IN THE INCOME TAX APPELLATE TRIBUNAL
PUNE BENCH "B", PUNE

BEFORE SHRI R. K. PANDA, VICE PRESIDENT
AND
MS ASTHA CHANDRA, JUDICIAL MEMBER

ITA No.97/PUN/2024
Assessment Year : 2009-10

ITO, Ward 1(1), Solapur	**Vs.**	Ms. Kshirsagar Fabrics S.No.286, Majarewadi, Solapur – 413251
		PAN: AABFK6351P
(Appellant)		**(Respondent)**

Assessee by	**:**	Shri Nikhil Pathak
Department by	**:**	Shri Sourabh Nayak, Addl. CIT
Date of hearing	**:**	11-07-2024
Date of pronouncement	**:**	17-09-2024

O R D E R

PER ASTHA CHANDRA, JM :

This appeal filed by the Revenue is directed against the order dated 23.11.2023 of the CIT(A) / NFAC relating to assessment year 2009-10.

2. Although a number of grounds have been raised by the assessee, however, these all relate to the order of the CIT(A) / NFAC in quashing the re-assessment proceedings initiated by the Assessing Officer and thereby deleting the addition of Rs.66,20,000/- made by the Assessing Officer u/s 40A(3) of the Income Tax Act, 1961 (hereinafter referred to as 'the Act').

3. Facts of the case in brief, are that the assessee is a partnership firm engaged in the business of dealing in chaddar and towels. It filed its return of income on

29.09.2009 declaring total income at Rs.2,30,550/-. The assessment was completed u/s 143(3) of the Act on 28.11.2011 by determining the total income at Rs.3,43,230/-. Subsequently, the Assessing Officer reopened the assessment by recording the following reasons which are reproduced by the CIT(A) / NFAC in the appellate order and which reads as under:

> *"5.2 Thus, it is clear from these remarks of the AO that a) none of the payments have exceeded Rs. 20000 in a day, and b) there are no split payments had been verified while completing the assessment proceedings. However, the AO, then proceeded to reopen the assessment by issuing notice u/s. 148 on 25/03/2014 on the following reasons:-*
>
> > *"During the financial year relevant to the A. Y. 2009-10, the assessee had made payment to the 15 related parties in cash totaling to Rs. 66.20 lacs in respect of which the assessee has not given any reasons or what was the exigency for making of such cash payment to these parties, whereas on other occasions payments to these parties were made through banking channels also. So also, whether these payments attract the exemption or not under Rule 6DD of the IT Rules. 1962 is also not furnished by the assessee. Thus, these transactions were deliberately split to circumvent the provisions of Section 40A(3) of the I.T. Act, 1961.*
>
> *From the foregoing facts, it is seen that the assessee failed to disclose the fully and truly all material facts necessary for assessment year under consideration, since it is reasoned to believe that the above income chargeable to tax to the extent of Rs.66,20,000 is escaped income for the assessment year under consideration. Considering the same notice u/s. 148 of the I.T.Act, 1961 to reassess/recompute the income escaped from the assessment is being issued."*

4. Accordingly, notice u/s 148 of the Act was issued and served on the assessee, in response to which the assessee filed a letter on 21.04.2014 stating that the return filed originally may be treated as return in response to the notice u/s 148 of the Act. The assessee also requested to supply the reasons recorded which were duly provided to the assessee.

5. During the course of assessment proceedings the Assessing Officer asked the assessee to explain as to why the provisions of section 40A(3) of the Act should not be applied to the cash payments made totaling to Rs.66.20 lacs in violation of provisions of section 40A(3) of the Act. Rejecting the various explanations given by the assessee, the Assessing Officer made addition of Rs.66,20,000/- u/s 40A(3) of the Act.

6. Before the CIT(A) / NFAC, the assessee, apart from challenging the addition on merit, challenged the validity of the re-assessment proceedings. It was explained that the reopening was made on the basis of objections raised by the audit party. The original assessment was completed u/s 143(3) of the Act and full details were given. Further, the Assessing Officer himself in his reply to the objection raised by the audit party had not agreed to their proposition. Relying on various decisions it was argued that the initiation of re-assessment proceedings was not in accordance with law. The assessee also challenged the addition on merit before the CIT(A) / NFAC.

