IN THE INCOME TAX APPELLATE TRIBUNAL
MUMBAI BENCH "B" MUMBAI

BEFORE SHRI OM PRAKASH KANT (ACCOUNTANT MEMBER)
AND
SHRI PAVAN KUMAR GADALE (JUDICIAL MEMBER)

ITA Nos. 2748, 2747 & 2761/MUM/2023
Assessment Year: 2011-12, 2012-13 & 2013-14

DR Batras Positive Health Clinic Pvt. Ltd., 2nd floor, H Kantilal Compound, Andheri Kurla Road, Sakinaka Andheri East-400072 **PAN No. AABCD 3857 G**	***Vs.***	CIT(A), National Faceless Appeal Centre, Delhi.
Appellant		**Respondent**

Assessee by	:	Mr. Yogesh A. Thar, Mr. Chaitanya Joshi & Ms. Nidhi Agrawal
Revenue by	:	Mr. Ashok Kumar Ambastha, Sr. DR
Date of Hearing	:	21/11/2023
Date of pronouncement	:	29/12/2023

ORDER

PER OM PRAKASH KANT, AM

These appeals by the assessee are directed against separate orders, each dated 11/07/2023, passed by the learned commissioner of Income–tax (Appeals)-National Faceless Appeal Centre, Delhi [in short the Ld. 'CIT(A)'] for assessment years 2011-12; 2012-13 and 2013-14 respectively. In these appeals, common issue in dispute is involved and therefore same were heard together

and disposed off by way of this consolidated order for convenience and avoid reputation of facts.

2. The parties agreed to take up the appeal for assessment year 2012-13 for adjudication as lead case and apply the decision of the same on other years *mutatis mutandis*. Accordingly, the appeal for assessment year 2012-13 is being taken up first for adjudication. The grounds raised by the assessee in appeal are reproduced as under:

> *1. GROUND NO. 1: REOPENING OF ASSESSMENT U/S. 147 OF THE ACT IS BAD-IN-LAW:*
>
> *1.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in upholding the action of the Assistant Commissioner of Income Tax - 16(2), Mumbai ("the Id. AO") of reopening the assessment u/s. 147 of the Act holding the same justified and in accordance with the provisions of the law.*
>
> *1.2. The Id. CIT (A) failed to appreciate and ought to have held that:*
>
> *1.2.1. reopening in absence of no new tangible material is bad in law;*
>
> *1.2.2 reopening based on change of opinion with same set of facts is bad in law;*
>
> *1.2.3 in the absence of any allegation that there is a failure on the part of the assessee to furnish fully and truly all material and relevant facts for the purpose of the assessment, reassessment is bad in law;*
>
> *1.2.4 notice u/s 143(2) of the Act issued prior to disposing off the objections which is in violation of the principles of GKN Driveshafts (India) Ltd. v. ITO [2003] 259 ITR 19;*
>
> *1.2.5 reopening based on audit objection is bad in law reopening of assessment is invalid for vagueness in reasons;*
>
> *1.2.6 reopening merely on taking approval from Pr. CIT u/s 151 does not satisfy that AO has applies his mind;*
>
> *1.2.7. the reassessment is otherwise bad in law;*

1.3. The Appellant prays that the reopening proceedings u/s. 147 of the Act be held as void-ab-initio and/or otherwise bad in law.

WITHOUT PREJUDICE TO GROUND NO. 1,

2. GROUND NO. 2: DISALLOWANCE OF ADVERTISEMENT EXPENSES AMOUNTING TO RS. 3,72,89,606/-:

2.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the action of the Id. AO of disallowing the advertisement expenses of Rs. 3,72,89,606/- incurred by the Appellant holding the same to be allegedly in violation of 'The Homeopathy Practitioners Regulations, 1982' (hereinafter "Homeopathy Regulations).

2.2. The Id. CIT(A) failed to appreciate and ought to have held that:

2.2.1. the advertisement expenses are allowable expense under the Act and thus, the proviso to section 37(1) of the Act does not get attracted;

2.2.2. the Appellant has not violated any regulations under the Homeopathy Regulations;

2.2.3 since the Homeopathy Regulations mandatorily require an Individual Practitioner alone' to be registered, the Homeopathy Regulations apply only to 'Individual Practitioner' and not to a Company;

2.2.4. without prejudice, the advertising and promotion expenses are fully compliant with the Homeopathy Regulations and in turn with The Homeopathic Practitioners - (Professional Conduct, Etiquette and Code of Ethics) Regulations 1982 (hereinafter "Practitioners Regulations);

2.2.5. the question whether there is an infraction of law or whether the expenditure is incurred for any purpose which is an offence or which is prohibited by law has to be decided by the authority or the court empowered to do so under the respective law and the tax department cannot determine such violation under the other laws without any authority;

2.2.6 the Appellant has consistently claimed advertisement which have been allowed by Tax Department.

2.3 The Appellant prays that the disallowance of the advertisement expenses amounting to Rs. 3,72,89,606/- claimed by the Appellant while computing its income under the head 'Income from Business and Profession' be deleted.

WITHOUT PREJUDICE TO GROUND NO. 1,

3. GROUND NO. 3: DISALLOWANCE OF DEPRECIATION ON YACHT AMOUNTING TO RS. 29,62,433/-:

3.1. On the facts and in the circumstances of the case and in law, Id. CIT(A) erred in confirming the action of the Id. AO of not allowing depreciation on yacht amounting to Rs. 29,62,433/-.

