IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "C", DELHI

BEFORE SHRI MAHAVIR SINGH, VICE PRESIDENT
SHRI KULDIP SINGH, JUDICIAL MEMBER AND
SHRI ANADEE NATH MISSHRA, ACCOUNTNAT MEMBER
SHRI VIKAS AWASTHY, JUDICIAL MEMBER, AND
SHRI BRAJESH KUMAR SINGH, ACCOUNTANT MEMBER

I.T.A. No.1079/Del/2016
(Assessment year 2009-10)

M/s India Exposition Mart Ltd., Plot No.1, 210, Atlantic Plaza, 2nd Floor, Local Shipping Centre, Mayur Vihar, Phase-I, New Delhi-110091. (Appellant)	vs	DCIT/ACIT, RANGE-1, Circle-12(1), Room No.405, C.R. Building, I.P.Estate, New Delhi-110002. (Respondent)

Assessee by	:	Shri A. K. Khanna, C. A./None
Department by	:	Shri M.S. Nethrapal, CIT-DR
Date of hearing	:	20.02.2019/07.08.2025
Date of pronouncement	:	07.08.2025

ORDER

PER: ANADEE NATH MISSHRA, AM

This appeal has been filed by Assessee against impugned order dated 07.01.2016 of Commissioner of Income Tax (Appeals) ['CIT(A)', for short]. The grounds of appeal are as under:

1) *The Learned DCIT erred in law by reopening assessment u/s 147 of Income Tax Act on the basis of change in opinion.*
2) *The Learned DCIT erred in law by re-opening assessment u/s 147 of Income Tax Act without any new or fresh materials not disclosed during course of assessment.*
3) *The Learned DCIT-Cir 12(1) erred in law by not appreciating the Fact that full enquiry was made by the Assessing officer*

regarding abandoned Phase- 3 project by seeking the facts about the details of the project and after due application of mind allowed the expense

4) *The Learned DCIT-Cir 12(l) erred in law by re-opening assessment u/s 147 of IT on the basis of Audit objection wherein no new facts have been disclosed.*

5) *The learned DCIT-Cir 12(1) erred in law by not in facts that the expenses on the abandoned phase-3 project were for survey and feasibility report, building plan preparation expenses and architecture fees and not on any capital asset and no new asset were created*

6) *The Learned DCIT-Cir 12(1) erred in law by treating abandoned Phase-3 as Capital expenditure when no new asset were created*

7) *The Hon'ble CIT (A) -4 erred in law by not disputing the facts presented by the assessee but dismissed appeal of the assessee without assigning any reason or any ground*

8) *The assessee reserves the right to add, modify or delete any ground of appeal.*

(2) Original Assessment Order Under Section ('U/s' for short) 143(3) of Income Tax Act ('IT Act' for short) was passed on 09.02.2011 wherein the only addition made by the Assessing Officer ('AO', for short) to the return income (Rs. 11,15,33,024/-) was disallowance of Rs. 1,06,500/- out of guest house rent amounting to Rs. 4,26,000/-. Thereafter, Asstt. Commissioner of Income Tax, S.A.P.-I, O/o CIT(Audit)-II, New Delhi vide F. No. ACIT/SAP-I/CIT(Audit)-II/2012-13/180 dated 25.02.2013 raised an audit objection. In this audit objection, inter alia, Audit raised objection that expenses of Rs. 1,81,70,947/- on account of Writing-Off of Capital Work-in-Progress is not allowable as it is neither a revenue expenditure nor does it pertain to Assessment Year ('AY', for short) in question. The AO reopened the assessment proceedings U/s 147 of I.T. Act by issuing notice U/s 148 of IT Act after recording the following reasons:

> *"The assessment in the above mentioned case for A.Y. 2009-10 was completed on 09.12.2011. On further verification it was found that during the year the assessee had* **an** *opening balance of Rs. 1.75 crores under the head "Work in progress", Phase-III (superstructure) and the assesses also incurred expenses of Rs. 6.26 lacs on the project. However, the assessee write off the full balance of this capital Work in progress in P&L A/c for F.Y. 2008-09, out of which Rs. 1.70 crores was debited as consultancy charges. Since, the write off of capital work in progress is not allowable in the act as it is neither a revenue expenditure nor does it pertains to current assessment year. By doing so, the assessee had not disclosed it income truly and fully to the extent of Rs. 1.81 crores.*
>
> *Based on the above facts, I have reason to believe that the income to the tune of Rs. 1.81 chargeable to tax has escaped assessment. If approved, a notice u/s 148 of IT Act may be issued to assessee."*

(2.1) Vide letter dated 19th March, 2014 the Assessee wrote to the AO submitting that the earlier return filed U/s 139(1) of I.T .Act on 30.09.2009 may be treated as return filed in response to notice issued U/s 148 of I.T. Act. The Assessee also requested the AO to provide the reasons which led the AO to believe that it was a fit case for reassessment. The AO provided the aforesaid reasons to the Assessee. The Assessee raised objections to reopening of assessment U/s 147 of I.T. Act, which were disposed off by the AO vide letter dated 22.12.2014. The relevant portion of this letter dated 22.12.2014 containing the objections raised by the Assessee, and removal of objections of the Assessee by the AO, is reproduced as under:

> *"The assessment order u/s 143(3) was passed by the Assessing officer on 09.12.2011 at an income of Rs. 11,16,39,520/-. Subsequently it was noticed that during the year the assessee had an opening balance of Rs 1.75 crores under the head "work in progress', Phase-Ill (superstructure) and the assessee also incurred expenses of Rs 6.26 lacs on the project However, the assessee had written off the full balance of this capital work in progress in P&L A/c for F.Y. 2008-09, out of which Rs. 1 70 crores was debited as consultancy charges. Since, the write off of capital work in progress is not allowable in the act as it is neither a*

revenue expenditure nor does it pertains to current assessment year, the assessee had not disclosed its income truly and fully to the extent of Rs. 181 crores. Therefore notice u/s 148 was issued on 10.03.2013 after recording reason, Notice u/s 143(2) was issued on 18.05.2014 fixing the date of hearing on 23.09.2014 However, on 23.09 2014 neither anybody attended the hearing nor any adjournment was requested. Further, fresh notice u/s 143(2) and 142(1) have been issued on 05 12 2014 as there was change in jurisdiction over this case The date of hearing was fixed for 12 12.2014 Sh. A K Khanna FCA. and Authorised Representative of the assessee company attended the proceedings and raised the following objections:

1. "In this case, as per Balance Sheet as on 01.04.2008, the assessee has an opening balance of Rs 1.75 crores under the head "Work-in-Progress Phase-Ill (Superstructure)'. During the year, the assessee incurred further expenses of Rs. 6.26 Lacs on the project. However the assessee wrote-off the full balance of this Capital W I P in the P&L Account of the F.Y 2008-09, out of which Rs 1 70 crores was debited to consultancy charges."

"It is submitted that the assessee was planning to set up the 3rd phase of the expansion but the same was shelved during the year as such Rs. 1,70,00,497/- appearing in Capital Work-in-Progress is not allowable under the provisions of section 37(1) as it is neither a revenue expenditure nor does it pertain to assessment year in question Major portion (Rs 1.75,44.280/-) of these expenses have been incurred in earlier years The AO is requested to kindly take necessary action in this regard."

2. Incorrect set-off of carried forward business losses

"In this case, the assessee has claimed set-off earned forward business losses amounting Rs 1,05.95,603/- from the Income of the current year The assessee has submitted copy of the acknowledgement of the ITR of A Y. 2008-09 in support of its claim. However, it was ascertained from DCR of the circle that the assessee s case of A.Y. 2008-09 was assessed at a loss of Rs 1,01,60,380/- u/s 143(3) on 16-12-2010 vide DCR No 158/36 Hence, c/f Business Loss of AY 2008-09 was allowed in excess by Rs. 4,35,223/-. The AO is requested to kindly take necessary action in this regard."

The objections raised by the assessee have been considered and the same are not tenable.

The assessees has contended that reopening of assessment u/s 147 in assessee's case is change of opinion as the assessment has been

completed earlier and same was accepted by the AO is wrong as during the course of assessment proceedings completed earlier thuis issue involved remained untouched. No information/detail in this regard was filed by the assessee. Therefore, reopening of assessment in the present case does not form to change of opinion.

The assessee s case was reopened as per the provisions of the I T Act, 1961 As per the Sec 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 recomputed the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned.

Some of the case laws which are very relevant for the reopening the assessment are as under:

***In the case of** Gruh Finance Ltd. Vs. Joint Commissioner of Income-tax (243 ITR 482) (GUJARAT High Court), the Hon'ble Court has upheld the action of the AO on similar grounds The Hon ble GUJARAT High Court has stated as under:*

*"The expression "reason to believe'' employed in section 147 of the Income Tax Act would **mean some cause or justification** **if** the competent authority has a cause or ground or some justification that some income has escaped assessment or **that there was a mistake in making assessment.** In the peculiar facts and special circumstances emerging from the record, we are extremely unable to uphold the contention raised on behalf of the petitioner that the respondent authority has no jurisdiction to issue the impugned notice under **section 148 of** the **Income-tax** Act, **1961** as it involved only **a** mere change of opinion."*

This court in Praful Chunilal Patel Vs M. J. Makwana, Asstt. **CIT** *[1999] **236 ITR** 832 has observed in this behalf while interpreting the provisions of section 147 of the Income Tax Act that the expression "reason to believe" which are relied on behalf of the respondents" are also material for reinforcing the view which we are taking in this group of petitions.*

*In cases where an error or mistake is detected, it can never be said that there is **only a mere change of opinion** **The mistake or error which is detected and which constituted a valid decision or cause to form a belief in the first assessment as a result of***

which the income has escaped assessment, would constitute a reason to believe that the income had escaped assessment and such cases where mistakes and errors are detected and which constitute a valid justification or cause to form a belief sought to be corrected, cannot be said to be cases of mere change of ' opinion.

In so far as the expressions "reason to believe" and "change of opinion'' are concerned, we are of the view that though the material was available on record, at the time of first assessment, when no conscious consideration of the material is made and a mistake has been committed take has been committed, it would not, in any case, create an embargo or a ban on the competent officer to exercise powers under the amended section 147 of the Income Tax Act, 1961, as prima facie, there could not be "change of opinion'' in that factual scenario.

In the case of Praful Chunilal Patel Vs M.J Makwana Asstt CIT [1999] 236 ITR 832 the Hon'ble Gujarat High Court has reiterated the same view in favour of the Dept holding the reassessment as valid.

Further in Bawa Abhai Singh Vs. DCIT (2001) 168 CTR (Delhi) 521/253 ITR 83 Arijit Pasayat CJ it was held that The only condition for action is that AO should have 'reason to believe that income has escaped asst, which belief can be reached in any
manner and is not qualified by a precondition of faith and true disclosure of material fact by the assessee as contemplated in the pre amended section 147(a).

AO can under the amended provision legitimately reopen the asstt in respect of an income which has escaped asstt. Viewed in that angle power to reopen asstt. is much wider under the amended provision and can be exercised even after assessee has disclosed fully and truly all the material facts, so similar view were the conclusion of this Court (Delhi) in 142 CTE (Delhi) 272, 225 ITR 496.

Further, as per clause (b) of Explanation to section 147 even if the assessment has not been made in terms of section 143(3) and only intimation has been sent to the assessee in pursuance of return filed by him, a reopening by issue of notice u/s 148 can be made in accordance with the provisions of section 147. (Ranchi Club Ltd. Vs CIT 214 ITR 643 (Patna High Court, 1995). Further Hon'ble Allahabad High Court in c/o Nagrath Chemicals Works (P) Ltd. Vs CIT, 265 ITR 401, 2004 has held that facts which are not in the knowledge of the ITO when he made the original assessment, it would constitute information and held reopening valid

Also Hon'ble Supreme Court in a number of judicial decision has already held that in determining whether commencement of reassessment proceedings was valid it has only to be seen whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at re-opening stage.

