आयकर अपीलीय अधिकरण, जयपुर न्यायपीठ, जयपुर
IN THE INCOME TAX APPELLATE TRIBUNAL, JAIPUR BENCHES,"B" JAIPUR

डा० एस. सीतालक्ष्मी, न्यायिक सदस्य एवं श्री राठौड़ कमलेश जयन्तभाई, लेखा सदस्य के समक्ष
BEFORE: DR. S. SEETHALAKSHMI, JM & SHRI RATHOD KAMLESH JAYANTBHAI, AM

आयकर अपील सं./ITA No. 359/JPR/2024
निर्धारण वर्ष/Assessment Years : 2014-15

Sh. Ashok Sharma 74, Gulab Bagh, Canal to Police Line Road, Kota.	बनाम Vs.	The DCIT Circle-2, Kota.
स्थायीलेखा सं./जीआईआर सं./PAN/GIR No.: AOXPS2855Q		
अपीलार्थी/Appellant		प्रत्यर्थी/Respondent

निर्धारिती की ओरसे/Assesseeby : Shri Priyank Kabra (C.A.) (V.C.)
राजस्व की ओरसे/Revenue by : Shri Anup Singh (Addl.CIT)

सुनवाई की तारीख/Date of Hearing : 03/09/2024
उदघोषणा की तारीख/Date of Pronouncement: 29/11/2024

आदेश/ORDER

PER: DR. S. SEETHALAKSHMI, J.M.

This appeal is filed by the assessee against the order of the ld. CIT(A) dated 04.01.2024, National Faceless Appeal Centre, Delhi [herein after referred to as "CIT(A)/NFAC"] for the assessment year 2014-15, which in turn arise from the order dated 31.10.2019 passed under section 147 r.w.s. 143(3) of the Income Tax Act, 1961 (hereinafter "Act") by the DCIT, Circle-2, Kota.

2. The assessee has raised the following grounds of appeal:-

> *"1. That the reopening of the case has been done on the basis of the same facts as were available to the ld. AO while making assessment u/s 143(3) and thus the re-opening itself is bad in the eyes of law and hence needs to be declared invalid and the order and the proceedings need to be quashed.*
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> *2. That, without prejudice to ground 1, the ld. AO and the ld CIT(Appeals) have passed the orders without considering the facts and circumstances of the case and the reply of the assessee that the payments were made within the limits of the section 40A(3) substantiated by the documents provided in that respect, making an addition of Rs. 8,00,000/-."*

3.1 At the outset of hearing, the Bench observed that there is delay of 19 days in filing of the appeal by the assessee for which the ld. AR of the assessee filed application for condonation of delay with following prayers and the assessee to this effect also filed an affidavit :-

> " With utmost regards your honour, this is an appeal filed by the assessee against the order of the CIT(Appeals), NFAC dated 04.01.2024 for AY 2014-15, the filing of which got delayed because of the poor medical condition of the assessee-appellant for which the assessee most respectfully submits as below:
>
> 1. The assessee is an individual and is proprietor of the firm-Ashoka Construction.
> 2. The assessee received the order on email on 04.01.2024.
> 3. The appeal was to be filed on 04.03.2024.
> 4. The assessee got unwell on 15.02.2024 and was under treatment of Dr. Ashish Khandelwal, Suprintending Medical Officer, Dispensary, Mahaveer Nagar-III, Kota who advised him complete rest for one month upto 16.03.2024.
> 5. The assessee-appellant is filing appeal alongwith medicate certificate.
> 6. The delay in filing the appeal is because of illness of the assessee for which he should not be held responsible.
> 7. The delay in filing appeal is approximately 20 days while the assessee-appellant remained ill for a period of 30 days and after getting well he got the appeal submission prepared within a week's time from his consultant which may be considered well within period of limitation.

> It is, therefore, requested to your honours to please condone the delay in filing the appeal considering to adopt justice –oriented approach so that a meritorious matter is not thrown out at the very threshold and cause of justice is not defeated on technical considerations that the assessee-appellant could not file the appeal due to being unwell on medical footing. The assessee-appellant shall remain obliged to your honours."

In support of the contentions so raised the Authorised person has filed an affidavit to support the contentions raised in the prayer for condonation of delay in filing the appeal.

3.2 The ld. AR of the assessee appearing in this appeal submitted that the assessee is serious on the duties and the delay of 19 days is on medical exigencies resulted in delay. Considering the decision of the apex court in the case of Collector, Land & Acquisition Vs. Mst. Katiji& Others 167 ITR 471(SC) wherein it was directed the other courts to consider the liberal approach in deciding the petition for condonation as the assessee is not going to achieve any benefit for the delay in fact the assessee is at risk.

3.3. During the course of hearing, the ld. DR objected to assessee's application for condonation of delay and prayed that Court may decide the issue as deem fit and proper in the interest of justice.

3.4 We have heard both the parties and perused the materials available on record. The Bench noted that the reasons advanced by assessee for condonation of

delay of 19 days are sufficient to condone the delay which has merit. Thus, we concur with the submission of the assessee and condone the delay of 19 days in filing the appeal by the assessee in view of the decision of Hon'ble Supreme Court in the case of Collector, land Acquisition vs. Mst. Katiji and Others, 167 ITR 471 (SC) as the assessee was prevented by sufficient cause.

4. The brief facts of the case are that the assessee derived income from the business of civil contractor and the return of income in respect of A.Y.2014-15 was filed by the assessee originally on 04-10-2014 declaring total income of Rs.42,88,790/-. The case was selected for scrutiny under manual selection and assessment u/s 143(3) of the Act was finalised on 30/07/2016 determining the total income at Rs.46,72,040/-. Subsequent thereto, it is noticed that on 31.07.2013 assessee had purchased material of Rs. 8,00,000/- and made cash payment on the same date vide voucher number 416. The same was claimed in P & L account and allowed by the assessing officer which was in contravention of the provision of section 40A(3) of the Act. Under the provision of section 40A(3) where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank on account payee bank draft, exceeds twenty thousand rupees (Rs. 35,000/- in the case of payment for plying, hiring or leasing goods carriages). No

deduction shall be allowed in respect of such expenditure. In view of the above, as there was reason to believe that by reason of the omission or failure on the part of the assessee, to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration, income chargeable to tax has escaped assessment as per section 147 of the I.T. Act, 1961. Reasons were recorded for reopening of assessment and necessary approval was obtained from the Pr.CIT, Kota vide his letter No.1187 dated 10/07/2019 and proceedings u/s 147 of the Act, were initiated by issuing notice u/s. 148 of the Act in order to assess/reassess such income. The notice u/s.148 of the Act dated 11/07/2019 was issued which was transmitted to the assessee by electronic mail to the e-mail address designated by him as per return of income filed. In response to the notice u/s 148 of the Act issued as per the above, the assessee filed his return of income on 11/09/2019 declaring the total income at Rs. 42,88,790/- against the notice issued u/s. 148 of the Act as per the above.

4.1 Subsequent thereto, in order to finalize the assessment/re-assessment proceedings, notice u/s 143(2) of the Act was issued under digital signature on 16-09-2019 which was transmitted to the assessee by electronic mail to the e-mail address designated by him as per return of income filed Subsequent thereto, Notice u/s 142(1) of the Act was also issued on 01/10/2019 under digital signature and

transmitted to the assessee by electronic mail to the e-mail address designated by him as per return of income filed by which necessary details were called for. In response to the notice u/s 143(2)/142(1) of the Act issued as per the above, the assessee/authorised representative of the assessee, Shri M.D. Soni, (C.A.) filed reply electronically online. The details furnished by the assessee/the authorized representative of the assessee were verified, print out of the same were taken and were placed on record. Conclusively, the AO made addition in the hands of the assessee by holding as under:-

> "9.4 I have carefully considered the submission of the assessee as well as the material on record. However, it has not been found acceptable for the reasons as discussed in detail hereunder:
>
> (i) Assesse had purchased material of Rs. 8,00,000/- and made cash payment on the same date vide voucher number 416. The same was claimed in P & L account and allowed by the assessing officer which was in contravention of the provision of section 40A(3) of the Act.
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> Under the provision of section 40A(3) where the assessee incurs any expenditure in respect of which a payment or aggregate of payments made to a person in a day, otherwise than by an account payee cheque drawn on a bank or account payee bank draft, exceeds twenty thousand rupees (Rs. 35,000/- in the case of payment for plying, hiring or leasing goods carriages). No deduction shall be allowed in respect of such expenditure.
>
> (ii) The payment made by the assessee does not fall under Rule 6DD of the I.T.Rules, 1962. The list provided under Rule 6DD of the I.T.Rules, 1962. is exhaustive and undersigned of the view that when the payment is made in contravention of section 40A(3) of the Act though the payment is genuine, that cannot be allowed, because the genuineness of payment is required in all cases but payment by account payee cheque or demand draft is additional requirement under section 40A(3) of the Act.
>
> (iii) The assessee has not furnished any supporting documents or evidences in support of his claim that the payment in cash was made due to necessity of the business.

9.5 As discussed above, as the assessee has incurred the expenditure of Rs.8,00,000/- in respect of which payment is made in a sum exceeding Rs.20,000/- otherwise than by crossed cheques or draft, as per the provisions of the Act, as laid down u/s 40A(3) of the Act, such expenses is hereby disallowed and the same is added back to the total income of the assessee.

Penalty proceedings u/s 271(1)(c) are also initiated against the assessee since I am satisfied that the assessee has furnished inaccurate particulars of income by claiming wrong deduction on account of the expenditure incurred of Rs.8,00,000/- in respect of which payment was made in a sum exceeding Rs.20,000/- otherwise than by crossed cheques or draft, as per the provisions of the Act, as laid down u/s 40A(3) of the Act."

5. Being aggrieved, from the said order of assessment, the assessee has filed an appeal before the ld. CIT(A). The ld. CIT(A) after hearing the contention of the assessee dismissed the appeal of the assessee by giving following findings on the issue:-

"05. Decision: I have carefully considered the facts on record, the assessment order, Grounds of appeal and statement of facts furnished by the appellant.

5.1 The issue under consideration is that the appellant case was reopened based on the information that the appellant had made payment of Rs. 8,00,000/- in cash on 31.07.2013 vide voucher number 416 and the same was claimed in P&L account. The AO disallowed the said amount as per the provisions of section 40A(3) of the Act while passing order under section 147 rws 143(3) on 31.10.2019.

5.2 In this regard, the appellant has submitted that the said amount of Rs. 800000 [38000+155778+395020+205950+5252] pertains to different parties and dates and it was merely a mistake while accounting as the accountant considered collective amount on last date of the month instead of entering separate entries at different date. Alternatively, the appellant has also submitted that while assessment proceedings under section 143(3) of the Act, disallowance on estimated portion of expenditure (i.e. 1% of expenditure) was made which was further allowed by the Ld. CIT(A) vide order dated 18.09.2017.

5.3 The appellant's contention is not acceptable because the appellant has not submitted any supporting documentary evidences in his submission. Merely

saying that it was an accountant's mistake does not absolve the appellant from the relevant provisions of Income tax Act. If it was a inadvertent mistake, the same would have been repeated in previous or after months whereas the mistake occurred only in the month of July. Moreover, the amount was made with voucher no. 416 which clearly shows that the payment was made to a particular party/person not to the different parties. This is the basic concept which an accountant uses while posting an entry.

5.4 Further, the contention of the appellant that similar issue has been already decided by the CIT(A), is not acceptable as the issue in the original assessment proceedings was pertaining to estimated portion of disallowance of expenditure whereas in the instant case, the issue pertains to disallowance in contravention of section 40A(3) of the Act. Here, no estimation theory was applied by the AO.

5.5 In view of the above discussion, it is held that the AO has rightly applied the provisions of section 40A(3) of the Act and therefore disallowance made by the AO is confirmed. Accordingly, appeal is dismissed.

6. In the result, appeal is dismissed."

6. As the assessee did not find any favour from the appeal filed before ld. CIT(A) who filed the present appeal against the said order of the ld. CIT(A) before this tribunal on the grounds as reiterated in para 2 above. To support the grounds so raised the ld. AR appearing on behalf of the assessee has placed reliance on the written submission which is extracted herein below:-

"With utmost regards your honour(s), this is an appeal filed by the assessee against the order of the CIT(Appeals), NFAC dated 04.01.2024 for AY 2014-15 sustaining the disallowance of expense of Rs.8,00,000 done by the Ld. Dy Commissioner of Income Tax, Circle-2, Kota. Copies of both the orders, i.e. appeal order of the Ld. CIT (Appeals) and reassessment order of the respondent form part of paper book at page no. 51-64 and 65-75 respectively.

