

आयकर अपीलिय अधिकरण, 'सी' न्यायपीठ, चेन्नई
IN THE INCOME TAX APPELLATE TRIBUNAL
'C' BENCH, CHENNAI

श्री एबी टी वर्की, न्यायिक सदस्य एवं श्री एस. आर. रघुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI ABY T VARKEY, HON'BLE JUDICIAL MEMBER AND
SHRI S.R.RAGHUNATHA, HON'BLE ACCOUNTANT MEMBER

आयकर अपीलसं./ITA No.: 2036/Chny/2024
& CO No.: 66/Chny/2024
निर्धारणवर्ष / Assessment Year: 2013-14

Income Tax Officer,
Corporate Ward -4(1),
Chennai – 600 034.

Macmillan Education India
v. Private Limited,
No.21, Patullos Road,
Chennai – 600 002.

[PAN:AAFCEM-5564-R]

(अपीलार्थी/Appellant)

(Respondent/Cross Objector)

Assessee by

: Mr. S.P. Chidambaram, Advocate

Department by

: Ms. R. Anita, Addl.CIT

सुनवाई की तारीख/Date of Hearing

: 22.11.2024

घोषणा की तारीख/Date of Pronouncement

: 30.01.2025

आदेश / O R D E R

PER S. R. RAGHUNATHA, ACCOUNTANT MEMBER:

This appeal filed by the revenue and cross objection filed by the assessee are directed against the order passed by the learned Commissioner of Income Tax (Appeals), National Faceless Appeal Centre (NFAC), Delhi, dated 08.11.2023 and pertains to assessment year 2013-14.

2. The revenue has raised the following grounds of appeal:

"1. The order of the Ld. Commissioner of Income Tax (Appeals) in ITA No. ITBA/NFAC/S/250/2023-24/1057815967(1) dated 08/11/2023 for the Assessment year 2013-14 is erroneous in law, facts and circumstances of the case.

2. The Ld. CIT(A) erred in holding that the reopening of the assessment made u/s 147 is bad in law without appreciating that the AO recorded reasons for failure on the part of the assessee to disclose fully and truly all material facts which are necessary for passing assessment.

3. The Ld. CIT(A) erred in holding that the reopening to disallow expenditure on provision of return rights, when the assessee had claimed provisions for return rights and not utilized the provisions created.

4. It is submitted that on similar issue in the assessee's own case for the AYs 2011-12 the Revenue has filed further appeal before the Hon'ble High Court and the decision is pending.

5. For these and other grounds that may be adduced at the time of hearing, it is prayed that the order of the learned CIT(A) may be set aside and that of the Assessing officer be restored."

3. The assessee has raised the following grounds of appeal:

"1. The order passed by the Hon'ble Commissioner of Income-tax. (Appeals) quashing the re-assessment proceedings u/s.147 on account of validity of re-opening of assessment is in line with law, facts and circumstances of the case.

No Failure on part of the Company to disclose fully and truly the material facts

a. The Ld. AO erred in making the assumption that the income chargeable to tax has escaped assessment as it is not correct and in line with the facts of the case.

b. The Ld. AO has erred in not appreciating the fact that erstwhile AO has examined the details provided which includes submission dated 12 December 2016 (filed on 13 December 2016) on the subject issue under dispute, i.e., 'provision for return rights'.

Scope for reopening of assessment beyond the limitation of 4 years not fulfilled

- c. *The Ld. AO has erred in initiating the re-assessment beyond 4 years in its reasons for reopening of assessment dated 31 March 2021.*

No new tangible material in record

- d. *The Ld. AO ought to have noted that the re-assessment is not justified as there is no new material or new information which would warrant a re-opening of the assessment.*

Merely change in opinion on part of the Ld. AO

- e. *The Ld. AO erred in not appreciating the fact that re-opening of assessment is a mere change of opinion in the instant case. The AO erred in not admitting the facts that all the material facts and information including submission on subject issue under dispute was available and discussed with him during the course of the original assessment proceedings.*
- f. *The Ld. AO has erred in proceeding with the re-assessment in a case where the AO forming opinion and issuing notice are different."*

