbai, while filing the Return of Income, as to how deduction u/s 35DD was being claimed by it, however later the jurisdiction of the case was transferred to Central Circle 1(4) Mumbai and therefore it is not clear whether this letter was in notice of the AO or was available on his record while passing the order u/s 153C of the Act, which was later reopened by the AO u/s 148. It is not quite clear that any such evidence was filed at the time of assessment proceedings and therefore this particular evidence, may not have been actively before the Assessing Officer and therefore could not be considered by him. Thus the then Assessing Officer failed to apply his mind to the same and may not have considered the relevant facts contained in these letters."

25. In this regard, Ld.AR made a reference to various additions made in the assessment order passed by the Assessing Officer u/s 153C wherein the Assessing Officer had referred to the notes to return of income which were filed by the assessee. Further, the Ld.AR also drew our attention to the copy of letter dated 28.12.2015 filed with the Assessing Officer who has passed the order u/s 153C of the Act, wherein the assessee had again submitted the copies of notes to original and revised return of income. It is clear from the above that allegation of the Ld.CIT(A) has no legs to stand. Even otherwise, if there was any doubt the Ld.CIT(A) could have called for the information from the Assessing Officer himself. In our view, he has brought in his scepticism to decide on a very important issue which for a quasi-judicial authority is not the correct approach.

26. Before us, the Ld.AR of the assessee emphasised that the Assessing Officer has applied his mind on all the impugned issues while passing the original assessment order. Our attention was drawn to the following observations in the decision of the jurisdictional High Court in case of SBI *v.* ACIT in WP 271 of 2018 vide order dated 15.06.2018:

> *"6. We note that the Apex Court in Income-Tax Officer V/s. Techspan India Private Limited and Another, reported in [2018] 404 ITR 10(SC) reiterated the settled principle of law laid down by*

the Supreme Court in CIT V/s. Kelvinator of India Ltd. [2010] 320 ITR 561(SC) that the Assessing Officer has a power only to reassess and has no power to review the assessment order. Thus, it held that no re-opening notice can be issued which is premised on a change of opinion. It further goes on to hold that before interference with a proposed reopening of the assessment, the Court should verify whether the assessment order made earlier has expressly or by necessary implication expressed an opinion on a matter which is the basis of the alleged escapement of income that was taxable. In fact, in this case we find that the assessment orders passed in regular assessment proceedings do refer to examining the computation of income filed alongwith the Return of Income. Moreover, the Assessment order in regular assessment proceedings in terms disallowed some of the claims made for deduction under Section 143(3) of the Act. Therefore, in the present facts, we are prima-facie of the view that, the Assessing Officer has by necessary implication allowed the claim. Moreover, the basic document for completing the assessment under Section 143(3) of the Act is the computation of income. Therefore, to the extent the claims made for deduction in the computation of come, were disallowed by the Assessing Officer, discussion on the same is found in the assessment order. It is an accepted position that the assessment orders would necessarily deal only with the claims being disallowed and not with the claims being allowed. This is for the reason as observed by the Gujarat High Court in CIT Vs. Nirma Chemicals Ltd 309 ITR 67, that if the Assessing Officer was to deal with all the claims which were to be allowed in the assessment order, the result would be an epictome. This is so, as it would cast an impossible burden upon the Assessing Officer considering his workload and the period of limitation. There was also no reason in the present facts for the Assessing Officer to ask any queries in respect of this claim of the petitioner, as the basic document viz. computation of income at note 21 (Assessment Year 2013-14) and note 22 (Assessment Year 2014-15) thereof explained the basis of the claim being made to the satisfaction of the Assessing Officer. Thus, it must necessarily be inferred that the Assessing Officer has applied his mind at the time of passing an assessment order to this particular claim made in the basic document viz. computation of the income by not disallowing it in proceedings under Section 143(3) of the Act as he was satisfied with the basis of the claim as indicated in that very document. Therefore, where he accepts the claim made, the occasion to ask questions on it will not arise nor does it have to be indicated in the order passed in the regular assessment proceedings. Thus, issuing the impugned notices on the above ground would, prima-facie, amount to a change of opinion." (Emphasis supplied).

27. Further, we note that as required under the proviso to section 147 of the Act, the reasons recorded by the Assessing Officer absolutely indicate nothing as a failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment. The reasons recorded by the Assessing Officer, a copy of which is provided to the assessee is the basic document through which the Assessing Officer communicates about the basis on which he has reopened the assessment. If there is no indication about the failure on part of assessee to disclose material facts in the reasons, it can be inferred that there is none. It is well settled that the reasons recorded by the Assessing Officer should speak for itself. The Hon'ble Jurisdictional High Court in the case of Hindustan Unilever Ltd. *v.* ACIT [268 ITR 332 (Bom)] has held as under: -

> *"20. The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear*

and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He 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, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced."

28. On the other hand, the Ld.DR in his defence relied upon the newly inserted Explanation (1) to section 147 of the Act to put across an argument that subsequent to the insertion of the said Explanation, reassessment is valid even on the basis of material already available on record. It is observed that the Assessing Officer and Ld.CIT(A) also placed reliance on the said explanation. In our view, the provisions of said Explanation (1) to section 147 is reproduced below for reference.

"Explanation – 1:-Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

29. The above Explanation was considered by the Hon'ble Jurisdictional High Court in case of Rajbhushan Omprakash Dixit *v.* DCIT [264 taxman 222]. The court's observation vis-à-vis, validity of reassessment proceeding on the material available on records is as under: -

> *"As per this Explanation thus, production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the first proviso to Section 147. Here is not a case where the Assessee is seeking to rely on a disclosure which the Revenue can seek to bring within the fold of the said Explanation. Here is a case where the Department already had collected certain documents and materials which were before the Assessing Officer at the time of framing assessment. If the Assessing Officer did not, for some reason, advert to such material or did not utilize the same, he surely cannot allege that the Assessee failed to disclose truly and fully all material facts."*

30. Similarly, the Hon'ble Delhi High Court in case of Ranbaxy Laboratories Ltd *v.* DCIT 351 ITR 23 dealt with the Explanation 1 to section 147 of the IT Act and observed as under: -

> *"13. Mr Maratha appearing on behalf of the respondents, vehemently supported the re-opening of the assessment in respect of the assessment year 2003-04 and submitted that there was failure on the part of the assessee to fully and truly disclose all material facts which were necessary for assessment. He strongly relied upon the 4th reason, that is, of club expenses by stating that the assessee had not disclosed this at the time of the assessment. On a pointed query, Mr Maratha could not show as to which particular information or material fact had not been disclosed by the assessee at the time of the original assessment proceedings.*

He only sought to place reliance on Explanation 1 to Section 147 which reads as under:-

> *"Explanation 1: Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."*

However, we do not see as to how Mr Maratha could place reliance on the said Explanation. Insofar as all the purported reasons other than the reason pertaining to club expenses are concerned, specific queries had been raised and the Assessing Officer had considered the material placed by the petitioner before him. As regards club expenses, Mr Maratha states that since no specific query had been raised, Explanation 1 would get triggered. We do not agree with this submission. This is so because the club expenses were specifically mentioned at serial No. 17(d) of the tax audit report in Form No. 3CD which was annexed along with the return. This was a clear statutory disclosure on the part of the assessee with regard to the claim of club expenditure. It was not a piece of evidence which was hidden in some books of accounts from which the Assessing Officer could have possibly, with due diligence, discovered the same. On the contrary, this was material which was placed before the Assessing Officer along with the return which the Assessing Officer was duty bound to go through before completing the assessment. Clearly this does not fall in the category of material which is referred to in Explanation 1 to Section 147 of the said Act."