The grounds of appeal as taken in the memorandum of appeal are as below:

1.) That the reopening of the case has been done on the basis of the same facts as were available to the ld. AO while making assessment u/s 143(3) and thus the re-opening itself is bad in the

eyes of law and hence needs to be declared invalid and the order and the proceedings need to be quashed.

2.) That, without prejudice to ground 1, the ld AO and the ld CIT (Appeals) have passed the orders without considering the facts and circumstances of the case and the reply of the assessee that the payments were made within the limits of the section 40A(3) substantiated by the documents provided in that respect, making an addition of Rs.8,00,000.

The appellant humbly requested for admission of the following additional grounds as per the application dated 20.04.2024 (paper book pg. no. 48-50):

Additional Ground No. 1: That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.

Additional Ground No. 2: That the Ld. Assessing Officer has not applied his own mind before issuance of notice u/s 148 and acted only on borrowed satisfaction, which is not permitted and thus the entire proceedings are liable to be quashed.

Additional Ground No. 3: That the Ld. Assessing Officer has erred in assuming jurisdiction u/s 148 during the pendency of proceedings u/s 154 in view of judgement of the Hon'ble ITAT, Jaipur Bench in the case of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT, Circle-6, Jaipur, ITA No. 206/JP/2015 and other case laws.

With utmost regards your honour(s), the appellant again requests admission of the above additional grounds as per the application dated 20.04.2024.

Thus, the appellant is very humbly in appeal before your honour(s) on the abovementioned five grounds.

The appellant requests to, please, allow him to present submissions related to additional grounds before ground no.2 taken in memorandum of appeal so that all four legal grounds are taken in sequence before taking up the fifth ground which is more of factual in nature.

However, courteously, before proceedings to discuss the grounds straight-away, the appellant is herewith enumerating the brief facts of the case as below:

BRIEF FACTS OF THE CASE

1.) The matter of the assessee was first taken up in the assessment u/s 143(3) for limited scrutiny wherein specific issue was raised related to AIR/CIB/26AS Data matching wherein some of the additions were made.
These additions included disallowance out of the head of expense - Material Consumed Expenditure / सामग्री व्यय after due examination of the same stating certain discrepancies,

to which the assessee didn't concur, and an addition was made of 1% of the whole of the amount of expense under this head that aggregated to Rs.2,13,83,459, which included the impugned amount of Rs.8,00,000.

2.) An **audit** of the assessee's assessment file was conducted after which the audit team mentioned that the ld. AO had allowed an expense of Rs.8,00,000 against the provisions of section 40A(3).

3.) On receiving the finding and observation of the audit party, the ld. AO (the new incumbent) issued a notice u/s 154 that there remained an omission that is apparent on record in the assessment order that needed to be rectified. The assessee replied to the said notice explaining that no payments were made in violation of section 40A(3). The matter was, however, not taken to finality, i.e. no order was passed for either dropping the case or making the alleged addition.

4.) Later, on the same ground, the ld. AO/respondent (another new incumbent) issued notice u/s 148 and proceeded to make addition of the aforesaid amount of Rs.8 lakhs stating further that by reason of the omission or failure on the part of the assessee, to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration, income chargeable to tax has escaped assessment as per section 147 of the I.T. Act, 1961. This was done even when the data was already in the possession of the department and the primary/material facts were already disclosed by the assessee during assessment proceedings u/s 143(3) and the same was considered in detail while forming an opinion to disallow expenses. The reasons recorded by the ld. AO for re-opening the assessment u/s 147 form part of the paper book at page no.76.

5.) Assessee moved to the First Appeal Authority and did not get any relief in the matter.

6.) Assessee is, thus, in appeal before the Honourable ITAT with his basic understanding of the matter as summarized below:

Reopening and Additions are against the provisions of **law**	Additions are made without examining the **facts** of the case
1. Earlier disallowance of 1% of the material consumed expenditure was made u/s 143(3), while now u/s 147, the same expense is considered for a 100% disallowance. Thus, there is a change of opinion and the notice as well as the proceedings should be set aside. 2. The same set of books were available to the department, with no new facts or source of information, during a.) the proceedings u/s 143(3),	A supervisor-employee of the assessee presented the details of his imprest account for the month of July 2013, as per which he had made payments to various vendors amounting to Rs.8 lakhs. The accountant entered the same in books of accounts on a single date on 31.07.2013 (i.e. the end of the month) although the payments to the third parties were made by the supervisor (as an agent of the assessee being his employee) from his petty cash (imprest

b.) the audit proceedings by the audit wing and c.) the proceedings u/s 147. Thus, the primary data was already provided by the assessee and thus the allegation of non-disclosure of information and discovering the same from hitherto undiscovered sources is baseless. Thus, the reopening beyond 4 years of the end of the assessment year needs to be quashed/set-aside. 3. After 1% disallowance already made u/s 143(3), a 100% disallowance made again on recommendation of the audit party u/s 147 making the total disallowance to *101%* (i.e. more than 100%) of the expenditure debited to P & L A/c. It is, thus, clear that the respondent-ld. AO did not apply his own mind to the observation of the audit wing otherwise he would have recorded reasons for disallowing the balance 99% only. Thus, the reopening on the basis of borrowed satisfaction is in itself invalid. 4. As a remedial measure of audit scrutiny, first a notice u/s 154 was issued and later, during pendency of proceedings u/s 154, a notice u/s 148 was issued on the same ground, which is not permissible.	account) on different dates within the limits prescribed u/s 40A(3). The accountant passed the entry of this account-summary as a single entry in the data of accounting software. This data was later copied and correct entries were passed and produced to the tax-auditor, who verified the same and, therefore, did not mention anything in the audit report to suggest that any payments were made in contravention of provisions of section 40A(3). The accountant although preserved both the data with him due to which later, prints from the old data that was copied (the non-finalized one) were presented to the ld. AO due to oversight and human error of the accountant. The matter was explained to the respondent during proceedings u/s 147 alongwith addresses of the vendors so that cross-examination may be conducted u/s 133(6), but his goodself had made up his mind and disallowance as per the direction of the audit party was made. The invoices, challans, copies of affidavits and extract of tax auditor's report depicting no violation of section 40A(3) are herewith annexed at paper book pg no. 102-118 with a request to consider them before passing an order.

Aggrieved by the above order of the ld CIT (Appeals), the assessee is in appeal before your honour(s) against the unjust addition to income by way of disallowance of the expenses on material consumed.

Written Submissions before your honour(s):

Ground No.1

That the reopening of the case has been done on the basis of the same facts as were available to the ld. AO while making assessment u/s 143(3) and thus the re-opening itself is bad in the eyes of law and hence needs to be declared invalid and the order and the proceedings need to be quashed.

Submissions before your honour(s) for Ground 1:

With request to consider as below, the appellant's humble submissions are:

Change of opinion on same set of facts

Three different proceedings have been carried out by three different incumbents as below:

S. No.	**Particulars**	**Name of the Incumbent**	**Basis of opinion**
1	Order u/s 143(3) (D. & C. R. No. 38/10)	Mr. A.L. Meena	Adhoc 1% disallowance of Material Consumed Exps.
2	Notice for rectification u/s 154 (ACIT/Cir-2/KTA/2017-18/1133)	Mr. Ajitesh Kumar	Omission to make addition as a mistake apparent on record of 8 lakhs. No order passed.
3	Order u/s 147 (D. & C. No. 36/77)	Mr. Shankar Lal Verma	Opined that the assessee's non-disclosure lead to escapement of income of Rs. 8 lakhs.

Different incumbent officers have differently looked upon and reacted differently on the **same set of books and documents with no fresh facts**.

A copy of the submission dated 28.06.2016 (forming part of the paper book at pg no. 85-86) made by the assessee during proceedings u/s 143(3) makes it clear that details of almost all the ledgers of expenses, including the detailed ledger of Material Consumed Expenditure was submitted to the ld. AO, as was required. It is this ledger that was discussed in detail by the ld. AO while passing order u/s 143(3). **The same ledger is now considered with a different opinion. This leads to review of assessment already done and not reassessment of fresh facts**.

It is quite clear that **there is no source of data other than what the assessee had produced at the time of original assessment u/s 143(3)**. Thus, clearly there is a change of opinion.

The **Division Bench of the jurisdictional Rajasthan High Court**, in the verdict given in **CIT vs Vardhman Industries (2014) 363 ITR 625 (Raj)** (paper book pg. no. 119-121), while reiterating the principle that the words 'reason to believe' did not admit of conferment of

arbitrary powers to the AO to reopen assessment on the basis of mere change of opinion. The Court held at para 12:

> *"It is no longer res integra that a mere change in the opinion of the AO after completion, of the assessment under s. 143(3) of the Act is not a legally approved determinant for valid initiation of reassessment proceeding under s. 147 of the Act the essential and inviolable condition precedent therefor being the reason to believe that any income chargeable to tax has escaped assessment.* ***Such a reason has to be essentially traceable to discoveries and satisfaction from new and hitherto unexplored sources and materials and not to a view of his own differently oriented on the basis of the same inputs once considered and applied****."*

Assessee-appellant also places reliance on **CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)** (paper book pg. no. 122-124), wherein while discussing the power to reopen as per section 147, the apex court observed in the judgement as below:

> *"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has* ***no power to review****; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, the Assessing Officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer."* (Emphasis Supplied)

The reassessment is being resorted to only on account of 'Change of Opinion' of the Assessment Officer without there being any fresh tangible evidence for reopening the assessment proceedings. Hence, the impugned notice dated 11.07.2019 under Section 148 of the Income Tax Act runs foul of the Supreme Court Judgment in the case of CIT vs.

Kelvinator of India Limited (supra) and jurisdictional Rajasthan High Court in CIT vs Vardhman Industries (supra) and thus, the same cannot be sustained and is liable to be struck down.

The appellant herewith submits his understanding of how different opinions were formed and what their legal consequences should be under major headings:

1.1) Formation of opinion while passing order u/s 143(3)

1.2) Opinion while issuing Notice for rectification of mistake apparent on record u/s 154 dated 21/11/2017

1.3) Opinion during issuance of notice u/s 148 and reassessment proceedings u/s 147

Submissions on the above headings is as detailed below, for your consideration, with utmost regards your honour(s):

1.1) Formation of opinion while passing order u/s 143(3):

The ld.AO has made the extract of his own show cause notice a part of the assessment order u/s 143(3), as a basis for his judgement/opinion in making disallowance out of Material Consumed Expenditure / सामग्री व्यय .