7. Based on the arguments advanced by the assessee, the CIT(A) / NFAC quashed the re-assessment proceedings by observing as under:

> *"5. Ground No 1 and 2 are directed against the Assessing Officer (hereinafter referred to as the AO) completing assessment u/s 147 based on a mere change of opinion. The brief fact of the case is that the appellant filed the return of Income for the Assessment year (AY) 2009-10 on 29.09.2009 declaring a total income of Rs 2,30,550. The case was selected for scrutiny and the assessment was completed u/s. 143(3) of the Act determining the assessed income at Rs.3,43,230 on 28/11/2011. Subsequently, revenue audit party raised objection on 21/8/2013 as follows:*

"It is seen from the records of the assessee that in the Ledgers of various related parties in the period from 1/4/2008 to 31/3/2009 the assessee had paid Rs. 68,85,000 to 16 related parties on 359 occasions towards purchase of goods. The Department did not verify the exigencies of payments so made in cash as it was seen that on other occasion payments to these parties were made through banking channel also. Hence the exemption cited under rite 6DD of Income Tax Rules. 1962 was not applicable to these transactions. It was the transactions were deliberately split to circumvent the provisions of Sec 40A(3) (Separate annexure attached of various related parties whom payment given by assessee) However, no disallowance was made despite clear legal position. Omission resulted in underassessment of income Rs.68,85,000 involving short levy of tax of Rs. 21,27,465

5.1 It is seen that the AO did not agree with the 30/08/2013, the AO stated:

"In the instant case, on careful verification of the ledger accounts based on which the audit objection is raised, it is found that none of the payments have exceeded Rs 20000 in a day, and there are no split payments. Thus, these facts had already been verified while completing the assessment proceedings, therefore, none of the payment referred in the audit objection attracts provisions of Section 40A(3).

5.2. Thus, it is clear from these remarks of the AO that a) none of the payments have exceeded Rs. 20000 in a day, and b) there are no split payments had been verified while completing the assessment proceedings. However, the AO, then proceeded to reopen the assessment by issuing notice u/s. 148 on 25/03/2014 on the following reasons.-

"During the financial year relevant to the A. Y. 2009-10, the assessee had made payment to the 15 related parties in cash totaling to Rs. 66.20 lacs in respect of which the assessee has not given any reasons or what was the exigency for making of such cash payment to these parties, whereas on other occasions payments to these parties were made through banking channels also So also whether these payments attract the exemption or not under Rule 6DD of the 11 Rules, 1962 is also not furnished by the assessee. Thus these transactions were deliberately split to circumvent the provisions of Section 404(3) of the IT Act 1961.

From the foregoing facts, it is seen that the assessee failed to disclose the fully and truly all material facts necessary for assessment year under consideration, since it is reasoned to believe that the above income chargeable to tax to the extent of Rs.66,20,000 is escaped income for the assessment year under consideration Considering the same notice u/s 146 of the LT Act. 1961 to reassess/recompute the income escaped from the assessment is being issued."

5.3. The appellant during the appeal proceeding submitted that the assessment for the A.Y. 2009-10 was completed u/s 143(3), in course of which all the relevant information including the account extracts of all the suppliers were called for furnished and are on the record of the Department and that the AO had called for the account extracts and extracts of the cash book precisely to verity cash payments. The appellant further submitted that not a single cash payment has been

made exceeding the limit of Rs 20000 specified in Section 40A(3) The appellant also placed strong reliance on the decision of Bombay High Court in IL&FS Investment Managers Ltd. vs ITO (2008) 298 ITR 32. The appellant also submitted that there is no failure on the part of the appellant to disclose fully and truly all material facts. The appellant submitted that it is a mere change of opinion, and AO had no reason to believe that income has escaped assessment.

5.4 I have carefully considered the facts of the case, the submission of the appellant and evidences on record. I find that the assessment was completed u/s. 143(3) of the Act determining the assessed Income at Rs 3,43,230 on 28/11/2011. Subsequently, revenue audit party raised objection but it is also seen that the AO did not agree with the audit party. From the rely of the AO dated 30/08/2013 it is seen that the AO has stated that none of the payments have exceeded Rs. 20000 in a day, and there are no split payments and that these facts had already been verified while completing the assessment proceedings and therefore, none of the payment referred in the audit objection attracts provisions of Section 40A(3) This clearly establishes that the AO has examined the issue at the time of assessment.