31. From the observations of the Hon'ble court on the applicability of Explanation 1 to section 147 brings out a clear position that if all the material information is made available on record with the Assessing Officer, he is bound to verify the same. If the records which are obvious and which are required to be referred for completing the assessment and are not verified then, the provisions of Explanation 1 to section 147 cannot be invoked by the authorities.

32. Further, it is also noted that while passing the order for disposal of the objection raised by the assessee the Assessing Officer had relied upon the decision of the Hon'ble Supreme Court in case of Rajesh Jhaveri Stock Brokers Pvt. Ltd. [291 ITR 502] in support of the argument that all that is required for the Assessing Officer is to form a reasonable belief on tangible material that the income of the assessee has escaped assessment.

33. In the case before the Hon'ble Supreme Court, the original assessment was completed u/s.143(1) of the Act and thereafter the assessment was reopened. Despite no regular assessment, the Hon'ble Supreme Court specifically observed that even if the reassessment has been made in respect of assessment originally completed u/s.143(1) of the Act, the necessary ingredients of Section 147 of the Act with regard to availability of tangible material which leads the Assessing Officer to form a belief that income of the assessee has escaped assessment, should be present. Hence, this decision would not advance the case of the revenue and in-fact strengthens the case of the assessee.

34. Further, reliance by the lower authorities on the decision of the Hon'ble Supreme Court in case of Raymond Woollen Mills Ltd. *v.* ITO

[236 ITR 34 (SC)] is ill placed since in the said decision also it has been held that there was some prima-facie material with the department on the basis on which reassessment was initiated. The Hon'ble Court held that the sufficiency or correctness of the material is not a thing to be considered at the stage of reassessment. In the present case, there is no prima facie material placed on records by the Assessing Officer. A perusal of the assessment framed u/s 143(3) r.w.s 147 of the Act shows that there is not even a whisper of non-disclosure of any material facts. There is no reference to any new fact or any new material which came to light of the Assessing Officer after framing of the original assessment order. In fact, adverse inference has been drawn only from the material which, were very much available on the records. These glaring facts make the decisions relied upon by the Ld.DR is distinguishable.

35. We observe that the Assessing Officer and the Ld.CIT(A) further drew support from the decision of the Hon'ble Jurisdictional High Court in case of Indian Hume Pipe Co. Ltd *v.* ACIT [348 ITR 439] to contend that full and true disclosure of material facts u/s 148 means disclosure must be full and true and same cannot be gargled or hidden in the crevices of documentary material which have been filed by the assessee with the Assessing Officer.

36. In the case before the Hon'ble Bombay High Court, the assessee had made a claim of exemption u/s.54EC of the Act in the computation of income but the date on which the amounts were invested were not mentioned anywhere in the records furnished with the Assessing Officer which are critical for determining the eligibility since the investments were required to be made within the prescribed time frame. The assessment order also did not deal with the said aspect. In this factual background of the case, the Hon'ble High Court had held that there was a complete failure on the part of the assessee to disclose fully and truly material facts that were necessary for conclusion of the assessment. There is no such observation made by the Assessing Officer in the instant case before us. Hence, this decision relied on by the tax authorities is distinguishable on facts.

37. Further, the Hon'ble Kolkata High court in the case of Simplex Concrete Pipes (India) Limited [(2004) (134 Taxmann 74)] has held that any action of reopening the assessment must begin with an allegation that the amounts now sought to be made taxable were not disclosed. In the case before the court such amounts were disclosed but claimed to be non-taxable. As a result, was held that there was no omission or failure to disclose fully and truly the materials necessary for assessment.

The High Court also observed that the Assessing Officer must satisfy the twin condition of information or material in his possession and the extent of disclosure of primary facts by the assesse.

38. Further, the Hon'ble jurisdictional High court in the case of ICICI Bank Limited [(2004) (136 Taxmann 669)] has held that if an assessee, after furnishing all material facts, erroneously claims higher depreciation, it will not be a case of failure to disclose fully and truly all material facts. The Hon'ble High Court observed that at the rate at which the depreciation is to be claimed is a matter of legal inference which to be drawn from the material facts and if legal inference drawn from material facts is erroneous, it cannot be said that there is failure on part of the assessee to disclose material facts.

39. Further reference to the decision of the Hon'ble Supreme Court in case of Gemini Leather Stores *v.* ITO ITR 100, wherein the Hon'ble Apex Court has observed as under:

> *"In the case before us the assessee did not disclose the transactions evidenced by the drafts which the Income-Tax Officer discovered. After this discovery the Income-tax Officer had in his possession all the primary facts, and it was for him to make necessary enquiries and draw proper inferences as to whether the amounts invested in the purchase of the drafts could be treated as part of the total income of the assessee during the relevant year. This the Income-tax officer did not do. It was plainly a case of oversight, and it cannot be said that the income chargeable to tax*

for the relevant assessment year had escaped assessment by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. The Income tax officer had all the material facts before him when he made the original assessment. He cannot now take recourse to Section 147(a) to remedy the error resulting from his own oversight."

40. We observe that the AO and the Ld.CIT(A) has also heavily placed reliance on the decision of the Mumbai Tribunal in case of Mahyco Seeds Limited *v.* DCIT (ITA No. 2235/Mum/2016) for the proposition that the assessment could be reopened based on existing material when the issue was not examined totally by the Assessing Officer, in the original assessment proceedings.

"We have perused the above-referred decision. In the said decision, the Tribunal has nowhere mentioned that there was failure of the assessee to disclose fully and truly all material facts required for assessment. Firstly, it is not clear that the reassessment proceedings in this case was initiated beyond the four-year period and hence there is no examination of failure to furnish fully and truly all information required for assessment. In the present case, the assessment is reopened beyond a period of four years and hence as per the proviso to section 147, AO is bound to prove that there has been failure on part of assessee to furnish fully and truly all material facts necessary for completing the assessment.

Secondly, when a regular assessment is made u/s 143(3) a presumption can be raised that the same is passed after proper application of mind that the judicial and official acts are performed in regular manner. If the argument of the department is accepted that the AO has failed to apply his mind and hence he has authority to re-examine, it would amount to giving a presumption to the authority to take benefit of its own wrong."