The extract of the same from page 2 of the assessment order u/s 143(3) (paper book page no. 77-84) is herewith reproduced as below:

1. <u>सामग्री व्यय</u> :– इस मद में निर्माण कार्य से सम्बन्धित विभिन्न सामग्रीयां जैसे सीमेन्ट, पत्थर, गिट्टी, बजरी, फ्लाई एश, टोर आदि की खरीद के खाताबही मे लेखांकन से सम्बन्धित रखे गये प्रमाणको के सत्यापन पर प्रकट होता है कि उक्त निर्माण सामग्रीयां उधार मे बडी मात्रा में तथा अल्प मात्रा में दिन प्रतिदिन की आवश्यकता के अनुसार नकद में भी खरीदी जाती है। नकद खरीद के किसी बाहरी व्यक्ति के बिल/वाउचर्स के स्थान पर स्वयं निर्मित वाउचर्स नकद भुगतान के है, जिनमे से कई को भुगतान करते समय मय राजस्व टिकिट के प्राप्तकर्ता के नाम, पता व हस्ताक्षर आदि नही लिये गये एवं कई व्यवहारो के मामलों में बिना किसी विशेष कारण के नकद भुगतान के 20 हजार रूप्ये से कम के एक मुश्त भुगतान किये गये दिखाये गये है। नकद भुगतान एवं उधार भुगतान द्वारा खरीदी गई सामग्री की मात्रा, दर एवं मूल्य के विवरण तथा स्टॉक रजिस्टर आदि नही रखने के कारण से कौन सी खरीदी गई सामग्री कितनी मात्रा में कब कब किस–किस कार्य मे प्रयुक्त की गई, सत्यापन किया जाना संभव नहीं है, इस आधार पर इस सामग्री लागत की राशि मे कोई काल्पनिक, बढा चढा कर दिखाई गई राशि हो तो, उसे ज्ञात करना संभव नहीं है। अतः लेखांकन के लिए रखे गये प्रमाणको की प्रमाणक व्यवस्था/प्रणाली में उपर्युक्त कमियों की मौजूदगी में आपके द्वारा दावा की गई सामग्री की लागत पूर्णतया सही एवं वास्तविक किस प्रकार से है, कृपया सप्रमाण स्पष्ट करे एवं पूर्णतया सत्यापित करवाये, अन्यथा क्यों नहीं आपके द्वारा सामग्री की दावा की गई लागत राशि 2,13,83,459/– का एक उचित अनुमानित अंश जो कि इसकी लागत का 1 प्रतिशत तक क्यों नहीं अस्वीकार करके करदाता की आय में जोड दिया जाए, कृपया सप्रमाण स्पष्ट करें एवं लेखापुस्तको से भी सत्यापित करवाये। इसके जवाब में करदाता में करदाता ने दिनांक 21.07.2016 के अपने लिखित जवाबी पत्र द्वारा इस प्रकार लिखा –

a. From the above it is clear that the expenses <u>on material consumed / सामग्री व्यय were considered by the ld. AO while passing the order u/s 143(3)</u>, <u>of which the impugned disallowance of Rs.8,00,000 is also a part</u>.
b. The ld. AO has mentioned:
"इस मद में निर्माण कार्य से संबंधित विभिन्न सामग्रियां जैसे सीमेंट, पत्थर, गिट्टी, बजरी, फ्लाई ऐश, टोर आदि की खरीद के खाता बही में लेखांकन से संबंधित रखे गए प्रमाणको के <u>सत्यापन</u> पर प्रकट होता है कि उक्त निर्माण सामग्रियां उधार में बड़ी मात्रा में तथा अल्प मात्रा में दिन प्रतिदिन की आवश्यकता के अनुसार नकद में भी खरीदी जाती है |"

From the above it may be understood that <u>the ld. AO had done verification of records produced alongwith books of accounts</u> consequent to which he considered the fact, and also mentioned the same in the assessment order, that the material was purchased on credit when procured in large quantities and in cash when procured in small quantities as per daily needs.

c. His goodself, while forming his opinion on making the disallowances done in the assessment order u/s 143(3), had also considered the cash payment aspect of the expenditure, which has been re-visited/reviewed in the reassessment proceedings u/s 147 (by mentioning the provisions of section 40A(3)), which may be read as below:

"… कई व्यवहारों के मामलों में बिना किसी कारण के नकद भुगतान के 20000 रूपये से कम के एक मुश्त भुगतान किये गए दिखाए गए हैं |"

d. Submissions made as per assessment note sheet (paper book page no. 87-95): The appellant herewith, with your honour's due permission, would like to draw your attention to the note sheet entries dated 28.06.2016, 12.07.2016 and 19.07.2016 (paper book page no. 89-90) wherein it is clearly mentioned by the ld. AO that the assessee has presented before his goodself the following:
   - Replies to the notices
   - Books of Accounts (Computer-Printed) (specifically mentioning the names of Journal, Ledgers (Khata-Bahi), Bank Book etc.)
   - Bank Accounts
   - Other evidences - Vouchers/Bills etc. (referred to as Pramaanak in Hindi)

   Thus, the ld. AO analysed the books of accounts and made a detailed note of these with specific comments in detail in the note-sheet and in the show cause notice.

   At last, while making the disallowance, the ld, AO mentions in the assessment order u/s 143(3) as below:

   " अतः सामग्री लागत की दावा की गयी राशि रू .2,13,83,439 की 1 प्रतिशत राशि 2,13,835 रू अस्वीकार करके करदाता की आय में जोड़ा जाता है जाता है |"

   The respondent, thus, after considering various reasons, ***including the cash payment aspect,*** formed an opinion to disallow 1% of the whole of the expenditure on material consumed / सामग्री व्यय amounting to Rs.2,13,83,439 that included the impugned amount of Rs.8 lakhs, while framing the assessment order u/s 143(3). Thus, out of the impugned

amount of Rs.8 Lakhs, 1% disallowance was already made in the original opinion of the ld. AO, amounting to Rs.8,000.

It may, thus, please be appreciated your honour(s) that earlier an opinion of 1% disallowance was made, while under proceedings u/s 147/148 the opinion has changed.

1.2) Opinion while issuing Notice for rectification of mistake apparent on record u/s 154 dated 21/11/2017:

'Mistake apparent on record' was the opinion of the ld. AO:

The ld. AO (new incumbent officer - Shri Ajitesh Kumar) issued a notice that there remained a mistake that is apparent on record that Rs.8 lakhs could not be added to income.

In the notice itself, annexed at paper book pg. 96-97, the Ld. AO mentioned, *"... Assessment of Sh. Ashok Sharma Individual was completed in scrutiny manner at Rs.46,72,040 income on 30.07.2016.* ***Audit Scrutiny revealed*** *that on 31.07.2013 assessee purchased material of Rs.8,00,000/- and made cash payment ... . There was no evidence on record that any remedial action under any of the provisions of the Act was initiated in the matter till the date of audit."*

From this action taken by the ld. AO, it is quite evident that the 'information' was already "**apparent on record**". There was no fresh fact being pointed out by the learned AO.

A copy of the submission dated 28.06.2016 (forming part of the paper book at pg no. 85-86) made by the assessee during proceedings u/s 143(3) makes it clear that details of almost all the ledgers of expenses, including the ledger of Material Purchases, was submitted to the ld. AO as was required. Thus, the data was called for by the ld. AO and submitted by the assessee and examined by the ld. AO while passing order u/s 143(3).

Thus, it was nothing but a change of opinion on the same facts available on record to the ld. AO as well, no fresh facts being brought to record.

Since before issuance of notice u/s 148 the ld. AO issued notice for rectification u/s 154, therefore, it is clear that his **intention was to rectify the mistake committed by him through reassessment proceedings u/s 147/148,** which is invalid and not covered by section 147.

It may, therefore, please be appreciated that since there is material already on record which has been made the basis of rectification u/s 154 (i.e. mistake "apparent on record"), there is nothing but a change of opinion.

Opinion during issuance of notice u/s 148 and reassessment proceedings u/s 147:

The assessee objected to the re-opening on facts but the objection was not considered by the respondent and an order was passed to make the addition as per the recommendation of the audit party.

The reasons to believe should have a link with an objective fact in the form of information or materials on record. Mere allegation in reasons cannot be treated equivalent to material in eyes of law. Mere receipt of information from any source would not by itself tantamount to reason to believe that income chargeable to tax has escaped assessments.

In the order u/s 147, another incumbent officer - Shri Shankar Lal Verma mentioned at para 2 and 3 as below: (paper book pg. no.66)

2. Subsequent thereto, it is noticed that on 31.07.2013 assesse had purchased material of Rs. 8,00,000/- and made cash payment on the same date vide voucher number 416. The same was claimed in P & L account and allowed by the assessing officer which was in contravention of the provision of section 40A(3) of the Act.

3. In view of the above, as there was reason to believe that by reason of the omission or failure on the part of the assessee, to disclose fully and truly all material facts necessary for his assessment for the assessment year under consideration, income chargeable to tax has escaped assessment as per section 147 of the I.T. Act,1961. Reasons were recorded for reopening of assessment and necessary approval was obtained from the Pr.CIT, Kota vide his letter No.1187 dated 10/07/2019 and proceedings u/s 147 of the Act, were initiated by issuing notice u/s. 148 of the Act in order to assess/reassess such income.

1.3.1) Observation, at para 2, on the opinion of the predecessor AO is change of opinion

The respondent mentions the erstwhile incumbent as "the assessing officer" and explains why his opinion should not be accepted, as if he is judging the order passed u/s 143(3) as is done in an appellate forum. Thus, there is clearly a change of opinion due to the change of incumbent.

The line *"... allowed by the assessing officer..."* *"... which was in contravention of the provision of section 40A(3) of the Act."* (which is mentioned in reasons recorded – ref. PB pg. no. 76) clearly suggests that it is now being re-visited/reviewed by the new incumbent and the opinion of the earlier incumbent is being averted.

Similar were the facts of the case in **CIT Vs Vaishali Avenue [2014] 268 CTR 207 (Raj)** (paper book pg. no. 125-128) wherein the comments/reasons of the successor AO were

considered as a change of opinion and the reopening held unsustainable. In the cited case also the facts available to the successor AO were the same as available to the predecessor AO and the comments by the former were in the form of another opinion on the existing opinion of the latter while passing the order u/s 143(3). The relevant extracts of what the honourable judge mentioned at Para 9 and 10 is as reproduced below:

"9. ... All the facts were definitely available before the AO at the time of framing original assessment order. A look at the reasons recorded by AO for purpose of reopening makes it clear that observations were made as if successor AO was sitting in appeal over original assessment order... ."

"10. Evidently, all the observations by the successor AO were only of the expression of another opinion on the same set of facts. Therefore, Tribunal cannot be faulted in finding that reassessment was based only on change of opinion and hence unsustainable."

In the result, the appeal was answered in favour of the assessee in the aforementioned case.

1.3.2) Unlike what is mentioned in para 3 of the order u/s 147, there was **no omission/non-disclosure on part of the assessee** as there was no fresh fact as basis for reopening u/s 147

From para 1.1 above, it may be deduced that during the assessment u/s 143(3):

- Complete books of accounts and other documents as required by the ld. AO were produced for verification.
- These books and relevant documents were duly verified by the ld. AO.
- The material consumed expenditure / सामग्री व्यय was verified by the ld. AO as has been stated at length in the show cause notice and also the assessment order.
- The cash payment aspect was also considered by the ld. AO in the show cause notice and also the assessment order.
- There are no fresh facts or tangible data available to the ld. AO after the assessment u/s 143(3) on the basis of which the reassessment proceedings were initiated. The same data already a part of the file has been looked upon with different perspective by different incumbents.

Thus, there is no omission on the part of the assessee to provide full and true disclosure of the information, hence the reopening is due to change of opinion and is bad in the eyes of law and is consequently unsustainable and should be set aside/quashed.

Various judgements which support assessee's contention that there isn't any non-disclosure on the part of the assessee are as below:

[A.] The Gujrat High Court in **Kalpataru Sthapatya (P.) Ltd Vs ITO [2013] 215 Taxman 479 (Guj)** (paper book pg. no. 129-135) has observed at Para 6 and 6.1 of the order as under:

> *"6. The **apex court in Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191** has laid down as under :*
>
> *"The assessee has responsibility of disclosing all primary facts, but once he has disclosed all the primary facts, his duty ends and it is for the assessing officer to draw the proper conclusions from it. If the wrong conclusion is drawn, then it is no ground for reopening the assessment because the assessing authority previously held another opinion as to the legal effect of certain primary facts and the assessing officer later on took a different view."*
>
> *6.1 **The phrase 'material facts' contemplated in the proviso to section 147 connotes 'primary facts' necessary for assessment** in relation to the year of assessment. The expression "material facts" was considered by the Supreme Court in the context of Section 34(1) (a) of the Income Tax Act, 1922 in **Associated Stone Industries (Kotah) Ltd. v. CIT [1997] 224 ITR 560/ 90 Taxman 553 (SC)**, wherein the assessee was granted a lease for quarrying stones by the then Maharao of Kotah State under an agreement of lease. The royalty was inclusive of income tax. When the State of Kotah later merged with United State of Rajasthan, a tri-partite dispute amongst the assessee, State of Rajasthan and Union of India arose pursuant to an application of the assessee-company to the Commissioner of income tax for a declaration that it was exempt from payment of income tax in accordance with the terms of the lease agreement. In that context, the Supreme Court observed that the primary fact in the case was the lease agreement entered into by the appellant-assessee with Maharao of Kotah State, which was placed before the Income tax Officer at the time to original assessment, and it was not the duty of the assessee to draw attention of the Income tax officer to any particular clause or portion of the document and invite him to draw any particular inference therefrom. The Supreme Court held that the expression "material facts" refers to only primary facts. It was observed that "there is not duty cast on the assessee to indicate or draw attention of the Income Tax Officer to what factual, legal or other inference can be drawn from the primary facts disclosed."”*

The primary fact in the appellant’s case is the ledger of Material Purchase/Consumed Expenditure that was submitted on 28.06.2016 (as per paper book pg. no. 85-86) during the original assessment proceedings. Thus, there wasn’t any non-disclosure on the part of the assessee during original assessment.