4. The brief facts of the case that the assessee is a private limited company engaged in the business of publishing, marketing, selling and distributing different segments of books, including school books, undergraduate courses books, customized books and professional books. The Assessee filed its Original return of income on 29.11.2013 for the A.Y.2013-14 and later filed Revised return of income on 29.11.2014. Subsequently, Notice under Section 143(2) of the Act was issued for scrutiny assessment. After detailed discussions and verification of various documents filed during the course of scrutiny assessment, the same was completed vide order dated 15.12.2016 without any additions/disallowances and by accepting the returned income(loss) as total income. Subsequently,

the assessment in the case of the assessee company was reopened u/s.147 by way of issuing notice u/s.148 dated 31.03.2021. The reason recorded for reopening cites on merit the reopening to have been carried out for the following:

"Based on the information available on record, it is seen that the assessee has claimed provisions for returns rights at Rs.3,33,34,000/- for the Asst. Year 2013-14. Since these provisions created have not been utilized by the assessee, the same deserves to be disallowed."

An addition of Rs. 3,33,34,000/- on account of disallowance of the provision made for return rights / provision for unsold goods for the reason there were provision for return rights but the assessee had not adjusted the returns from those provisions but directly debited into the P&L account.

5. On appeal, the Ld. CIT(A) quashed the reopening of the assessment for the reason that in case of assessee for the A.Y.2011-12, the ITAT in ITA No.2784/CHNY/2019 dated 26/09/2022 on the similar issue of provision for return rights has quashed the reopening done beyond 4 years by observing as follows:

"In view of the above facts and circumstance, we are of the view that the reopening is beyond 4 years and as the original assessment was framed u/s.143(3) of the Act, the Revenue could not establish any failure on the part of the assessee to disclose fully and truly all material facts necessary for reassessment, the reopening in present case is bad in Jaw and hence, quashed. Since, we have quashed the reassessment on reopening, we need not go into the merit of the case."

6. The Id.CIT(A) also observed that since for the year under consideration also, similar set of facts exists and that the AO could not establish that there was any failure on the part of the appellant to disclose fully and truly all material facts for its original assessment u/s 143(3) dated 15.12.2016 and that on the contrary, the AO examined the issue, and no adverse view was taken at that point. Thus, there is change of opinion in the present situation and reopening beyond four years is barred by law. There is no discussion on merits by the Ld. CIT(A). Aggrieved by the order of the Id.CIT(A), the revenue is before us.

7. The Id. Senior DR submitted that the facts before the ITAT for the A.Y.2011-12 in the case of assessee are different from that available for A.Y.2013-14 while for A.Y.2011-12, the ITAT has quashed the re-opening for the reason that the re-opening is beyond 4 years and as the original assessment was framed u/s.143(3) of the Act and since the revenue could not establish any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. As against the above, it is submitted that for the A.Y.2013-14, subsequent to original assessment u/s.143(3) of the Act dated 15.12.2016, it is clearly

established that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. For the year under consideration, the original assessment was passed on 15.12.2016. Post this passing of order, for AY 2011-12, on assessee's appeal before the Id.CIT(A), the Ld.CIT(A) called for various details for various AYs with reference to the provision for return rights and the assessee submitted the following details:

"Summary of provisions for return rights - year on year analysis (Rs. In'000s)

Particulars	AY 2010-11	AY 2011-12	AY2012-13	AY2013-14	AY2014-15
Opening Provision	18,483	24,308	96,153	1,08,699	1,42,033
Closing Provision	24,308	36,683	1,08,699	1,42,033	1,57,710
Amount debited to P&L	5,824	12,375	12,547	33,334	15,677
Gross Sale	8,02,868	9,72,534	16,30,820	15,91,037	17,27,100
Actual Return	91,142	1,07,417	2,77,649	2,05,671	1,92,652
Net Sale	7,11,727	8,65,117	13,53,171	13,85,366	15,34,448
Return%	11.35%	11.05%	17.03%	12.93%	11.15%

Based on the above, summary of provisions for return rights -Year on Year analysis for the AYs 2010-11 onwards till AY 2014-15 during the course of appeal proceeding for AY 2011-12, the Ld.CIT(A) gave a factual finding as follows:

"It is seen that the provision for return rights or provision for unsold books has been claimed from Assessment Year 2010-11 onwards. The assessee company has accounted the actual returns as a deduction from the gross sales year on year. The provision for return rights (unsold books) has not been utilised by the assessee at all.