41. In this connection, it is worth noting the decision of the Hon'ble Supreme Court in the case of Kelvinator of India Ltd. (320 ITR 561) wherein it was held that the Assessing Officer cannot proceed to reopen the assessment on the basis of mere change of opinion. The Hon'ble Supreme Court held as under:

> *"... Therefore, post-1st April, 1989, power to re-open is much wider.*
>
> *However, one needs to give a schematic interpretation to the words 'reason to believe' failing which we are afraid Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion', which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to re-assess. But re- assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion' is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material ' to come to the conclusion that there is escapement of income from assessment. Reasons must have a link with the formation of the belief."*
>
> *The Hon'ble Court further observed as under:*
>
> *"Under the Direct Tax Laws (Amendment) Act, 1987, the Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147. However, on receipt of representations from the companies against omission of the words 'reason to believe', the Parliament reintroduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer."*
>
> *The Delhi High Court in CIT vs. Kelvinator of India Limited [2002] 256 ITR 1 (Del.) [decision affirmed by the Supreme Court in [2010] 320 ITR 561 (SC)] held that if two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be*

favoured. In the event it is held that by reason of section 147 if the ITO exercises his jurisdiction for initiating a proceeding for reassessment only upon a mere change of opinion, the same may be held to be unconstitutional. We are therefore of the opinion that section 147 of the Act does not postulate conferment of power upon the A.O. to initiate reassessment proceeding upon his mere change of opinion. If "reason to believe" of the A.O. is founded on an information which might have been received by the A.O. after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act, 1872, judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong.

42. Further, as held in CIT *v.* Bhanji Lavji [1971] 79 ITR 582 (SC) that when the primary facts necessary for assessment are fully and truly disclosed, the ITO will not be entitled on change of opinion to commence proceedings for reassessment. Similarly, if he has raised a wrong legal inference from the facts disclosed, he will not, on that account, be competent to commence reassessment proceedings. Similar view was taken in ITO *v.* Nawab Mir Barkat Ali Khan Bahadur [1974] 97 ITR 239 (SC) where the Hon'ble Apex Court held that having second thoughts on the same material, and omission to draw the correct legal

presumption during original assessment, do not warrant the initiation of a proceeding u/s 147 of the Act.

43. As held in case of Parveen P. Bharucha *v.* DCIT [(2012) 348 ITR 325 (Bom)], the Hon'ble jurisdictional High Court that it is settled that in absence of new material, reopening of assessment on the basis of material already on record at the time of assessment was completed cannot stand even within the normal period of 4 years.

44. The Ld.AR further argued that the reassessment proceeding based on the findings made in the audit objection without application of mind is not valid. The fact that present case was initiated on the basis of the audit objection has not been disputed by the lower authorities.

45. The Ld.AR drew our attention to the decision of Hon'ble jurisdictional High Court in case of Voltas Limited *v.* ACIT in WP 1180 of 2022 vide order dated 5.04.2022 wherein the Hon'ble Court has held that reopening of the assessment on behest of audit party is to be treated as misconceived, incorrect and bad in law.

46. This issue has been discussed in detail by the Hon'ble Supreme Court in case of Indian & Newspaper Society *v.* CIT [119 ITR 996],

wherein it has been held that the opinion of the Audit Party on a point of law cannot be regarded as "information" within the meaning of Section 147(b) of the Act, for the purpose of reopening an assessment. This view has been also confirmed in various other decisions viz.

i. *CIT v/s Lucas T.V.S. Limited. 249 ITR 306 (SC),*
ii. *Indian & Eastern Newspaper Society v/s. CIT 119 ITR 996 (SC),*
iii. *Vijaykumar M. Hirakhanawala HUF v/s ITO 287 ITR 443 (Born.),*
iv. *Reckitt Benckiser Healthcare India P. Ltd v/s. DCIT 74 Taxmann.com 260,*
v. *Adani Exports v/s DCIT 240 ITR 224 (Guj.),*
vi. *Rajalakshmi Textile processors ltd, v/s. CIT 235 ITR 178 (Mad.),*
vii. *CIT v/s Ram Mangatrarn 312 ITR 100 (P & H), and*
viii. *Waldies Ltd v/s. ITO 246 ITR 29 (Cal.).*

47. Now, let us come to the issues involved in the instant case on which the Revenue has concluded the reassessment proceedings. Elaborate arguments were advanced by both sides on these which are considered below:

48. Ground No. 3 of the assessee's appeal relate to claim of deduction u/s 35DD of the Act. In this case, SCL which merged into the assessee

Company from 01.07.2010 had incurred certain expenses in relation to its demerger from Grasim Industries Limited in the year 2009-10. Such expenditure was disallowed in the respective return of income by SCL and only 1/5thportion was claimed in accordance with provisions of section 35DD of the Act for that year. The expenses incurred on demerger is allowable as deduction equally over a period of 5 years. Out of eligible 5 year of claim for such expenditure, SCL had made claim in initial two years of its existence and thereafter it got amalgamated with the assessee Company. The balance claim of 1/5th expenditure is being made by the assessee in its return of income starting from AY 2012-13

49. The Ld.AR submitted that the term 'assessee' as used in section 35DD of the Act includes not only the assessee who incurs such expenses but also its successor. Accordingly, since SCL was amalgamated with the assessee Company, the remaining claim of deduction available as per section 35DD should be available to the assessee being the successor of SCL, especially when there are no such restrictions posed under the Act.

50. The argument of the Revenue on the other hand is that since there is no express provision under section 35DD of the Act to allow

such claim in the hands of the resulting company similar to that u/s 35D of the Act, no such benefit can be allowed in the hands of the resulting company i.e. the assessee.

51. The Ld.AR of the assessee, however, rebutted the aforesaid argument of the revenue and to lay emphasis on its contention, it referred to the decision of the Hon'ble Supreme Court in case of CIT *v.* T. Veerabhadra Rao [155 ITR 152] wherein it has been held that in the case of succession, the successor steps into the shoes of the predecessor and therefore the deduction allowable to the predecessor would also be allowed to the successor. In that case, a business was transferred by an assessee to another and with such transferred business, the outstanding debtors also got transferred. The successor in business had to write off certain debts and it claimed the same as bad debts. One of the conditions of grant of deduction in respect of bad debt is that the assessee should have offered the relevant debt as its income in earlier years. Indeed, while the debts were written off by the successor, the corresponding income was offered by the predecessor in the earlier years. Therefore, the claim for bad debt in the hands of successor was denied and the matter reached Supreme Court. The Apex Court allowed the claim and held that the successor would step

into shoes of the predecessor and hence the condition of income being offered in earlier year gets satisfied.

52. The Ld.AR, further stressed and invited attention of the Bench to the provisions relating to availability of Minimum Alternate Credit (MAT) u/s 115JAA. It was argued that a taxpayer is subject to MAT as per the provisions of section 115JB of the Act, if the amount of income-tax payable under general provisions of the Act is less than 15% of the company's 'book profit'. In such case, the 'book profit' computed are deemed to be the total income of the company and income-tax is levied thereon at 15%. However, the excess of MAT paid over normal tax liability for the year is permitted to be carried forward under Section 115JAA of the Act, for set-off in the subsequent years when the normal tax liability exceeds MAT liability (MAT Credit). It was pointed out that there is no express provision in Section 115JAA to allow an amalgamated / resulting company to carry forward and claim MAT Credit which was available to the amalgamating / demerged company. However, the Courts have held that such credit will be allowable to the Successor Company.