[B.] The Hon'ble Supreme Court in the case of **New Delhi Television Limited Vs. ACIT : [2020] 271 Taxman 1 (SC)** (paper book pg. no. 136-153) has referred to the judgement by **Constitution Bench of the Apex Court in Calcutta Discount Co. Ltd. vs. Income tax Officer, Companies District I, Calcutta and Another AIR 1961 SC 372** while, analyzing the meaning of expression 'full & true disclosure', held as under:

> *"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 AIR 1961 SC 372, wherein it was held as follows :*
>
> *"(8)-(9) xxx*
> *(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 genuineness 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."

Thus, the Constitution Bench of the Hon'ble Supreme Court has held in Calcutta Discount Co. Ltd's case (supra) (paper book pg. no. 154-178) as below:

"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?"

In the instant case of appellant-Ashok Sharma too, there are two inferences that have been drawn by the ld. AO at two different points of time, on the same facts, for which the assessee Ashok Sharma should not be held liable for non-disclosure on the similar footing as held in Calcutta Discount Co. Ltd's case (supra) and followed in the New Delhi Television Limited Case (supra).

[C.] In Gemini Leather Stores Vs ITO [1975] 100 ITR 1 (SC) (paper book pg. no. 179-180), the Hon'ble Supreme Court has held as below:

*"It was plainly a **case of over-sight**, 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 ITO had all the material facts before him when he made the original assessment. **He cannot now take recourse to s. 147 (a) to remedy the error resulting from his own oversight**."*

Although, it is clear from the submissions made above, that when the note-sheet and show cause notice find mention to the effect that the ledger and the nature of transactions were noticed/considered, however still of there is any oversight, the assessee-appellant cannot be blamed for the same.

[D.] In ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (paper book pg. no. 181-191), the Hon'ble Supreme Court has observed as under :

"The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advice the Income-tax Officer with regard to the inference which he should draw from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of

opinion with regard to that inference would not justify initiation of action for reopening assessment."

[E.] In ITO vs Tech Span India P. Ltd (2018) 255 Taxman 152 (SC) (paper book pg. no. 192-195), the Hon'ble Supreme Court has held as below:

"13) … However, a bare perusal of notice dated 09.03.2004 which was issued in the original assessment proceedings under Section 143 makes it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. In fact, the very basis of issuing the show cause notice dated 09.03.2004 was that the assessee was not maintaining any separate books of account for the said two categories and the details filed do not reveal proportional allocation of common expenses be made to these categories. Even the said show cause notice suggested how proportional allocation should be done. All these things leads to an unavoidable conclusion that the question as to how and to what extent deduction should be allowed under Section 10A of the IT Act was well considered in the original assessment proceedings itself. Hence, initiation of the re-assessment proceedings under Section 147 by issuing a notice under Section 148 merely because of the fact that now the Assessing Officer is of the view that the deduction under Section 10A was allowed in excess, was based on nothing but a change of opinion on the same facts and circumstances which were already in his knowledge even during the original assessment proceedings."

Your honour(s) may please appreciate that in the instant case also the phraseology of the Show Cause Notice and various noting in the note-sheet during assessment u/s 143(3) make it clear that the point on which the re-assessment proceedings were initiated, was well considered in the original proceedings. Thus, there is clearly a change of opinion on the same facts.

[F.] In Asian Paints Ltd Vs DCIT-LTU [2019] 261 Taxman 380 (Bom) (paper book pg. no. 196-205), the SLP of which filed by the department was dismissed by the Hon'ble Apex Court, wherein there was expense which the ld. AO had occasion to examine during assessment proceedings u/s 143(3) and later wanted to add more of disallowance, the Mumbai High Court at Para 10 of the Judgement held:

"10. …During the regular assessment proceedings under Section 143(3) of the Act, the Assessing Officer had occasion to examine the petitioner's claim for expenses in respect of "Colour Idea Store" as a part of its advertisement and sales promotion expenses. Thus, there was a complete disclosure of all primary material facts on the part of the petitioner. (See Calcutta Discount Co. Vs. ITO, 41 ITR 191). Therefore, no failure to disclose all fully and truly material facts necessary for assessment. Thus, on the above ground itself the impugned notice is hit by the proviso to Section 147 of the Act and is without jurisdiction."

Your honour(s), in the instant case as well, the ld. AO had occasion to examine the impugned expenditure during assessment u/s 143(3) meaning thereby that there was complete disclosure by the assessee and there is nothing but a change of opinion in the reassessment proceedings.
Thus, from the above submissions it may be inferred that the reopening of the case has been done on the basis of the same facts as were available to the ld. AO while making assessment u/s 143(3) and thus the re-opening itself is bad in the eyes of law and hence needs to be declared invalid and the order and the proceedings need to be quashed.

Prayer for Ground No.1

On the basis of the above submissions, the assessee-appellant requests your honour(s) to

a. Accept the request made in ground no.1,
b. Declare the notice issued u/s 148 as invalid and/or quash/set-aside the order u/s 147,
c. Any other relief that your honour(s) may deem fit in the case.

Additional Ground No. 1:

That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.

Submissions before your honour(s) for Additional Ground No. 1:

With request to consider as below, the appellant's humble submissions are:

Reopening after a lapse of 4 years from the end of the relevant assessment year is invalid as per section 147.

Since, as per the humble submissions of the appellant under ground no.1, there isn't any non-disclosure on the part of the assessee, therefore, as per proviso to section 147, the reassessment proceedings are invalid and not as per law. The section 147, as it stood for the relevant assessment year under consideration is as reproduced below:

"Income escaping assessment.

Section 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:"*

The assessment year 2014-15 in the instant case ended on 31.03.2015 and end of four years from that date comes to 31.03.2019. **The notice for reopening u/s 148 was issued on 11.07.2019 (as mentioned at para 4 – ref. PB pg. no. 66) which is beyond the limitation prescribed by law in force as it stood during the reassessment proceedings and thus the notice and the proceedings are invalid as there isn't any non-disclosure on the part of the assessee.**

The **Honourable Rajasthan High Court in Rampal Samdani vs UOI [2023] 330 CTR 672 (Raj)** (paper book pg. no. 206-210) has taken a similar view and declared the notice to be time-barred.

Thus, on facts and in law the reopening is barred by limitation and requested to be held invalid.

Additional Ground No. 2:

> That the Ld. Assessing Officer has not applied his own mind before issuance of notice u/s 148 and acted only on borrowed satisfaction, which is not permitted and thus the entire proceedings are liable to be quashed.

Submissions before your honour(s) for Additional Ground No. 2:

With request to consider as below, the appellant's humble submissions are:

1.) Reopening was made to make a ***disallowance of Rs.8,08,000 out of Rs.8,00,000 of expense***, i.e. disallowance of more than the expense itself.

The learned AO has on the basis of the objection raised by the Audit Party recorded the reasons for making an addition of Rs.8 lakhs, ***while a disallowance of Rs.8000 out of this impugned Rs.8 lakhs was already made as per the original assessment order***. Thus, his goodself proceeded to reopen the case to make a disallowance of Rs.8,08,000 out of an expense of Rs.8,00,000 which is more than the expense itself.

2.) When 1% of expense was already disallowed, the reason for balance 99% should have been recorded

If the ld. AO had applied his mind, he would have proceeded to mention in the satisfaction note about the disallowance of:

Particulars	Amount
Amount sought to be disallowed as was pointed out by the Audit Party	Rs.8,00,000
Less: the amount already disallowed	Rs.8,000
Amount for which reason should have been recorded in the satisfaction note	***Rs.7,92,000***

Thus, it is clear that the ***learned AO went on to re-open the case, merely on the observation and direction of the Audit Party, in a mechanical manner and without independent application of his own mind, which is bad in the eyes of law***, since it was **not his 'reason to believe'.**

In **Shashi Mohan Garg Vs ITO (Delhi High Court)**, Appeal Number : W.P.(C) 7619/2019 dated 05.10.2023 (paper book pg. no. 211-216), it was held that non application of mind leads to borrowed satisfaction due to which the notice u/s 148 was quashed.

"12. Interestingly, in the "reason to believe", there is no reference to the original assessment order dated 14.01.2015. Had the AO looked at the assessment order and the record concerning the petitioner's/assessee's case, the explanation given by the petitioner/assessee would have come to light.

13. Therefore, the AO being unable to tie up the information received by him, with the alleged failure on the part of the petitioner to "fully and truly" disclose all material facts, attains criticality in the instant case. ***There is a non-application of mind by the AO.*** *The AO appears to have solely proceeded based on the general information received by him. The AO, in a sense, has taken recourse to* ***"borrowed" satisfaction****.*

14-15. xxx

16. Thus, for the foregoing reasons, we are of the view that the reassessment proceedings were triggered against the petitioner/assessee without due application of mind by the AO about the information received by him from the Kolkata Division of the Investigation Directorate.

17. We are, thus, inclined to allow the prayer made in the writ petition. Consequently, the impugned notice dated 28.03.2019 issued under Section 148 of the Act is quashed."

Thus, on the basis of the facts of the case and relied upon cases, the notice and the proceedings of reopening are requested to be quashed.

Additional Ground No. 3:

> That the Ld. Assessing Officer has erred in assuming jurisdiction u/s 148 on the same ground as was there in proceedings u/s 154 in view of judgement of the Hon'ble ITAT, Jaipur Bench in the case of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT, Circle-6, Jaipur, ITA No. 206/JP/2015 and other case laws.

Submissions before your honour(s) for Additional Ground No. 3:

With request to consider as below, the appellant's humble submissions are:

Your honour(s) may please appreciate the fact that the **proceedings of rectification u/s 154 were not taken to finality**, by either passing an order against the assessee or by dropping the proceedings. The reply filed by the assessee against notice for rectification of mistake u/s 154 is annexed herewith as per paper book page no. 98-101, on which at the bottom of the page there is a comment by the ld. AO – **"Not acceptable. Draft a 154 order with demand notice."** The comment is signed at the bottom by the then incumbent. Thus, it is clear from the above that there was no intention to drop rectification proceedings, but to raise a demand which was eventually not so done as the proceedings u/s 148/147 were initiated.

Initiating the proceedings under section 148 is bad in law as once proceedings on the same issue are pending, another proceedings on that very issue cannot be initiated.

The appellant relies on the following judicial precedents:

[A.] Jurisdictional ITAT Jaipur Bench in case of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT, Circle-6, Jaipur, ITA No. 206/JP/2015 (paper book pg. no. 217-235), has stated and held as below:

> *"… we are of the considered opinion that the reopening is not sustainable when the proceedings u/s 154 of the Act were pending on the same issue. Accordingly, we set aside the initiation of proceeding u/s 147/148 of the Act and consequential reassessment order."*

In the aforesaid case the honourable ITAT referred to the following three cases:

- Sterilite Indistries India Ltd. vs. ACIT 209 Taxmann 76 (Mad)

- Mahinder Freight Carrier vs. DCIT 56 DTR 247 (Mum.)

- Berger Paints India Ltd. vs. DCIT 322 ITR 369 (Cal.)

The hon'ble ITAT, Jaipur, in this judgement, mentioned the following paragraphs of the judgement of Madras High Court in the matter of Sterilite Industries India Ltd. vs. ACIT 209 Taxmann 76 (Mad):

"29. A reading of the notice under Section 154 of the Act and the reassessment notice dated 11th May 2009 shows that there is absolutely no material difference on the issues sought to be considered under these notices, except the fact that while in the proceedings under Section 154, the notice is based on the view that there was a mistake apparent on the face of the record warranting a rectification, the proceedings under Section 147 alleged that by reason of the untrue and incorrect particulars given by the assessee, there had been an escapement of tax. Given the fact that the area of operation of both these provisions are on totally different fields, the simultaneous assumption of jurisdiction under Sections 154 and 147 on the self same issue, plainly shows the contradiction in the reasoning of the second respondent and as without logic or reason.