5.5 The Hon'ble Bombay High Court in the case of Bharat Amratlal Shah Vs ITO in Writ Petition (L) No. 3268 of 2022 [Date of Judgement/Order: 10/02/2023] held that reopening of assessment on the basis of change of opinion without reasons to indicate failure on the part of the petitioner to disclose truly and fully all the material facts is untenable in law. The Hon'ble Bombay High Court pronounced a Judgement on 20th February 2023 in the case of Survival Technologies Pvt. Ltd. V. DCIT wherein the assessee questioned the legality of the notice dated 30-03 2021 issued urs 148 of the Act which sought for the reopening of the petitioner's assessment for the AY 2015-16 along with the order dated 21.07. 2022 passed by the OCIT, wherein the objections regarding the reopening of assessment were disposed off. The Bombay high court set aside the order and notice, holding that change of opinion don't give jurisdiction for the reopening of Assessment.

5.6 A recent authoritative opinion on the validity of reassessment proceedings is Full Bench decision of the Delhi High Court in the case of CIT v/s. Usha International Ltd. (2012) 348 ITR 485 (Delhi)(FB) The Hon'ble High held as follows

(1) Reassessment proceedings can be validity initiated where return of income is processed u/s. 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion as no opinion is formed

(2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion

(3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing

Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.

5.7 The Hon'ble Bombay High Court in IL&FS Investment Managers Ltd. vs ITO [2008] 298 ITR 32 has held as under:-

"11. We have considered the submissions of both the counsel. In the facts of the present case, it is quite clear that the petitioner was granted depreciation allowance on the intangible assets in the nature of know-how purchased by it. A regular assessment order was passed under Section 143(3) of the IT Act. In reply to the Director of Audit, the AO had opposed the reopening. In spite of the same, he has reopened the assessment. It is, therefore, difficult to say that he has formed his own opinion that the income has escaped assessment.

12. Secondly, it is not at all a case that the petitioner has not disclosed anything to the respondents. The petitioner has given full particulars of the intangible assets and it has maintained that it is eligible for the depreciation Mr. Mistri has submitted that, in fact, Section 32(1)(i)/(ii) of the IT Act permits depreciation in respect of know-how, franchises, copyrights, any other business or commercial rights which are intangible assets. We may not express our opinion on the merits of the claim of the petitioner. But the fact remains that as far as this asst yr 2003-04 is concerned, the stand taken by the petitioner was accepted by the respondents on merits and even after disagreeing with the audit objection, as a second thought on the objections from the auditors, he has reopened the assessment In the reasons to reopen as well as in the decision on the objections, he has nowhere stated as to how the income has escaped assessment. In our view, reopening of the assessment without any basis and merely a change of opinion is not permissible while exercising the powers under Section 147 r/w Section 148 of the IT Act"

5.8 In the present case, scrutiny assessment has taken place u/s. 143(3) of the Act and it is seen that the AO has stated that none of the payments have exceeded Rs. 20000 in a day, and there are no split payments and that these facts had already been verified while completing the assessment proceedings and the reopening would be hit by the principle of change of opinion which cannot enable the AO to issue reassessment notice as the AO has not established that new facts material or information came the knowledge of the AO which was not on record and available at the time of assessment. It is clear that on account of the audit objection that a remedial action of reopening the assessment by an action u/s 148 of the Act was taken The Hon'ble Jurisdictional Bombay High Court, in IL&FS Investment Managers Ltd vs ITO [2008] 298 ITR 32 where a regular assessment order was passed under section 143(3) of the Income-tax Act. In reply to the director of audit, the Assessing Officer had opposed the reopening. In spite of the same, even after disagreeing with the audit objection, as a second though on the objections from the auditors, AO reopened the assessment. The Hon'ble Court was thus of the opinion that it is, therefore, difficult to say that he has formed his own opinion that the income has escaped assessment. Secondly, it is not at all a case that the petitioner has not disclosed anything to the respondents. The Hon'ble Court held that reopening of the assessment without any basis and merely a change of

opinion is not permissible while exercising the powers under section 147 read with section 148 of the Income-tax Act. This decision of Hon'ble Bombay High Court squarely applies to the instant case. The decision of the Bombay High Court in IL&FS was also affirmed by the Hon'ble Bombay High Court in CIT v Rajan Aswani [2018] 91 Taxmann.com 313 (Bom).