In view of the above facts and circumstances the objection raised by the assessee are rejected."

(**2.2)** Fresh Assessment Order dated 18.02.2015 by the AO passed U/s 143(3) read with 147 of I.T. Act, wherein addition of Rs. 1,81,26,000/- was made on account of disallowance of Capital Work-in-Progress. Relevant portion of the assessment order is reproduced as under:

"Original assessment in this case was completed order u/s 143(3) on 09.12.2011 at income of Rs. 11,16,39,520/-. Subsequently, notice u/s 148 was issued on 11.03.2014 after recording reasons. Notice u/s 143(2) of the Act was issued on 18.09.2014. In response to notice u/s 148 and notice u/s 143(2) the assessee submitted, vide its letter dated 12.12.2014 that the return already filed for A.Y. 2009-10 on 30th September 2009 may be treated as a return filed pursuant to the notice u/s 148 of the Act. The assessee vide its letter dated 26/03/2014 objected to the issuance of notice u/s 148. The objections raised by the assessee have been dealt with vide this office letter dated 22/12//2014. The assessee has further filed its reply dated 3/2/2015, challenge the validity of the reassessment stating that the notice u/s 143(2) dated 18.05.2014 & 22.12.2014 have become time barred u/s 153(2) of the l.T.Act. Further, assessee stating in its reply that the notice u/s 148 was issued on 10.03.2013 therefore the assessment order u/s 148 of the I.T.Act should have been passed within one year from the end of Financial Year in which the notice u/s 148 of the I.T.Act was issued i.e. by 31st March 2014 The objection raised by the assessee company has been considered. It is observed that the date of notice u/s 148 of the I T Act was inadvertently mentioned as 10.03.2013 in place of 10.03.2014 being typographical error.

Hence, the objection raised by the assessee was rejected and treated as disposed off being not maintainable. In this regard a letter

dated 03.02.2015 was issued to the assessee. In response to notices u/s 143(2) and 142(1), Sh. A.K. Khanna, CA & Authorized Representative of the assessee company attended and furnished the details called for.

2.1 *On verification of the case record, it has been observed that during the year the assessee had an opening balance of Rs.1.75 crore under the head "work in progress", Phase III (superstructure) and the assessee also incurred expenses of Rs.6.26 lacs op the project. However, the assessee had written off the full balance of this capital work in progress in P&L A/c for F.Y. 2008-09, out of which Rs.1.70 crore was debited as consultancy charges. Since, the written off of capital work in progress is not allowable in the Act as it is neither revenue expenditure nor does it pertains to current Assessment Year. By doing so, the assessee had not disclosed its income truly and fully to the extent of Rs.1.81 crore (Rs.1.75 crore+6.26 lac).*

2.2 *The assessee's representative attended and submitted its reply vide which he just (reiterated its objection filed which were duly disposed off by passing a speaking order.)*

2.3 *The assessee's arguments have been considered but the same are not acceptable.*

Since, the written off of capital work in progress is not allowable in the Act as it is neither a revenue expenditure nor does it pertains to current Assessment Year. By doing so, the assessee had not disclosed its income truly and fully to the extent of Rs.1.81 crore end same is added back to income of the assessee. Since, the assessee has furnished inaccurate particular of its income, penalty proceedings u/s 271(l)(c) of the Act, is initiated separately."

(2.3) The Assessee filed appeal before the Ld. CIT(A) in which the following grounds of appeal were raised:

"1. The Learned DCIT erred in law by reopening assessment u/s 147 of Income Tax on the basis of change in opinion.
2. The Learned DCIT erred in law by reopening assessment u/s 147 without any new or fresh materials not disclosed during course of assessment.
3. The Learned DCIT erred in law by reopening assessment u/s 147 of IT on the basis of Audit objection wherein no new facts have been disclosed.
4. The assessee reserves the right to add, modify or delete any ground of appeal."

(2.4) Vide order dated 07.01.2016, the Ld. CIT(A) dismissed Assessee's appeal. The relevant portion of the order of the CIT(A) is reproduced as under:

> *"3. In response to the notice of hearing issued under Section 250 of the Act, Mr. A. K. Khanna, CA, appeared for the appellant. To substantiate the grounds of appeal, the appellant has submitted as under:-*
> *"In continuation of appeal filed by M/s India Exposition Marts Ltd. against re-opening of assessment u/s 147 for A.Y 2009-2010. We are submitting here with the following:*
> *1) Assessment for A.Y 2009-2010 was made u/s 143(3) of Income Tax by DOT. Cir 11(1) on 09.12.2011. Copy of original assessment u/s 143(3) is enclosed herewith at page no. 5 &6.*
> *2) During the course of original assessment preceding the details asked by the Assessing Officer was duly provided and accepted by the assessing officer.*
> *3) The assessee got notice dated 11.03.2013 by mistake year mentioned 2013 instead of 2014 under Sec 147/143 for reopening of assessment for A.Y 2009-2010 without specifying reason for reopening. Copy of notice enclosed herewith at page no.7*
> *4) The Assessee requested the Assessing Officer to specify the reason for reopening of assessment u/s 148 vide letter no dated 19.03.2014 received by Dept, on 21.03.2014. Copy enclosed at page no. 8.*
> *5) In spite of repeated request no reason was provided. However a copy of revenue audit objection was provided to us in the second week of December 2014. Copy enclosed at page no. 9&10.*
> *6) Vide letter dated 12/12/2014 the Assessee objected to re-opening of assessment u/s 148of IT on the ground that no new information had come to the notice of the Assessing Officer. The assessment was re-opened on solely on the basis of audit objection which were derived from the assessment records and document submitted by the assessee during course of assessment proceedings. It is pointed out that the genuineness and authenticity of the document submitted by the assessee was not been questioned at any stage by the Department. Copy is enclosed at page no. 11 to 16.*
> *7) In the letter dated 12/12/2014 the assessee again requested to provide reason of reopening of assessment requested by it vide on 19th march 2014 which were not supplied to it till that date. The Assessee's*

replies were based on the copy of Revenue audit objection supplied it The Assessee was finally provided reason of reopening of Assessment which was based on Audit (copy is enclosed at page no.17) Objection Memo of the Internal Audit Department Copy is enclosed at page no. 9 & 10.

8) The Assessing officer rejected the objection of the Assessee vide order dated 22/12/2014 (copy enclosed) on the ground that issue involved remained untouched no information has been filed by the assessee during the course of original assessment as such issue of assessment does not form change of opinion. Copy is enclosed at page no. 18 to 20.

9) The Assessing officer was totally wrong in rejecting the objections raised by the assessee without going through the replies of the Assessee dated 12/12/2014 and the Assessment records which contained full disclosure of facts by the Assessee & passed assessment order u/s 143(3) /147 of Income Tax Act dated 18/02/2015. Copy is enclosed at page no. 21 to 24.

10) In the letter dated objecting to reopening of assessment 12/12/2014 the assessee had filed the citation of case law in case of " Carlton Overseas (P) Ltd vs. Income Tax officer (2010) 188 Taxman 299 CTR 439 (Delhi)" where in it was held by Hon 'ble Delhi high Court that

I) Where there was no new or fresh material; before Assessing officer except opinion of revenue's audit, mere change of opinion cannot be basis for Assessing notice u/s 147/148. (Copy have been submitted along with appeal).

II) Further the Assessee also cited the case of "Mohan Gupta (HUF) vs. CIT-XII (2014) 44 Taxmann.com 171 (Delhi) where it was held that Where no new information was available reassessment could not be done on the basis of opinion of Assessing Officer. (Copy have been submitted along with appeal).

11) In support of the contention of the assessee weare submitting herewith the copy of correspondences/ documents submitted by the Assessee during course of Original Assessment

a) Copy of submission dated 29/11/2011 at page no. 25 to 28 (copy enclosed) which

contained following information asked for by the Assessing Officer regarding charging of Capital Work in Progress to Profit & Loss A/c relating to Phase-3 of Project which was abandoned by the Assessee during the year (which is the ground of reopening assessment by the Assessing Officer).

I) Ledger account of consultancy charges paid along with Form no. 16 issued to some of the major consultants like Fairwood Consultant

Pvt. Ltd., Rajinder Kumar & Associates, Ravi Chauhan is enclosed herewith at page no, 29 to 37.

II) Copy of ledger account of Fairwood Consultants Pvt. Ltd. from April 2007 to March 2009for Professional fees paid to him is enclosed herewith at page no. 38,

III) Copy of ledger account of Rajinder Kumar & Associates for consultancy fees paid to him for April 2007 to March 2009 is enclosed at page no. 39 to43.

IV) Copy of agreement with Rajinder Kumar & Associates as project Management Consultant for Phase-3 is enclosed herewith at page no. 44 to 74.

V) Copy of Agreement with Fairwood Consultants Pvt Ltd. as Project Management Consultant for phase-3 is enclosed herewith at page no. 75 to 97.

b) It is submitted that the assessee was planning to set up the 3 rd phase of the expansion but the same was shelved during the year as such Rs. 1,70,02,497/- relating to payment to consultants like Fairwood Consultants (P) Ltd, Rajinder Kumar & Associates & Ravi Chauhan initially debited the Capital Work in Progress but transferred to P&L a/c during the year on shelving the project.

Further vide letter dated 28/08/2011 (copy enclosed at page no. 29) the assessee had submitted the details of consultancy charges which gave full details of consultancy charges which contained debit of Rs. 1,70,02,497'/- towards consultancy charges in connection with Phase - III project which wasabandoned during the year.

It is submitted here that the Assessing officer in course of original Assessment had fully applied his mind as he had asked for full Information about the Phase-3 project started In 2007 by asking details of the Project from the start in 2007 to 2009 like the project agreement with various consultants and fees paid to them which was submitted by the Assessee vide letter dated 29/11/2013,

Thus it Is clear from records & submission by the Assessee during course of original assessment that the Assessing Officer had fully applied his mind while allowing charging of capital work in Progress if Rs. 1,70,02,4977- to Profit & Loss Account on shelving of Phase-3 Project of the Assessee company.

Thus by no stretch of imagination it can be said that the assessee had not submitted information relating to the issue or the issue remaining untouched by the Assessing Officer.

The Assessee's case is supported by Full Bench of Hon'ble Delhi High Court in case of CIT vs. Usha International Ltd. ITA no. 2026/2010 dated

21/09/21012 held that "So long as the assessee has furnished full true particulars at the time of original assessment and so long as the assessment order is framed u/s 143(3) of the Act, it matters little that tile Assessing Officer did not ask any question or query. In such a case if the assessment s reopened in respect of matters covered by disclosure It would amount to change of opinion and cannot be reopened u/s 147/148 of IT." Copy enclosed at page no 98 to 145.

In view of above submission & case laws favoring assessee. We pray your honor to quash proceedings undersea 147/148 Income Tax Act"

4. There is infact only one ground of appeal and that is against the reopening of assessment u/s 147. The main argument of the appellant revolves around the fact that full details of the expenses of Phase-lll of the project and its write off were duly disclosed, during the original assessment made u/s 143(3) by the Assessing Officer. Therefore, they argued that since full facts are disclosed already, the assessment could not have been reopened u/s 147 on the basis of the audit objection. I have gone through the submissions as well as the assessment order, and I find that the case of the appellant is different from the ease laws quoted by them. The appellant has nothing to say on merit and, I hereby dismiss the appeal."