30. As rightly pointed out by the learned senior counsel appearing for the petitioner placing reliance on the decision reported in Premier Automobiles Ltd. (supra), ***when once the assessment order has been the subject matter of rectification under Section 154, the self same issue cannot be the subject matter of reassessment by taking recourse to Section 147 of the Act****. Thus, on the facts that are available today, as far as the assessment year 2003-2004 is concerned, there are two proceedings, one under Section 154 and another under Section 147 of the Act.* ***The jurisdiction given under both the Sections thus operating on different fields, (as far as this assessment year is concerned), and with the doubt in the mind of the Officer as to which direction he has to go, I have no hesitation in holding that the notice lacks the very basis for assumption of jurisdiction under Section 147 of the Act.*** *For the reasons that there cannot be two parallel proceedings on the self same issue as one based on the view that there were materials available on record which warranted exercise of jurisdiction under Section 154 and the other initiated under Section 147 that there was escapement of income from tax on account of the failure of the assessee from disclosing the full and correct particulars, I have* ***no hesitation in quashing the notice on reassessment****."*

The hon'ble ITAT, Jaipur, in the same case, mentioned para 10 of the judgement of the Mumbai Bench of the Tribunal in case of Mahinder Freight Carrier vs. DCIT 129 ITD 278, the relevant extracts of which are as below:-

"10. In this case, the Assessing Officer initiated the proceeding under section 154 of the Act and said proceeding, as per record, has not reached the finality, either by dropping the same or passing any order in the said proceeding. ...

… Admittedly, in this case, the mandate of section 147 is not fulfilled for the reasons that the Assessing Officer himself was not sure whether the issue in controversy could be the subject-matter of section 154 or the same can be the subject-matter of proceedings under section 147. Ld. D.R. placed his heavy reliance in the case of Damodar H. Shah(supra). In the said case the Hon'ble High Court has explained in details the difference between section 154 viz-a-viz section 147. As per said decision there is no bar to evoke section 147 but Assessing Officer has to demonstrate why he was required to do so. Nothing has been demonstrated by Assessing Officer in this case. In our opinion, for the reasons given above, the Assessing Officer was not justified in issuing the notice to the assessee under section 148 and we, accordingly, hold the same as void ab initio and quash the proceedings initiated by the Assessing Officer under section 147. Accordingly, this issue is decided in favour of the assessee …"

The hon'ble ITAT, Jaipur also mentioned the following paragraphs of the judgement of Madras High Court in the matter of Berger Paints Ltd Vs DCIT (supra):

*"42. However, if the Assessing Officer is of the view that income has escaped assessment by reason of a mistake apparent from records, and takes recourse to section 154, but finds later, that there is no apparent mistake, then he cannot, in the absence of any **other ground** on the basis of which he still has reason to believe that the income has escaped assessment, start reassessment proceedings under section 147 of the Act. In other words, the Assessing Officer cannot again start reassessment proceedings on the basis of the same reasons.*

43. The Assessing Officer has not disclosed the reasons for the Assessing Officer to still believe that income that was the subject matter of rectification had still escaped assessment though that was not due to any obvious mistake, borne out from existing records."

Consequently the honourable ITAT Jaipur in the matter of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT (supra) decided the matter in favour of the assessee stating that once the proceedings u/s 154 of the Act were pending on the same issue no proceedings u/s 147 may be initiated on the same issue.

[B.] The honourable Apex Court in discussing a similar matter on section 154 and 147 in the case of **S. M. Overseas Pvt. Ltd. vs CIT [2023] 450 ITR 1 (SC)** (paper book pg. no. 236-237) has stated as below:

"4. … In the absence of any specific order of withdrawal of the proceedings under Section 154 of the Act, the proceedings initiated under Section 154 of the Act can be said to have been pending.

5. In that view of the matter, during the pendency of the proceedings under Section 154 of the Act, ***it was not permissible on the part of the Revenue to initiate the proceedings under Section 147/148 of the Act pending the proceedings under Section 154*** *of the Act. …"*

Further in the judgement of Berger Paints Ltd (supra) (paper book pg. no. 238-245), the Madras High Court has held that **once the AO takes recourse to section 154, he cannot start reassessment proceedings if there is no "other ground" on the basis of which he still believes that there is income escaping assessment.**

Thus, the fate of rectification proceedings becomes irrelevant; the reassessment proceedings are invalid if they are started on same ground as the rectification proceedings.

It is, therefore, humbly submitted your honour(s) that since there is no other ground in the instant case as well, the reopening is done on the same ground as taken in rectification proceedings and thus they are requested to be held invalid, whatever the fate of rectification proceedings is.

Ground No. 2 (As per memorandum of appeal filed originally)

That, without prejudice to ground 1, the ld AO and the ld CIT (Appeals) have passed the orders without considering the facts and circumstances of the case and the reply of the assessee that the payments were made within the limits of the section 40A(3) substantiated by the documents provided in that respect, making an addition of Rs.8,00,000.

Submissions before your honour(s) for Ground No. 2:

The payments were made on different dates within the limit prescribed u/s 40A(3):

It may please be appreciated your honour(s), a supervisor-employee of the assessee presented the details of his imprest account for the month of July 2013, as per which he had made payments to various vendors amounting to Rs.8 lakhs. The accountant entered the same in books of accounts on a single date on 31.07.2013 although the payments to the third parties were made by the supervisor (as an agent of the assessee being his employee) from his petty cash (imprest account) on different dates within the limits prescribed u/s 40A(3).

The assessee explained, while replying to notice u/s 154 and also in the proceedings u/s 147, that the payments were made on different dates and it was a human error due to oversight of

the accountant in presenting prints of the pre-finalised/unaudited data of books of accounts to the learned AO rather than the prints of the finalised/audited data of books of accounts that was presented before the tax-auditor.

The assessee explained that the entry of a bunch of expenses incurred in month of July 2013 was posted by the accountant in the cash book on the end of the month i.e. 31st July in the pre-finalised/unaudited data. This data was copied on the computer system in order to take a back-up of the same and later the data was finalised for being properly presented to the tax-auditor. However, while presenting the same to the income tax department, the accountant by mistake submitted the pre-finalised/unaudited data of books of accounts. This mistake of the accountant has created the whole confusion that the payment was made in contravention of the provisions of section 40A(3). The payments were made at different dates as was replied by the assessee alongwith complete details in the reply to notice u/s 154 and also to notice u/s 148 in the proceedings of reassessment. The reply by the assessee was made part of the order u/s 147 by the ld. AO but was neither touched-upon nor considered while framing the assessment when he had the power to examine by issuing notice u/s 133(6), which makes it clear that the ld. AO did not want to apply his mind to the directions of the audit party. Although his goodself did not take pain to examine the facts presented by the assessee from the third parties, the assessee has himself tried to support his contention in the form of affidavits from these parties that the payments were made on specified different dates (which were within the limits prescribed u/s 40A(3)). Also, in addition, an affidavit of the accountant is annexed herewith regarding the mistake conducted by him is being taken to support the contention. The above affidavits are filed herewith alongwith the copies of respective deponents' aadhaar cards at paper book page no. 102-109.

Regarding mentioning of the voucher no. 416, the assessee-appellant submits that it is not a voucher that is created by the assessee, it is rather an auto-generated voucher number which is generated by the accounting software for every entry passed in the system. The voucher no. 416 is actually not a voucher on the basis of which a payment has been made. If it was so, the concerning voucher also would have been on record and would have been presented to the ld. AO during the assessment/reassessment proceedings. However, it is not so and the voucher number is just a number created by the accounting software for the entry passed and it is not an actual payment voucher as the same nowhere exists.

The independent tax auditor, while issuing his report for FY 2013-14, had verified that the payments were not made in contravention of the provisions of section 40A(3). This may be verified from the audit report in form 3CD filed by him on the income tax portal, also annexed herewith as paper book page no. 110-118, wherein he has not mentioned of any contravention of the provisions of section 40A(3) at para 21(d) of the audit report. (PB pg. no. 113)

Thus the following documents clear the position of payments being made on different dates, not in contravention of the provisions of section 40A(3):

a. Audit report of the tax-auditor,
b. Affidavits of the suppliers in support of invoices raised and payments being made,
c. Affidavit of the accountant regarding mistake in presenting the prints from the pre-finalised/unaudited data to the ld. AO
d. Reply of notice u/s 154 containing summary of invoices/challans of material purchase for impugned amount (separate invoices are part of the submission made to the ld. AO. A 54-page submission was made as mentioned at the top right corner of the front page of submission)
   Hence, it is requested to please be kind enough and consider the matter on facts as well which make it quite clear that the payments were not made in contravention of the provisions of section 40A(3) and delete the additions made.

Prayer:

On the basis of the above discussions/submissions, it is prayed that following reliefs to the assessee may please be granted:

- quashing the orders of ld. AO and the ld. CIT (Appeals) being not on legal footing,
- deleting the disallowance in the facts and circumstances of the case and the legal precedents,
- any other relief as your honour(s) may deem fit.

The assessee shall remain obliged for the same."

7. To support the various grounds so raised by the ld. AR of the assessee and has relied upon the following evidences in support of the contentions so raised:-

S. No.	Brief Description of document and its relevance	Pg From	Pg To
1	Written submission before your honours	1	47
2	Copy of application to request admission of additional grounds and additional evidences	48	50
3	Order u/s 250 of ld. CIT (Appeals), dated 04.01.2024, appealed against	51	64
4	Order u/s 147 r.w.s. 143(3) dated 31.10.2019	65	75
5	Reason recorded by the ld. AO for re-opening of assessment u/s 147	76	76
6	Order u/s 143(3) dated 30.07.2016	77	84
7	Submission by assessee dated 28.06.2016 to the respondent during	85	86

	assessment proceedings u/s 143(3)		
8	Note Sheet of assessment proceedings u/s 143(3)	87	95
9	Notice u/s 154 dated 21.11.2017 for rectification of mistake apparent on record in order u/s 143(3) dated 30.07.2016	96	97
10	Reply to notice u/s 154 (rectification proceedings) containing summary of invoices/challans of material purchase for impugned amount	98	101
11	Copies of affidavits alongwith aadhaar cards of deponents and extract of tax auditor's report depicting no violation of section 40A(3)	102	118
	Relied upon Judgements:		
12	Rajasthan High Court Judgement in **CIT vs Vardhman Industries** (2014) 363 ITR 625 (Raj) as judicial precedent	119	121
13	Supreme Court Judgement in **CIT Vs Kelvinator of India Ltd.** (2010) 320 ITR 561 (SC) as judicial precedent	122	124
14	Rajasthan High Court Judgement in **CIT Vs Vaishali Avenue** [2014] 268 CTR 207 (Raj) as judicial precedent	125	128
15	Gujrat High Court Judgement in **Kalpataru Sthapatya (P.) Ltd Vs ITO** [2013] 215 Taxman 479 (Guj) as judicial precedent	129	135
16	Supreme Court Judgement in **New Delhi Television Limited Vs. ACIT** : [2020] 271 Taxman 1 (SC) as judicial precedent	136	153
17	Supreme Court Judgement in **Calcutta Discount Co. Ltd. v. ITO** [1961] 41 ITR 191 as judicial precedent	154	178
18	Supreme Court Judgement in **Gemini Leather Stores Vs ITO** [1975] 100 ITR 1 (SC) as judicial precedent	179	180
19	Supreme Court Judgement in **ITO v. Lakhmani Mewal Das** [1976] 103 ITR 437 (SC) as judicial precedent	181	191
20	Supreme Court Judgement in **ITO vs Tech Span India P. Ltd** (2018) 255 Taxman 152 (SC) as judicial precedent	192	195
21	Bombay High Court Judgement in **Asian Paints Ltd Vs DCIT**-LTU [2019] 261 Taxman 380 (Bom) as judicial precedent	196	205
22	Rajasthan High Court judgement in **Rampal Samdani vs UOI** [2023] 330 CTR 672 (Raj) as judicial precedent	206	210
23	Delhi High Court Judgement in **Shashi Mohan Garg Vs ITO** Appeal Number : W.P.(C) 7619/2019 dated 05.10.2023 as judicial precedent	211	216
24	Jurisdictional ITAT Jaipur Bench Judgement in **Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT**, Circle-6, Jaipur, ITA No. 206/JP/2015 as judicial precedent	217	235
25	Supreme Court Judgement in **S. M. Overseas Pvt. Ltd. vs CIT** [2023] 450 ITR 1 (SC) as judicial precedent	236	237
26	Calcutta High Court Judgement in **Berger Paints India Ltd. vs. DCIT**	238	245

	322 ITR 369 (Cal.) as judicial precedent		

8. The ld. AR for the assessee also filed on 23.04.2024 for admission of additional ground and additional evidences which reads as under:-

"With utmost regards your honours, we are thankful for the hearing conducted on 02.05.2024 and further adjourned for 09.07.2024 on the request of the Ld. Sr.DR-II for enabling him to call for report from the DCIT, Circle-2, Kota on the matter.