5.9 I find that that the reopening is sought on the basis of change of opinion as apparent from the reply of the AO to audit and there is nothing in the reasons to indicate that reopening is sought on the ground of failure on the part of the appellant to disclose truly and fully all material facts. In view of the above facts and relying on the decisions of the jurisdiction High Court, the reopening made by the AO is not valid and addition made by the AO is therefore not sustainable and is to be deleted. The appeal on Ground no 1 & 2 are treated as allowed."

8. Aggrieved with such order of CIT(A) / NFAC, the Revenue is in appeal.

9. The Ld. DR drew the attention of the Bench to the objection raised by the audit party which reads as under:

"Subject:- Incorrect computation of business income.

As per Section 40A(3) of Income Tax Act, 1961, where the assessee incurs any expenditure in respect of which a payment or aggregate of payment made to a person in a day, otherwise than by an account payee cheque drawn on bank or account payee bank draft exceeds twenty thousand rupees, no deduction shall be allowed in respect of such expenditure.

It has been judicially held in the ITAT Jodhpur BENCH case of Vaishali Builders & Colonizers Vs Addl Commissioner of Income-tax, Range -1. Jodhpur 138 ITD 222 (Jodhpur) that conscious split up of payment by the assessee to avoid rigours of 40A(3) would still result in disallowance of expenses.

It is seen from the case record of the assessee that in the Ledgers of various related parties in the period from 01/04/2008 to 31/3/2009 the assessee had paid rupees Rs 66,20,000 to 15 related parties on 345 occasions towards purchase of goods. The department did not verify the exigencies of payments so made in cash as it was seen that on other occasions payments to these parties were made through banking channels also. Hence, the exemption cited under rule 6DD of income tax rules 1962 was not applicable to these transactions. It was the transactions were deliberately spilt to circumvent the provision of Section 40A(3). (Separate annexure attached of various related parties whom payment given by the asseessee) However, no disallowance was made despite clear legal position. Omission resulted in underassessment of income Rs 66,20,000 involving short levy of tax of Rs.20,45,580.

This is brought to the notice of the department for confirmation and necessary action.

Sd/-
Sr. Audit Officer/LAP IX"

10. Referring to the decision of the Hon'ble Bombay High Court in the case of Yuvraj vs. Union of India reported in 225 CTR 283 (Bom), he submitted that the Hon'ble High Court in the said decision has held that where during original assessment completed u/s 143(3) of the Act, issue as to whether gain from sale of right to purchase of a plot was capital gain or casual income was not addressed, reopening of assessment to treat the long term capital gain as casual income could not be said to be based on change of opinion. Accordingly, the re-assessment proceedings were held to be valid. Relying on the following decisions, he submitted that the re-assessment proceedings initiated by the Assessing Officer are in accordance with law:

1. *CIT vs. P.V.S. Beedies (P.) Ltd. (1999) 237 ITR 13 (SC)*
2. *New Light Trading Company vs. CIT (2002) 256 ITR 391 (Del)*
3. *M/s. Vaishali Builders & Colonizers vs. Addl.CIT vide ITA No.391/Jodh/2011, order dated 25.07.2012*

11. The Ld. Counsel for the assessee on the other hand heavily relied on the order of CIT(A) / NFAC in quashing the re-assessment proceedings. Referring to the decision of the Hon'ble Bombay High Court in the case of IL and FS Investment Managers Ltd. Vs. ITO (2008) 298 ITR 32 (Bom), he submitted that the Hon'ble High Court in the said decision has held that where the petitioner was

granted depreciation allowance on intangible assets in nature of know-how purchased by it and regular assessment order was passed under section 143(3), reopening of assessment pursuant to audit objection that such depreciation was not admissible, being based on change of opinion, was not valid.