(2.5) The present appeal is filed by Assessee against the aforesaid impugned order dated 07.01.2016 of the Ld. CIT(A). The grounds of appeal are as mentioned in the opening paragraph of this order. The following particulars were filed by the Assessee at the time of filing of appeal:

Sl. No.	Particulars
1	Form 36, Statements of Facts and Ground of Appeal
2	Copy of Appeal Order of CIT(A) dated 07.01.2016
3	Copy of Reassessment order u/s 147 dated 18.02.2015
4	Copy of Regular/ Original Assessment Order Dt. 09.12.2011
5	Copy of Form 35 B with Statement of Facts and Ground of Appeal filled with CIT (A)
6	Copy of Representation before CIT(A)-4 dated 29/10/15
7	Copy of Notice under section 148 Dated 11/03/2013 issued by DCIT Cir 11(1)
8	Letter dated 19.03.2014 by the assessee to DCIT Circle 11(1) asking the reason for re-opening of assessment.
9	Copy of Reply Dated 12/12/2014 of notice under section 148, submitted to DCIT Cir 11 (1)

10	Copy of letter Dated 29/11/2011 submitted at the time of original assessment where in full details of project in progress given at Point No. 19 and write off of project expenses at Point No. 21 in the same Letter.
11	Copy of HON'ABLE Delhi Order Dated 18/08/2005 in case of Carton Overseas Private Limited VS. ITO submitted DCIT Cir 11(1) on 12/12/2014 and to CIT (A) -4 vide letter Dated 29/10/2015 in support of Queshing proceedings under section 147/148 of IT.
12	Copy of HON'ABLE Delhi High Court Dated 28/01/2014 in case of Mohan Gupta VS. CIT (2014) 44 Taxmann.com submitted to DCIT Cir 11(1) vide letter Dated 12/12/2014 & to HON'ABLE CIT (A)-4 vide letter Dated 29/10/2015, in support of Queshing Proceeding under Section 147/148 of IT.
13	Copy of HON'ABLE Delhi High Court Order dated 21/09/2012 in the case of CIT vs. Usha International Ltd. ITA no. 2026/2010 submitted to HON'ABLE CIT(A)-4 vide letter Dated 29/10/2015 in support of Assesses Contention that Income Tax Assessment cannot be opened under section 147/148 of IT in case of change of Opinion.
14	Copy of HON'ABLE Delhi High Court order in case of Priya Village Road Show Private Limited (2009) 32 DTR 0316 2010 where it was held that in case of abandoned Project no new Asset was created and expenses were treated revenue expenditure.
15	Copy of HON'ABLE Calcutta High Court in case of Binani Cement Limited VS. CIT.2015 277 CTR 0049 where it was held that expenses on abandoned project were revenue expenses and case cannot be opened under section 147 of IT.
16	Power of Attorney.
17	Chailan of Rs. 10,000 for Appeal fee

(2.6) At the time of hearing before us the Ld. Authorized Representative ('AR', for short) of the Assessee submitted that the reopening of assessment U/s 147 by issue of notice U/s 148 of IT Act was improper because it amounted to change of opinion by the AO. He submitted that the audit objection raised by Audit was based on opinion available on assessment record already; and no fresh material had come into the possession of the AO. He further submitted that reopening of assessment U/s 147 of I.T. Act, based on audit objection, which in turn was based merely on opinion already

available on assessment record was improper because it amounted to change of opinion by the AO and no other material, except the audit objection, had come into the possession of the AO. Thus, he contended, that the second assessment order dated 18.02.2015 should be annulled. For this purpose, he relied on order of Hon'ble Delhi High Court in the case of *Carlton Overseas Pvt. Ltd. vs. Income Tax Officer & Ors. in W.P(C) No. 9180/2007 & CM No. 17282/2007* dated 18.08.2009. The Ld. AR also relied on order of Hon'ble Delhi High Court in the case of *Mohan Gupta (HUF) vs. Commissioner of Income Tax-XI* dated 28.01.2014. The Ld. AR placed further reliance on order in the case of *Commissioner of Income Tax-VI vs. Usha International Ltd.* dated 21.09.2012. On merits of the additions made by the AO in the aforesaid assessment order dated 09.12.2011 Ld. AR of the Assessee relied on order in the case of *Commissioner of Income Tax vs. Priya Village Roadshows Ltd.*, *Binani Cement Ltd. vs. Commissioner of Income tax*. At the time of hearing before us the Ld. AR of the Assessee fairly conceded that the date of issue of notice U/s 148 of IT Act was 10.03.2014, which inadvertently was mentioned as 10.03.2013 by the AO. Accordingly, the Ld. AR fairly conceded that the order dated 18.02.2015 U/s 143(3) read with 147 of IT Act, being pursuant to notice U/s 148 of IT Act dated 10.03.2014 (inadvertently mentioned as 10.03.2013 in place of 10.03.2014 being typographical error) was within time and was not barred by limitation. He further fairly conceded that the notice U/s 148 of IT Act, having been issued on 10.03.2014 was within a period of four years from end of the AY 2009-10. The Ld. Departmental Revenue ('DR' for short) submitted that the Assessee had not raised in grounds of appeal pertaining to merits of the additions made in assessment order dated 18.02.2015, in appellate proceedings before the Ld. CIT(A). The grounds raised by the Assessee before the

Ld. CIT(A), Ld. DR pointed out, were only pertaining to initiation of reopening of assessment U/s 147 of IT Act and not on the merits of the additions made. Reading from the order of the Ld. CIT(A), the Ld. DR also pointed out that the Ld. CIT(A) had not adjudicated on the merits of the additions made by the AO. In view of these, the Ld. DR submitted that in the present appeal in the Income Tax Appellate Tribunal ('ITAT' for short) the Assessee should only be heard on the initiation of reassessment proceedings U/s 147 of IT Act; and not on merits of the additions made by the AO. On initiation of the reassessment proceedings U/s 147 of IT Act the Ld. DR relied on *R.K. malhotra ITO vs. Kastirbhai Lalbhai [1977] 109 ITR 537 (Hon'ble Supreme Court), Yuvraj vs. Union of India [2009] 315 ITR 84 (Bombay)/[2009] 225 CTR 283 (Bombay)* and *Devi Electronics Pvt. Ltd. vs. ITO 2017-TIOL-92-Hon'ble High Court-Mum-IT.*

(2.6.1) We have heard both sides patiently. We have perused materials on record. We have considered judicial precedents brought to our notice by the two sides and also the judicial precedents referred to in orders of the lower authorities, namely the Ld. CIT(A) and the AO. It is not in dispute that the notice U/s 147 of IT Act was issued on 10.03.2014 (inadvertently mentioned as 10.03.2013 due to typographical error). Therefore, the assessment order dated 18.02.2015, passed within one year, is within the time limit prescribed U/s 153 of IT Act and is not barred by limitation. Provisions U/s 147 of IT Act are reproduced as under for ready reference:

> **"***Income escaping assessment.*
> ***147. <u>If the Assessing Officer has reason to believe</u>*** *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) :
…

…". (emphasis supplied by us)

(2.6.2) For taking a view on the validity of reopening of assessment u/s 148 of I.T. Act, read with section 147 of I.T. Act, useful reference may be made to a few decided precedents. In the case of Indian and Eastern Newspaper Society v. CIT 119 ITR 996 (SC), a three judge Bench(consisting of Justice P.N. Bhagwati, Justice V.D. Tulzapurkar and Justice R.S. Pathak), the Hon'ble Supreme Court held: "*The opinion of an internal audit party of the income –tax department on a point of law cannot be regarded as "information" … for the purpose of reopening an assessment. But although an audit party does not possess the power to pronounce on the law, it nevertheless may draw the attention of the ITO to it. Law is one thing, and its communication another. If the distinction between the source of the law and the communication of the law is carefully maintained, the confusion which often results … may be avoided. While the law may be enacted or laid down only by a person or body with authority in that behalf, the knowledge or awareness of the law may be communicated by anyone. No authority is required for the purpose. That part alone of the note of an audit party which mentions the law which escaped the notice of the ITO constitutes "information" …; the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account ;by the ITO. In every case, the ITO must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe*

that income has escaped assessment. The basis of his belief must be the law of which he has now become aware. The opinion rendered by the audit party in regard to the law cannot, for the purpose of such belief, add to or colour the significance of such law. ***The true evaluation of the law in its bearing on the assessment must be made directly and solely by the ITO****. …. In every case, a declaration or exposition to be law, must be a creation by a formal source, either legislative or judicial authority. A statement by a person or body not competent to create or define the law cannot be regarded as law. The suggested interpretation of enacted legislation and the elaboration of legal principles in text books and journals do not enjoy the status of law. They are merely opinions and, at best, evidence in regard to the state of law an in themselves possess no binding effect as law. …"* (emphasis supplied by us). In the case of R. K. Mulhotra, Income Tax Officer v. Kasturbhai Lalbhai 109 ITR 537 (SC), the Hon'ble Apex Court held that the Audit Department was the proper machinery to scrutinize the assessments of Income-tax Officer and point out the errors, if any, in law, and that the intimation received by the Income-tax Officer constituted "information" … in consequence of which the Income-tax officer could reopen the assessment. It was further held in this case by the Hon'ble Supreme Court that the words 'external source" cannot be construed as implying that the source must be outside the record. The information may be gathered from the assessment record itself. To quote from this decision, Hon'ble Supreme Court held: "…*The "information" may be of facts or of law. The "information" of a fact may be from external source. The fact that the Income-tax Officer with diligence could have obtained the information during the previous assessment on a proper investigation of the materials on the record or the facts disclosed thereby, would not make it any the less*

information if the fact was not in fact obtained and came to his knowledge only subsequently. So also the fact that on a research as to the state of law the Income-tax Officer would have ascertained the true legal position would not make any difference if the officer came to know the real position of the law only subsequently." (emphasis supplied by us). In the case of CIT v. P.V. S. Beedies Pvt. Ltd. 237 ITR 13 (SC), the Hon'ble Supreme Court held: " … *The internal audit party was entitled to point out a factual error or omission in the assessment. Reopening of a case on the basis of a factual error pointed out by the audit party was permissible under law. Therefore, the reopening of the assessment was valid."* (emphasis supplied by us). On cumulative consideration of these orders of the Hon'ble Supreme Court, **we are of the view that initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act, cannot be held to be invalid merely because these proceedings were initiated subsequent to an audit objection. Therefore, we hold that initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act on the basis of audit objection does not amount to change of opinion and initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act cannot be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.** Accordingly, we reject the contention of the Ld. AR for assessee that the reopening of assessment U/s 147 by issue of notice U/s 148 of IT Act was improper because it amounted to change of opinion by the AO. **However, in our opinion, for initiation of these proceedings to be valid, what is of utmost importance is whether, once the audit objection was received, whether the AO, after due application of his own mind, formed his own belief, that**

income had escaped assessment. If the proceedings U/s 147 read with section 148 of I.T. Act, were initiated by the AO, under the instructions of the higher authorities, or to protect the interests of Revenue; despite not agreeing with the audit objection and / or despite not coming to his own belief that income had escaped assessment, the initiation of proceedings cannot be held to be valid. For the purposes of the U/s 147 of I.T. Act read with section 148 of I.T. Act, the touch stone is whether the AO himself believed, legitimately and not under the influence of higher authorities or under the pressure of the Audit Department, that the income had escaped assessment. If the AO did not himself legitimately and genuinely believe, free from pressure and undue influence; that income had escaped assessment; the belief of any other authority that income had escaped assessment is immaterial; and the initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act have to be held as invalid. For this opinion, we take support from the cases of CIT v. Shilpa Gravures Ltd. 40 taxmann.com 309 (Guj.) and Vodafone West Ltd. v. ACIT 37 taxmann.com 158 (Guj.), in which view was taken by the Hon'ble High Court that if the reassessment proceedings were initiated merely and solely at the instance of the audit party and when the Assessing officer had tried to justify the assessment orders and had requested the audit party to drop the objections and there had been no independent application of mind by the Assessing Officer with respect to the subjective satisfaction for initiation of the reassessment proceedings, the impugned reassessment proceedings could not be sustained and the same deserved to be quashed and set aside. We also take support from decisions in the cases of N.K. Roadways P. Ltd. v.