Further we humbly submit as below:

1. During the conduct of hearing, the Ld. Sr.DR-II, filed objections in writing dated 01.05.2024 against the request by the appellant dated 20.04.2024 received by him on 25.04.2024, stating that since these grounds were not raised before the Ld. CIT(A), hence these grounds cannot be admitted at this stage.
2. In respect of the above, during the hearing, it was re-iterated (being earlier submitted in the application itself) on behalf of the appellant, that the grounds are purely legal in nature on the basis of the facts already on record in the assessment/re-assessment proceedings and no fresh facts need to be investigated and, thus, they are requested to be allowed to be taken, in order to impart justice, in view of the judgement of the **Supreme Court** in the case of **National Thermal Plant Co. Ltd vs CIT** as reported at 229 ITR 383.
3. In the above-cited case the **Apex Court** has stated as below:

   "... Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings ***we fail to see why such a question should not be allowed to be raised*** *when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*
   The refrained question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

4. We herewith again humbly submit what we had already submitted in the request to admit the grounds, that the appellant could not take these grounds in the memorandum of

appeal as there was a change of counsel (at the second appeal stage) who after examining the assessment records, which were available with the incumbent AO, could understand the matter in more detail and only after the going-over the detailed facts, as per assessment file, could these grounds come to light. The copy of letter seeking inspection of file was annexed with the application requesting allowing of additional grounds and additional evidences, however again herewith annexed. It is, therefore, again requested that being purely legal grounds of appeal, these may, please, be allowed to be taken.

5. For the sake of brevity, the additional grounds, not reproduced here again, that are requested to be admitted, are as per the request letter dated 20.04.2024 received by the hon'ble ITAT and the Sr.DR-II on 25.04.2024.
6. We very humbly submit that the appellant also requested to admit confirmations from the accountant and parties with whom the transactions were entered into in order to provide an assurance to the facts submitted to the Ld. AO and the Ld. CIT (Appeals). These confirmations are only re-iterating the facts already on records and there is no fresh fact that is to be investigated/adjudicated. Hence, the additional evidences are also requested to be admitted.

It is, therefore, again requested to please admit the additional grounds and additional evidences, to adopt justice-oriented approach so that a meritorious matter is not thrown out at the very threshold and cause of justice is not defeated on technical considerations. The assessee-appellant shall remain obliged to your honours."

7. The ld. AR for the assessee also submission in response to objection by the Ld. Sr. –II against request for admission of additional grounds and additional evidences which reads as under:-

"With utmost regards your honours, we are thankful for the hearing conducted on 02.05.2024 and further adjourned for 09.07.2024 on the request of the Ld. Sr.DR-II for enabling him to call for report from the DCIT, Circle-2, Kota on the matter.

Further we humbly submit as below:

During the conduct of hearing, the Ld. Sr.DR-II, filed objections in writing dated 01.05.2024 against the request by the appellant dated 20.04.2024 received by him on 25.04.2024, stating that since these grounds were not raised before the Ld. CIT(A), hence these grounds cannot be admitted at this stage.

1. In respect of the above, during the hearing, it was re-iterated (being earlier submitted in the application itself) on behalf of the appellant, that the grounds are purely legal in

nature on the basis of the facts already on record in the assessment/re-assessment proceedings and no fresh facts need to be investigated and, thus, they are requested to be allowed to be taken, in order to impart justice, in view of the judgement of the **Supreme Court** in the case of **National Thermal Plant Co. Ltd vs CIT** as reported at 229 ITR 383.

2. In the above-cited case the **Apex Court** has stated as below:

"... Undoubtedly, the Tribunal will have the discretion to allow or not allow a new ground to be raised. But where the Tribunal is only required to consider a question of law arising from the facts which are on record in the assessment proceedings ***we fail to see why such a question should not be allowed to be raised*** *when it is necessary to consider that question in order to correctly assess the tax liability of an assessee.*
The refrained question, therefore, is answered in the affirmative, i.e., the Tribunal has jurisdiction to examine a question of law which arises from the facts as found by the authorities below and having a bearing on the tax liability of the assessee. We remand the proceedings to the Tribunal for consideration of the new grounds raised by the assessee on the merits."

3. We herewith again humbly submit what we had already submitted in the request to admit the grounds, that the appellant could not take these grounds in the memorandum of appeal as there was a change of counsel (at the second appeal stage) who after examining the assessment records, which were available with the incumbent AO, could understand the matter in more detail and only after the going-over the detailed facts, as per assessment file, could these grounds come to light. The copy of letter seeking inspection of file was annexed with the application requesting allowing of additional grounds and additional evidences, however again herewith annexed. It is, therefore, again requested that being purely legal grounds of appeal, these may, please, be allowed to be taken.
4. For the sake of brevity, the additional grounds, not reproduced here again, that are requested to be admitted, are as per the request letter dated 20.04.2024 received by the hon'ble ITAT and the Sr.DR-II on 25.04.2024.
5. We very humbly submit that the appellant also requested to admit confirmations from the accountant and parties with whom the transactions were entered into in order to provide an assurance to the facts submitted to the Ld. AO and the Ld. CIT (Appeals). These confirmations are only re-iterating the facts already on records and there is no fresh fact that is to be investigated/adjudicated. Hence, the additional evidences are also requested to be admitted.

It is, therefore, again requested to please admit the additional grounds and additional evidences, to adopt justice-oriented approach so that a meritorious matter is not thrown out at the very threshold and cause of justice is not defeated on technical considerations. The assessee-appellant shall remain obliged to your honours."

8 The ld. AR for the assessee also filed on 08.08.2024 for submission in response to the ld. DR's filed of the report of the jurisdictional AO which reads as under:-

"With utmost regards your honours, before making submissions on the report of the Jurisdictional AO, it is requested to the honourable Bench to kindly appreciate that a detailed hearing was conducted on 2nd May 2024 by referring to the Paper Book including the additional grounds which are purely legal in nature (and thus were requested to be allowed in view of the judgement of the Supreme Court in the case of National Thermal Plant Co. Ltd vs CIT as reported at 229 ITR 383) and additional evidence in the form of confirmations of transactions which are in the form of reiterating the facts that are already on record in the form of reply submitted to the ld AO forming part of paper book at pages 98-101.

[A] The **hearing conducted on 02.05.2024** included:

1. Discussion on the 'Change of Opinion' on the same set of inputs being considered for reopening with no fresh facts. The Material Purchase ledger was the one considered during the original assessment alongwith the cash payment aspect (referring to pg 79, 85 and 89-90 of the paperbook) and was again reviewed in the reassessment proceedings. Also discussed that there is no power to review as per the Supreme Court Judgement in the case of CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) (paper book pg. no. 122-124). (as per Ground No.1)

2. Discussion that if there was mistake/oversight committed by the ld. AO during the original assessment related to Material Purchase ledger, then any such oversight cannot be a basis for reopening in the light of judgement of the honourable Supreme Court in the matter of Gemini Leather Stores vs ITO [1975] 100 ITR 1 (SC) (paperbook page 179-180).
3. Discussion on reassessment being done during the pendency of the rectification proceedings u/s 154 on the same issue is bad in law in view of judgement of the Hon'ble ITAT, Jaipur Bench in the case of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT, Circle-6, Jaipur, ITA No. 206/JP/2015 (paper book pg. no. 217-235). The notice issued u/s 154 was referred as per page 96-97 of the paperbook. (as per additional Ground No.3)
4. Discussion on the limitation prescribed by the first proviso to section 147 as per which there cannot be a reassessment u/s 147 after a lapse of four years from the end of the assessment year if an assessment was earlier done u/s 143(3) wherein full and true disclosures of material facts was made by the assessee, which in the instant case has been

done by way of submitting the complete ledger of Material Purchase during original assessment proceedings, as was verified from page 85 of the paperbook. (as per additional Ground No.1)

5. Discussion on the additional evidence that they are in the form of confirmations of transactions and are only reiterating the facts that are already on record in the form of reply submitted to the ld AO forming part of paper book at pages 98-101 and there are no fresh facts to be investigated.

[B] Ld. DR's request to call for Jurisdictional AO's report

On the same day's hearing, the ld. DR, on his turn, requested to call for a report from the Jurisdictional AO to comment on the submissions in the paperbook which is now available on record and was provided to the appellant on 06.08.2024 during the conduct of the hearing.

[C] Appellant's submissions on the report:

Appellant humbly submits in respect of the said report that there is nothing in it that leads to different inference from what may be deduced from the paperbook and documents already on record. Still if we refer the report, it favours the grounds raised by the appellant in the following manner:

1. **Change of Opinion and Mistake/Oversight by the Ld. AO**

1.1) It has been agreed by the Jurisdictional AO that there was different opinion to make disallowance while making assessment u/s 143(3) from the opinion formed while making reassessment u/s 147, for which the honourable Bench's appreciation is requested to the 2nd line of the last paragraph of the 2nd page of the report which reads as:

> *"... the issue in the original assessment proceedings was pertaining to estimated portion of disallowance of expenditure whereas, in the instant case, the issue pertains to disallowance in contravention to section 40A(3) of the Act. Here no estimation theory was applied by the AO."*

Thus, on the same set of inputs (no fresh facts), first the estimation theory was applied and later in the reassessment proceedings no estimation theory was applied rather section 40A(3) was resorted. It is, therefore, quite evident that there was a change of opinion of the ld. AO on the same input – the Material Purchase Account.

1.2) The appellant very humbly further requests the honourable Bench's appreciation and consideration to the **Jurisdictional AO's admission that a mistake/oversight was committed in the original assessment** which may be referred to from the report's 1st page's para 3rd which reads as:

> *"The assessee further served a notice u/s 148 about the mistake in original assessment..."*

The ld. AO admits here that a mistake was committed in the original assessment and the said mistake resulted in the "review" of the original assessment in the form of reassessment so that the mistake/oversight by the ld. AO may be made good.

Hence, the reopening was not a result of discoveries and satisfaction from new and hitherto unexplored sources or materials, rather it was on account of a differently oriented view of the Ld. AO on the basis of same inputs once considered & applied. Such condition has been commented in favour of the appellant by the Division Bench of the Rajasthan High Court in the case of **CIT vs Vardhman Industries (2014) 363 ITR 625 (Raj)** (paper book pg. no. 119-121)

For both 1.1 and 1.2 above, the appellant has already submitted in the paperbook the judgements of the Supreme Court, which favour the appellant's Ground No.1 of the appeal, and they are:

a.) **CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)** (paper book pg. no. 122-124)
"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has ***no power to review****; he has the power to reassess. But reassessment has to be based on fulfilment of certain preconditions and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer..."*

b.) **Gemini Leather Stores Vs ITO [1975] 100 ITR 1 (SC)** (paper book pg. no. 179-180) wherein it has been held that the **AO cannot take recourse to s. 147 to remedy the error resulting from his own oversight**.

Thus, on the first ground of appeal it is clear that there was a Change of Opinion on same set of inputs, the reopening is bad in law for which I would request the honourable Bench to allow Ground No.1 and oblige.

2. Reassessment was done during the pendency of the rectification proceedings u/s 154 on the same issue

At para 3 of the 2nd page of the Jurisdictional AO's report there is a para numbered (ii) as per which it is clear that the rectification proceedings were not taken to finality. Thus, the reassessment is bad in law in view of judgement of the Hon'ble ITAT, Jaipur Bench in the case of Rajasthan State Industrial Development & Investment Corp. Ltd. Vs. ACIT, Circle-6, Jaipur, ITA No. 206/JP/2015 (paper book pg. no. 217-235).

Thus, the additional Ground No.3 may please be allowed in favour of the appellant. The detailed submission on the same forms part of the paperbook at page 36-43.