3.2. The Id. CIT(A) failed to appreciate and ought to have held that:

3.2.1. the yacht has been used for the business of the Appellant for holding conferences etc. and therefore depreciation is allowable;

3.2.2. the asset had been added to the block of asset and it looses its identity when added to the block of assets;

3.2.3 depreciation on yacht is consistently claimed by the Appellant and the same has been accepted by the Id. AO in earlier years;

3.2.4 it is a settled position in law that claim of depreciation allowed in first year cannot be disallowed in subsequent assessment years unless the claim in the first year itself has been disturbed;

3.2.5. the Id. AO cannot sit in the armchair of the businessman to decide whether or not to use and how to use a particular asset for its business;

3.2.5 the Appellant at no stage of the proceedings had claimed to have used the yacht for treating patients;

3.2.6 The Appellant prays that the disallowance of the depreciation on yacht amounting to Rs. 29,62,433/- while computing its income under the head 'Income from Business and Profession' be deleted.

WITHOUT PREJUDICE TO GROUND NO. 1,

4. GROUND NO. 4: DISALLOWANCE OF REPAIRS ON YACHT AMOUNTING TO RS.23,23,212/-:

4.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the action of the Id. AO of disallowing the expenditure pertaining to repairs on yacht amounting to Rs. 23,23,212/- for the reason that the said yacht has not been used by the Appellant for its business.

4.2. The Id. CIT(A) failed to appreciate and ought to have held that:

4.2.1 the yacht has been used for the business of the Appellant for holding conferences etc. and therefore repairs expenditure in respect of the same is allowable u/s. 37(1);

4.2.2 repairs have been consistently allowed whenever claimed by the Appellant;

4.2.3 the Appellant at no stage of the proceedings had claimed to have used the yacht for treating patients.

4.3 The Appellant prays that the disallowance of expense on repairs of yacht amounting to Rs. 23,23,212/- while computing its income under the head 'Income from Business and Profession' be deleted."

3. Briefly stated facts of the case are that the assessee is a company engaged in operating 'homeopathic' clinics across the India for medical consultation and treatment of various ailments and diseases. For the year under consideration, the assessee filed return of income on 26/09/2012 declaring total income of ₹9,66,78,890/-. The scrutiny assessment under section 143(3) of the Income-tax Act, 1961 (in short 'the Act') was completed on 18/03/2015, wherein total income was assessed at ₹9,75,88,480/-. Subsequently, on the basis of the information in the form of audit objection raised by the Audit Officers of the Controller and Auditor General (C&AG) of India, the Assessing Officer recorded reasons to believe that income escaped assessment and reopened the assessment under section 147 of the Act by way of issuing notice under section 148 of the Act dated 29/03/2018.

3.1 In the re-assessment completed under section 147 of the Act on 28/12/2018, the Assessing Officer disallowed following expenses:

(i) Business promotion expenses amounting to ₹3,72,89,606/- ;
(ii) Depreciation on 'yacht' amounting to ₹29,62,433/-and
(iii) Repair expenses of the yacht amounting to ₹ 23, 23, 212/.

4. Aggrieved, the assessee filed appeal before the Ld. CIT(A), however, could not succeed, both on the legal ground challenging

validity of the reassessment as well as on merit of the addition/ disallowance made by the Assessing Officer. Therefore, the assessee is before us by way of the grounds raised as reproduced above.

5. Before us, the assessee has filed a paper book containing pages 1 to 202.

6. The ground No. 1 of the appeal relates to validity of the reassessment. The assessee has challenged validity of reassessment on the various issues.

6.1 Firstly, in **ground No.1.2.2**, the assessee has challenged reopening as bad in law being based on '**change of opinion'** on same set of facts. The learned counsel for assessee submitted that reassessment has been initiated for examining different aspects / another facet of issue of business promotion expenses, which was already dealt in assessment completed u/s 143(3) of the Act. The learned counsel referred to paper book page 80 to 84 and submitted that the Assessing Officer in para seven of the assessment order passed u/s 143(3) of the Act, had already made disallowance amounting to ₹ 1, 87, 624 out of the business promotion expenses and therefore reassessment is based on examination of 'another facet' of same issue or mere 'change of opinion' only. In support of the contention that Assessing Officer cannot reopen assessment to examine 'another facet' of same issue, the learned counsel relied on decision of the **Hon'ble Gujarat High Court in the case of Qx Kpo**

Services P Ltd vs DCIT (2018) 94 taxmann.com 467 (Guj). Further, he submitted that Special Leave Petition (SLP)filed by the Department against the said decision has been dismissed by the Hon'ble Supreme Court as reported in **(2018) 99 taxmann.com 301(SC)**. The learned counsel also relied on the decision of the Hon'ble Supreme Court in the case of **CIT vs Kelvinator of India Ltd** reported **in 320 ITR 561 (SC)**.

6.2 The learned DR on the other hand submitted that issue of disallowance of business promotion expenses has not been dealt by the Assessing Officer in the original assessment proceedings u/s 143(3) of the Act and the disallowance of ₹1,87,624/- referred by the learned counsel for assessee in para 7 of the assessment order is out of 'Public Relation Expenses' of ₹37,52,470/-, whereas in the reassessment proceeding, the Assessing Officer has disallowed expenses of ₹3,72,89,606/- out of 'advertisement and business promotion expenses' amounting to Rs.23,84,27,077/-. According to the Assessing Officer, no opinion was framed in respect of disallowance of 'advertisement and business promotion' expenses in the original assessment proceeding and therefore question of change of opinion on same set of facts does not arise in instant case. He also submitted that contention of examining of another facet of same expense of learned counsel of the assessee is also not correct in the case in hand.