When this provision is not utilised or not intended to be utilised, there is no requirement of provision itself. The correct accounting treatment should have been that the assessee makes a provision towards unsold books and reduces any such value of unsold books in the subsequent years out of cumulative provision available in that year. This proper accounting has not been followed. On the contrary, the assessee company has incorrectly reduced the unsold goods/return goods from the sales of subsequent years. This accounting treatment is incorrect. The assessee company should have followed either of the two methods. If the provision was created, it should have been used by reducing the actual returns or unsold goods from the said provision. Alternatively, the provision could have been avoided and the assessee could have simply reduced the actual returns/return goods from the sales. The assessee company has attempted to be over-smart and has claimed both. The provision created is claimed as revenue expenditure but not utilised. The return goods/actual returns have been reduced from the sales itself. This claim of dual benefit cannot be condoned.

If the assessee does not make use of the provision created, the said provision cannot be allowed."

8. While the details as available in the audited accounts are as follows:

Particulars	Opening Balance	Additions	Released	Closing Balance
<i>Provision for Return Rights</i>	<i>108,699</i>	<i>33,334</i>	<i>0</i>	<i>142,033</i>

The details filed before the AO for the AY 2013-14 during the course of original assessment proceedings on 13.12.2016 are as follows:

"During the F.Y.2012-13, the company has debited an amount of Rs.3,33,34,000/- towards provision for return rights. We submit that provision for return rights is created on account of the

goods/books that could be returned by the distributors on account of following reasons:

Damages, or Obsolescence, or Books which does not have any sales value. The Company had made a provision at 13% approximately of the sales value made in the past 6 month based on historical trend and past data analysis. Further, the provision is created on a scientific basis on the value of sales made and corroborates to the industry norms in which the Company operates."

9. The order of the Id.CIT(A) was passed on 16.07.2019. Based on the above factual finding given by the Id.CIT(A) for the AY 2011-12, the AO was satisfied for the year under consideration and came to a conclusion that there was complete failure on the part of the assessee to disclose fully and truly all material facts necessary for assessments and made the reopening with the following reasons.

"Based on the information available on record, it is seen that the assessee has claimed provisions for returns rights at Rs.3,33,34,000/- for the Asst. Year 2013-14. Since these provisions created have not been utilized by the assessee, the same deserves to be disallowed."

10. Hence, it is submitted that re-opening for the year under consideration should be upheld for the reason that fresh tangible material came to the knowledge of the AO regarding the claim for

the provision of the return right which was not truly and fully disclosed by the assessee before the AO during the original assessment proceedings.

11. Hence, the Id.DR submitted for favourable consideration and prayed for setting aside the order of the Id.CIT(A).

12. Per contra, the Id.AR for the assessee stated that the for the AY 2013-14, after detailed discussions and verification of various documents filed during the course of scrutiny assessment, the assessment was completed vide order dated 15.12.2016 without any additions/disallowances and by accepting the returned income as total income. Subsequently, Notice under Section 148 of the Act dated 31.03.2021 was issued and the reasons recorded (refer page 124 to 128 at page 137) are as follows:

"Based on the information available on record, it is seen that the assessee has claimed provisions for returns rights at Rs.3,33,34,000/- for the Asst. Year 2013-14. Since these provisions created have not been utilized by the assessee, the same deserves to be disallowed.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/ reassessment. This fact is corroborated from the contents of notices issued by the AO u/s 143(2)/142(1) and order sheet entries recorded during the 143(3)/147 proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment

proceedings and the same may be embedded in annual report, audited P&L, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information. For afore stated reasons, it is not a case of change of opinion by the AO." (emphasis supplied)

12.1 Further, the approval granted under Section 151 by PCIT is at page 150 wherein the recommendation of Additional CIT is as under:

"Yes, I am satisfied that it is a fit case for reopening u/s 147. The provision created towards 'Return Rights' is contingent in nature and cannot be allowed. Hence it is a clear case of income escaping assessment and therefore, the proposal made by the Assessing Officer for sanction to issue notice u/s.148 is recommended to Pr,CIT-4, Chennai."