53. In this regard our attention was drawn to the decision of the Chennai Tribunal in case of ACIT *v.* Caplin Point Laboratories in order dated 31.01.2014 in ITA No.667/ MDS/ 2013. The ITAT in this case has held that MAT credit will be available to the assessee despite no express provision for the same in section 115JAA of the Act. The relevant findings of the ITAT is as under:

> *"…. Ld. CIT(Appeals) after considering the submissions of the assessee and by following the decision of the ITAT in the case of M/s. Ranganathan Industries Private Limited v. Addl. CIT in I.T.A. No.2434/Mds/ 2004 vide order dated 30.11.2007, in which it has been held has under:*
>
> > *"Upon a careful consideration of the issue we find that, after amalgamation, the assessee company is entitled to all the assets, claims, etc. of the erstwhile company, which is also supported by Hon'ble High Court order in this regard. Further, when the assessee company is now being assessed in place of erstwhile company and the TDS credit pertaining to the erstwhile company is being given credit to the assessee company, there is no reason why a different treatment should be given to the MAT credit available pertaining to the erstwhile company. We do not agree with the learned Commissioner of Income Tax (Appeals) that there is need for specific mention in this regard in Section 115JAA as the Carry forward of MAT credit of erstwhile company by amalgamated company is in-built in the scheme of amalgamation as well as the scheme of MAT credit. Hence, we set aside the order of learned Commissioner of Income Tax (Appeals) in this regard and decide the issue in favour of the assessee. "*
>
> *12. The ld. CIT(Appeals), by following the above decision of the Tribunal, directed the Assessing Officer to allow the claim of the assessee. Moreover, the ld. DR could not controvert the above findings of the Tribunal or filed any higher Court's decision to take a different view. In view of the above, we find no reason to interfere with the order passed by the ld. CIT(Appeals) on this issue and dismiss the grounds raised by the Revenue."*

54. The Ld.AR pointed out that the aforesaid view has been confirmed by various Tribunal holding that there is no specific restriction under the law barring the resulting company to claim MAT credit, the same should be available to the resulting company despite no specific provision to this effect in the Act. Few decisions in which the above stand has been confirmed are as under:

i. *Ambuja Cement Limited vs. DCIT, ITA No.3643 of 2018 (Mum Tribunal) vide order dated 17 June 2019*

ii. *Adani Gas Ltd. vs. ACIT, ITA No.2241 of 2011 (Ahd Tribunal)*

iii. *Skol Breweries Ltd. vs. ACIT, ITA No.2313 of 2017 (Mum Tribunal)*

55. It was vehemently argued that an analogy can be drawn in the present case to the effect that if there is no specific provision which restricts / debars the resulting company from claiming deduction u/s.35DD of the Act for the remaining period such claim should be allowed in hands of the resulting company.

56. Our attention was further drawn to the ruling of Delhi Tribunal in case of Convergys India Services Pvt. Ltd *v.* DCIT ITA No. 782/Del/2021, wherein the tax authorities had disallowed the claim of the assessee (resulting company) u/s 43B by pointing out that the Act contains

specific provisions in other sections to entitle the amalgamated company to claim the deductions to which the amalgamating company was entitled to and such language is missing in section 43B of the Act. The Ld. DRP concurred with the view of the Assessing Officer. The Tribunal while deciding this issue has referred to the scheme of the amalgamation approved by the relevant High Court wherein it was provided that all debts, liabilities, contingent liabilities, duties, obligations and guarantees of the Amalgamating companies shall be taken over by the Assessee, the MAT credit being an asset of the earlier company would be available to the assessee at its disposal for utilization.

57. After considering the submissions of both parties, we are in agreement with the proposition put forth by the Ld AR. If there is no express prohibition under the law with respect to specific claim, then it is reasonable to assume that such deduction / claim is deemed to be allowed. The Ld. DR has not pointed out any decision which has held otherwise.

58. Further, we observed that it is a settled position of law that any order passed by the Hon'ble High Court in the scheme of arrangement acquires statutory recognition where there are no specific provisions,

under the Act. The law laid down by the Hon'ble High Court, in the scheme of demerger would apply as operation of law. In this regard, the Kolkata Tribunal in the case of Electrocast Sales India Ltd. *v.* DCIT [2018] 170 ITD 507 (Kol.), has held as under:

> *"4.4 We find that the scheme of amalgamation would be approved by the Hon'ble High Court only after ensuring that the same is not prejudicial to the interests of its members or to public interest. Hence the merger scheme approved by the Hon'ble High Court having in mind the larger public interest, cannot be disturbed by the revenue merely because the assessee is not entitled for benefits u/s 72A of the Act. ….*
>
> *Hence it could be safely inferred that the Court would exercise due diligence and would conduct detailed enquiries before sanctioning the scheme. A scheme formulated for the purposes of tax evasion cannot be held to be in 'public interest' and hence the same cannot be sanctioned under the provisions of Companies Act, 1956. The fact that the Hon'ble Calcutta High Court had accorded its sanction to the scheme of amalgamation in the assessee's case implies that the same had been done by considering representations from the various fields and by duly considering the tax evasion point for income tax purposes.*
>
> *4.4.1 Further we find that the provisions of section 394A of the Companies Act, 1956 reads as under:—*
>
> > *Notice to be given to Central Government for applications under sections 391 and 394 - The court shall give notice of every application made to it under section 391 or 394 to the Central Government, and shall take into consideration the representations, if any, made to it by that Government before passing any order under any of these sections.*
>
> *Hence if there be any objections for the income tax department, they could raise the same at that stage i.e. prior to sanction of scheme by the court. Once the scheme is approved, it implies that the same has been done after duly considering the representations from the Government / revenue."*

59. In the present case also, it is noted that the Scheme of Amalgamation specifically provides that all the tax benefits and exemptions shall be available to the amalgamated company i.e. the assessee. There cannot be any doubt that the Hon'ble High court had followed the normal procedure to call for and address any objection of the tax authorities on any of the content of the Scheme. Accordingly, since the Scheme is approved by the Hon'ble High Courts of Bombay and Gujarat, the objection raised by the authorities now cannot be approved.

60. In view of the above discussion, we are of the view that assessee is eligible for the claim of deduction u/s 35DD of the Act for the unexpired portion.

61. The Brief facts related to Ground No. 4 is as follows:

- The assessee had incurred certain expenditure which results in coming into existence of a capital asset for which the assessee does not get the ownership
- The case of the assessee is that such expenditure has to be incurred purely because of business expediency

- The assessee has claimed such expenditure as revenue expenditure as per the provisions of section 37(1) of the Act
- The assessee has placed on records agreement with respective parties for incurring such expenditure.