6.3 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The contention of the assessee that in the original assessment proceeding, already disallowance has already been made out of same head of expenses and therefore now the Assessing Officer is not permitted to examine another facet of said expenses. However on perusal of para 7 of original assessment order, which is available on paper book pages 80 to 84, we find that disallowance in original assessment order has been made in respect of 'public relation expenses' and not in respect of 'advertisement and business promotion' expenses. For ready reference, the relevant paragraph of the original assessment order is reproduced as under:

> *"07. Public Relation Expenses: The assessee has debited Rs.37,52,470/- on public relation expenses. It is treated by the assessee that this expenditure has incurred necessarily to maintain public visibility and proper media relations in the interest of the business of the company. However, personal and non-business element cannot be ruled out in the types of expenditures as listed by the assessee. Hence 5% of these expenses ie, Rs. 1,87,624/- are disallowed and added back to the total income of the assessee.* ***(Amount added back: Rs. 1,87,624/-)"***

6.3.1 Before us no other evidence, like query letter issued by the AO or submission on behalf of assessee, has been submitted to support that the issue of disallowance of 'advertisement and business promotion' expenses was examined by the Assessing Officer in original assessment proceeding or any opinion was framed by him on the issue. Thus, in absence of examination of the issue or opinion framed on the issue of disallowance of 'advertisement and business promotion expenses' in the original

assessment proceeding, the decisions relied upon by the learned counsel for the assessee citing 'change of opinion' or examination of 'another facet' of same expense, are not applicable on the facts of the instant case and hence same are distinguishable. Accordingly, the relevant ground of the appeal is dismissed.

7. Secondly, in **ground No. 1.2.5** of the appeal, the assessee has challenged validity of the reassessment on the ground of '**vagueness'** of the reasons recorded and reopening on the basis of '**audit objection'**. The learned counsel for the assessee submitted that reasons recorded are vague and not clear. He further submitted that reopening based on the audit objection is not permissible. In support of the contention, the learned counsel relied on the decision of the Hon'ble Bombay High Court in the case of **DRM Enterprises reported in (2015) 55 taxmann.com 181 (Bom)** and Supreme Court in the case of **Indian & Eastern Newspaper Society vs CIT (1979) 119 ITR 996(SC)** and **CIT Vs Lucas TVS Ltd (2001) 249 ITR 306 (SC)**. The learned DR on the other hand submitted that in the reasons recorded, the Assessing Officer has clearly specified that expenses incurred on advertisement and business promotion being in violation of the statutory regulations therefore, there is no vagueness in the reasons recorded as alleged by the learned counsel for the assessee. As far as reopening based on the audit objection is concerned, the learned DR submitted that reopening on the basis of audit objection is permitted if the

Assessing Officer has reopened the assessment after due application of mind.

7.1 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. The assessee has challenged reasons recorded on the basis of the vagueness, therefore it is imperative to reproduce the reasons recorded for ready reference, as under:

> *"Subject: Reasons recorded for reopening of assessment U/s. 147 of the I.T. Act, 1961 in your case for A.Y. 2012-13 PAN AABCD3857G*
>
> *Assessee is a company carrying on the activity of operating homeopathy clinics for medical consultation and treatment and operates a large number of clinics located in various cities of the country. During the year assessee has declared income under the heads Profits and Gains of Business or Profession and Income from Other Sources. The assessee has filed the return of income of Rs. 9,66,78,890/-. The return was processed u/s. 143(1) and was assessed under section 143(3) on 18.03.2015 assessing income at Rs.9,75,88,480/-*
>
> *The revenue audit has vide LAR 54 cycle has held that the assessee has i incurred expenditure of Rs.23,84,27,0771- on advertisement and business promotion. Any expenditure in form of advertising/publicity by physician, by group of physicians or by institutions or organisations is unethical. This has resulted in underassessment of income amounting to Rs. 23,84,27.077/-with resultant short levy of tax amounting to Rs.7,73,57.665 ii)availed depreciation of Rs.29,62,433/- and repairs and maintenance charges of Rs.23,23,212 on account of repairs to the yatch in A.Y. 2012-13 on Azimuth Yacht. This has resulted in underassessment of income amounting to Rs.53,85,645/-with resultant short levy of tax amounting to Rs.17.47,372/-. The relevant portion of audit objection is as under:*
>
> *On perusal of the details filed, return of income and Annexure Il to Form 3CD pertaining to depreciation availed as per Income Tax, it is observed that assessee had incurred expenditure of Rs.23,84,27,0771- on advertisement and business promotion. In view of para 6(1) of the Homeopathic Practitioners Regulations, 1982, which is reproduced as follows:*
>
> > *"Solicitation of patients directly or indirectly by a practitioner of Homoeopathy either personally or by advertisement in the newspapers. by placards or by the distribution of circular cards*

or handbills is unethical. A practitioner of Homeopathy shall not make use of, or permit others to (make use of. him or his name as a subject of any form or manner of advertising or publicity through lay channels which shall be of such a character as to invite attention to hin or to his professionai position or skill or as would ordinarily result in his self-aggrandisementprovided that a practitioner of Homoeopathy is permitted formal announcement in press about the following matters, namely:-

(i) the starting of his practice:
(ii) change of the type of practice:
(iii) change of address:
(iv) temporary absence from duty;
(v) resumption of practice
(vi) succeeding to another's practice.

(2) He shall further not advertise himself directly or indirectly through price lists or publicity

materials of manufacturing firms or traders with whom he may be connected in any capacity, nor shall he publish cases. operations or letters of thanks from patients in non-professional newspapers or journals provided it shall be permissible for him to publish his name in connection with a prospectus or a director's or a technical expert's report"

As per the above, advertisement expenses incurred by the assessee is unethical. Therefore, the expenses incurred on advertisement and business promotion is needed to be added back. And therefore, in view of the above facts, I have reason to believe that income to the extent of Rs. 23,84,27,077/- has escaped assessment for the year A.Y.2012-13.