12.2 The Id.AR brought to our attention that the above recommendation along with the reasons recorded are approved by the Addl.CIT. There is a stark difference between the reasons recorded and recommendation. In the reasons recorded it is mentioned that the provision was not utilized whereas in the recommendation it is mentioned that the provision is contingent in nature. From the above, it is clear that there is total non-application of mind by the Id.addl.CIT while granting her approval and as such the entire reassessment is void ab initio.

12.3 Further, the Id.AR stated that apart from the above, in the reasons for reopening nowhere it is mentioned that the assessment is reopened based on the Ld.CIT(A) order for AY 2011-12. However, in the reassessment order it is mentioned that the disallowance of provision for return rights of RS.1,23,76,000/- made in A.Y.2011-12 was sustained/confirmed by the Id.CIT(A) for that particular AY and therefore the subject AY 2013-14 is reopened. In this regard, the Respondent Assessee would like to emphasis on two points:

A. The Ld.CIT(A) order for AY 2011-12 basis which the reassessment is done for subject AY 2013-14, stands reversed by subsequent ITAT order in ITA.No.2784/2019 vide order dated 19.09.2022. The Hon'ble ITAT has held that the reopening for AY 2011-12 is bad in law as the said issue was already examined at the time of scrutiny assessment.

It just and crucial to note that even for the subject AY 2013-14, this issue of provision for return rights was examined at the time of scrutiny assessment. **In fact, the Respondent Assessee had filed financials wherein the provision for return rights is grouped under "other expenses" refer page 78.** Since this was apparent from the face of financials, the Assessing Officer during the

course of scrutiny assessment had called for explanation on the same. **The Respondent vide submissions dated 12.12.2016 (filed on 13.12.2016) refer page 87 to 89 at page 89 at point no. 7 had furnished a Note on provision for return rights.** Since the then Assessing Officer after examining the issue and after being satisfied with the explanation, passed the scrutiny assessment order without any adjustment. The Ld.CIT(A) for the subject AY 2013-14 had followed the **ITAT order (refer page 294 to 301 at para 4.1) in Assessee's own case for AY 2011-12** and held that the reopening is on basis of change of opinion by making the following crucial finding:

"6.4 For the year under consideration also similar set of facts exists. It is observed from the Ld. AO could not assessment order as well as from the appellant's the appellant to establish that there was any failure on the part of disclose fully and truly all materials facts for its original assessment u/s.143(3) dated 15.12.2016 on the contrary the Ld. Assessing Officer examined the issue, and no adverse view was taken at the point. Thus there is change of opinion in the present situation and reopening beyond four years is barred by law. Thus, considering the discussion made above and also relying on the decision in the appellant's own case for the A.Y.2011-12 by the hon'ble ITAT, I hold that reopening u/s.147 is bad in law and accordingly, quash the same,"

B. Without prejudice to the above, it is submitted that reopening cannot be done on the merely because a different

view was taken in subsequent AY and the same cannot tantamount to tangible material. The Respondent Assessee relies on the Bombay High Court decision in the NYK Line (India) Ltd Vs DCIT reported in 346 ITR 361 (Bom).

12.4 In light of the above arguments, the Id.ARsubmitted that the issue is squarely covered in favor of the Assessee by the decision of this Hon'ble Tribunal in Assessee's own case for AY 2011-12 in ITA.No.2784/Chny/2019 dated 19.09.2022 and prayed for dismissing the department appeal.

13. We have heard the rival contentions, gone through the materials available on record and perused the orders. Admittedly, the order of the AO u/s.143(3) of the Act has been concluded by the Assessing Officer on 15.12.2016 by accepting the loss returned by the assessee without any addition/disallowance. We note that the Assessing Officer in his re-assessment order u/s.147 r.w.s. 144B of the Act dated 29.03.2022 has mentioned that the reasons for reopening and necessary approval has been taken by stating as below:

"The assessee M/s. Macmillan Publishers India Limited is assessed to tax with Corporate Circle-(1), Chennai vide PAN: AAFCM5564R. The assessee filed its return of income for the assessment year 2013-14

on 29.11.2013 by admitting loss of Rs.36,59,62,530/-, return of income for Asst Year 2013-14 was taken up for scrutiny and the assessment order u/s.143(3) r.w.s.92CA(3) was passed on 15.12.2016 by accepting the loss returned by the assessee.

