* IN THE HIGH COURT OF DELHI AT NEW DELHI

\+ I.T.A. NO. 2026/2010

Judgment reserved on: 19th July, 2012

% **Date of Decision: 21st September, 2012**

COMMISSIONER OF INCOME TAX-VI, NEW DELHI ...Appellant
Through Mr. Deepak Chopra and
Mr. Harpreet Singh Ajmani, Advs.

Versus

USHA INTERNATIONAL LIMITED …Respondent
Through Mr. Ajay Vohra with Mr. Rohit Jain,
Ms. Kavita Jha, Mr. Amit Sachdeva
And Mr. Somnath Shukla, Advs.

CORAM:
HON'BLE THE ACTING CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE R.V. EASWAR

SANJIV KHANNA, J.

1. By order dated 23rd April, 2012 in ITA No. 2026/2010, ***Commissioner of Income Tax – VI, New Delhi vs. Usha International Limited***, the following substantial questions of law have been referred to this Full Bench:

> "(i) What is meant by the term "change of opinion?
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> (ii) Whether assessment proceedings can be validly reopened under Section 147 of the Act, even within four year, if an assessee has furnished full and true particulars at the time of original assessment with reference to income alleged to have escaped assessment and whether and when in such cases reopening is valid or invalid on the ground of change of opinion?
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> (iii) Whether the bar or prohibition under the principle "change of opinion" will apply even when the Assessing Officer has not asked any question or query with respect to

> an entry/note, but there is evidence and material to show that the Assessing Officer had raised queries and questions on other aspects?
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> (iv) Whether and in what circumstances Section 114 (e) of the Evidence Act can be applied and it can be held that it is a case of change of opinion?"

2. We need not refer to the factual matrix relating to ITA 2026/2010 (supra) but are only required to note that the aforesaid questions relate to interpretation of Section 147 of the Income Tax Act, 1961 (Act, for short) as amended w.e.f. 1st April, 1989. We record that the questions of law require elucidation in view of contentions raised regarding observations made by the Bench of three Judges of this Court in ***CIT vs. Kelvinator of India Limited***, (2002) 256 ITR 1 (Del – FB). Revenue had filed an appeal against the said decision but the Supreme Court dismissed the appeal of the Revenue in a decision which is reported as ***CIT vs. Kelvinator of India Ltd.*** (2010) 2 SCC 723. Conflicting views expressed on the question of "change of opinion" have been noticed below.

3. As Section 147 of the Act is required to be interpreted and examined we deem it appropriate to reproduce the said Section as it exists:

> "147. Income escaping assessment.--If the Assessing Officer, has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):

> Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment for that assessment year.
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> Explanation 1.--Production before the Assessing officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing officer will not necessarily amount to disclosure within the meaning of the foregoing proviso.
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> Explanation 2.--For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-- (a) where no return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not chargeable to income-tax; (b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income or has claimed excessive loss, deduction, allowance or relief in the return; (c) where an assessment has been made, but-- (i) income chargeable to tax has been under assessed; or (ii) such income has been assessed at too low a rate; or (iii) such income has been made the subject of excessive relief under this Act; or (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.
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> Explanation 3.— For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or reassess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of section 148."

4. For the purpose of clarity we state that we are required to examine and answer the said questions in cases where an assessee is earlier subjected to regular assessment under Section 143(3) of the

Act and the reassessment notice issued is under challenge. Where an assessee has not been subjected to regular assessment under Section 143(3) of the Act, the issue stands concluded by the decision of the Supreme Court in the case of ***ACIT vs. Rajesh Jhaveri Stock Brockers Pvt. Ltd.*** (2008) 14 SCC 208. The decision in ***Rajesh Jhaveri's*** case has been referred to subsequently in this decision for a different purpose.