On perusal of the details filed, return of income and Annexure Il to Form 3CD pertaining to depreciation availed as per Incone Tax. it is observed that assessee had availed depreciation of Rs 29,62,433/- in A.Y. 2012-13 on Azimuth Yacht. Further the break up of repairs and maintenance charges debited to the P&L Account revealed that the assessee has debited an amount of Rs.23,23,212/- on account of repairs to the yatch. Since the assessee is in the business of medical consultation and treatment, the use of yatch for the purpose of business and profession is not justified. Therefore the depreciation availed and expenses debited on the yatch are incorrect and needed to be added back.

Therefore, in view of the above facts, I have reason to believo that income to the extent of Rs. 53,85,645/- has escaped assessment for the A.Y.2012-13.

Therefore in view of the above facts, I have reason to believe that income to the extent of Rs.24,38,12,722/- has escaped assessment for the A.Y.2012-13."

7.1.1 On perusal of above reasons recorded, we do not find any 'vagueness' and the Assessing Officer has duly recorded his reasons in respect of both the issues of 'advertisement and business promotion expenses' as well as 'expenses related to yacht'. The Assessing Officer has also specified the quantum of escapement of income in relation to both the issues. Therefore the allegations of the assessee of the vagueness in the reasons recorded are rejected. Regarding the contention of the learned counsel for the assessee that reopening on the basis of audit objection is not valid, the learned counsel relied on the decision of the Hon'ble Bombay High Court in the case of DRM Enterprises (supra), wherein the Hon'ble High Court has analysed the decision of the Hon'ble Supreme Court in the case of Indian & Eastern newspaper Society (supra).

7.1.2 After thoroughly considering the arguments put forth by both parties and the relevant judicial precedents, including Indian and Eastern Newspapers Society (supra), and CIT vs. Lucas T.V.S. Ltd. (supra), we have carefully examined whether the current case aligns with the established legal principles.

7.1.3 In the Indian and Eastern Newspapers Society (supra) case, it is emphasized that the internal audit party's stance on a legal matter does not constitute a valid basis for initiating re-assessment proceedings. This principle has been reiterated in the Lucas T.V.S. Ltd. (supra) case, where the audit party's perspective on a legal question did not warrant the initiation of re-assessment.

7.1.4 However, the decision in the case of **PVS Beedis Pvt. Ltd., 237 ITR 13 (SC)** provided a nuanced perspective, as the Hon'ble Supreme Court upheld the initiation of re-assessment proceedings based on a factual error identified by the internal audit party. The Hon'ble Court underscored that while the audit party cannot judicially interpret a provision, it is well within its role to draw the Assessing Officer's attention to relevant legal provisions. The relevant finding of Hon'ble Supreme Court is reproduced as under:

> "*3. We are of the view that both the Tribunal and the High Court were in error in holding that the information given by internal audit party could not be treated as information within the meaning of Section 147(b) of the Income Tax Act. The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law. In view of that we hold that reopening of the case under Section 147(b) in the facts of this case was on the basis of factual information given by the internal audit party and was valid in law. The judgment under appeal is set aside to this extent.*"

7.1.5 This distinction between interpreting the law and communicating its existence has been further emphasized in **CIT vs. First Leasing Co. of India Ltd. (2000) 241 ITR 248 (Mad).**

7.1.6 In essence, the Hon'ble Court has clarified that initiating re-assessment proceedings solely based on the audit party's interpretation of legal provisions is impermissible, however, when the audit party communicates the existence of law or highlights factual inaccuracies, such communication qualifies as 'information' justifying re-assessment. We further note that various decisions relied upon by the assessee have been considered by the Coordinate bench of Tribunal in the case of **Rollatainers Ltd., New Delhi in ITA No. 3134/Del/2010 for AY 2003-04**, wherein it is held that audit objection communicating law constitutes 'information' and thus reopening based in such audit objection is valid.

7.1.7 In the instant case before us also the audit party merely noticed the expenses incurred of ₹23,84,27,077/- incurred on 'advertisement in business promotion' expenses and referred to the homeopathic practitioners regulation, 1982. It is the Assessing Officer who after examination of the relevant annexure to 3CD report (tax audit report) formed opinion that said expenses were unethical and accordingly he recorded the reasons to believe that corresponding amount of the income had escaped assessment. The issue of disallowance of advertisement and business promotion expenses was not examined in original assessment proceeding and the audit party has merely communicated position of the law and the facts of the case and not interpreted the law. Further, it is not

the case that initially audit objection was not accepted by the AO as there are no evidences on record to substantiate the same.

7.1.8 Applying these principles to the present case, the audit objection presented a factual oversight where the AO had failed to recognize that a sum incurred and claimed on advertisement and business promotion by 'homeopathic practitioners' is in violation of Regulation issued by Government of Maharashtra. This omission, as communicated by the audit party, amounted to a communication of law rather than an interpretation of law. Therefore, the audit objection in this case qualifies as 'information,' justifying the initiation of reassessment proceedings

7.1.9 In conclusion, we do not find merit in the argument opposing the validity of reassessment based on the audit objection. The audit objection in the present case constitutes an 'information,' leading to a valid initiation of reassessment proceedings. The relevant ground of the appeal is accordingly dismissed.

8. In ground No. 1.2.3, the assessee has challenged validity of reopening on the ground that reopening beyond four years from the of the relevant assessment year, without failure in disclosing material facts on the part of the assessee, is bad in law.