12. Referring to the decision of the Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. vs. DCIT (2022) 145 taxmann.com 228 (Bom), he submitted that the Hon'ble High Court in the said decision has held that when initially Assessing Officer had not accepted audit objection that as assessee was not satisfying condition of an industrial undertaking as prescribed under section 72A, set-off of brought forward losses on amalgamating company on amalgamation with assessee was not in order, reopening of assessment on second thought on same audit objection was not permissible while exercising powers under section 147 read with section 148.

13. Referring to the decision of the Hon'ble Supreme Court in the case of ACIT vs. ICICI Securities Primary Dealership Ltd. (2012) 24 taxmann.com 310 (SC), he submitted that the Hon'ble Supreme Court in the said decision has held that where accounts had been furnished by assessee when called upon and thereafter assessment was completed u/s 143(3), subsequently on a mere re-look of said accounts earlier furnished by assessee it is not permissible under section 147 to reopen assessment of assessee on ground that income has escaped assessment.

14. Referring to the decision of the Hyderabad Bench of the Tribunal in the case of DCIT vs. M/s. DRS Logistics Pvt. Ltd. vide ITA No.1718/Hyd/2018, order dated 17.10.2023 for assessment year 2008-09, he submitted that the Tribunal has held that in absence of any tangible and concrete material in the form of fresh evidence, reopening cannot be made.

15. He submitted that in the instant case, the original assessment was completed u/s 143(3) of the Act. When the audit party raised objection, the Assessing Officer initially did not agree with the audit party and in his reply dated 30.08.2013 which has been reproduced by the Ld. CIT(A) / NFAC in his order had mentioned as under:

> *"5.1 It is seen that the AO did not agree with the audit party. In his reply dated 30/08/2013, the AO stated:*
>
> *"In the instant case, on careful verification of the ledger accounts based on which the audit objection is raised, it is found that none of the payments have exceeded Rs 20000 in a day, and there are no split payments. Thus, these facts had already been verified while completing the assessment proceedings, therefore, none of the payment referred in the audit objection attracts provisions of Section 40A(3)."*

16. He accordingly submitted that once the Assessing Officer himself had stated that none of the payments have exceeded an amount of Rs.20,000/- in a day and there are no split payments noticed during original assessment proceedings, then when the reopening is made on the basis of objection of the audit party, the same is nothing but a change of opinion. Further, there is no allegation by the Assessing Officer in the reasons recorded for reopening, of any failure on the part of the assessee to disclose fully and truly all material facts necessary for completing the

assessment. Therefore, when the notice u/s 148 of the Act was issued after a period of four years from the end of the relevant assessment year and original assessment was completed u/s 143(3) of the Act, the proviso to section 147 of the Act is clearly applicable and therefore, such reopening is not in accordance with law.

17. He accordingly submitted the order of the CIT(A) / NFAC being in accordance with law, the same should be upheld and the grounds raised by the Revenue should be dismissed.

18. We have heard the rival arguments made by both the sides, perused the orders of the Assessing Officer and the Ld. CIT(A) / NFAC and the paper book filed on behalf of the assessee. We have also considered the various decisions cited before us. We find the Assessing Officer in the instant case has completed the original assessment u/s 143(3) on 28.2011 by determining the total income at Rs.3,43,230/- as against the returned income of Rs.2,30,550/-. Subsequently, the Assessing Officer reopened the assessment, the reasons of which are already reproduced in the preceding paragraphs. In the order passed u/s 143(3) / 147 of the Act, the Assessing Officer made disallowance of Rs.66,20,000/- on account of violation of provisions of section 40A(3) of the Act. We find the CIT(A) / NFAC quashed the re-assessment proceedings, the reasons of which have already been reproduced in the preceding paragraphs. We do not find any infirmity in the order of the CIT(A) / NFAC on this issue. Admittedly, the reopening was made on the

basis of objection raised by the audit party which is reproduced at para No.9 of the order. We find initially the Assessing Officer did not agree with the objection raised by the audit party and in his reply dated 30.08.2013 had specifically mentioned that none of the payments have exceeded Rs.20,000/- in a day and there are no split payments. The reply of the Assessing Officer has already been reproduced at para No.15 of this order.