3. **Nothing in the Jurisdictional AO's report contradicts the limitation provided by first proviso to section 147**

The 2nd last para of the 1st page of the Jurisdictional AO's report is a para numbered (i), which deals with the limitation aspect, does not anywhere contradicts the proviso to section 147 that restricts the ld. AO to take action u/s 147 after a lapse of four years if the assessment u/s 143(3) has earlier been done where full and true disclosures of material facts was made.

It is clear from the submission dated 28.06.2016 at paperbook page no.85 that the ledger of Material Purchase Account was submitted during assessment proceedings u/s 143(3). Thus, the restriction specified in first proviso to section 147 gets attracted. Hence, the proceedings related to reassessment carried out after 31st March 2019 in respect of AY 2014-15 are not as per law. Similar view has been taken by the Honourable Rajasthan High Court in Rampal Samdani vs UOI [2023] 330 CTR 672 (Raj) (paper book pg. no. 206-210).

Thus, it is again humbly requested to allow the additional Ground No.1 of the appellant related to the limitation aspect.

4. **In respect of payments being not in contravention of section 40A(3)**

At 2nd last para the 2nd page of the Jurisdictional AO's report the Ld. AO has mentioned that:

"During the assessment proceedings, the assessee has not submitted any supporting documentary evidences in support of his claim."

In this respect, the appellant humbly submits that the matter of contravention of section 40A(3) first came up in the notice u/s 154 which forms part of the paperbook at page 96-97. The reply to the same submitted to the ld. AO is as per paperbook page 98-101, wherein everything related to non-contravention has been submitted including the list of invoices for which payments were made within limits of section 40A(3) and also the copies of these bills/vouchers were submitted with the reply. Confirmations of the relevant parties in the forms of affidavits to re-iterate these facts already on record alongwith aadhaar cards of the deponents and extract of tax auditor's report depicting no violation of section 40A(3) form part of the paperbook at pages 102-118 which may

please be considered and on facts also the Ground No.2 of the appeal may please be allowed in favour of the appellant.

Appellant, thus, again very humbly submits in respect of the said Jurisdictional AO's report that there is nothing in it that leads to a different inference from what may be deduced from the paper book and documents already on record.

It is, therefore, requested to please adopt justice-oriented approach and allow the appeal of the appellant on all the grounds. The assessee-appellant shall remain obliged to your honours for the same."

9. The ld. AR for the assessee also filed on 29.08.2024 for submission in response to the Ld. DR's filed on 08.08.2024 of the case of law compilation relied upon by the department which reads as under:-

"With utmost regards your honours, during the conduct of the last hearing on 08.08.2024 the Ld. DR presented a compilation of various case laws on which the respondent relied regarding time limit for reopening u/s 148, for which we submit as under:

A. As the Ground raised by the appellant does not relate to section 148 or section 149, rather it relates to "Proviso to section 147", hence **the submissions of the respondent, which revolve around section 148, 149 and to some extent section 147 (but not proviso to section 147), are taking the honourable Bench away from the moot question of applicability of the proviso to section 147 in the appellant's instant case.**
The submission of the Ld. DR may be tabulated in the following manner as per which the relied upon case laws are of a.) the honourable Supreme Court, b.) the honourable Jaipur Bench of ITAT and c.) various other Tribunals and High Courts (other than Jurisdictional Honourable Rajasthan High Court):

a.	Honourable Supreme Court	The judgements as relied upon by the respondent: - Raymond Woollen Mills Ltd Vs ITO - Ajay Gupta Vs. ITO - Associated Stone Industries (Kotah) Ltd. Vs. CIT do not specifically address the conditions/restrictions contained in the proviso to section 147 that are claimed by the appellant to be applicable in the instant case. Thus, these

		judgements are more general in nature and have not specifically examined the applicability of the proviso to section 147 and are, thus, requested to not be applied in the instant case before the honourable Bench.
b.	Honourable Jaipur ITAT	The judgement in Smt Uma Mandal Vs. ITO does not specifically address the proviso to section 147. Also, the assessee, in this case referred by the respondent, was not assessed u/s 143(3) before being assessed u/s 147. Thus, the ratio of the judgement does not get applicable in the appellant's instant case because here earlier an assessment was done u/s 143(3) wherein the facts, that are the basis of order u/s 147 being the subject matter in the case, were already examined.
c.	various other Tribunals and High Courts (Non-jurisdictional)	Since, there is a **jurisdictional Honourable Rajasthan High Court**'s case for reference, that forms part of the Paper Book Pg. 206-210, the citation of which is **Rampal Samdani Vs. UOI [2023] 330 CTR 672 (Raj),** it has binding value and the same is requested to be considered by the Honourable Bench. The Honourable Court addressing a writ petition on similar matter has stated in this judgement at para 5 as: *"…This Court, after analysis of material facts available on record, is of a categoric opinion that the assessee disclosed all material facts truly and fully while furnishing the return for the Assessment Year 2013-14 and hence, there was no justification for invoking the proviso to Section 147 of the Income Tax Act so as to initiate reassessment proceedings after a period of 4 years."*

B. Proviso to section 147 reads as under:

"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*

In this regard, the appellant reiterates that:

i.) During assessment proceedings u/s 143(3), the assessee submitted the detailed ledger of Material Purchase on 28.06.2016 (please refer pg.85-86). The assessment Note Sheet (pg.89-90 of the Paper Book) clearly mentions the examination of the same by the ld. AO. Thus, **there wasn't any non-disclosure by the assessee-appellant during original assessment proceedings** and the allegation in reasons recorded for reopening being baseless, make it bad in law.

ii.) **In the assessment order u/s 143(3)**, the ld. AO has expressed his opinion on the Material Purchase ledger after examination of books of accounts **categorically stating** (paper book pg.79) that:

"... कई व्यवहारों के मामलों में बिना किसी विशेष कारण के **नकद भुगतान के 20000 रूपये से कम के एक मुश्त भुगतान** किये गए दिखाए गए हैं |"

His goodself has nowhere mentioned that payments made have been shown to be 'more than' Rs.20,000; rather he mentioned that the payments have been shown to be made 'lesser than' Rs.20,000. **This categorical statement makes it clear that the ld.AO had examined the cash payments and had found that payments lesser than Rs.20,000 have been shown to be made by the assessee. After making examination of cash payment aspect, not making a disallowance u/s 40A(3) then and there, makes it clear that there wasn't any such violation as understood on examination by the ld. AO.**

The fact of making payments less than Rs.20,000 was well explained to the ld. AO during the assessment proceedings u/s 143(3) by producing the vouchers, bills, books of accounts, etc. and explaining to him the manner in which payments were made by a supervisor following the law laid down by section 40A(3). After examination and understanding the explanations made to him, the ld. AO understood clearly that payments less than Rs.20,000 were made and the same was categorically and explicitly stated by him in the order u/s 143(3).

Thus, assessment proceedings u/s 143(3) are more reliable, as compared to the reassessment proceedings u/s 147, as complete books alongwith vouchers were examined, including the cash payment aspect, and a categorical finding was made by the incumbent ld. AO after complete examination that cash payments less than Rs.20,000 were made.

iii.) There are **affidavits** of the vendors (for whose payments the allegation of violation of sec 40A(3) are made) making a declaration on oath that the payments lesser than Rs.20,000 per day were received by them. Affidavit of the supervisor and the accountant stating the facts are also annexed. The averments in these affidavits (pg.102-109), submitted alongwith the ID proofs of the deponents, are requested to be relied as gospel truth unless disproved and, thus, requested not to be disbelieved in the absence of any adverse material on record.

iv.) Earlier, all the primary facts were submitted by the assessee during proceedings u/s 143(3) and an opinion of not making a disallowance u/s 40A(3) was formed after examination of cash payment being lesser than Rs.20,000.
Later, without any fresh facts on record, made an opinion to disallow expenses u/s 40A(3) by first initiating rectification proceedings and then reassessment proceedings.
Hence, there is clearly a case of "change of opinion" due to review, which is not allowable in the light of CIT Vs Kelvinator of India Ltd. (2010) 320 ITR 561 (SC) (paper book pg. no. 122-124) and CIT vs Vardhman Industries (2014) 363 ITR 625 (Raj) (paper book pg. no. 119-121).

v.) Although complete disclosures were made by the assessee and were verified & considered by the Ld. AO, however, if at all for the sake of argument, there was an '**oversight by the AO**', the same **cannot be the basis for re-opening as held by the Supreme Court** in case of Gemini Leather Stores Vs ITO [1975] 100 ITR 1 (SC) (paper book Pg.179-180).

C. The additional ground no.1, thus, may please be allowed due to the following:

i.) Assessment already done u/s 143(3) (paper book pg. 77-84).

ii.) Primary facts were disclosed and the allegation of non-disclosure is baseless.
The assessee cannot be held for non-disclosure if the primary facts have been properly disclosed by him; and on the basis of these, if a wrong conclusion is drawn by the AO, then it cannot be a ground for reopening because the AO previously held another opinion. Such rulings are given:

- By the Apex Court in 4 cases
  + Calcutta Discount Co. Ltd. v. ITO [1961] 41 ITR 191 (paper book Pg.154-178)
  + New Delhi Television Limited Vs. ACIT : [2020] 271 Taxman 1 (SC) (paper book Pg.136-153)
  + ITO v. Lakhmani Mewal Das [1976] 103 ITR 437 (SC) (paper book Pg.181-191) and
  + ITO vs Tech Span India P. Ltd (2018) 255 Taxman 152 (SC) (paper book Pg.192-195)
- By the Bombay High Court in Asian Paints Ltd Vs DCIT-LTU [2019] 261 Taxman 380 (Bom) (paper book Pg.196-205); and

- By the Gujrat High Court in Kalpataru Sthapatya (P.) Ltd Vs ITO [2013] 215 Taxman 479 (Guj) (paper book Pg.129-135)

iii.) Since the allegation of non-disclosure cannot sustain on facts, the order passed u/s 147 in the instant case is beyond limitation of 4 years from the end of the AY 2014-15 as the notice u/s 148 was served on 11th July 2019 and order passed on 31.10.2019. The jurisdictional Honourable Rajasthan High Court in Rampal Samdani Vs. UOI [2023] 330 CTR 672 (Raj.) (paper book Pg.206-210) has declared the notice and the proceedings to be time-barred on similar grounds.

D. Prayer:

It is prayed, on the basis of the humble submission of the appellant as above and as made earlier, that the submission by the respondent should not be considered as the same is contrary to the facts of the case and do not have relevance to the grounds raised by the appellant.

It is further prayed that since it is a classic and clear case of change of opinion as also there are no fresh facts on record, hence it is very humbly requested to your honours to please be kind enough and consider the grounds of appeal by allowing them in the favour of the appellant. The appellant shall remain obliged to your honours for the same."

10. Per contra, ld. DR supported the order of the lower authorities. The ld. DR in addition also filed the following written submissions:-

"2. In this regard it is submitted that the assessee vide his letter received in this office undersigned on 25.04.2024 has requested to Hon'ble Bench for admission of additional grounds and additional evidences. The assessee has requested for admission of following 3 additional grounds:

1. That on the facts and circumstances of the case and in law, the impugned order passed by the assessing officer is barred by limitation and therefore, is liable to be quashed.

2. That the Ld. Assessing Officer has not applied his own mind before issuance of notice u/s 148 and acted only on borrowed satisfaction, which is not permitted and thus the entire proceedings are liable to be quashed.

3. That the Ld. Assessing Officer has erred in assuming jurisdiction u/s 148 on the same ground as was there in proceedings u/s 154 in view of judgement of the Hon'ble ITAT, Jaipur Bench in the case of Rajasthan State Industrial Development & Investment Corp. Lad. Vs. ACIT, Circle-6. Jaipur, ITA No. 206/JP12015 and other case laws.

2. The aforesaid additional grounds were not raised before the Ld. CIT(A). Hence the lower authority had not adjudicated on these additional grounds. Therefore these grounds can not be admitted at this stage.

2.1 Further the assessee submitted through his letter to the Hon'ble Bench that he wishes to submit copies of confirmations from parties (4 parties) with whom the transactions were entered into as additional evidences.