8.1 The learned counsel for the assessee referred to the reasons recorded and submitted that the Assessing Officer has nowhere recorded that there was any failure on the part of the assessee in

disclosing the material facts fully and truly. He further submitted that assessee has duly disclosed all information in respect of advertisement and business promotion expenses in the original assessment proceeding and even provided entire list of the expenses claimed under said head and thus, assessee had disclosed all the facts related to said expenses fully and truly and in absence of any such failure on the part of the assessee, the assessment cannot be reopened for the assessment year beyond period of four years from the end of relevant assessment year. He submitted that the assessment year being 2012-13 and four years from the relevant assessment year expired on 31/03/2017, whereas notice under section 148 of the Act has been issued to the assessee on 26/03/2018. The learned counsel submitted that therefore reopening of the assessment beyond the period of four years from the end of the relevant assessment year, without satisfying the condition of the nondisclosure of material fact truly and fully by the assessee, is bad in law. The learned DR on the other hand relied on the order of the lower authorities.

8.2 We have heard rival submission of the parties on the issue in dispute and perused the relevant material on record. In the case original assessment was completed under section 143(3) of the Act on 18/03/2015 and thereafter case has been reopened on 26/03/2018. Regarding the reopening of the completed assessment

beyond the four years from the of the relevant assessment year, the proviso below the section 147 prescribes as under:

> *"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :*
>
> ***Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:***
>
> *……"*

8.3 As far as facts of the case in hand are concerned, details of advertisement and business promotion expenses were already available on the assessment record and it is not the case that assessee has hidden or suppressed any of the details of advertisement and business promotion expenses during the course of original assessment proceeding and thus, we do not find any failure on the part of the assessee in disclosing all material facts truly and fully to the Assessing Officer. Further, the Assessing Officer while recording 'reasons to believe' has also not formed his belief that there was any failure on the part of the assessee in disclosing all the material facts truly and fully. Thus invoking the

above proviso, where assessment has been completed under section 143(3) of the Act, the Assessing Officer is barred from reopening the assessment beyond the period of four years from end of the relevant assessment year unless there is a failure on the part of the assessee in disclosing all the material fact truly and fully. In absence of any such satisfaction by the Assessing Officer, the reopening of the assessment is invalid and bad in law. The reassessment proceedings are accordingly quashed. The relevant ground of the appeal of the assessee is accordingly allowed.

9. In ground 1.2.4 the assessee has challenged reopening on the ground that notice under section 143(2) of the Act was issued, prior to disposing off the objections, which is in violation of the principle of Hon'ble Supreme Court in the case of **GKN Driveshaft(india) Ltd Vs ITO (2003) 259 ITR 19.** The learned counsel referred to the decision of the Hon'ble Supreme Court and further referred to the decision of the coordinate bench of the Tribunal in the case of **Motilal R Todi vs ACIT (2017) 174 TTJ 185(Mumbai)** and submitted that the Assessing Officer was required to issue notice under section 143(2) of the Act only after disposing off the objection of the assessee against reopening of the assessment. He submitted that the Assessing Officer has disposed off the objections of the assessee on 05/11/2018 whereas the notice under section 143(2) of the Act was issued on 07/09/2018, which being prior to the disposal of the objections, is in violation of the principle laid down

by Hon'ble Supreme Court in the case of GKN Driveshaft Ltd (supra). The learned counsel for the assessee filed a detailed chart of various dates for action taken in the process of reassessment proceeding. For ready reference, said chart is reproduced as under:

Chart showing chronology of reassessment proceedings :

Sr. No.	**Particulars**	**AY 2011-12**	**AY 2012-13**	**AY 2013-14**
		Date		
1.	AO to record reasons for reopening	-	-	-
2.	AO to obtain prior approval u/s 151	23-03-2018 (FPB - 236)	23-03-2018 (FPB - 202)	22-03-2018 (FPB – 235)
3.	AO to issue notice u/s 148	26-03-2018 (FPB - 103)	26-03-2018 (FPB - 85)	30-03-2018 (FPB - 113)
4.	Assessee to file ROI and ask for reasons for reopening	16-04-2018 (FPB - 104)	16-04-2018 (FPB - 86)	16-04-2018 (FPB - 114)
5.	**AO to provide copy of reasons for reopening**	**07-09-2018 (FPB -105)**	**07-09-2018 (FPB -87)**	**07-09-2018 (FPB - 115)**
6.	**Assessee to file objections to reopening**	**19-10-2018 (FPB - 108)**	**19-10-2018 (FPB - 91)**	**19-10-2018 (FPB - 118)**
7.	AO to pass order disposing objections to reopening	05-11-2018 (FPB - 111)	05-11-2018 (FPB - 94)	05-11-2018 (FPB - 121)
8.	**AO to issue notice u/s 143(2) w.r.s. 147/148**	**07-09-2018 (FPB - 107)**	**07-09-2018 (FPB - 90)**	**07-09-2018 (FPB - 117)**

9.1 The learned departmental representative(DR) on the contrary, submitted that under the procedure laid down in GKN Driveshaft Ltd (supra), there is no specific mention as when notice under section 143(2) of the Act can be issued. He submitted that under the notice u/s 143(2) of the Act, an assessee is asked only to support the return of income filed with evidences only and therefore no prejudice is caused to the assessee by merely issuing notice under section 143(2) of the Act. The issuing of notice under section 143(2) of the Act cannot come in ways of AO, if he is satisfied with the objection of the assessee and the Assessing Officer can drop the

proceedings under section 148 of the Act even after issuing notice u/s 143(2) of the Act.