Based on the information available on record, it is seen that the assessee has claimed provisions for returns rights at Rs.3,33,34,000/- for the Asst. Year 2013-14. Since these provisions created have not been utilized by the assessee, the same deserves to be disallowed.

Since, 4 years from the end of the relevant year has expired in this case, the requirements to initiate proceedings u/s.147 of the Act are reason to believe that income for the year under consideration has escaped assessment because of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for the assessment year under consideration. It is pertinent to mention here that reasons to believe that income has escaped assessment for the year under consideration have been recorded above. I have carefully considered the assessment records containing the submissions made by the assessee in response to various notices issued during the assessment/reassessment proceedings and have noted that the assessee has not fully and truly disclosed the material facts necessary for the assessment for the year under consideration:

It is evident from the above facts that the assessee had not truly and fully disclosed material facts necessary for the assessment for the year under consideration thereby necessitating reopening u/s.147 of the Act.

It is true that the assessee has filed a copy of annual report and audited P&L Ac and balance sheet along with return of income where various information/material were disclosed. However, the requisite full and true disclosure of all material facts necessary for assessment has not been made as noted above. It is pertinent to mention here that even though the assessee has produced books of accounts, annual report, audited P&L Ac and balance sheet or other evidence as mentioned above, the requisite material facts as noted above in the reasons for reopening were embedded in such a manner that material evidence could not be discovered by the AO and could have been discovered with due diligence, accordingly attracting provisions of Explanation 1 of section 147 of the Act.

It is evident from the above discussion that in this case, the issues under consideration were never examined by the AO during the course of regular assessment/reassessment. This fact is corroborated from the contents of notices issued by the AO u/s.143(2)/142(1) and order sheet entries recorded during the 143(3)/147 proceedings. It is important to highlight here that material facts relevant for the assessment on the issue(s) under consideration were not filed during the course of assessment proceeding and the same may be embedded in annual report, audited P&L A/C, balance sheet and books of account in such a manner that it would require due diligence by the AO to extract these information.

For afore stated reasons, it is not a case of change of opinion by the AO. In this case more than four years have lapsed from the end of assessment year under consideration. Hence necessary sanction to issue notice u/s.148 is solicited from the Principal Commissioner of Income Tax-4, Chennai as per the provisions of section 151 of the Act."

13.1 However, it is pertinent to note that the assessee in the detailed reply filed on 12.12.2016 during the original assessment proceedings u/s.143(3) of the Act, the AO had the entire details of 'provision for returned rights' for Rs.3,33,34,000/- and which has been taken note by the Assessing Officer while passing the assessment order dated 15.12.2016. During the course of original assessment proceedings, the Assessing Officer asked specific questions on 'provision for return rights'. In response, the Company filed a detailed submission on claim of provision for return rights vide submission dated 12th December 2016 explaining the same and after considering the said reply the then AO was satisfied and

allowed the same and no adverse inference was drawn. Apart from that as the Id.AR has stated in his argument, the entire details of financials has been filed along with the annual report before the Assessing Officer, based on that the Assessing Officer has drawn conclusion and accepted the return of income filed by the assessee by passing an order after considering entire details like P&L account, balance sheet, annual report and other information/materials filed along with return of income which is available at the time of original assessment proceedings u/s.143(3) of the Act. Therefore, the reasons recorded by the Assessing Officer which has been recommended by the Addl.CIT for approval by the Id.PCIT beyond four years is not sustainable in the eyes of law, since there is no fresh material available on record to state that there is a failure on the part of the assessee to disclose fully and truly all material facts necessary for framing the original assessment.