5. For reopening an assessment made under Section 143(3) of the Act, the following conditions are required to be satisfied:-

(i) The Assessing Officer must form a tentative or prima facie opinion on the basis of material that there is under-assessment or escapement of income;

(ii) He must record the prima facie opinion into writing;

(iii) The opinion formed is subjective but the reasons recorded or the information available on record must show that the opinion is not a mere suspicion.

(iv) Reasons recorded and/or the documents available on record must show a nexus or that in fact they are germane and relevant to the subjective opinion formed by the Assessing Officer regarding escapement of income.

(v) In cases where the first proviso applies, there is an additional requirement that there should be failure or omission on the part of the assessee in disclosing full and true material facts. Explanation to the Section stipulates that mere production of books of accounts or other documents from which the Assessing Officer could have, with due diligence, inferred material facts, does not amount to "full and true disclosure of

material facts". (The proviso is not applicable where reasons to believe for issue of notice are recorded and notice is issued within four years from the end of assessment year.)

6. The questions of law at serial Nos. 1 to 3 referred to the Full Bench are inter-connected. They deal with the term and facets of the term "change of opinion". The expression "change of opinion" postulates formation of opinion and then a change thereof. In the context of Section 147 of the Act it implies that the Assessing Officer should have formed an opinion at the first instance, i.e., in the proceedings under Section 143(3) and now by initiation of the reassessment proceeding, the Assessing Officer proposes or wants to take a different view.

7. The word 'opinion' is derived from the latin word "opinari" which means 'to believe', 'to think'. The word "opinion" as per the *Black's Law Dictionary* means a statement by a Judge or a court of a decision reached by him incorporating cause tried or argued before them, expounding the law as applied to the case and, detailing the reasons upon which the judgment is based. Advanced Law Lexicon by P. Ramanatha Aiyar (3rd Edition) explains the term 'opinion' to mean "something more than mere retaining of gossip or hearsay; it means judgment or belief, that is, a belief or a conviction resulting from what one thinks on a particular question …….. An opinion is a conviction based on testimony….. they are as a result of reading, experience and reflection".

8. 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 to use the words in Law Lexicon by P. Ramanatha Aiyar. Question of change of opinion arise when an Assessing Officer forms an opinion and decides not to make an addition or holds that the assessee is correct and accepts his position or stand.

9. It was argued on behalf of the Revenue that for determining whether or not it is not a case of change of opinion, reference can and should be made only to the assessment order and the discussion or the reasons stated therein. Reliance was placed on the decision of this Court in ***Commissioner of Income Tax versus H.P. Sharma***, 1980 (122) ITR 675 (Del.) and ***Consolidated Photo and Finvest Limited versus Assistant Commissioner of Income Tax***, (2006) 281 ITR 394(Del.). The relevant portion of the judgment in ***H.P. Sharma*** (supra) reads as under:-

> "Adverting to the next question as to whether the resorts to reassessments under ss. 147(b) and 148 of the Act were justified or not, it is noteworthy that both the ITO and the AAC have clearly observed that the assessee had not disclosed at the original assessment stage that the rents realised exceeded those mentioned in the municipal records. The Tribunal has not controverted this finding, perhaps it did not consider it appropriate to go into the same after having held that the municipal valuation should have a sway over the rent realised. My learned brother has on this score sent the matter back to the Tribunal for giving a finding on this aspect. I will only like to observe in this connection that the Second Explanation to s. 147 itself makes it clear that the production before the ITO of account books or other evidence from which material evidence could with due diligence have been discovered by the ITO will not necessarily amount to disclosure within the meaning of this section. The Supreme Court too has, in the decision Kalyanji Mavji & Co. v. CIT [1976] 102 ITR 287 and CIT v. A. Raman and Co. [1968] 67 ITR 11 (SC), observed that information in order to justify reassessment may be obtained even from the record of original assessment from an investigation of the material on record or the facts disclosed thereby or from other enquiry or research into facts or law. " To inform " means to " to impart knowledge " and the detail available to the ITO in