19. Thus, once the Assessing Officer himself has accepted that in the original assessment proceedings such violation of provisions of section 40A(3) were examined and it was found that none of the payments have exceeded Rs.20,000/- in a day and there are no split payments, the reopening of assessment on the very issue in our opinion is nothing but a change of opinion.

20. We find the Hon'ble Supreme Court in the case of ACIT vs. ICICI Securities Primary Dealership Ltd. (supra) while quashing the re-assessment proceedings has observed as under:

> *"1. Heard Mr. Mistry for the Petitioner and Mr. Kotargale for the Respondents. The Respondents have filed their reply and the rejoinder has also been filed by the Petitioner*
>
> *2. Rule. Rule is made returnable forthwith*
>
> *3. We have noted the submissions of both the parties. The Petitioner is a public limited company engaged in the business of carrying on various non-banking financial activities. The present petition is concerning the assessment your 1999-2000. The assessment of the Petitioner for that year had been finalised under section 143 of the Income Tax Act. An order in that behalf was passed earlier on 28th March, 2002 determining the income of the Petitioner as Rs. 27 72 crores. Thereafter the 1st Respondent sought to reopen the assessment and the reasons for reopening the assessment recorded vide his letter dated 27th March, 2006 disclose that it is essentially after having another look at the annual accounts which had been furnished earlier. The officer records that now it is noticed that during that*

year the assessee company had incurred a loss in trading in share. The officer thereafter discusses the various entries appearing in the opening and closing stocks and purchases and sales of those stocks. Thereafter the officer has concluded that there is a loss of Rs. 19.56 crores and that the loss was speculative one. He has therefore come to a conclusion that the income chargeable to tax to the extent of Rs. 19.86 crores has escaped the assessment and that is how he has passed the order under section 147 of the Income Tas Act although almost 4 years have gone after the assessment of the concerned year.

4. Mr. Mistry, learned counsel for the Petitioner, points out that the reasons given by the 1st Respondent in his order dated 27th March, 2006 are clearly based on the documents, which the Petitioner had already furnished, containing the accounts tendered by the Petitioner. There is nothing new that has come to the notice of the revenue at this point of time. It is only a different analysis which is now being done and the conclusion is being drawn that its income to the extent of Rs. 19.86 crores has escaped the assessment. In his submission, this is impermissible under the powers that are available to the revenue under section 147 of the Income Tax Act. It can only be where there is a failure on the part of the assessee to make a true return which is what provided in proviso to section 147 and wherein such a reopening would be permissible after the expiry of four years. In the instant case, nothing of the kind has happened.

5. Mr. Kotangale, learned counsel for the Respondents, has drawn our attention to a judgment of the Apex Court in the case of Sri Krishna (P) Lid. v. Income Tax Officer-221 IT.R. 538. In this case, what is held by the Apex Court is that where certain loan transactions were relied upon and which were subsequently discovered to be false, reassessment proceedings were validly initiated. What is however material to note is that in that particular case the Court has given a clear finding that the assessee had created and recorded bogus entries of loan and, therefore, the Court held that the assessee could not say that it had truly and fully disclosed all material facts necessary for the assessment for the concerned year.

6. The second judgment relied upon by Mr. Kotangale is in the case of Phool Chand Bajrang Lal v. Income Tax Officer-203 I.T.R. 456. In this case, the reopening was permitted in view of subsequent information which was found to be definite, specific and reliable. This subsequent information included the confession of the Managing Director that the company had not advanced any loan to any person during the period covered and for which certain cash loans were supposed to have been advanced. It was in the facts of this particular development that the Apex Court held that the reopening was justified."