13.2 Further, we also note that the Id.CIT(A) in his order dated 08.11.2023 has clearly stated that the assessee's own case was reopened u/s.147 of the Act for the assessment year 2011-12 which was also beyond four years without any fresh materials available for reopening and hence, the same was quashed by this Tribunal by

relying on the decision of the Hon'ble Supreme Court in the case of CIT Vs.Foramer France (2003) 264 ITR 566, wherein the Hon'ble Supreme Court affirmed the decision of Hon'ble Allahabad High Court in the case of Foramer France Vs. CIT (2001) 247 ITR 436, in its order dated 26.09.2022 vide ITA No. 2784/Chny/2019 by holding as under:

"6.3 Having gone through the reasons for re-opening u/s 147 of the Act and the appellant's written submission and other documentary evidence, I find that the issue of returns rights at Rs.3,33,34,000/- was considered by the Ld AO while passing original order u/s 143(3) dated 15.12.2016. In this regard the appellant has submitted before me that during the course of original assessment proceedings, the Assessing Officer asked specific questions on 'provision for return rights'. In response, the Company filed a detailed submission on claim of provision for return rights vide submission dated 12th December 2016 explaining the same and after considering the said reply the then AO was satisfied and allowed the same and no adverse inference was drawn. Thereafter, case was re-opened u/s 147 based on the order of the CIT(A)'s in the appellant's own case for A.Y. 2011-12 dated 16.07.2019 asclaimed by the appellant. The case of the appellant for A.Y 2011-12 was also re-opened u/s 147 on the same issue i.e 'provision for return rights' and the Id CIT(A)-8,Chennai vide his order dated 16.7.2019 upheld the re-opening beyond 4 years andconfirmed the addition on account of 'provision for return rights'. Aggrieved by thesaid order the appellant moved to thehon'ble ITAT for A.Y,2011-12. In the meantime,theLd.AO re-opened various years which were earlier completed u/s 143(3) and in each year the Ld AO examined the issue of provision for return rights' and acceptedthe same and addition was made in the original assessment. Hon'ble ITAT in theappellant's case for the A.Y 2011-12 vid its order in TA No.2784/CHNY/2019 datedon re-opening and hence did not go into the 26.09.2022 quashed the reassessment merit of the case. The observation of the hon'ble ITAT re-produced below:-

"In view of the above facts and circumstance, we are of the view that the reopening is beyond 4 years and as the original assessment was framed u/s 143(3) of the Act, the Revenue could not establish any failure on the part of the assessee to disclose fully and truly all material facts necessary for its reassessment, the reopening in present case is bad in law and hence, quashed. Since we have quashed the reassessment on reopening, we need not go into the merit of the case."

6.4 For the year under consideration also similar set of facts exists. It is observed from the assessment order as well as from the appellant's the Ld AO could not establish that there was any failure on the part of the appellant to disclose fully and truly all material facts for its original assessment u/s 143(3) dated 15.12.2016 on the contrary the Ld AO examined the issue, and no adverse view was taken at that point. Thus, there is change of opinion in the present situation and reopening beyond four years is barred by law. Thus, considering the discussion made above and also relying on the decision in the appellant's own case for the A.Y.2011-12 by the hon'ble ITAT, I hold that reopening u/s.147 is bad in law and accordingly quash the same. It is needless to say that once the proceedings u/s 147 does not survive, therefore, there is no need to go into the merit of the case."

13.3 In this context, it is gainful to refer to the hon'ble jurisdictional High Court decision in the case of TANMAC India Vs.DCIT [2017] 78 taxmann.com 155 (Madras), had an occasion to examine the legal issue of reopening u/s.147 of the Act of an intimation u/s.143(1) of the Act and even in such a case their lordship held that AO should have tangible material in his possession for recording his 'reason to believe' escapement of income. And in that case, their lordship observed that on perusal of the reasons would indicate that the AO proceeds solely on the basis

of the return of Income and the enclosures thereto, to initiate proceedings for reassessment. However, the aforesaid documents are part of the record and the basis on which the intimation u/s.143(1)(a) has been issued. Thus, it is noted that even when reopening is resorted against the intimation u/s.143(1) of the Act, the AO to successfully reopen should have tangible material. The relevant extract of the decision of the Hon'ble High Court of Madras is given below:

11. The phrase reason to believe in section 147 relates to such other new or tangible material as may have come to the knowledge of the assessing officer pursuant to the original proceedings for assessment. The Supreme Court in CIT Vs. Kelvinator of India (320 ITR 561) states thus in the context of the belief that should form the basis for a re-assessment;

'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 fulfillment of certain pre-conditions 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 link with the formation of the belief.'