ITO (OSD) 362 ITR 522 (Guj.), P.C. Patel and Co. v. DCIT 379 ITR 151 (Guj.), Shree Ram Builders v. ACIT (OSD) 377 ITR 631 (Guj.), and Adani Exports v. DCIT 240 ITR 224 (Guj.). After considering CIT vs. P.V.S. Beedies Pvt. Ltd. (supra) and Indian and Eastern Newspaper Society v. CIT (supra), it was held by Hon'ble High Court in the case of N.K. Roadways P. Ltd. v. ITO (OSD) (supra): " … *Any action of reopening solely at the behest of objection raised by audit party without any independent belief while recording the reasons would make the very assumption of jurisdiction vulnerable. The logical decision of initiating proceedings of reassessment in the form of reason to believe has to be directly and invariably of that of the Assessing Officer*…". (emphasis supplied by us). After considering CIT vs. P.V.S. Beedies Pvt. Ltd. (supra), the Hon'ble High court held in the case of P.C. Patel and Co. v. DCIT(supra): "*Information given by the audit party or an audit objection can be used for the purpose of reopening of the assessment. However, for that there must be formation of opinion by the Assessing Officer or the Assessing Officer independently must have reason to believe that the income chargeable to tax has escaped assessment".* (emphasis supplied by us). In the case of Shree Ram Builders v. ACIT (OSD)(supra), the Hon'ble High Court held, after considering CIT v. Shilpa Gravures (supra) and Vodafone West Ltd. v. ACIT (supra), that reassessment proceedings initiated merely and solely at the instance of the audit party are not valid. It was further held by the Hon'ble High Court, in this order, that when the Assessing Officer tried to justify the assessment order and requested the audit party to drop the objections and there was no independent application of mind by the Assessing officer with respect to the subjective satisfaction for initiation of the reassessment proceedings, the reassessment proceedings could not be sustained. In the case of Adani Exports v. DCIT (supra), the Hon'ble High

Court, applying Indian and Eastern Newspaper Society v. CIT (supra), held: "*That part alone of the note of an audit party which mentions the law which escaped the notice of the Income-tax Officer constitutes "information", …* ***the part which embodies the opinion of the audit party in regard to the application or interpretation of the law cannot be taken into account by the Income-tax Officer****. In every case the* ***Income-tax Officer must determine for himself what is the effect and consequence of the law mentioned in the audit note and whether in consequence of the law which has now come to his notice he can reasonably believe that income had escaped assessment.*** *The basis of his belief must be the law of which he has now become aware."* (emphasis supplied by us). The Hon'ble High Court further held in this case: "*… contrary to the decision of the Supreme Court, the instruction of the Board directs that merely on raising of audit objection remedial action by initiating proceedings of reassessment be taken, notwithstanding that the authority vested with power to exercise jurisdiction for issuing notice is not satisfied about existence of such circumstances which may warrant exercise of such power. To say the least, such ultra vires instructions cannot be pressed into service to save the initiation of proceedings under section 147, in the absence of holding of any belief by the Assessing Officer, by arrogating the power to itself by the Board by issuing such directions contrary to the provisions of law at the pain of subjecting the officer to pain of exposing him to charge of insubordination".*

(2.7) On perusal of the orders of the AO and the Ld. CIT(A), information whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment; is not available. It could

have been ascertained by the Ld. CIT(A) from communication, including correspondence, between assessment authorities (including the AO) and Audit Department. However, the Ld. CIT(A) did not do this. As the relevant information is not available on record, and in the background of views and opinions expressed by us in the foregoing paragraph no. **(2.6.2)** of this order, we remand the issue regarding validity of initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, to the file of the Ld. CIT(A) with the direction to pass the fresh order as per law, taking into consideration the views and opinions expressed by us in the foregoing paragraph no. **(2.6.2)**, after ascertaining whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment.

(2.7.1) On merits of the additions made by the AO, the Assessee did not raise any grounds of appeal in the appellate proceedings before the Ld. CIT(A). For ready reference, the grounds of appeal raised by the Assessee in the appellate proceedings before the Ld. CIT(A), have been mentioned in the foregoing paragraph no. **(2.3)** of this order. The grounds of appeal taken by the Assessee in the present appeal in ITAT, on the merits of the additions made by the AO, do not arise from the impugned order of the Ld. CIT(A) and the Ld. CIT(A) cannot be faulted for not adjudicating on merits of the additions, when the Assessee did not raise any grounds of appeal before the Ld. CIT(A) on merits of the additions. Therefore, the grounds of appeal of the Assessee in the present appeal in ITAT, as far as the merits of the addition are concerned, are not maintainable. Accordingly, grounds related to merits of the

additions, being not maintainable, are dismissed. In the foregoing paragraph no. (2.7) of this order, we have already remanded the issue regarding validity of initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, to the file of the Ld. CIT(A) with the direction to pass the fresh order as per law. If the Assessee files additional ground of appeal pertaining to the merits of the addition, before the Ld. CIT(A), the Ld. CIT(A) will deal with the admissibility and the merits of such additional grounds of appeal in accordance with law. We decline to express any opinion presently, on these matters. For statistical purposes, this appeal is partly allowed.

PER KULDIP SINGH, JUDICIAL MEMBER :

3. Having gone through the proposed order passed by my Esteemed Brother, Accountant Member, wherein he has proposed to remand the issue regarding validity of initiation of proceedings under section 147/148 of the Income-tax Act, 1961 (for short 'the Act') to CIT (A) to pass a fresh order after ascertaining from communication between Assessing Authorities and Audit Party if AO indeed believed, genuinely and legitimately free from pressure and undue influence before the initiation of reassessment proceedings that income had escaped assessment, I am constrained to differ with the conclusion arrived at paras 2.6 & 2.7.1, thus writing a separate dissenting order.

4. Appellant, M/s. India Exposition Mart Limited (hereinafter referred to as the 'assessee') by filing the present appeal sought to set aside the impugned

order dated 07.01.2016 passed by the Commissioner of Income-tax (Appeals)-4, New Delhi qua the assessment year 2009-10 on the grounds inter alia that :-

> ***"1) The Learned DCIT erred in law by reopening assessment u/s 147 of Income Tax Act on the basis of change in opinion.***
>
> ***2) The Learned DCIT erred in law by re-opening assessment u/s 147 of Income Tax Act without any new or fresh materials not disclosed during course of assessment.***
>
> ***3) The Learned DCIT-Cir 12(1) erred in law by not appreciating the Fact that full enquiry was made by the Assessing officer regarding abandoned Phase- 3 project by seeking the facts about the details of the project and after due application. of mind allowed the expense***
>
> ***4) The Learned DCIT-Cir 12(1) erred in Jaw by re-opening assessment u/s 147 of IT on the basis of Audit objection wherein no new facts have been disclosed.***
>
> ***5) The learned DCIT-Cir 12(1) erred in law by not in facts that the expenses on the abandoned phase-3 project were for survey and feasibility report, building plan preparation expenses and architecture fees and not on £1m; capital asset and no new asset were created.***
>
> ***6) The Learned DCIT-Cir 12(1) erred in law by treating abandoned Phase-3 as Capital expenditure when no new asset were created.***
>
> ***7) The Hon'ble CIT (A)-4 erred in law by not disputing the facts presented by the assessee but dismissed appeal of the assessee without assigning any reason or any ground.***

5. Briefly stated the facts necessary for adjudication of the controversy at hand are : original assessment was framed on 09.12.2011 at income of Rs.11,16,39,520/- u/s 143 (3) of the Act. Subsequently, consequent upon the audit report dated 25.02.2013 received by the Assessing Officer that, "the

expenses of Rs.1,81,26,000/- on account of write off capital expenditure is not allowable as it is neither a revenue expenditure nor it pertains to the year under assessment." initiated proceedings u/s 148 of the Act on 11.03.2014 and resultantly assessment order u/s 147/143(3) was framed on 18.02.2015, making an addition of Rs.1,81,26,000/- on account of disallowance of expenditure incurred/claimed by the assessee. The ld. CIT (A) dismissed the appeal confirming the initiation of proceedings u/ 147 of the Act. Feeling aggrieved, the assessee has come up before the Tribunal by way of filing the present appeal.

6. We have heard the ld. Authorized Representatives of the parties to the appeal, gone through the documents relied upon and orders passed by the revenue authorities below in the light of the facts and circumstances of the case.

GROUNDS NO.1, 2, 3, 4 & 7

7. Assessee has preferred to challenge the reopening of assessment u/s 147 of the Act on the basis of audit objection disclosing no new material/facts on record.

8. Ld. AR for the assessee challenging the impugned order contended inter alia that in the absence of any fresh material subsequent to the assessment order framed u/s 143 (3), no valid proceedings can be initiated u/s 147 of the Act; that reassessment proceedings have been initiated by the AO on the basis of opinion expressed by audit party that the claim of deduction claimed by the assessee

already allowed by the AO by framing the assessment u/s 143 (3) of the Act is not allowable; that when the AO has allowed the claim debited by the assessee in the profit & loss account, in the absence of fresh tangible material, reassessment proceedings cannot be initiated on the basis of audit objection; and that assumption of jurisdiction by the AO on the basis of objection raised by the audit party amounts to change of opinion and as such proceedings u/s 148 of the Act were without jurisdiction.

9. On the other hand, ld. DR for the Revenue relied upon the orders passed by the AO as well as CIT (A) and contended that proceedings have been validly initiated after disposing of the objections raised by the assessee. Ld. DR also filed written submissions which are extracted as under :-

> ***"In the above case, it is humbly submitted that the following decisions may kindly be considered with regard to reopening of cases u/s 147 of I.T. Act:***
>
> ***1. R.K. Malhotra, ITO Vs Kasturbhai Lalbhai [1977]109 ITR 537 (SC)***
>
> ***Where the Hon'ble Supreme Court held that the intimation which the Income-tax Officer received from the audit department would constitute "information" within the meaning of section 147 (b).***
>
> ***2. Yuvraj v. Union of India [2009] 315 ITR 84 (Bombay)/ [2009] 225 CTR 283 (Bombay)***
>
> ***Where the Hon'ble Court held that points not decided while passing assessment order under section 143 (3) not a case of change of opinion. Assessment reopened.***
>
> ***3. Devi Electronics Pvt. Ltd. vs. ITO 2017-TIOL-92-HC-Mum-IT***

Wherein the Hon'ble High Court held that The likelihood of a different view when materials exist of forming a reasonable belief of escaped income, will not debar the AO from exercising his jurisdiction to assess the assessee on reopening notice."