62. We note that the assessee has incurred following expenses:

- Construction of supply line and plant for supply of power- An agreement was reached with M.P. Poorv Kshetra Vidyut Vitaran Company Ltd. (MPPKVVCL) for construction of supply line for uninterrupted supply of required power based on the understanding that the supply line and plant shall be owned by electric supply company. Cement manufacturing is a power intensive process and hence obtaining assurance for uninterrupted power supply augments the purpose of business.
- Cost of transmission supply line and related equipment – The Assessee entered into agreement with power supply company Dakshinanchal Vidyut Vitaran Nigam Ltd. (DVVNL) through Electricity Distribution Division (E.D.D-III) for laying down of transmission supply line and related equipment for

supply of power – With the arrangement, the Company ensured receiving uninterrupted supply of required power.

- Rehabilitation expenses of Mohanpura village – The assessee purchased land of Mohanpura village which was in the area under mining lease granted to the assessee company. As a result the villagers of Mohanpura village were required to be rehabilitated. The assessee company constructed a new school, temple, chopal & toilets etc. at the new location and handed over these assets to the village panchayat.
- Expenses incurred on installation of fenders at Jetty – As per the notification issued by Gujarat Maritime Board (GMB) and communication between assessee and authorities of GMB, the responsibilities of maintenance and repair of jetty along with structures required its plant at Kovaya, Gujarat were to be taken care by the assessee. In order to protect the jetty from damage that may arise due to movement of ship and tugs, D type rubber fenders were installed surrounding the jetty by the assessee. Such Jetty is owned by the Gujarat Maritime Board but used by the assessee for its captive use for imports and exports.

- Expenses incurred on setting up of Fly ash handling system at Bellary Thermal power station (BTPS) under Karnataka Power Corporation Ltd. (KPCL) - The assessee had set up a Fly ash handling system for efficient collection of Fly ash generated from power station. Such Fly ash is used as a raw material in the cement manufacturing process. With the Flyash handling system, the assessee has ensured smooth and constant supply of this essential raw material from KPCL. In this arrangement as well, the ownership of the assets remains with BTPS and KPCL.
- Expenses incurred on civil pavement work etc. at Truck Tailor Yard – Assessee had entered in to a lease agreement with cement transport association for allowing parking of transporters vehicle on their plot of land known as Truck Trailor yard. During the year, the assessee incurred expenditure for levelling of surface of such yard along with expenditure on building concrete road, constructing office for transporters, boundary wall etc. for the amenities to be provided to truck drivers. This ensured smooth movements of its goods to and from the factory premises.

- Expenses incurred on installation of 1500 KVA HT power line – Assessee entered into agreement with Cochin Port Trust (CPT) for receiving power supply on the understanding that the assessee will construct and pay the required cost of supply line which shall be owned by CPT.

63. The Ld AR of the assessee contented that the test of enduring nature applied to the purpose for which a particular expenditure is incurred is not a conclusive test, it is only one of the several factors to be considered while answering the question – whether an expenditure is capital or revenue in nature. An expenditure which does not result in the acquisition of any permanent asset indicates that the expenditure incurred was of a revenue nature.

64. In the case Empire Jute Co Ltd *v.* Commissioner of Income Tax [1980] 124 ITR 1/3 Taxman 69, the Hon'ble Supreme Court held that the true test is to consider the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable. It was observed as under:

> *"...There may be cases where expenditure, even if incurred for obtaining advantage of enduring benefit, may, nonetheless, be on revenue account and the test of enduring benefit may break down. It is not every advantage of enduring nature acquired by an*

assessee that brings the case within the principle laid down in this test. What is material to consider is the nature of the advantage in a commercial sense and it is only where the advantage is in the capital field that the expenditure would be disallowable on an application of this test. If the advantage consists merely in facilitating the assessee's trading operations or enabling the management and conduct of the assesse's business to be carried on more efficiently or more profitably while leaving the fixed capital untouched, the expenditure would be on revenue account, even though the advantage may endure for an indefinite future. The test of enduring benefit is, therefore, not a certain or conclusive test and it cannot be applied blindly and mechanically without regard to the particular facts and circumstances of a given case..."

65. In our view, if the advantage which accrued to the assessee was to facilitate its trading operation or the conduct of its business while leaving the fixed capital untouched, the expenditure would be on the revenue account.

66. The Ld.AR of the assessee had argued that the same principle was laid down in a decision in the case of L.H Sugar Factory and Oil Mills (P) Ltd *v.* CIT [1980] 125 ITR 293/4 Taxman 5 (SC) wherein the assessee had made a contribution for meeting the cost of construction of roads in the area around its sugar factory under a sugarcane development scheme. The Supreme Court held as follows:

"Now it is clear on the facts of the present case that by spending the amount of Rs 50,000, the assessee did not acquire any asset of an enduring nature. The roads which were constructed around the factory with the help of the amount of Rs 50,000 contributed by the assessee belonged to the Government of Uttar Pradesh and not

to the assessee. Moreover, it was only a part of the cost of construction of these roads that was contributed..."

67. Attention of the Bench was also drawn to the decision of the Gujarat High Court in CIT *v.* Gujarat Mineral Development Corporation [1981] 132 ITR 377, where the assessee had laid out an expenditure which was paid over to the Gujarat Electricity Board for laying electric transmission lines and other ancillary facilities. The Hon'ble Gujarat High Court took note of the fact that the transmission lines were to be the property of the Board and that the assessee was not acquiring a benefit of an enduring nature. Applying the test laid down by the Supreme Court in Empire Jute Co Ltd (supra), the Hon'ble Gujarat High Court held as follows:

"Applying the test laid down by the Supreme Court in Empire Jute Co's case (1980) 124 ITR 1 to the facts before us, it is clear that even if securing electric supply for a period of seven years and longer, if the agreement to supply is not terminated by the Electricity Board, is a benefit of an enduring nature, if the advantage consisted in facilitating the assessee's trading operation and enabled the assessee to conduct its business more efficiently and more profitably, then the expenditure would still be on revenue account and not on capital account. The peculiar feature in this case is that the amount was spent for securing electric supply for the Beneficiation Plant which was intended to enable the assessee-company to carry on its business more efficiently and more profitably. It was a business which was being previously carried on by the assessee-company, namely, of extracting fluorspar ore and selling it but in order to enable it to carry on that business more efficiently and more profitably, the Beneficiation Plant was proposed to be installed and the electric cables and supply lines

were laid for that Beneficiation Plant as has been pointed out by the Tribunal in its order. Once the purpose of the Beneficiation Plant is properly understood, it is obvious that the advantage consisted merely in facilitating the conduct of the assessee's business and enabling the assessee to carry on its business more efficiently or more profitably, but the capital, in the sense of the block capital, was remaining untouched by the expenditure of this amount of Rs. 20.46 lakhs. Hence, in the commercial sense, it was not an advantage in the capital field. Since it left the fixed capital of the assessee employed for the main business of mining untouched and the advantage was not in the capital field, it could not be said to be an expenditure of a capital nature. As we have pointed out, while arriving at this conclusion, we are prepared to proceed on the footing that the advantage which the assessee-company got was an advantage of an enduring nature, but applying the test culled out by the Supreme Court in Empire Jute Co.'s case [1980] 124 ITR 1, it is obvious that, in spite of the presumption, it can be held on the facts and circumstances of this case that the expenditure was not of a capital nature but was of a revenue nature."