12. If the assessing officer, after issuing intimation u/s section 143(1) does not to issue a notice u/s 143(2) of the Act to initiate proceedings for scrutiny of the return of income, the obvious conclusion is that he does not consider it necessary or expedient to do so, the inference being that the Return of Income filed in order. It is this opinion that cannot be arbitrarily changed by the assessing officer, to re-assess income on the basis of stale material, already on record. If we thus keep in the mind the above fundamental requirement of section 147, it would be apparent that the exercise undertaken by the Revenue in this case is not one of re-assessment, but of review. The reasons make it abundantly clear that the re-assessment is sought to be initiated on the basis of the return of income and the enclosures which were available

with the assessing officer since 2.11.1998 and which ought to have prompted him to issue a notice under section 143(2) of the Act to conduct the proceedings under scrutiny. What is sought to be done by the re-assessment ought to have been achieved by scrutiny assessment proceedings. Having missed the bus earlier, the Department cannot be permitted to avail of the extended time limit in the absence of any new or tangible material, when the time for scrutiny assessment has elapsed on 31.3.2001, prior to issue of notice u/s.148. The notice under section 148 dated 9.12.2002 is thus an arbitrary exercise of power and a review of proceedings impermissible in law.

13. The Division Bench of the Delhi High Court in the case of Commissioner of Income Tax Vs. Orient Craft Ltd (354 ITR 546) deals specifically with this aspect of the matter. The substantial question of law that was dealt with by the High Court is as follows;

'Was the Tribunal right in law in holding that in the absence of any tangible material available with the Assessing Officer to form the requisite belief regarding escapement of income, the reopening of the assessment made under section 143(1) is bad in law?'

14. The Division Bench notes that the Supreme Court in the case of Asst. CIT V. Rajesh Jhaveri stock Brokers P. Ltd, (supra) only deals with the formation of an opinion at the time of issuance of prima facie intimation and does not indicate anywhere that a re-assessment can be initiated in the absence of a reason to believe.

To conclude, the Division Bench holds thus:

'This judgment, contrary to what the Revenue would have us believe, does not give a carte blanche to the Assessing Officer to disturb the finality of the intimation under section 143(1) at his whims and caprice; he must have reason to believe within the meaning of the section.'

13.4 Therefore, it is very clearly stated that even in the case of intimation u/s.143(1)(a) issued, without issuing notice u/s.143(2) for scrutiny assessment proceedings u/s.143(3) of the Act, the reason to believe cannot be made without any tangible material available with the AO to initiate proceedings u/s.147 of the act for reassessment.

14. Therefore, in the present facts and circumstances of the case and respectfully following the decisions of the hon'ble courts(Supra), we find that assessee's case is on a better footing since assessee has undergone scrutiny u/s.143(3) of the Act, wherein the AO had specifically asked about the issue (provision for returned rights). Therefore, the AO ought not to have resorted to the reopening proceedings. Thus, in light of the above discussion and relying on the assessee's own case held by this Tribunal for the A.Y.2011-12, we are of the considered view that there is no infirmity in the order of Id.CIT(A).Hence, we dismiss the grounds of appeal raised by the revenue.

15. Since this appeal in ITA No.2036/Chny/2024 is decided against the revenue, the cross objection filed by the assessee becomes academic and hence the CO is also dismissed.

16. In the result, the appeal filed by the revenue and cross objection filed by the assessee are dismissed.

Order pronounced in the open court on 30th January, 2025 at Chennai.

Sd/-
(एबी टी वर्की)
(ABY T VARKEY)
न्यायिकसदस्य/**Judicial Member**

चेन्नई/Chennai,

दिनांक/Dated, the 30th January, 2025

Sd/-
(एस.आर.रघुनाथा)
(S. R. RAGHUNATHA)
लेखासदस्य/**Accountant Member**

JPV

आदेशकीप्रतिलिपिअग्रेषित/Copy to:

1. अपीलार्थी/Appellant
2. प्रत्यर्थी/Respondent
3. आयकर आयुक्त/CIT – Chennai
4. विभागीय प्रतिनिधि/DR
5. गार्ड फाईल/GF