10. To proceed further in this case, reasons recorded for assuming the jurisdiction u/s 147 of the Act are extracted for ready perusal as under :-

" The assessment in the above mentioned case for A.Y. 2009-10 was completed on 09.12.2011. On further verification it was found that during the year the assessee had an opening balance of Rs.1.75 crores under the head "Work In progress", Phase-III (superstructure) and the assesses also incurred expenses of Rs.6.26 lacs on the project. However, the assessee write off the full balance of this capital Work in progress in P&L a/c for F.Y. 2008-09, out of which Rs.1.70 crores was debited as consultancy charges. Since, the write off of capital work in progress is not allowable in the act as it is neither a revenue expenditure nor does it pertains to current assessment year. By doing so, the assessee had not disclosed it income truly and fully to the extent of Rs.1.81 crores.

Based on the above facts, I have reason to believe that the income to the tune of Rs.1.81 chargeable to tax has escaped assessment. If approved, a notice u/s 148 of IT Act may be issued to assessee."

11. Bare perusal of the reasons recorded apparently goes to show that original assessment was framed in this case on 09.12.2011. It is also recorded in the reasons recorded itself that, "**on further verification,** it was noticed that during the year under assessment, assessee had opening balance of Rs.1.75 crores under the head **"work in progress, Phase III (super structure)"** and the assessee has incurred expenses of Rs.6.26 lacs on the project, whereas the assessee has written off the total balance of this capital work in progress in P&L account for 2008-09 out of which Rs.1.70 crores was debited as consultancy charges as it is neither a revenue expenditure nor it pertains to current assessment year, thus assessee has

not disclosed income fully and truly to the extent of Rs.1.81 crores chargeable to tax which has escaped assessment."

12. Apparently, no new material/fact has come on record/in the notice of the AO subsequent to the assessment order framed u/s 143 (3) so as to enable the AO to assume the jurisdiction u/s 147 of the Act. Rather the sole basis for reopening is the opinion given by the audit party in whose opinion the amount debited in the profit & loss account could not have been allowed as deduction. AO has merely qualified the audit opinion with the words that, **"on further verification"** which I am of the considered opinion that the AO has taken into consideration the same material on the basis of which original assessment was framed. In other words, AO formed opinion only on the basis of existing material that the amount of Rs.1.81 crores claimed by the assessee is not allowable under the Act.

13. Opinion expressed by the AO in the "reasons recorded" on the basis of which proceedings u/s 147 were initiated is not based on any fresh material or information rather on the basis of material already available on record at the time of framing of assessment u/s 143 (3) of the Act. In these circumstances, reopening u/s 147 of the Act is not permissible under law having been amounted to "change of opinion" because AO is not empowered under the Act to review his own order. When we make a conjoint reading of audit objection letter dated 25.02.2013 and reasons recorded, it leads to irresistible conclusion that initiation of reassessment proceedings is based on opinion expressed by the audit party.

14. From the facts and circumstances of the case, order passed by the lower authorities and arguments addressed by the ld. ARs of the parties to the appeal, the sole question arises for determination in this case is:-

> ***"as to whether reopening of assessment u/s 147 of the Act merely on the basis of audit opinion as to the allowability of write off of capital work in progress Phase - III already considered and allowed by AO while framing assessment u/s 143 (3) of the Act amounts to change of opinion and as such reassessment order is liable to be quashed as contended by ld. AR for the assessee?"***

15. Hon'ble Apex Court in case cited as ***CIT vs. Kelvinator of India Ltd. & Anr. - 320 ITR 561*** has interpreted the words *"reasons to believe"* and also held that on mere change of opinion, reopening is not permissible by observing as under :-

> ***"However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."***

16. Hon'ble jurisdictional High Court in the case cited as ***Carlton Overseas Pvt. Ltd. vs. ITO – 318 ITR 295 (Delhi)*** dealt with the identical issue wherein reopening has been initiated on the basis of opinion raised by the audit party and decided the issue in favour of the assessee. For ready perusal, reasons recorded

in the said case for issuance of the notice u/s 148 of the Act are extracted as under:-

> ***"Reasons for reopening the assessment in the case of M/s. Carlton Overseas Ltd. for the assessment year 2002-03.***
>
> ***Return of income for the assessment year 2002-03 was filed on October 31, 2002, declaring the income of Rs. 23,70,590 and the case was assessed under section 143(3) at an income of Rs. 27,44,850. On perusal of the return, it was noticed that the assessee was allowed deduction of Rs. 70.70 lakhs under section 80-IA and the same was not deducted from the profit of the business for the purpose of calculating deduction under section 80HHC. As per sub-section (9) of section 80-IA, the profits considered for the deduction under section 80-IA should be reduced for computing the deduction under any other section mentioned in Chapter VI-A. This has resulted in the incorrect allowance of deduction of Rs. 49.08 lakhs involving short, levy of tax of Rs. 24.57 lakhs including interest.***
>
> ***Therefore, I have reason to believe that taxable income of Rs. 24.57 lakhs chargeable to tax has escaped assessment and I am satisfied that it is a fit case for issue of notice under section 148 of the Income tax Act.***
>
> ***(Sd.) . . . . . .***
> ***(V. Vizay Babu)***
> ***Deputy Commissioner of Income-tax,***
> ***Cricle-3 (1), New Delhi."***

17. So, in the identical set of facts extracted above, Hon'ble High Court in case of ***Carlton Overseas Pvt. Ltd. vs. ITO*** (supra) held as under :-

> ***"Held, allowing the petition, that the audit report merely gave an opinion with regard to the non-availability of the deduction both under section 80-IA and under section 80HHC and that the deduction under section 80-IA was not deducted from the profits of the business while computing deduction under section 80HHC. Therefore, there was no new or fresh material before the Assessing Officer except the opinion of the Revenue audit party. Mere change of opinion could not form the basis for issuing of a notice under section 147/148 of the Act. Therefore, the notice under section 148 of the Act was liable to be quashed."***

18. Full Bench of Hon'ble Delhi High Court in case of ***CIT vs. Usha International Ltd. – 348 ITR 485 (Delhi)*** has discussed and decided the scope of power of reassessment u/s 147/148 of the Act by returning following findings:-

> ***"Held, by the Full Bench (i) that reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion. Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion". Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons. The expression" change of opinion" postulates formation of opinion and then a change thereof. In the context of assessment proceedings, it means formation of belief by an Assessing Officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection. A distinction must be drawn between erroneous application/interpretation/ understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression "material facts" means those facts which if taken into account would have an adverse effect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have a remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. If***

a subject-matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and, therefore, it is a case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, the principle of "change of opinion" cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject-matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject-matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion. Whether or not the Assessing Officer had applied his mind and examined the subject-matter, claim, etc., depends upon factual matrix of each case. The Assessing Officer can examine a claim or subject-matter even without raising a written query. There can be cases where an aspect or question is too apparent or obvious to hold that the Assessing Officer did not examine a particular subject-matter, claim, etc. The stand and stance of the assessee and the Assessing Officer in such cases are relevant."

19. When ratio of the judgments (supra) discussed in the preceding paras is applied to the facts and circumstances of the case, it is proved that it is a case of "change of opinion" for the following reasons :-

(i) that when it was nowhere the case of the AO that some factual information or material qua the issue in question was incorrect or was not available with him at the time of original assessment u/s 143 (3) of the Act, merely on the basis of opinion expressed by audit party, the reopening is not permissible without applying his independent mind;

(ii) that when the issue in controversy as to the claim of deduction of Rs.1,81,26,000/- debited in the P&L account was specifically raised and explained by the assessee during the original assessment proceedings qua the year under assessment, as is evident from the detailed reply filed by the assessee dated 29.11.2011 but has not been dealt with by the AO while disposing off the objections or by

ld. CIT (A), which fact has not been denied by ld. DR in written submissions, the issue cannot be ordered to be reinvestigated;

(iii) that schematic interpretation to the words "reason to believe" needs to be given otherwise section 147 would give arbitrary power to the AO to reopen the assessment on the basis of mere “change of opinion” which cannot be per se reason to open as in the instant case;

(iv) that subsequent to the original assessment framed u/s 143 (3) of the Act, AO was not in possession of any fresh material/facts so as to initiate the reassessment proceedings u/s 147/148 of the Act;

(v) that perusal of the reasons recorded, assessment framed u/s 143 (3) & u/s 143 (3)/147 of the Act and order passed by the ld. CIT (A) go to prove that except for mere “change of opinion” on the basis of opinion expressed by audit party, there was no fresh material with the AO to reopen the assessment u/s 147 which is not permissible;

(vi) that assessee has filed extensive written submissions before the ld. CIT (A) qua the claim of deduction of Rs.1,81,26,000/- in the P&L account which are duly extracted by the ld. CIT (A) in para 11 of the impugned order which are extracted as under :-

> ***“11) In support of the contention of the assessee we are submitting herewith the copy of correspondences/ documents submitted by the Assessee during course of Original Assessment.***

a) Copy of submission dated 29/11/2011 at page no. 25 to 28 (copy enclosed which contained following information asked for by the Assessing Officer regarding charging Capital Work in Progress to profit & loss A/c relating to phase-3 of Project which was abandoned by the assessee during the year (which is the ground of reopening assessment by the Assessing Officer).

I) Ledger account of consultancy charges paid along with Form no.16 issued to some of the major consultants like Fairwood Consultant Pvt. Ltd., Rajinder Kumar & Associates, Ravi Chauhan is enclosed herewith at page no, 29 to 37.

II) Copy of ledger account of Fairwood Consultants Pvt. Ltd. from April 2007 to March 2009 for Professional fees paid to-him is enclosed herewith at page no.38,

III) Copy of ledger account of Rajinder Kumar & Associates for consultancy fees paid to him/or Apri1 2007 to March 2009 is enclosed at page no.39 to 43.

IV) Copy of agreement with Rajinder Kumar & Associates as project Management consultant for Phase-3 is enclosed herewith at page no, 44 to 74.

V) Copy of Agreement with Fairwood Consultants Pvt Ltd. as Project Management Consultant for phase-3 is enclosed herewith at page no.75 to 97.

b) It is submitted that the assessee was planning to set up the 3rd phase of the expansion but the same was shelved during the year as such Rs.1.70,02497/- relating to payment to consultants like Fairwood Consultants (P). Ltd, Rajinder Kumar & Associates & Ravi Chauhan initially debited the Capital Work In Progress but transferred to P&L a/c during the year on shelving the project.

Further vide letter dated 28/08/2011 (copy enclosed at page no. 29) the assessee had submitted the details of consultancy charges which gave full details of consultancy charges which contained debit of Rs.1,70,02,497/- towards consultancy charges in connection with Phase-III project which was abandoned during the year.

It is submitted here that the Assessing Officer in course of original Assessment had fully applied his mind as he had asked for full information about the Phase-3 project started in 2007 by asking details of the Project from the start in 2007 to 2009 like the project agreement with various consultants and fees paid to them which was submitted by the Assessee vide letter dated 29/11/2013.

Thus it is clear from records & submission by the Assessee during course of original assessment that the Assessing Officer had fully applied his mind while allowing charging of capital Work in Progress If Rs.1,70,02,497/- to Profit & Loss Account on shelving of Phase-3 Project of the assessee company."

(vii) that ld. CIT (A) has not discussed and meet with the aforesaid submissions raised by the assessee rather summarily upheld the reopening of assessment u/s 147 of the Act;

(viii) that while disposing of the objections by the AO, he has relied upon the decision rendered by Hon'ble Gujarat High Court in case of ***Gruh Finance Ltd. vs. JCIT – 243 ITR 482*** and ***Praful Chunilal Patel vs. M.J. Makwana, ACIT – 236 IT 832,*** which are not applicable to the facts and circumstances of the case in the face of binding precedent laid down by the Hon'ble jurisdictional High Court and Hon'ble Apex Court (supra) discussed in the preceding paras. So, I am of the considered view that they are not supporting the case of the Revenue in initiating the proceedings under section 147 of the Act.