68. We note that the decision of the Hon'ble Gujarat High Court has been confirmed by the Supreme Court in CIT *v.* Gujarat Mineral Development Corporation. [2001] 249 ITR 787.

69. A similar principle has been laid down by the Division Bench of the Madras High Court in CIT *v.* Coats Viyella India Ltd. [2002] 253 ITR 667/124 Taxman 797, where the expenditure incurred by the assessee by way contribution to the government for building a new bridge for providing access to the factory of the assessee was held to be on the revenue account. The Hon'ble Madras High Court held as follows:

"Here, the bridge is one, which is built across the river. The bridge is not owned by assessee. It is built by the government, and the assessee does not acquire any rights of ownership over the bridge in the short-term or in the long run by reason of the contribution that it agreed to pay towards the construction of the bridge. So far as the assessee is concerned, the payment made is an outgo in return for which it receives no addition to the value of any of the assets owned by it. The bridge merely facilitates the movement of the workmen to gain access to the assessee's factory and to return home, and also for the movement of the goods over the bridge. The facts of this case are such as to bring it within the ratio of the decision in the case of L. H. Sugar Factory and Oil Mills (P) Ltd. v. CIT, (1980) 125 ITR 293 (SC). We, therefore, do not see any justification for calling for a reference. The Tribunal has rightly held that the amount is to be treated as revenue expenditure. The assessment year is 1991-92. The petitions are dismissed."

70. The Hon'ble Rajasthan High Court in CIT *v.* Hindustan Zinc Ltd [IT Appeal No. of 2002, dated 30.01.2009], also upheld similar contention of the tax payer wherein it was held that the erection of power lines by the assessee was for facilitating its routine operations and for smooth functioning of its business. The power lines remained the property of the Electricity Board. The Hon'ble Rajasthan High Court came to the conclusion that the assessee had not acquired a capital asset or any enduring benefit or advantage.

71. Again the Hon'ble Supreme Court in the case of CIT *v.* Associated Cement Company Ltd. [172 ITR 257] observed that a tripartite agreement was entered into by and between the Government, the

municipality, and the assessee-company, whereby the Company undertook, firstly, to supply water to municipality and provide water pipelines, secondly supply electricity for street lighting and put up a transmission line therefor, and thirdly, to concrete the main road from the factory to railway station. Based on the facts, the Hon'ble Apex Court observed that expenditure laid out by the assessee has not resulted in bringing into existence any capital assets for the Company. It was, thus, held that the expenditure was revenue in nature and deductible in computing the profits of the company.

72. The ratio of above decisions has also been confirmed by the Hon'ble jurisdictional High Court in the following cases:

i. *CIT vs. Sociedade De Fomento Industrial Pvt. Limited (123 taxmann.com 38) Bombay High Court*

ii. *CIT vs. Salgaocar Mining Industries Limited (108 taxmann.com 116) Bombay High Court*

73. Considered the rival submissions and material placed on record and we observe that it is undisputed fact that in the present case the ownership of all assets remained with the third parties. Further, it is also undisputed that although assessee has capitalized such assets in its books, it has not claimed depreciation u/s 32 of the Act on such assets.

74. The assessee incurred such expenditure out of commercial expediency and such expenditure although resulted in the benefit of enduring nature but since the ownership of such assets never belonged to the assessee or will always remain with either such third parties or Government authorities, the expenditure was not on capital account.

75. Thus from the decisions cited above, we see no compelling reason to take a different stand. The expenses incurred by the assessee was for facilitating its routine operations and for smooth functioning of its business and assessee has not acquired any capital asset. Thus, such expenditure should be treated as revenue expenditure. Accordingly, the Ground No. 4 raised by the assessee is allowed.

76. Ground No. 5 deals with the allowance of expenditure incurred by the assessee towards purchase of IPL tickets and meet & greet expenses.

77. The Ld.AR of the assessee contended that it has incurred expenditure towards purchase of IPL match tickets and also towards meet & greet functions during IPL matches. Such expenditures were incurred to entertain its long standing customers, to garner goodwill and

improve its business relations and therefore, it passes the test of commercial expediency. These expenses are essential for maintaining a healthy business relationship and advancement of the business objectives of the organisation.

78. The Ld. DR on the other hand relied on the order of authorities below to submit that the Assessing Officer had alleged that such expenditure were not wholly and exclusively for the purpose of business and the same are personal in nature.

79. The Ld.AR vehemently argued that for a corporate entity there cannot be any expenditure which could be held as personal in nature. For this, the Ld.AR placed reliance on the decision of the Hon'ble Gujarat High Court in case of Sayaji Iron & Engg. Co. *v.* CIT (2002) 253 ITR 749 which has made following important observations:

> *"The assessee which is a private limited company is a distinct assessable entity as per the definition of "person" under Section 2(31) of the Act. Therefore, it cannot be stated that when the vehicles are used by the directors, "even if they are personally used by the directors" the vehicles are personally used by the company, because a limited company by its very nature cannot have any "personal use". The limited company is an inanimate person and there cannot be anything personal about such an entity"*

80. Considered the rival submissions and material placed on record, we observe from the record, the disallowance was upheld by the Ld.CIT(A) on the ground that the assessee has not furnished documentary evidence to prove that such expenditure was incurred for distributors, dealers and stockists and thus held that such expenses were personal in nature and incurred for family & friends. No evidences were placed on record to prove such an allegation.

81. As regards non submission of the documentary evidence in relation to such expenditure, the Ld.AR submitted that the assessee has furnished relevant details on sample basis during the course of proceedings. With regard to the names of the parties, the Ld.AR submitted that it was important for the business to maintain secrecy of the recipient of such tickets. No such information was required to be maintained. Further once it is established that a Company cannot incur any personal expenses and since it is an accepted fact that the expenditure was not capital in nature, the expenditure is necessarily required to be held as revenue expenses.

82. In this regard, attention was drawn to the decision of the Ahmedabad Tribunal in case of ACIT *v.* Armee Infotech in ITA

1778/Ahd/2016 dated 11.01.2022 wherein the Tribunal has observed that in order to maintain secrecy of the business of the assessee it is not incumbent for the assessee to disclose personal details of recipient of gift.

83. Therefore, we are inclined to agree with the submission of Ld AR that a corporate entity can never be said to incur expenses which are personal in nature. The allegations of the authorities that the expenses incurred are for family and friends cannot be sustained as a corporate entity cannot be said to have any family or friends. The assessee being a sponsor of the event which was gaining lot of viewership and was becoming popular among cricket fans, had to satisfy the ever growing demand from its dealers and business associates by providing tickets for the event and hold meet and greet events.

84. We are, therefore, of the view that such expenses incurred by the assessee are for the purpose of promotion of business and hence allowable as deduction u/s 37 of the Act.

85. Having considered the grounds on merits, our view on each of the grounds is as under:

i) Ground No.1 is general in nature and requires no adjudication.

ii) Ground No. 2 relates to validity of reopening. The Assessing Officer in the case before us has not placed reliance on any new tangible material for framing the reassessment and the only material referred by the Assessing Officer is the assessment records of the assessee. We also fail to persuade ourselves to believe that while framing the original assessment order, the Assessing Officer did not look into the computation of total taxable income and relevant notes especially when details with respect to most of the additions made in the assessment order are flowing from the notes to return of income.