For the sake of understanding, Rule 29 of the ITAT Rules is reproduced below:

> "29. Production of additional evidence before the Tribunal.- The parties to the appeal shall not be entitled to produce additional evidence either oral or documentary before the Tribunal, but if the Tribunal requires any documents to be produced or any witness to be examined or any affidavit to be filed to enable it to pass orders or for any other substantial cause, or, if the income-tax authorities have decided the case without giving sufficient opportunity to the assessee to adduce evidence either on points specified by them, or not specified by them, the Tribunal, for reasons to be recorded, may allow such document to be produced or witness to be examined or affidavit to be filed or may allow such evidence to be adduced."

In this regard it is submitted that the assessee has not produced such copies of confirmation before the Lower Authorities. What substantial cause has restricted him to submit the copies of confirmation before the lower authorities. In view of the above the additional evidences cannot be admitted at this stage under Rule 29 of the ITAT Rules."

11.1 Ld. DR also filed on 09.07.2024 addition written submission which reads as under:-

"Kindly refer on the above mentioned subject wherein report was sought on additional evidence submitted by the assessee before the Hon'ble ITAT.

In this connection it is submitted that the Assessee is civil contractor and original return was filed by assessee on 04-10-2014. Subsequently, assessment order u/s 143 has been passed on 30-7-2016 by making additions of Rs 125900/- for the A.Y.2014-15. In against the said order, the assessee has preferred appeal before CIT(A). The assessee did not get any relief vide order dated passed by the CIT(A) on 18.09.2017.

The assessee further served a notice u/s 148 about mistake in original assessment wherein the AO was found a cash entry of Rs.800000/- as expenditure in cash which is liable to disallow u/s

40(A)(3). Further, the AO was passed an order u/s 147/148 and make additions Rs. 800000. Aggrieved from the order assessee is again filed appeal before CIT(A).

Further, the CIT(A) has dismissed of the appeal of the assessee on 04.01.2024. Now, the assessee has provided additional evidences during the course of appellate proceedings before the Hon'ble ITAT which is being discussed hereunder:-

(i) As additional evidence, the assessee has submitted before Hon'ble ITAT that reopening proceedings u/s 147 after a lapse of 4 years from the end of the relevant assessment year is invalid and not as per act.

On perusal of records available with this office it is noticed that notice u/s 148 of the I.T. Act was issued to the assessee for the AY 2014-15 on 11/07/2019 after getting approval of the competent authority i.e. PCIT, Kota. The due process of initiating proceedings u/s 148 of the Act has been undertaken after due approval of the competent authorities wherever necessary and after recording the reasons for initiation of such reassessment proceedings. The action of reopening the case is based on the factual findings. The reasons are based on the relevant material on record at the time of recording reasons. The legislative intent was to allow the AO to go through the process of assessment and Assessing officer has fulfilled all the procedural conditions as prescribed in section 147 of the Act.

During that time of issuing of notice u/s 148, time limit for issuing notice u/s 1 was a under:

(1) No notice under section 148 shall be issued for the relevant assessment year,- (a) if four years have elapsed form the end of the relevant assessment year, unless the case falls under clause (b) or clause (c);

(b)If four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year;

Hence, the notice u/s 148 of the Income Tax Act, 1961 for the AY 2014-15 issued to the assessee are legal, justified and within time under the purview of the Income Tax Act, 1961.

(ii) As additional evidence, the assessee has submitted before Hon'ble ITAT that proceedings of rectification u/s 154 were not taken to finality by either passing an order against the assessee or by dropping the proceedings.

On perusal of records available with this office it is noticed that no mistake was found apparent from records, therefore the then A.O. did not considered the said rectification as per direction of competent authority.

(iii) As additional evidence, the assessee has submitted before Hon'ble ITAT that the said amount of Rs.800000/- [38000+155778+395020+205950+5252] pertains to different parties and dates and it was merely a mistake while accounting as the accountant considered collective amount on last date of the month instead of entering separate entries at different date.

Further, the assesssee has also submitted that while assessment proceedings u/s 13(3), disallowance on estimated portion of expenditure (1% of expenditure) was made which was further allowed by the Ld. CIT(A) vide order dated 18.09.2017.

On perusal of records available with this office it is noticed that the case of assessee was reopened based on the information that the assessee had made payment of Rs. 8,00,000/- in cash on 31.07.2013 vide voucher number 416 and the same was claimed in P&L account. The AO disallowed the said amount as per the provisions of section 40A(3) of the Act while passing order under section 147 r.w.s. 143(3) oп 31.10.2019.

During the assessment proceedings', the assessee has not submitted any supporting documentary evidences in support of his claim. Merely saying that it was an accountant's mistake does not absolve the assessee from the relevant provisions of Income tax Act. If it was a inadvertent mistake, the same would have been repeated in previous or after months whereas the mistake occurred only in the month of July. Moreover, the amount was made with voucher no. 416 which clearly shows that the payment was made to a particular party/person not to the different parties. This is the basic concept which an accountant uses while posting an entry.

Further, the contention of the assessee that similar issue has been already decided by the CIT(A), is not acceptable as the issue in the original assessment proceedings was pertaining to estimated portion of disallowance of expenditure whereas in the instant case, the issue pertains to disallowance in contravention of section 40A(3) of the Act. Here, no estimation theory was applied by the AO.

In view of the above facts, the AO has rightly applied the provisions of section 40A(3) of the Act and therefore disallowance made by the AO is also confirmed by the CIT(A). Accordingly, the CIT(A) has dismissed of the appeal of the assessee on 04.01.2024.

Hence it can be fairly presumed that the assessee does not have any substantial evidence and explanation in this regard.

In view of the above facts, your good self is requested not to consider the additional ground submitted by the assessee before Hon'ble Bench ITAT. The report is being submitted for kind perusal and necessary action.

12. We have heard both the parties and perused the materials available on record. The moot issue in this appeal is that the AO disallowed payment of Rs.8.00 lacs as per the provisions of Section 40A(3) of the Act while passing the order u/s 147 r.w.s. 143(3) of the Act on 31-10-2010 on the ground that the assessee had not furnished any supporting documents or evidences in support of his claim that the payment was made due to necessity of the business. In first appeal, the ld. CIT(A) has dismissed the appeal by observing as under:-

> ''5.2 In this regard, the appellant has submitted that the said amount of Rs. 800000 [38000+155778+395020+205950+5252] pertains to different parties and dates and it was merely a mistake while accounting as the accountant considered collective amount on last date of the month instead of entering separate entries at different date. Alternatively, the appellant has also submitted that while assessment proceedings under section 143(3) of the Act, disallowance on estimated portion of expenditure (i.e. 1% of expenditure) was made which was further allowed by the Ld. CIT(A) vide order dated 18.09.2017.
>
> 5.3 The appellant's contention is not acceptable because the appellant has not submitted any supporting documentary evidences in his submission. Merely saying that it was an accountant's mistake does not absolve the appellant from the relevant provisions of Income tax Act. If it was a inadvertent mistake, the same would have been repeated in previous or after months whereas the mistake occurred only in the month of July. Moreover, the amount was made with voucher no. 416 which clearly shows that the payment was made to a particular party/person not to the different parties. This is the basic concept which an accountant uses while posting an entry.

> 5.4 Further, the contention of the appellant that similar issue has been already decided by the CIT(A), is not acceptable as the issue in the original assessment proceedings was pertaining to estimated portion of disallowance of expenditure whereas in the instant case, the issue pertains to disallowance in contravention of section 40A(3) of the Act. Here, no estimation theory was applied by the AO.
>
> 5.5 In view of the above discussion, it is held that the AO has rightly applied the provisions of section 40A(3) of the Act and therefore disallowance made by the AO is confirmed. Accordingly, appeal is dismissed.
>
> 6. In the result, appeal is dismissed."

It is noted by the Bench that in reassessment proceedings, this issue has already been considered in first round wherein *the appellant has submitted that the said amount of Rs. 800000 [38000+155778+395020+205950+5252] pertains to different parties and dates and it was merely a mistake while accounting as the accountant considered collective amount on last date of the month instead of entering separate entries at different date. Alternatively, the appellant has also submitted that while assessment proceedings under section 143(3) of the Act, disallowance on estimated portion of expenditure (i.e. 1% of expenditure) was made which was further allowed by the Ld. CIT(A) vide order dated 18.09.2017.* Thus the issue upon which Revenue had already considered and taken a view which was finalized in first round. However, the Bench has deeply gone through the entire conspectus of the case and found that the AO reopened the case of the

assessee after a lapse of 04 years from the end of the relevant assessment year 2014-15 which is invalid as per Section 147 of the Act. The section 147, as it stood for the relevant assessment year under consideration is as reproduced below:

> *"Income escaping assessment.*
>
> *Section 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:"*

It is also noteworthy to mention that the assessment year 2014-15 in the instant case ended on 31.03.2015 and end of four years from that date comes to 31.03.2019. The notice for reopening u/s 148 was issued on 11.07.2019 (as mentioned at para 4 – ref. PB pg. no. 66) which is beyond the limitation prescribed by law in force as it stood during the reassessment proceedings and thus the notice and the proceedings are invalid as there isn't any non-disclosure on the part of the assessee. We take strength from the order of the Hon'ble

Rajasthan High Court in the case of Rampal Samdani vs Union of India [2023] 330 CTR 673 wherein at page 209 and 210 the Hon'ble Court observed as under:-

> ''5……..A clear perusal of the proviso to Section 147 of the Income Tax Act (supra) makes it clear that reassessment proceedings after expiry of four years from the end of the relevant assessment year can only be initiated in case, there is tangible ma with the A.O. to show that the assessee had failed to fully and truly disclose all material facts necessary for his assessment for that assessment year. This Court, after analysis of material facts available on record is of a categoric opinion that the assessee disclosed all material facts truly and fully while furnishing the return for the Assessment Year 2013-14 and hence, there was no justification for invoking the proviso to Section 147 of the Income Tax Act so as to initiate reassessment proceedings after a period of 4 years. Thu reassessment notice is definitely time barred. In addition thereto, the reassessment notice has been issued only on account of change of opinion", plain and simple, without any tangible fresh material being available to the ITO for reopening the assessment proceedings.
>
> 6. Resultantly, the impugned notice (Annexure-5) dated 30.03.2021 is declared to time barred and cannot be saved by proviso to Section 147 of the Income Tax Act reproduced supra.
>
> 7. In addition thereto, the reassessment is being resorted to only on account of 'change of opinion' of Assessment Officer without there being any fresh tangible evidence for reopening the assesse proceedings. Hence also, the impugned notice dated 30.03.2021 under Section 148 of the Income Tam runs foul of the Supreme Court Judgment in the case of Commissioner of Income Tax vs. Kelvinator of Limited (Supra) and thus, the same cannot be sustained and is liable to be struck down.
>
> 8. Consequently, the impugned notice (Annexure-5) dated 30.03.2021 issued by the Income Tax Officer Ward-1 Chittorgarh and all proceedings sought to be undertaken in pursuance thereof deserve to he anu hereby quashed and set aside.
>
> 9. The writ petition is allowed accordingly.''

Hence, in view of the above facts and circumstances and also the order of the Jurisdictional High Court in the case of Rampal Samdani vs Union of India (supra), we do not concur with the findings of the ld.CIT(A) and thus the order passed by the AO is quashed. Thus the appeal of the assessee is allowed.

13. In the result, the appeal of the assesse is allowed

Order pronounced in the open court on 29/11/2024.

Sd/-	Sd/-
(राठौड़ कमलेश जयन्तभाई)	(डॉ.एस.सीतालक्ष्मी)
(RATHOD KAMLESH JAYANTBHAI)	(Dr. S. Seethalakshmi)
लेखा सदस्य / Accountant Member	न्यायिक सदस्य / Judicial Member

जयपुर / Jaipur
दिनांक / Dated:- 29/11/2024

*Santosh
आदेश की प्रतिलिपिअग्रेशित / Copy of the order forwarded to:
1. The Appellant- Shri Ashok Sharma, Kota.
2. प्रत्यर्थी / The Respondent- DCIT, Circle-2, Kota.
3. आयकरआयुक्त / The ld CIT
4. विभागीय प्रतिनिधि, आयकरअपीलीय अधिकरण, जयपुर / DR, ITAT, Jaipur
5. गार्डफाईल / Guard File ITA No. 359/JPR/2024)

आदेशानुसार / By order,

सहायक पंजीकार / Asstt. Registrar