9.2 We have heard rival submission of the parties on the issue in dispute in the light of the material available on record. We find that coordinate bench of the Tribunal in the case of Motilal R Todi (supra) has charted out various steps of reassessment proceedings in pursuance to the decision of the Hon'ble Supreme Court in the case of GKN Drivshaft (India) Ltd (supra). The relevant part of the decision of the Tribunal(supra) is reproduced as under:

> *"6.3. Thus, taking help from these judgments, relevant provisions of law, fixing obligations upon the AO for making mandatory compliances, in a step-wise manner, for valid assumption of jurisdiction for reopening and reframing of reassessment order, can be summarized as under:*
>
> *(i) Availability of the new tangible material indicating escaped income of the assessee, which should have come into possession of the AO, after the passing of original assessment order, whether u/s 143(3) or 143(1),*
>
> *(ii) Recording of the 'Reasons' by the AO: 'Reasons' recorded should not be based upon the change of opinion of the Assesing Officer. 'Reasons' should be such that any person of ordinary prudence should be in a position to make a belief about escapement of income on the basis of facts narrated and material referred to, in the 'Reasons' recorded. The 'Reasons' should show that, there is rational nexus and cause & effect relationship between the material sought be relied upon in the Reasons and belief sought to be formed by the AO about escapement of income.*
>
> *(iii) (iii) In case; reopening is sought to be done by the AO after expiry of four years from the end of the relevant assessment year and the original assessment was framed u/s 143(3) then reasons can be recorded only if there was failure on the part of the assessee in disclosure of material of facts, as has been envisaged in first proviso to section 147.*
>
> *(iv) (iv) Before issuing notice u/s 148, the AO has to obtain, on the reasons recorded by him, sanction for reopening of the case, from the competent authority as envisaged u/s 151 viz. Additional Commissioner or the Commissioner of Income Tax, as the case may*

be. Before granting its sanction, the sanctioning authority is required to record its satisfaction based upon its independent application of mind, making out a case that as per the facts narrated and material referred to in the 'Reasons' recorded by the AO, a belief can be formed about escapement of income and case sought to be reopened is a fit case for reopening u/s 147.

(v) *(v) After obtaining the sanction, the AO is required to issue and serve notice u/s 148 upon the assessee, within the time limit as prescribed u/s 149, to enable him to assume jurisdiction to reopen the assessment.*

(vi) *(vi) The assessee is required to file to return of income, in response to notice u/s 148 and may request for the copy of reasons.*

(vii) *(vii) The AO is bound, as per law, to provide a certified and verbatim copy of Reasons to the assessee.*

(viii) *(viii) The assessee may file its objections before the AO, to the Reasons recorded, if any.*

(ix) *(ix) In pursuance to judgment of Hon'ble Supreme Court in the case of GKN Driveshafts 259 ITR 19 (SC), the AO is obliged to dispose of these objections and intimate the same to the assessee, before proceeding further with the reassessment proceedings. (x) Thereafter, the AO is obliged under the law to issue and serve notice u/s 143(2) to enable him to make http://www.itatonline.org 11 Motilal R. Todi assessment of the return filed by the assessee in response to notice issued under section 148.*

(x) *(xi) Framing of the re-assessment order by the AO u/s 147/143(3) after providing adequate opportunity of hearing to the assessee and considering replies and evidences of the assessee, and all other applicable provisions of the Act.*

6.4. The aforesaid compliances have to be made by the AO u/s 147 to 151 of Income Tax Act, 1961 read with other relevant provisions of the Act, in a step-wise and chronological manner. Therefore, validity of the reopening proceedings initiated by the AO, can be examined in this step-wise or chronological manner only."

9.2.1 Evidently, in the instant case notice under section 143(2) of the Act has been issued prior to disposal off the objection of the assessee challenging reopening, which is not permitted as held by the Tribunal (supra), and therefore following the finding of the Tribunal, the reassessment proceeding are liable to be quashed. Therefore, we are of view that other propositions of learned counsel

for the assessee challenging validity of the reassessment are also accordingly not required to be adjudicated upon.

9.2.2 Since we have held the reassessment proceeding as invalid in law and the reassessment order stands quashed, the impugned order of the Ld. CIT(A) for assessment year 2012-13 is also set aside and we are not required to adjudicate upon arguments of parties on the other grounds of the assessee challenging merit of the addition.

10. Now we take up the appeal of the assessee for assessment year 2013-14. The grounds raised by the assessee are reproduced as under:

> *GROUND NO. 1: REOPENING OF ASSESSMENT U/S. 147 OF THE ACT IS BAD-IN-LAW*
>
> *1.1 On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in upholding the action of the Assistant Commissioner of Income Tax - 16(2), Mumbai ("the Id. AO") of reopening the assessment u/s. 147 of the Act holding the same justified and in accordance with the provisions of the law.*
>
> *1.2. The Id. CIT(A) failed to appreciate and ought to have held that:*
>
> *1.2.1. reopening in absence of no new tangible material is bad in law;*
>
> *1.2.2. reopening based on change of opinion with same set of facts is bad in law;*
>
> *1.2.3. in the absence of any allegation that there is a failure on the part of the assessee to furnish fully and truly all material and relevant facts for the purpose of the assessment, reassessment is bad in law;*
>
> *1.2.4 notice u/s 143(2) of the Act issued prior to disposing off the objections which is in violation of the principles of GKN Driveshafts (India) Ltd. v. ITO [2003| 259 ITR 19;*

1.2.5 reopening based on audit objection is bad in law reopening of assessment is invalid for vagueness in reasons;

1.2.6 reopening merely on taking approval from Pr. CIT u/s 151 does not satisfy that AO has applies his mind;

1.2.7. the reassessment is otherwise bad in law;

1.3. The Appellant prays that the reopening proceedings u/s. 147 of the Act be held as void-ab-initio and/or otherwise bad in law.