Further, regarding assets not owned which are claimed as revenue expenditure by the assessee, there was specific questionnaire issued by the Assessing Officer during the course of original assessment proceeding and a detailed submission was filed by the assessee in

support of its claim. With these facts on records, it cannot be said that there was a failure on the part of the assessee to disclose all or any material facts necessary to complete the assessment.

iii) We concur with the arguments put forth by the Ld.AR and the position taken by the Hon'ble Jurisdictional High Court in case of SBI (supra). We are of the view that if the assessee provides all the information (including filing of computation and notes to computation) and the Assessing Officer refers to it while passing the assessment order without making any observations regarding the claim not disputed, it will be assumed that the Assessing Officer has applied his mind to those issues.

iv) The facts present before us clearly indicate that the Assessing Officer had no new tangible material which formed the basis of reopening the assessment. The Assessing Officer has himself acknowledged the fact by stating as under

"although the documents/material, suggesting escapement of income, were available on records at the time of completion of assessment u/s 143(3) r.w.s. 153C of the Act, the same were remained to be examined by the Assessing Officer ."

Thus, the only material referred by the Assessing Officer is part of the assessment records and hence this leads to the conclusion that there was no failure on part of the assessee to disclose fully and truly all material facts necessary for conclusion of assessment.

v) In view of the above, we are of the view that once the relevant data / information / material is placed on records by the assessee with the Assessing Officer, it cannot be said that there was omission or failure on the part of the assessee to disclose fully and truly all material facts. If, therefore, based on same set of facts the Assessing Officer intends to reassess any income it will tantamount to change of opinion which is not allowed under the Act.

vi) The Explanation 1 to section 147 of the Act does not enlarge the power of the assessing authorities to

review the assessment. It is a precautionary provision to discharge the assessee not to submit the relevant information in the garb of information which is difficult to review and take decision. Thus, when the assessee has submitted complete and clear details which are easy to review for the authorities, they cannot take recourse of the above explanation for their own wrong. They are expected to carry out their function diligently and regularly. Reliance on the decision in the case of Mahyco Seeds Limited *v.* DCIT (ITA No. 2235/Mum/2016) is therefore misplaced.

vii) We are inclined to follow the judicial precedents of the Hon'ble Supreme Court and the Hon'ble jurisdictional High Court on the impugned subject to hold that the assumption of jurisdiction u/s 147 by the Assessing Officer, is based only on change of opinion, made without any tangible material that constituted new information and hence the reopening of assessment u/s 148 and consequential reassessment order passed u/s 147 is bad in law.

86. Even otherwise on the issues raised on merits in the reassessment, we have held as under: -

87. Ground No. 3 of the assessee relates to deduction claimed u/s.35DD. As discussed in Para No. 48 to 60, we are of the view that in absence of any provisions prohibiting, for allowance of any expense, the benefit of deduction cannot be denied subject to it being for the purpose of business and not a capital expenditure. The assessee is therefore entitled to deduction u/s 35DD for the balance years.

88. Ground No. 4 of the assessee relates to deduction of expenses incurred on certain facility / installation / construction of assets which are not owned by it.

89. The Hon'ble Supreme Court's decision in case of L.H. Sugar has clearly held that with the expenditure incurred the assessee did not acquire any asset of any enduring nature. The road in that cases belonged to the Government and hence the contribution made was held to be revenue expenses. Similar proposition has been laid down by the Gujarat High Court in case of GMDC (later confirmed by the Supreme

Court) where the expenses incurred on installation on transmission lines were held as revenue in nature.

90. The expenses incurred in the present case by the assessee are very much similar to the expenses considered in the above referred decision by the Hon'ble Apex Court. We therefore have no hesitation to follow the ratio laid down and hold that the expenses incurred are revenue in nature and allowable as deduction.

91. Ground No. 5 of the assessee relates to Allowability of IPL expenses. On this we are of the view that such expenses are incurred by the assessee for the purpose of business and hence allowable as deduction u/s 37 of the IT Act. A corporate cannot incur any expenses which are personal in nature. Merely because the details of beneficiary business associates are not maintained cannot make the expenses as non- business expenses.

92. It is also noted that the reasons recorded for reopening did not propose any addition towards IPL expenditure including meet & greet expenses. However, the said issue was separately taken up for verification during the assessment and disallowed.

93. Attention of the Bench in this regard was invited to the order of the Hon'ble Delhi High Court in case of CIT *v.* Adhunik Niryat Ispat Ltd in IT Appeal No. 2090 of 2010, wherein it has been held that when the grounds for reopening the reassessment do not exist any longer and no additions were ultimately made on that account, the addition in respect of the other items, which were not part of the " reasons to believe" cannot be made.Similar finding has been given by the Hon'ble Delhi High Court in the case of Ranbaxy Laboratories Ltd *v.* CIT [(2011) 242 CTR 117 (Del)]. We are in agreement with this contention put forth by the Ld.AR.

94. Accordingly, even if the department was to succeed on the validity of reopening, it would have been meaningless since on merits the assessee's appeal is allowed.

95. We direct the Assessing Officer to delete the additions accordingly. The issue in dispute involved in the grounds raised by the assessee is accordingly allowed in favour of the assessee.

96. With regard to Departmental Appeal in ITA. No. 1789/Mum/2021, Ground nos. 1 to 3 of the appeal relate to allowance of claim towards

expenditure incurred in connection with assets not owned by the assessee either by treating the same as revenue expenditure or allowing the same as deferred revenue expenditure.

97. We have already decided this issue while disposing the Ground no.3 of the assessee's appeal and in favour of the assessee. Accordingly, we reject this ground raised by the Revenue.

98. In the result appeal filed by the assessee is allowed and appeal filed by the revenue is dismissed.

ASSESSMENT YEAR: 2014-15

ITA NO. 220/MUM/2022 (A.Y. 2014-15) – ASSESSEE APPEAL

99. Assessee has raised following grounds in its appeal: -

> *"1. On the facts and in the circumstances of the case and in law, the learned Commissioner of Income-tax (Appeals) [CIT(A)] erred in confirming the order passed by the learned Asst. Commissioner of Income-tax, Central Circle 1(4), Mumbai (DCIT) under section 143(3) r.w.s. 147 of the Income-tax Act, 1961 (IT Act).*
>
> *2. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in confirming that the reassessment was validly carried out by DCIT. despite the following:*

- *No fresh facts or new material has been brought on record evidencing escapement of income;*

- *Reassessment based on same set of facts as existing in the original assessment, is nothing but mere change of opinion which is not permitted;*

- *Review of own assessment order is not permissible in the reassessment proceedings;*

- *Reassessment proceedings based on audit objection is not sustainable.*

3. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by DCIT in respect of the deduction claimed by appellant (being successor to amalgamating company) amounting to Rs.27,05,29,884 u/s 35DD of the IT Act pertaining to the amalgamation expenses incurred by the amalgamating company. The Learned CIT(A) erred in not appreciating that there is no restriction u/s 35DD for claiming such expenses and upon amalgamation, pursuant to the scheme approved by Hon'ble High Court, all assets and liabilities including any unexpired tax claim of amalgamating company were succeeded by appellant Company and appellant Company becomes eligible/ liable (as the case may be) for the same.

4. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in treating following expenditure incurred on installing assets/contributing for installing assets on the premises of third party for which it does not get any ownership, as capital expenditure:

- *Setting up of fly ash handling system at Thermal Power Plant Chhabra Unit 3 & 4 under Rajasthan Rajya Vidyut Utpadan Nigam Limited amounting to Rs. 14,70,55,410;*

- *Construction of concrete pavement work near fly ash silo at Harduaganj Thermal Power Station (Unit 8), Kasinpur under U.P. Rajya Vidyut Utpadan Nigam Limited amounting to Rs.38,08,220;*

- *Setting up of Fly ash handling system at Bellary Thermal Power Station under Karnataka Power Corporation Limited amounting to Rs 70,75,959,*

Without prejudice to above, and in the alternative the learned CIT(A) ought to have directed the learned DCIT to allow depreciation on expenditure treated as capital in nature and erred in not adjudicating this separate ground raised by the appellant

5. On the facts and in the circumstances of the case and in law, the learned CIT(A) erred in upholding the disallowance made by learned DCIT in respect of expenditure incurred towards purchase of IPL tickets, meet and greet expenses amounting to Rs.2,27,87,975 despite the fact that such expenditure was incurred to promote the goodwill of the appellant Company amongst the dealers/selling agents/business associates, which ultimately results in overall revenue growth of the appellant Company.

The Appellant Company craves leave to add, alter, amend or delete the aforesaid grounds of appeal from time to time and upto the date of hearings."

100. Ground no. 2 of the appeal relate to challenging the validity of reassessment.

101. This ground is similar to Ground no.2 of the assessee's appeal in ITA No. 1466/Mum/2021 for AY 2013-14. We have discussed this issue at length, hereinabove, while disposing the assessee's appeal for A.Y.2013-14 and allowed the ground of the assessee. Since facts relating to this ground of appeal remain same for A.Y. 2014-15 also except for the fact that in this year the reassessment has been initiated before the end of four years. However, we have also concluded that in

absence of any new material, reopening of assessment on the basis of material already on record at the time of assessment would merely tantamount to change of opinion which is not allowed even within the period of four years. We apply the ratio of the decision in the case of Parveen P. Bharucha *v.* DCIT [(2012) 348 ITR 325 (Bom)] in this regard. Accordingly, we allow Ground no.2 of the assessee's appeal and direct the Assessing Officer to delete the disallowance.

102. Ground no. 3 of the appeal relate to claim made by the assessee u/s 35DD of the Act.

103. This ground is similar to Ground no.3 of the assessee's appeal in ITA No. 1466/Mum/2021 for AY 2013-14. We have discussed this issue at length, hereinabove, while disposing the assessee's appeal for A.Y.2013-14 and allowed the ground of the assessee. Since facts relating to this ground of appeal remain same for AY 2014-15 also, we allow Ground No.3 of the assessee's appeal and direct the Assessing Officer to delete the disallowance.

104. Ground no. 4 of the appeal relate to claim made by the assessee with respect to assessee's claim towards expenditure incurred in

connection with assets not owned by the assessee by treating the same as revenue expenditure

105. This ground is similar to Ground no.4 of the assessee's appeal in ITA No. 1466/Mum/2021 for AY 2013-14. We have discussed this issue at length, hereinabove, while disposing the assessee's appeal for A.Y.2013-14 and allowed the ground of the assessee. Since facts relating to this ground of appeal remain same for AY 2014-15 also, we allow Ground No.4 of the assessee's appeal and direct the Assessing Officer to delete the disallowance.

106. Ground no. 5 of the appeal relate to claim made by the assessee for expenditure incurred towards purchase of IPL tickets, meet and greet expenses

107. This ground is similar to Ground no.5 of the assessee's appeal in ITA No. 1466/Mum/2021 for AY 2013-14. We have discussed this issue at length, hereinabove, while disposing the assessee's appeal for A.Y.2013-14 and allowed the ground of the assessee. Since facts relating to this ground of appeal remain same for A.Y.2014-15 also, we

allow Ground No.5 of the assessee's appeal and direct the AO to delete the disallowance.

108. In the result, appeal filed by the assessee is allowed.

ITA No. 222/MUM/2022 (A.Y. 2014-15) – REVENUE APPEAL

109. Revenue has raised following grounds in its appeal: -

"1. Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in allowing the capital expenditure of Rs. 12,72,93,009/- incurred for capital assets at the premise of third party?"

2. "Whether on the facts and in the circumstances of the case and in law, the nature and character of capital assets undergo change of usability from capital asset to revenue asset, if such capital asset is installed at the premise of third party for procurement of raw utilisation?" material and optimum

3. "Whether on the facts and in the circumstances of the case and in law, since the assessee did not prove ownership of any assets for the expenses incurred in power line transmission, would the decision of the Hon'ble Bombay High Court in CIT vs. Excel Industries Ltd. (1980) 122 ITR 995 be applicable to the assessee?"

4. "Whether on the facts and in the circumstances of the case and in law, the ld. CIT(A) was justified in not treating the expenditure of Rs. 14,55,267/- incurred for Rehabilitation and Resettlement (R & R) as capital expenditure, ignoring the fact that such expenditure is directly attributable, inseparable and compulsory part for land acquisition for projects within the meaning of Government policies for land acquisition and that the assessee shall not have discretion to separately claim such expenses as revenue expenditure?"

5. "The appellant craves leave to add, delete, alter, modify, rectify, substitute or otherwise any or all of the grounds of appeal at or before the time of hearing of the appeal"

110. Ground no. 1 to 4 of the appeal relate to allowance of claim towards expenditure incurred in connection with assets not owned by the assessee either by treating the same as revenue expenditure or allowing the same as deferred revenue expenditure.

111. This ground is similar to Ground no.1 to 3 of the department's appeal in ITA No. 1789/Mum/2021for AY 2013-14. We have rejected the department's appeal in A.Y.2013-14. Since facts relating to these grounds of appeal remain same for A.Y. 2014-15 also, we dismiss Ground No.1 to 4 of the department's appeal.

112. In the result, appeal filed by the revenue is dismissed.

113. To sum-up, appeals filed by the assessee are allowed and appeals filed by the revenue are dismissed.

Order pronounced in the open court on 28th June, 2023.

Sd/-	Sd/-
(SANDEEP SINGH KARHAIL)	**(S. RIFAUR RAHMAN)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai / Dated 28/06/2023
Giridhar, Sr.PS

Copy of the Order forwarded to:

1. The Appellant
2. The Respondent.
3. CIT
4. DR, ITAT, Mumbai
5. Guard file.

//True Copy//

BY ORDER

(Asstt. Registrar)
ITAT, Mum