21. We find the Hon'ble Bombay High Court in the case of IL and FS Investment Managers Ltd. Vs. ITO (supra) while quashing the re-assessment proceedings has observed as under:

"11. We have considered the submissions of both the counsel. In the facts of the present case, it is quite clear that the petitioner was granted depreciation allowance on the intangible assets in the nature of know-how purchased by it. A

regular assessment order was passed under Section 143(3) *of the IT Act. In reply to the Director of Audit, the AO had opposed the reopening. In spite of the same, he has reopened the assessment. It is, therefore, difficult to say that he has formed his own opinion that the income has escaped assessment.*

12. Secondly, it is not at all a case that the petitioner has not disclosed anything to the respondents. The petitioner has given full particulars of the intangible assets and it has maintained that it is eligible for the depreciation. Mr. Mistri has submitted that, in fact, Section 32(1)(i)*/(ii) of the* IT Act *permits depreciation in respect of know-how, franchises, copyrights, any other business or commercial rights which are intangible assets. We may not express our opinion on the merits of the claim of the petitioner. But the fact remains that as far as this asst. yr. 2003-04 is concerned, the stand taken by the petitioner was accepted by the respondents on merits and even after disagreeing with the audit objection, as a second thought on the objections from the auditors, he has reopened the assessment. In the reasons to reopen as well as in the decision on the objections, he has nowhere stated as to how the income has escaped assessment. In our view, reopening of the assessment without any basis and merely a change of opinion is not permissible while exercising the powers under* Section 147 *r/w* Section 148 *of the IT Act.*

13. For the aforesaid reasons, we have no option but to allow this petition. Petition is allowed in terms of prayer (a), whereby the aforesaid notice dt. 2nd March, 2006 issued under Section 148 *of the IT Act, the notice dt. 6th June, 2006 issued under* Section 142(1) *and the decision on the objections dt. 6th Oct., 2006 shall get quashed."*

22. We find the Hon'ble Bombay High Court in the case of Bennett Coleman & Co. Ltd. vs. DCIT (supra) has quashed the re-assessment proceedings on the ground that when initially Assessing Officer had not accepted audit objection that as assessee was not satisfying condition of an industrial undertaking as prescribed under section 72A, set-off of brought forward losses on amalgamating company on amalgamation with assessee was not in order, reopening of assessment on second thought on same audit objection was not permissible while exercising powers under section 147 read with section 148.

23. The various other decisions relied on by the Ld. Counsel for the assessee also supports his case to the proposition that the re-assessment proceedings

initiated on the basis of audit objection and in absence of any allegation of any failure on the part of the assessee to disclose fully and truly all material facts required for completion of assessment, re-assessment is not valid. In view of the above discussion and in view of the detailed reasoning given by the CIT(A) / NFAC, we do not find any infirmity in the order of the CIT(A) / NFAC quashing the re-assessment proceedings initiated by the Assessing Officer. Accordingly, the same is upheld and the grounds raised by the Revenue challenging the re-assessment proceedings are dismissed.

24. Since we have quashed the re-assessment proceedings, the grounds raised by the Revenue challenging the deletion of addition made by the Assessing Officer u/s 40A(3) has become academic in nature and therefore, the same is not being adjudicated.

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

Order pronounced in the open Court on 17th September, 2024.

Sd/-	**Sd/-**
(R. K. PANDA)	(ASTHA CHANDRA)
VICE PRESIDENT	JUDICIAL MEMBER

पुणे Pune; दिनांक Dated : 17th September, 2024
GCVSR

<u>आदेश की प्रतिलिपि अग्रेषित/Copy of the Order is forwarded to</u>:

1. अपीलार्थी / The Appellant;
2. प्रत्यर्थी / The Respondent
3. The concerned Pr.CIT
4. DR, ITAT, 'B' Bench, Pune
5. गार्ड फाईल / Guard file.

आदेशानुसार/ BY ORDER,

// True Copy //

Senior Private Secretary
आयकर अपीलीय अधिकरण ,पुणे
/ ITAT, Pune

S.No.	Details	Date	Initials	Designation
1	Draft dictated on	11.09.2024		Sr. PS/PS
2	Draft placed before author	13.09.2024		Sr. PS/PS
3	Draft proposed & placed before the Second Member			JM/AM
4	Draft discussed/approved by Second Member			AM/AM
5	Approved Draft comes to the Sr. PS/PS			Sr. PS/PS
6	Kept for pronouncement on			Sr. PS/PS
7	Date of uploading of Order			Sr. PS/PS
8	File sent to Bench Clerk			Sr. PS/PS
9	Date on which the file goes to the Head Clerk			
10	Date on which file goes to the A.R.			
11	Date of Dispatch of order			