WITHOUT PREJUDICE TO GROUND NO. 1,

2. GROUND NO. 2: DISALLOWANCE OF ADVERTISEMENT EXPENSES AMOUNTING TO RS. 4,01,53,779/-:

2.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the action of the Id. AO of disallowing the advertisement expenses of Rs. 4,01,53,779/- incurred by the Appellant holding the same to be allegedly in violation of The Homeopathy Practitioners Regulations, 1982' (hereinafter "Homeopathy Regulations).*

2.2. The Id. CIT(A) failed to appreciate and ought to have held that:

2.2.1. the advertisement expenses are allowable expense under the Act and thus, the proviso to section 37(1) of the Act does not get attracted;

2.2.2. the Appellant has not violated any regulations under the Homeopathy Regulations;

2.2.3. since the Homeopathy Regulations mandatorily require an Individual Practitioner alone' to be registered, the Homeopathy Regulations apply only to Individual Practitioner' and not to a Company;

2.2.4 without prejudice, the advertising and promotion expenses are fully compliant with the Homeopathy Regulations and in turn with 'The Homeopathic Practitioners - (Professional Conduct, Etiquette and Code of Ethics) Regulations 1982 (hereinafter "Practitioners Regulations");

2.2.5. the question whether there is an infraction of law or whether the expenditure is incurred for any purpose which is an offence or which is prohibited by law has to be decided by the authority or the court empowered to do so under the respective law and the tax department cannot determine such violation under the other laws without any authority;

2.2.6 the Appellant has consistently claimed advertisement which have been allowed by Tax Department.

2.3 The Appellant prays that the disallowance of the advertisement expenses amounting to Rs. 4,01,53,779/- claimed by the Appellant while computing its income under the head 'Income from Business and Profession' be deleted.

WITHOUT PREJUDICE TO GROUND NO. 1,

3. GROUND NO. 3: DISALLOWANCE OF DEPRECIATION ON YACHT AMOUNTING TO RS. 23,69,946/-:

3.1. On the facts and in the circumstances of the case and in law, Id. CIT(A) erred in confirming the action of the Id. AO of not allowing depreciation on yacht amounting to Rs. 23,69,946/-.

3.2. The Id. CIT(A) failed to appreciate and ought to have held that:

3.2.1. the yacht has been used for the business of the Appellant for holding conferences etc. and therefore depreciation is allowable;

3.2.2. the asset had been added to the block of asset and it looses its identity when added to the block of assets;

3.2.3 depreciation on yacht is consistently claimed by the Appellant and the same has been accepted by the Id. AO in earlier years;

3.2.4 it is a settled position in law that claim of depreciation allowed in first year cannot be disallowed in subsequent assessment years unless the claim in the first year itself has been disturbed;

3.2.5 the Id. AO cannot sit in the armchair of the businessman to decide whether or not to use and how to use a particular asset for its business;

3.2.6 the Appellant at no stage of the proceedings had claimed to have used the yacht for treating patients;

3.3 The Appellant prays that the disallowance of the depreciation on yacht amounting to Rs. 23,69,946/- while computing its income under the head Income from Business and Profession' be deleted.

11. In the year under consideration also original assessment proceeding were completed under section 143(3) of the Act and the reassessment proceeding has been taken up beyond the period of the four years from the of the relevant assessment years that too without recording any failure on the part of the assessee in

disclosing all the facts truly and fully. Thus, following our finding in assessment year 2012-13, the reassessment proceeding in the year under consideration are also held to be invalid and accordingly the reassessment order passed by the Assessing Officer is quashed and the impugned order of the Ld. CIT(A) is set aside. The grounds challenging validity of the reassessment are accordingly allowed. Consequently, the grounds challenging merit of the addition are not required to be adjudicated upon.

12. Now we take up, the appeal of the assessee for assessment year 2011-12. The grounds raised by the assessee are reproduced as under:

> *GROUND NO. 1: REOPENING OF ASSESSMENT U/S. 147 OF THE ACT IS BAD-IN-LAW*
>
> *1.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in upholding the action of the Assistant Commissioner of Income Tax - 16(2), Mumbai (the Id. AO") of reopening the assessment u/s. 147 of the Act holding the same justified and in accordance with the provisions of the law.*
>
> *1.2. The Id. CIT(A) failed to appreciate and ought to have held that:*
>
> *1.2.1 reopening after the expiry of a period of four years from the end of the relevant assessment year, is bas in law;*
>
> *1.2.2 reopening in absence of no new tangible material is bad in law;*
>
> *1.2.3. reopening based on change of opinion with same set of facts is bad in law;*
>
> *1.2.4 in the absence of any allegation that there is a failure on the part of the assessee to furnish fully and truly all material and relevant facts for the purpose of the assessment, reassessment is bad in law;*

1.2.5 notice u/s 143(2) of the Act issued prior to disposing off the objections which is in violation of the principles of GKN Driveshafts (India) Ltd. v. ITO [2003] 259 ITR 19;

1.2.6 reopening based on audit objection is bad in law reopening of assessment is invalid for vagueness in reasons;

1.2.7 reopening merely on taking approval from Pr. CIT u/s 151 does not satisfy that AO has applies his mind;

1.2.8. the reassessment is otherwise bad in law;

1.3 The Appellant prays that the reopening proceedings u/s. 147 of the Act be held as void-ab-initio and/or otherwise bad in law.