20. In view of what has been discussed above, I am of the considered view that issuance of notice u/s 148 of the Act on the basis of opinion expressed by

the audit party and in the absence of any fresh facts/tangible material, consequent assessment framed u/s 147/143(3) of the Act were illegal, erroneous and without jurisdiction, hence liable to be quashed.

21. However, before parting with the aforesaid order, I have noticed that my Esteemed Brother has stated in para 2.7 of the order that:-

> ***"On perusal of the orders of the AO and the Ld. CIT(A), information whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of LT. Act read with section 148 of I.T. Act, that income had escaped assessment; is not available. It could have been ascertained by the Ld. CIT(A) from communication, including correspondence, between assessment authorities (including the AO) and Audit Department. However, the Ld. CIT(A) did not do this. As the relevant information is not available on record, and in the background of views and opinions expressed by us in the foregoing paragraph no. (2.6.2) of this order, we remand the issue regarding validity of initiation of proceedings U/s 147 of LT. Act read with section 148 of I.T. Act, to the file of the Ld. CIT(A) with the direction to pass the fresh order as per law, taking into consideration the views and opinions expressed by us in the foregoing paragraph no. (2.6.2), after ascertaining whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of LT. Act read with section 148 of I.T. Act, that income had escaped assessment."***

22. I am unable to agree with the aforesaid approach adopted by the Esteemed Brother, because it was for the Revenue to establish before us by bringing on record cogent evidence that the AO had initiated the proceedings u/s 148 of the Act uninfluenced by the audit objection. Whereas it is abundantly clear from "reasons recorded" that the AO has initiated the proceedings u/s 147 of the act merely on the basis of opinion expressed by audit objection and without having any fresh fact/material on record and without applying any independent mind.

23. Furthermore, I am of the considered view that the Tribunal, being a fact finding authority, is required to draw conclusion, "if AO indeed believed genuinely and legitimately free from pressure and undue influence at any stage before initiation of proceedings u/s 147 of the Act" from the reasons recorded, original assessment framed and order disposing off objections filed by the assessee as well as from the order passed by the ld. CIT (A) and these powers cannot be delegated to the lower Revenue authorities who are having powers to frame and reframe the assessment u/s 143 (3) or u/s 143 (3)/147 of the Act, as the case may be, but not to review their orders. Because in order to interpret and to know intent and spirit of the order, extraneous material, if any, cannot be looked into as has been held by Hon'ble Apex Court in case of ***Mohinder Singh Gill vs. Chief Election Officer – AIR 1978 SC 85***1 by observing as under :-

> ***"The second equally relevant matter is that when a statutory functionary makes an order based on certain grounds, its validity must be judged by the reasons so mentioned and cannot be supplemented by fresh reasons in the shape of affidavit or otherwise. Otherwise, an order bad in the beginning may, by the time it comes to court on account of a challenge, get validated by additional grounds later brought out. [Para 8]"***

24. So, in view of the law laid down by Hon'ble Apex Court in case of ***Mohinder Singh Gill*** (supra), I am of the considered view that validity of initiation of reassessment u/s 147 of the Act is to be judged by the reasons so mentioned, judged from the reasons recorded, assessment order passed, which cannot be supplemented with any fresh material.

25. Even, at the time of hearing, no submission whatsoever has been made by the ld. DR that any cogent material has not been considered by the AO or ld. CIT

(A) or assessee has not disclosed true and material facts as the issue in controversy so as to initiate the reassessment proceedings. Moreover, when the Tribunal being a fact finding authority is equally empowered to ascertain if the AO has believed genuinely and legitimately free from pressure and undue influence (which is not the case of assessee as well as Revenue) before initiation of the proceedings u/s 147/148 of the Act that income had escaped assessment, this power cannot be delegated further to the ld. CIT (A) for reinvestigation to ascertain these facts.

26. Hon'ble Delhi High Court in case of ***CIT vs. Kamdhenu Steel and Alloys Ltd. 361 ITR 220*** has decided the issue as to how and under what circumstances Tribunal can order further enquiry by returning following findings :-

> ***"(iv) This Court is acting as appellate Court and has to act within the limitations provided under Section 26A of the Act. The appeals can be entertained only on substantial questions of law. In the process, this Court is to examine as to whether the order of the Tribunal is correct and any substantial question of law arises therefrom. The Tribunal has passed the impugned orders, sitting as appellate authority, on the basis of available record. When the matter is to be examined from this angle, there is no reason or scope to remit the case back to the AO(s) once it is found that on the basis of material on record, the order of the Tribunal is justified. Even the Tribunal acts purely as an appellate authority. In that capacity, the Tribunal has to see whether the assessment framed by the AO, all for that matter, orders of the CIT(A) were according to law and purportedly framed on facts and whether there was sufficient material to support it. It is not for the Tribunal to start investigation. The Tribunal is only to see as to whether the additions are sustainable and there is adequate material to support the same if not the addition has to be deleted. At that stage, the tribunal would not order further inquiry. It is to be kept in mind that the AO is prosecutor as well as adjudicator and it is for the AO to collect sufficient material to make addition. There may be exceptional circumstances in which such an inquiry can be ordered, but normally this course is not resorted to."***

27. By applying the ratio of the judgment of Hon'ble jurisdictional High Court in ***CIT vs. Kamdhenu Steel and Alloys Ltd.*** (supra) to the facts of this case, I am of the considered view that except in exceptional circumstances, the Tribunal would not order further enquiry rather it is to decide on its own, whether additions are sustainable and there are adequate material to support the same, if not, the addition has to be deleted. Moreover, in the instant case, neither it is the case of the assessee nor the ld. DR for the Revenue that some material facts have not been considered by the AO or ld. CIT (A) or true and material facts qua issue in question have not been disclosed by the assessee or new facts have come to the notice of AO subsequent to the assessment framed u/s 143 (3) of the Act.

28. So, all these facts go to prove that AO has not applied his independent mind except relying on the opinion expressed by the audit party nor laid hand on any fresh material to reach the conclusion that income has escaped assessment. Prefixing word "on further verification" to the reasons recorded by the AO itself proves that there was no fresh material/facts available with him subsequent to the assessment u/s 143(3) nor he has applied his independent mind rather merely relied upon audit opinion. It is also not the case of either party to the appeal that adequate opportunity of being heard is not given to them at the time of framing assessment or at the time of appellate proceedings before the ld. CIT (A). So, in these circumstances, remanding the case back for reinvestigation by the ld. CIT (A) would be misuse of process of law.

29. So, in view of what has been discussed above, without entering into the grounds on merits, it is concluded that right from the initiation of proceedings u/s 148 of the Act and consequent assessment framed u/s 147/143 (3) of the Act were illegal, erroneous and without jurisdiction, and as such are quashed. Hence, question framed is answered in affirmative and consequently, grounds no.1, 2, 3, 4 & 7 are decided in favour of the assessee.

GROUNDS NO.5 & 6

30. In view of my findings on grounds no.1 to 4 & 7, grounds no.5 & 6 on merits have become academic, hence need no adjudication.

31. Resultantly, the appeal filed by the assessee is allowed.

PER: MAHAVIR SINGH, VP, AS THIRD MEMBER

By order of Hon'ble President, vide U.O.No.-F.90-Jd(ATD)/2024 dated 02/05.08.2024, undersigned is nominated to adjudicate the difference between the Learned Accountant Member and Learned Judicial Member.

2. The difference pointed out by Learned Judicial Member reads as under:-

(i) *"Whether validity of initiation of proceedings under section 147/148 of the Income-tax Act, 1961 (for short 'the Act') is to be examined from the perusal of reasons recorded, objections raised by the assessee, order passed by the Assessing Officer qua objections raised by the assessee, assessment order and impugned order of the Ld. CIT (A) and no extraneous material is to be taken into consideration?*

(ii) *Whether the Tribunal being a fact finding authority is empowered to delegate its function to Ld. CIT (A) by way of remand to ascertain if the Assessing Officer has believed genuinely and legitimately free from pressure and undue influence by applying his*

independent mind that income had escaped assessment particularly when entire material relied upon is available on record?

(iii) Whether the Tribunal can remand the issue to the Ld. CIT (A) to ascertain application of independent mind by the Assessing Officer from the communication/correspondence between Assessing Officer and Audit Party, which has not been relied upon, in the absence of any allegation/request on the part of Ld. DR before initiating the proceedings under section 147/148 of the Act?"

3. Similarly, the difference pointed out by Learned Accountant Member reads as under:-

(A) "Whether, when initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act has been done before the expiry of four years from the end of the relevant Assessment Year, initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act, can be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.

(B) Whether, when initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act has been done before the expiry of four years from the end of the relevant Assessment Year, the initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act on the basis of audit objection amounts to change of opinion; and, whether, the initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act can be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.

(C) Whether, for initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act to be valid, it is necessary for the AO, after due application of his own mind, to form his own belief, that income had escaped assessment and whether, if the AO did not himself legitimately and genuinely believe, free from pressure and undue influence that income had escaped assessment; the belief of any other authority that income had escaped assessment is immaterial.

(D) Whether, when the information if the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment; is not available on records of Income Tax Appellate Tribunal; the issue regarding validity of initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act, can be remanded to Commissioner of Income Tax (Appeals) to pass fresh order as per law after ascertaining whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s

147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment."

4. Since the facts are already narrated by Learned Accountant Member and Learned Judicial Member in their respective orders and there is no dispute on the same. But for sake of clarity and brevity, I am narrating relevant facts that the assessee, India Exposition Mart Ltd., is a company promoted by Export Promotion Council for Handicrafts (Sponsored by Ministry of Textiles, Govt. of India) and exporters of Handicraft items. The company got certificate of registration with Registrar of Companies on 12/04/2001 and certificate of Commencement of Business on 12/06/2001. The main object of the company as per its Memorandum of Association is as under:

"To provide support to cottage industries, small scale industries and Small Medium Enterprises (SMEs) engaged in exports and to encourage, supplement and support their marketing efforts through long term planning and creation of support facilities. The priority areas will be creation of new opportunities/market and improvement in the existing marketing/export opportunities of the cottage sector and SMEs exporting units, efficient utilization of present potential of exporting small scale sector by creating a new concept of round the clock international marketing through permanent contact point and to create a link between craft industries in developing countries which have limited international marketing facilities and the consumer market of Europe and other developed nations, through organizing exposition, exhibition, trade fairs or to provide such facilities to others on rental, license, contract and/or on lease basis, development of International network of marketing and product development expertise, and agents from around the world throughout the year and any other activity to promote the above sectors, in particular Handicrafts, Gift Items, Carpets, Silk, Jute, Handloom and other products having similar nature and to promote new products, languishing crafts, new items of crafts for exports, new exporters/new craftsmen entrepreneurs and to promote for the country design development to earn increased foreign exchange".