WITHOUT PREJUDICE TO GROUND NO. 1,

2. GROUND NO. 2: DISALLOWANCE OF ADVERTISEMENT EXPENSES AMOUNTING TO RS. 3,05,22,128/-:

2.1. On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the action of the Id. AO of disallowing the advertisement expenses of Rs. 3,05,22,128/- incurred by the Appellant holding the same to be allegedly in violation of The Homeopathy Practitioners Regulations, 1982' (hereinafter "Homeopathy Regulations").

2.2. The Id. CIT(A) failed to appreciate and ought to have held that:

2.2.1. the advertisement expenses are allowable expense under the Act and thus, the proviso to section 37(1) of the Act does not get attracted;

2.2.2 the Appellant has not violated any regulations under the Homeopathy Regulations;

2.2.3 since the Homeopathy Regulations mandatorily require an 'Individual Practitioner alone' to be registered, the Homeopathy Regulations apply only to 'Individual Practitioner' and not to a Company;

2.2.4 without prejudice, the advertising and promotion expenses are fully compliant with the Homeopathy Regulations and in turn with The Homeopathic Practitioners - (Professional Conduct, Etiquette and Code of Ethics) Regulations 1982 (hereinafter "Practitioners Regulations"):

2.2.5 the question whether there is an infraction of law or whether the expenditure is incurred for any purpose which is an offence or which is prohibited by law has to be decided by the authority or the court empowered to do so under the respective law and the tax department

cannot determine such violation under the other laws without any authority;

2.2.6 the Appellant has consistently claimed advertisement which have been allowed by Tax Department.

2.3 The Appellant prays that the disallowance of the advertisement expenses amounting to Rs. 3,05,22, 128/- claimed by the Appellant while computing its income under the head Income from Business and Profession' be deleted.

WITHOUT PREJUDICE TO GROUND NO. 1,

3. GROUND NO. 3: DISALLOWANCE OF DEPRECIATION ON YACHT AMOUNTING TO RS. 22,72,613/-:

3.1. On the facts and in the circumstances of the case and in law, Id. CIT(A) erred in confirming the action of the Id. AO of not allowing depreciation on yacht amounting to Rs. 22,72,613/-.

3.2. The Id. CIT(A) failed to appreciate and ought to have held that:

3.2.1 the yacht has been used for the business of the Appellant for holding conferences etc. and therefore depreciation is allowable;

3.2.2. the asset had been added to the block of asset and it looses its identity when added to the block of assets;

3.2.3. depreciation on yacht is consistently claimed by the Appellant and the same has been accepted by the Id. AO in earlier years;

3.2.4 it is a settled position in law that claim of depreciation allowed in first year cannot be disallowed in subsequent assessment years unless the claim in the first year itself has been disturbed;

3.2.5 the Id. AO cannot sit in the armchair of the businessman to decide whether or not to use and how to use a particular asset for its business;

3.2.6 the Appellant at no stage of the proceedings had claimed to have used the yacht for treating patients;

3.3 The Appellant prays that the disallowance of the depreciation on yacht amounting to Rs. 22,72,613/- while computing its income under the head Income from Business and Profession' be deleted.

WITHOUT PREJUDICE TO GROUND NO. 1,

4. GROUND NO. 4: DISALLOWANCE OF REPAIRS ON YACHT AMOUNTING TO RS. 17,67,9231-:

4.1 On the facts and in the circumstances of the case and in law, the Id. CIT(A) erred in confirming the action of the Id. AO of disallowing the expenditure pertaining to repairs on yacht amounting to Rs. 17,67,923/- for the reason that the said yacht has not been used by the Appellant for its business.

4.2. The Id. CIT(A) failed to appreciate and ought to have held that:

4.2.1. the yacht has been used for the business of the Appellant for holding conferences etc. and therefore repairs expenditure in respect of the same is allowable u/s. 37(1);

4.2.2. repairs have been consistently allowed whenever claimed by the Appellant;

4.2.3 the Appellant at no stage of the proceedings had claimed to have used the yacht for treating patients.

4.3 The Appellant prays that the disallowance of expense on repairs of yacht amounting to Rs. 17,67,923/- while computing its income under the head Income from Business and Profession' be deleted.

13. In the year under consideration, the original assessment was not completed under section 143(3) of the Act and therefore, the proviso below the section 147 prescribing reopening beyond the four years from the end of the relevant assessment year only in case of failure on the part of the assessee in disclosing material facts truly and fully, is not applicable in the instant assessment year. However as far as the issue of notice under section 143(2) of the Act in reassessment proceeding prior to disposing off the objection of the assessee challenging reopening of the assessment, we find that Assessing Officer has violated the requirement of procedure laid down by the Hon'ble Supreme Court in the case of GKN Driveshaft (India) ltd (supra), as held by us in the appeal of the assessee for assessment year 2012-13, therefore following our finding in assessment year 2012-13, the reassessment proceeding in the year

under consideration i.e AY 2011-12 are accordingly quashed. Since we have quashed the reassessment proceeding, the finding of the Ld. CIT(A) are accordingly set aside and we are not required to adjudicate upon merit of the addition.

14. In the result, all the appeals of the assessee are allowed.

Order pronounced in the open Court on 29/12/2023.

Sd/-	**Sd/-**
(PAVAN KUMAR GADALE)	**(OM PRAKASH KANT)**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Mumbai;
Dated: 29/12/2023
Dragon Legal/Rahul Sharma, Sr. P.S.

Copy of the Order forwarded to :

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

BY ORDER,

//True Copy//

(Assistant Registrar)
ITAT, Mumbai