The Company had received a grant in aid of Rs.12 Crores from Govt. of India for Construction of the Mart for holding exhibition for export of Handicrafts. The Assessee further received a grant of Rs.5 crores from UP Government for enhancing reputation of Greater Noida. The Company has 2 nominee Directors from the Ministry of Textiles and 2 Directors from Greater Noida Industrial Development Authority. The Assessee Company had completed two phases of Construction, and the marts were sold to the allotters during the assessment year 2009-2010. The Third phase of the construction was also in the initial stage of progress. The Construction in Phases 1, 2 & 3 are in the same compound and are contagious in nature. As contended by Ld. Counsel that due to deep depression in International Market, the export of Handicrafts was also very badly affected. In view of the bleak international economic scenario, it was decided by the company not to go ahead with the expansion of 3rd Phase and Capital Work in Progress of Rs.1,70,00,497/- was transferred to expenses account. During the assessment proceedings for A.Y. 2009-10, the Assessee was asked to give full details of capital work in progress for 3rd phase & was provided full details of Rs.1,70,02,497/- i.e. consultancy charges along with copy of ledger accounts & copy of contracts with consultants and which were accepted by the assessing officer & write off of Capital work in progress of Rs.1,70,00,497/- was allowed by him. This fact can also be verified from the audit observation made by the office of the A.C.I.T, S.A.P, O/o CIT (Audit) -II from the reply of the assessee to the Assessing officer which reads as under:-

> *"It is submitted that the assessee was planning set up the 3rd phase of the expansion but the same was shelved during the year as such Rs.1,70,00,497/-appearing in Capital Work in progress Phase-III*

have been changed to Profit & Loss Account. (Copy of our letter dated 29/11/2011 wherein Point No. 19 last Para & point 20 regarding charging in P&L A/c have been mentioned by us)"

Subsequently Internal Audit objection was raised by SAP-1 Assistant CIT (audit) that incorrect claim of Rs.1,81,70,947 on account of capital work in progress was made by the assessee. But on the basis of audit objection DCIT Cir 12(1) reopened the case by issuing notice U/s 148 of the Income Tax Act, 1961(hereinafter 'the Act'). Further, while raising the objection, the audit officer mentioned extracts of assessee's letter dated 29.11.2011 & 07.12.2011 submitted to the assessing officer which reads as under.

"It is submitted that the assessee was planning to set up the IIIrd phase of the expansion but the same was shelved during the year as such Rs.1,70,00,497/-appearing in capital work in progress phase III, have been charged to Profit & loss account."

Based on an audit objection discovered from the assessment records raised by the audit party, the assessing officer issued notice u/s 148 of the Act date 11/03/2013. The assessee was supplied the reason for re-opening on 12.12. 2014 which reads as under:-

"The assessment in the above-mentioned case no A.Y 2009-10 was completed on 09.12.2011. On further verification it was found that during the year the assessee had an opening balance of Rs.1.75 crore under the head "works in progress" phase III (superstructure) and the assessee also incurred expense of Rs.6.26 lacs on the project. However, the assessee write off the full balance of capital work in progress in P&L a/c in Financial year 2008-09 out of which Rs.1.70 crores was debited as consultancy charges. Since, the write off of capital work in progress is not allowable in the act as it is neither a revenue expenditure nor does it pertain to the current assessment year. By doing so the assessee had not disclosed its Income Truly & Fully to the extent of Rs.1.81 crores.
Based on the above facts, I have reasons to believe that the Income to the tune of Rs.1.81 crores chargeable to tax has escaped assessment. If approved, a notice u/s 148 of IT ACT, may be issued to the assessee.

Date: 11/03/2013 *(Rajeev Kumar)*
Dy Commissioner of Income tax Circle 11(1)"

5. The Assessing Officer framed reassessment under section 143(3) read with section 147 of the Act and disallowed write off capital work in progress amounting to Rs.1,81,26,000 by holding that the written off capital work in progress is not allowable as it is neither a revenue expenditure nor does it pertain to current assessment year. He discussed that the assessee had an opening balance of Rs.1.75crores under the head 'work in progress in Phase-III[super structure]' and the assessee also incurred expenses of Rs.6.26 lacs on the project. He noted that the assessee had written off the full balance of this capital work in progress in profit and loss account for the financial year 2008–09 relevant to assessment year 2009–10 out of which Rs.1.7crore was debited as consultancy charges. Hence he disallowed this amount of Rs.1.81crore. The Ld. CIT(A) adjudicated the issue only on jurisdiction and dismissed the appeal of the assessee by upholding the reopening of assessment u/s. 147 of the Act by the Assessing Officer by observing as under:-

> *"4. There is in fact only one ground of appeal and that is against the reopening of assessment u/s. 147. The main argument of the appellant revolves around the fact that full details of the expenses of Phase-III of the project and its write off duly disclosed, during the original assessment made u/s. 143(3) by the Assessing Officer. Therefore, they argued that since full facts are disclosed already, the assessment could not have been reopened u/s. 147 on the basis of the audit objection. I have gone through the submissions as well as the assessment order, and I find that the case of the appellant is different from the case laws quoted by them. The appellant has nothing to say on merit and, I hereby dismiss the appeal."*

6. Before Tribunal, the assessee raised the issue on merits as well as on jurisdiction of reopening of assessment under section 147 of the Act. Ld.

Accountant Member adjudicated the issue on reopening by Assessing Officer u/s. 147 of the Act vide para no. 2.7. of his order and upheld the reopening. However, the learned Accountant Member set aside the issues on merits to the file of the CIT(A) for fresh adjudication. Ld. Judicial Member quashed the reopening and decided the issue of jurisdiction in favour of assessee vides para nos. 28 & 29 of his order. Hence there is a dissent and questions were referred to me by Hon'ble President, ITAT to adjudicate the same.

7. Now before me, Ld. Counsel for the assessee, first of all stated the facts in brief that assessee company was planning to set up a 3rd phase of the expansion, but the same was shelved during the year and for the same an amount of Rs.1.70 crore relating to the payment to consultants like Fairwood Consultants (P) Ltd., Rajinder Kumar & Associate & Ravi Chauhan were initially debited to capital work in progress, but later transferred to profit and loss account during the year. It was contended that during the original assessment proceedings vide letter dated 28.8.2011, assessee submitted all the details of consultancy charges containing debit notes for an amount of Rs.1.70 crore towards consultancy charges in connection with Phase-III Project which has been abandoned during the year. Ld. Counsel for the assessee first of all made an argument that this is allowable claim and AO rightly allowed the claim during the original assessment proceedings. He stated that the construction/acquisition project was abandoned at work in progress stage only and decision to abandon project was taken in relevant assessment year for the purpose of business expediency, hence, write off of the said expenditure by the assessee arose in the relevant assessment year. I

noted that this issue itself is covered by the decision dated 05.06.2018 decided in TS (Appeal) Nos. 907 and 908 of 2007 of the Honourable Madras High Court in the case of Tamil Nadu Magniste Ltd. vs. ACIT wherein, exactly same facts were discussed as loss of Rs.11.58 crores as project expenses was claimed and charged to the profit and loss account by appending the note stating that due to various reasons, the Government of Tamil Nadu ordered the closure of the project i.e. implementation of the Chemical Beneficiation Plant vide G.O. No. 140 dated 11.05.1998 and as a consequence the project was abandoned and major portion of intangible assets were shown as revenue expenditure. Hon'ble Madras High Court allowed the same as capital expenditure. Similarly Hon'ble Calcutta High Court in the case of Binani Cement Vs. vs. CIT (2016) 380 ITR 116 wherein it was held that if the expenditure is incurred for starting a new business, which was not carried out by the assessee in earlier year, such expenditure was held to be capital in nature. However, if the expenditure incurred is in respect of same business, which is already carried on by the assessee, even if it is for the expansion of the business, viz. to start a new unit, which is same as earlier business and there is unity of control and a common fund, then such an expense is to be treated as business expenditure and in such a case where it is a new business / asset would become a relevant factor. Similarly, Hon'ble Delhi High Court in the case of Indo Rama Synthetics Limited (2011), 333 ITR 18 (Delhi) considered and held that if the expenditure is incurred for starting a new business, there is no creation of new asset then the expenditure would be revenue in nature. Hence, in the present case before me also the expenditure

incurred would be revenue in nature. Also, it is not the allegation of the revenue that a new asset is created.

8. Be that as it may be, whether it is a fit case of reopening of assessment, this is being answered by Hon'ble Delhi High Court Full Bench in the case of CIT V Usha International (2012) 348 ITR 485 Del, wherein the principle of "change of opinion" was discussed extensively as under:-

> *"16. Here we must draw a distinction between erroneous application/ interpretation/understanding of law and cases where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of —change of opinion‖ will not apply. The reason is that —opinion‖ is formed on facts. —Opinion‖ formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of —change of opinion‖. Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression _material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which confers jurisdiction to reopen the assessment.*
>
> *17. Correct material facts can be ascertained from the assessment records also and it is not necessary that the same may come from a third person or source, i.e., from source other than the assessment records. However, in such cases, the onus will be on the Revenue to show that the assessee had stated incorrect and wrong material facts resulting in the Assessing Officer proceeding on the basis of facts, which are incorrect and wrong. The reasons recorded*

and the documents on record are of paramount importance and will have to be examined to determine whether the stand of the Revenue is correct. Decision of this Court in Writ Petition (Civil) No. 6205/2010, Dalmia Private Limited versus Commissioner of Income Tax Delhi 10 and Another, dated 26th September, 2011 and decision of Bombay High Court in Writ Petition No. 1017/2011, The Indian Hume Pipe Company Limited versus The Assistant Commissioner of Income Tax, dated 8th November, 2011 are two such cases. In the first case, the Assessing Officer in the original assessment had made additions of Rs.19,86,551/- under Section 40(1) on account of unconfirmed sundry creditors. The reassessment proceedings were initiated after noticing that unconfirmed sundry creditors, of which details etc. were not furnished, were to the extent of Rs.52,84,058/- and not Rs.19,86,551/-. In Indian Hume Pipe Company Limited (supra), after verification the claim under Section 54-EC was allowed but subsequently on examination it transpired that the second property was purchased prior to the date of sale. The aforesaid decisions/facts cases must be distinguished from cases where the material facts on record are correct but the Assessing Officer did not draw proper legal inference or did not appreciate the implications or did not apply the correct law. The second category will be a case of ―change of opinion‖ and cannot be reopened for the reason that the assessee, as required, has placed on record primary factual material but on the basis of legal understanding, the Assessing Officer has taken a particular legal view. However, as stated above, an erroneous decision, which is also prejudicial to the interest of the Revenue, can be made subject matter of adjudication under Section 263 of the Act.

18. In New Light Trading Co. vs. Commissioner of Income Tax (2002) 256 ITR 391 (Del), a Division Bench of this Court had referred to decision of the Supreme Court in CIT vs. P.V.S. Beedies Pvt. Ltd. (1999) 237 ITR 13 (SC) and the following observations were made:-

> *―In the case of P. V. S. Beedies Pvt. Ltd. [1999] 237 ITR 13, the apex court held that the audit party can point out a fact, which has been overlooked by the Income-tax Officer in the assessment. Though there cannot be any interpretation of law by the audit party, it is entitled to point out a factual error or omission in the assessment and reopening of a case on the basis of factual error or omission pointed out by the audit party is permissible under law. As the Tribunal has*

> *rightly noticed, this was not a case of the Assessing Officer merely acting at the behest of the audit party or on its report. It has independently examined the materials collected by the audit party in its report and has come to an independent conclusion that there was escapement of income. The answer to the question is, therefore, in the affirmative, in favour of the Revenue and against the assessee.*‖
>
> *19. As recorded above, the reasons recorded or the documents available must show nexus that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income. At the same time, it is not the requirement that the Assessing Officer should have finally ascertained escapement of income by recording conclusive findings. The final ascertainment takes place when the final or reassessment order is passed. It is enough if the Assessing Officer can show tentatively or prima facie on the basis of the reasons recorded and with reference to the documents available on record that income has escaped assessment."*

8.1 The ratio of the above judgment discussed is that when it was nowhere the case of the Assessing Officer that some factual information or material qua the issue in question was incorrect or was not available with him at the time of original assessment under section 143(3), merely on the basis of opinion expressed by Audit Party, the reopening is not permissible, because, as in the present case before us the claim of deduction of Rs.1,81,26,000 debited in the profit and loss account was specifically raised and explained by the assessee during the original assessment proceedings as is evident by the detailed reply filed by the assessee dated 28.8.2011. Even this issue has been dealt by the Hon'ble Delhi High Court in the case of Carltron Overseas (P) Ltd. V ITO (2009) 318 ITR 295 (Delhi) wherein, after considering the facts and submissions sides, it has been observed as under:-

> *"6. Mr. Ajay Vohra, learned counsel for the petitioner has contended that the reasons for reopening of the assessment clearly*

do not provide the basis for issuing of the notice under Section 148 inasmuch as no new material has been disclosed for issuing of the notice and the reasons given for reopening of the assessment merely reflect a change of opinion, and a mere change of opinion is not sufficient for issuing the notice under Section 148. Counsel has further referred to the counter-affidavit filed by the Revenue in this Court in which it has been clearly stated that objection was raised by the Revenue audit party with regard to allowing of the deduction under sections 80-IA and 80HHC, i.e. after the assessee was allowed deduction of Rs.70.70 lakhs under section 80-IA but the said amount was not deducted from the profits of the business while computing deduction under section 80HHC, and, therefore, the mistake has resulted in the incorrect allowance of deduction of Rs.49.08 lakhs involving a short levy of tax of Rs.24.57 lakhs including interest. Mr. Vohra contends that it is quite clear in view of the stand taken in the counter-affidavit that no new facts have come on record and the impugned notice is merely based on a change of opinion being on the basis of the same material which was already available with the Assessing Officer at the time of making initial assessment under section 143(3) of the Act.

7. Mr. Vohra, in support of his contention, has specifically relied upon Transworld International Inc. v. Joint CIT [2005] 273 ITR 242 (Delhi) in support of his contention and which holds that when sufficient material was placed on record and the Assessing Officer had arrived at conclusion that the assessee was entitled to a particular relief (depreciation in that case) then on the same material a different view could not be taken as the same amounted to a change of opinion and consequently the notice and the subsequent proceedings are not valid and liable to be quashed.

8. Ms. Prem Lata Bansal, learned counsel appearing for the Revenue has contended that audit party can on factual basis ask for reassessment and which has, therefore, been done in the present case. It is, however, admitted by her that a mere change of opinion does not permit action under section 147/ 148 of the Act.

9. We find that the arguments on behalf of the petitioner are well founded and it must succeed. The audit report merely gives an opinion with regard to the non-availability of the deduction both under section 80-IA and under section 80HHC and that the deduction under section 80-IA was not deducted from the profits of the business while computing deduction under Section 80- HHC. Clearly, therefore, there was no new or fresh material before the Assessing Officer except the opinion of the Revenue audit party.

Since it is settled law that mere change of opinion cannot form the basis for issuing of a notice under Section 147/ 148 of the Act, therefore, we do not propose to burden our judgment with the

said judgments. In fact, as stated above, counsel for the Revenue does not dispute this principle of law."

8.2 Similar is the ratio of this judgment is also same that the audit report gives an opinion with regard to deduction from the profit or the claim of allow ability of deduction on the available material in assessment records. If there is no new or fresh material before the assessing officer except the opinion of audit party, reopening u/s 147 read with section 148 of the Act is not possible. The facts in the present case are that all the details in regard to write off of capital work-in-progress were available with the Assessing Officer during original assessment proceedings. The fact is that assessee had written off full balance of this capital work-in-progress in profit & loss account for the relevant assessment year 2009-10, out of which, a sum of Rs.1.70 crores was debited as consultancy charges. This fact was available before the Assessing Officer during original assessment proceedings and the Revenue audit party also relied on the same material which was considered by the Assessing Officer. However, on merits, this issue is covered by the decision of Hon'ble Delhi High Court in the case of Carlton Overseas Pvt.Ltd. (supra).

8.3 Hon'ble Supreme Court has propounded the jurisprudence on reopening on the basis of audit objection in the case of Indian and Eastern Newspaper Society Vs. CIT, New Delhi [1979] 119 ITR 996 (SC), wherein it has considered that the opinion of internal audit party of the Department on a point of law cannot be regarded as information within the meaning of Section 147(b) of the Act for the purpose of reopening of assessment. Hon'ble Supreme Court considered the fact that the ITO had, when he made the

original assessment, considered the provisions of Section 9 and 10 of the I.T. Act, 1922 and any different view taken by him afterwards on the application of those provisions would amount to a change of opinion on material already considered by him. This decision was cited by the learned Accountant Member as it is favourable to the Revenue but, it is favouring the assessee on the given facts and circumstances of the case. Learned AM also relied on the decision of Hon'ble Supreme Court in the case of CIT Vs. P.V.S. Beedies Pvt.Ltd. [1999] 237 ITR 13 (SC). I noted that Hon'ble Supreme Court has held that internal audit party is entitled to point out a factual error or omission in the assessment. Reopening of a case on the basis of a factual error pointed out by the audit party was permissible in law. Hon'ble Supreme Court, in these facts, held that reopening of assessment was valid. This was not an opinion on a question of law. But, the facts in the present case are totally distinguishable for the reason that the capital work-in-progress claimed by the assessee in the present case is allowable deduction per-se and the Assessing Officer, during original assessment proceedings, after considering all the evidences and documents, applied his mind and formed an opinion and thereafter allowed the claim. Here, the audit party pointed out, which is not a factual error, rather, that was an allowable claim. Hence, in my view, the decision relied upon by the learned Accountant Member in the case of P.V.S. Beedies Pvt.Ltd. (supra) is totally distinguishable from the facts of the present case in hand. According to me, the reopening in the present case is bad in law as held by learned Judicial Member.

8.4 In terms of the above discussion, now I will answer the questions referred, both by the learned Accountant Member as well as learned Judicial Member, as under :-

Question framed by the Ld. Accountant Member	**Answer to the Question framed by the Ld. Accountant Member**
(i) Whether, when initiation of proceedings under Section 147 of I.T. Act read with Section 148 of I.T. Act has been done before the expiry of four years from the end of the relevant Assessment Year, initiation of reassessment proceedings U/s 147 read with section 148 of I.T. Act, can be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.	In the given facts and circumstances of the case and in view of the above discussion, the reopening under Section 147 read with Section 148 of the Act on the basis of audit objection is invalid. Accordingly, this question is answered in the affirmative.
(ii) Whether, when initiation of proceedings under Section 147 of I.T. Act read with Section 148 of I.T. Act has been done before the expiry of four years from the end of the relevant Assessment Year, the initiation of reassessment proceedings U/s 147 read with section 148 of I.T. Act on the basis of audit objection amounts to change of opinion; and, whether the initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act can be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.	In the given facts and circumstances of the case and in view of the above discussion that there is a change of opinion, the reopening under Section 147 read with Section 148 of the Act on the basis of audit objection is invalid. Accordingly, this question is answered in the affirmative.
(iii) Whether, for initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act to be valid, it is necessary for the AO, after due application of his own mind, to form his own belief, that income had escaped assessment and whether, if the AO did not himself legitimately and	In the given facts and circumstances of the case and in view of the above discussion, the AO has just relied on the audit objection and not applied his own mind for reopening, and hence, the reopening under Section 147 read with Section 148 of the Act

genuinely believe, free from pressure and undue influence that income had escaped assessment; the belief of any other authority that income had escaped assessment is immaterial.	on the basis of audit objection is invalid. Accordingly, this question is answered in the affirmative.
(iv) Whether, when the information if the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment; is not available on records of Income Tax Appellate Tribunal; the issue regarding validity of initiation of proceedings Under Section 147 of I.T. Act read with Section 148 of I.T. Act, can be remanded to Commissioner of Income Tax (Appeals) to pass fresh order as per law after ascertaining whether the AO indeed believed, genuinely and legitimately, free from pressure and undue influence, at any stage before initiation of proceedings U/s 147 of I.T. Act read with section 148 of I.T. Act, that income had escaped assessment.	This question needs not be answered as it has become academic for the reason that the question of jurisdiction of reopening under Section 147 read with Section 148 of the Act has been held as invalid and answered above vide Question No.(i) and (ii).
Question framed by the Ld. Judicial Member	**Answer to the Question framed by the Ld. Judicial Member**
(i) Whether validity of initiation of proceedings under section 147/148 of the Income-tax Act, 1961 (for short 'the Act') is to be examined from the perusal of reasons recorded, objections raised by the assessee, order passed by the Assessing Officer qua objections raised by the assessee, assessment order and impugned order of the Ld. CIT(A) and no extraneous material is to be taken into consideration?	In the given facts and circumstances of the case and in view of the above discussion, the reopening under Section 147 read with Section 148 of the Act on the basis of audit objection is invalid. Accordingly, this question is answered in the affirmative.
(ii)Whether the Tribunal being a fact finding authority is empowered to	Since answer to Question No.(i), as above, is in the affirmative, this

delegate its function to Ld. CIT(A) by way of remand to ascertain if the Assessing Officer has believed genuinely and legitimately free from pressure and undue influence by applying his independent mind that income had escaped assessment particularly when entire material relied upon is available on record?	has become academic and needs no answer.
(iii) Whether the Tribunal can remand the issue to the Ld. CIT(A) to ascertain application of independent mind by the Assessing Officer from the communication/correspondence between Assessing Officer and Audit Party, which has not been relied upon, in the absence of any allegation/request on the part of Ld. DR before initiating the proceedings under section 147/148 of the Act?	Since answer to Question No.(i), as above, is in the affirmative, this has become academic and needs no answer.

8.5 In view of the above answers to the questions referred and discussions carried out on facts and circumstances of the case, I agree with the view of the learned Judicial Member quashing the reopening under Section 147 read with Section 148 of the Act.

PER: BRAJESH KUMAR SINGH, AM

This appeal was filed by the assessee assailing the order of ld. Commissioner of Income Tax (Appeals), New Delhi (hereinafter referred to as the 'the CIT(A)') dated 07.01.2016 for AY 2009-10 upholding the issue of notice u/s 148 of the Act dated 11.03.2013.

2. After hearing the appeal, the Accountant Member held that initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act on

the basis of audit objection does not amount to change of opinion and initiation of the reassessment proceedings U/s 147 read with section 148 of I.T. Act cannot be held to be invalid merely because these proceedings were initiated subsequent to an audit objection.

3. However, the ld. Judicial Member opined otherwise and wrote a separate order stating that he was of the considered view that issuance of notice u/s 148 of the Act on the basis of opinion expressed by the audit party and in the absence of any fresh facts/tangible material the consequent assessment framed u/s 147/143(3) of the Act were illegal, erroneous and without jurisdiction and hence liable to be quashed.

4. On account of difference of opinion between the Members constituting the Bench, a reference was made to the Hon'ble President, ITAT u/s 255(4) of the Act. The Hon'ble President vide order dated 02/05.08.2024 nominated Third Member to decide the reference. The Ld. Third Member concurred with the view of Ld. Judicial Member in quashing the reopening u/s 147 read with section 148 of the Act, consequent to the opinion of Ld. Third Member, appeal of the Assessee stands allowed.

Order pronounced in the open Court on Thursday, 07th August, 2025

Sd/-	**Sd/-**
[VIKAS AWASTHY]	**[BRAJESH KUMAR SINGH]**
JUDICIAL MEMBER	**ACCOUNTANT MEMBER**

Dated 12.08.2025.

Shekhar

Copy forwarded to:
1. Appellant
2. Respondent
3. CIT
4. CIT(A)
5. DR

Asst. Registrar,
ITAT, New Delhi