> the papers filed before him does not by its mere availability become an item of information. It is transmuted into an item of information in his possession only if, and only when, its existence is realised and its implications are recognised. Where the ITO had not in the original assessment proceedings applied his mind, the reassessment proceedings are valid. (See in this respect the decisions of the Kerala and Madras High Courts in United Mercantile Co. Ltd. v. CIT [1967] 64 ITR 218 (Ker) and Muthukrishna Reddiar v. CIT [1973] 90 ITR 503 (Ker) and A.L.A. Firm v. CIT [1976] 102 ITR 622 (Mad)].
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> It need hardly be said that change of opinion presupposes that there was earlier a formation of an opinion. When no such opinion was formed, it will be too far-fetched to assume that a change in that opinion was being effected. Further, the safest and surest guide for ascertaining whether any such opinion was formed at the original assessment stage is to look to the assessment order itself. When it, of its own, does not reveal that the matters and controversies now sought to be raised by way of reassessment were at all before the ITO or considered by him, it would be entirely surmiseful and, therefore, not permissible to still import their existence and consideration. This can, however, be permissible only where the assessment record of that stage overwhelmingly brings out that the matter did come for due consideration and was in fact considered. Mere silence on a matter or absence of discussion in the original order does not imply that the ITO adjudicated upon the same one way or the other."
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> (Emphasis supplied)

10. We may note that the said decision was not dealing with Section 147 of the Act as amended with effect from 1st April, 1989, but was with reference to Section 147(b) of the Act under which an Assessing Officer could reopen assessment on the basis of "information". The term "to inform" it was observed means to impart knowledge and it does not mean mere availability. It gets transmuted into an item of information only when its existence is realized and its implications are recognized. However, it is not possible to agree with the observations made in paragraph 16, which have been underlined.

The reason is that experience shows that the Assessing Officers do examine several aspects and raise queries but when the written opinion is expressed in form of the assessment order, there is no discussion or elucidation on certain aspects and issues decided or held in favour of the assessee. Assessee is not the author of the assessment order and has no control over what the Assessing Officer wants to state or mention. It is in this context that Delhi High Court in ***Commissioner of Income Tax Vs. Eicher Ltd.,*** (2007) 294 ITR 310, observed as under:

> "In Hari Iron Trading Co. v. Commissioner of Income Tax,(2003) 263 ITR 437, a Division Bench of Punjab and Haryana High Court observed that an assessed has no control over the way an assessment order is drafted. It was observed that generally, the issues which are accepted by the Assessing Officer do not find mention in the assessment order and only such points are taken note of on which the assessee's Explanations are rejected and additions/disallowances are made. We agree.
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> Applying the principles laid down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessed before the Assessing Officer at the time when the original assessment was made and the Assessing Officer applied his mind to that material and accepted the view canvassed by the assessed, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, Therefore, the assessment needed to be reopened. On the other hand, if the Assessing Officer did not apply his mind and committed a lapse, there is no reason why the assessed should be made to suffer the consequences of that lapse."

11. Accordingly, we hold that the following observations in ***Consolidated Photo and Finvest Limited*** (supra) do not reflect the correct legal position:

"In the light of the authoritative pronouncements of the Supreme Court referred to above, which are binding upon us and the observations made by the High Court of Gujarat with which we find ourselves in respectful agreement, the action initiated by the Assessing Officer for reopening the assessment cannot be said to be either incompetent or otherwise improper to call for interference by a writ court. The Assessing Officer has in the reasoned order passed by him indicated the basis on which income exigible to tax had in his opinion escaped assessment. The argument that the proposed reopening of assessment was based only upon a change of opinion has not impressed us. The assessment order did not admittedly address itself to the question which the Assessing Officer proposes to examine in the course of reassessment proceedings. The submission of Mr. Vohra that even when the order of assessment did not record any explicit opinion on the aspects now sought to be examined, it must be presumed that those aspects were present to the mind of the Assessing Officer and had been held in favour of the assessee is too far-fetched a proposition to merit acceptance. There may indeed be a presumption that the assessment proceedings have been regularly conducted, but there can be no presumption that even when the order of assessment is silent, all possible angles and aspects of a controversy had been examined and determined by the Assessing Officer. It is trite that a matter in issue can be validly determined only upon application of mind by the authority determining the same. Application of mind is, in turn, best demonstrated by disclosure of mind, which is best done by giving reasons for the view which the authority is taking. In cases where the order passed by a statutory authority is silent as to the reasons for the conclusion it has drawn, it can well be said that the authority has not applied its mind to the issue before it nor formed any opinion. The principle that a mere change of opinion cannot be a basis for reopening completed assessments would be applicable only to situations where the Assessing Officer has applied his mind and taken a conscious decision on a particular matter in issue. It will have no application where the order of assessment does not address itself to the aspect which is the basis for reopening of the assessment, as is the position in the present case. It is in that view inconsequential whether or not the material necessary for taking a decision was available to the Assessing Officer either generally or in the form of a reply to the questionnaire served upon the assessee. What is important is whether the Assessing Officer had based on the material available to him taken a view. If he had not done so, the proposed reopening cannot

be assailed on the ground that the same is based only on a change of opinion."

12. The said observations have been rightly held to be contrary to the Full Bench decision of the Delhi High Court in ***Kelvinator of India Limited*** (supra) in ***Eicher Limited*** (supra). The said decision in ***Eicher Limited*** (supra) makes reference to the decision of ***KLM Royal Dutch Airlines vs. Assistant Commissioner of Income Tax*** [2007] 292 ITR 49 (Delhi). ***KLM Royal*** case (supra) deals with some other issues on which we do not express or make any observation approving or disapproving. Some of these aspects have been considered and explained in other decisions in light of the judgment of the Supreme Court in the case of ***Rajesh Jhaveri Stock Brokers Pvt. Ltd.*** (supra).

13. It is, therefore, clear from the aforesaid position that:

(1) 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;

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

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

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

14. In the second and third situation, the Revenue is not without remedy. In case the assessment order is erroneous and prejudicial to the interest of the Revenue, they are entitled to and can invoke power under Section 263 of the Act. This aspect and position has been highlighted in ***CIT vs. DLF Powers Limited***, ITA 973/2011 decided on 29th November, 2011 and ***BLB Limited vs. ACIT*** Writ Petition (Civil) No. 6884/2010 decided on 1st December, 2011. In the last decision it has been observed:

> "13. Revenue had the option, but did not take recourse to Section 263 of the Act, inspite of audit objection. Supervisory and revisionary power under Section 263 of the Act is available, if an order passed by the Assessing Officer is erroneous and prejudicial to the interest of the Revenue. An erroneous order contrary to law that has caused prejudiced can be correct, when jurisdiction under Section 263 is invoked."

15. Thus where an Assessing Officer incorrectly or erroneously applies law or comes to a wrong conclusion and income chargeable to tax has escaped assessment, resort to Section 263 of the Act is available and should be resorted to. But initiation of reassessment proceedings will be invalid on the ground of change of opinion.

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.

20. This brings us to the observations of Delhi High Court in ***Kelvinator of India Ltd. (supra)*** which read as under:-

> "The Board in exercise of its jurisdiction under the afore-mentioned provisions had issued the Circular on 31st October 1989. The said Circular admittedly is binding on the Revenue. The Authority, Therefore, could not have taken a view, which would run counter to the mandate of the said Circular. Clause 7.2 as referred to hereinbefore is important.
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> From a perusal of Clause 7.2 of the said Circular it would appear that in no uncertain terms it was stated as to under

what circumstances the amendments had been carried out i.e. only with a view to allay the fears that the omission of the expression "reason to believe" from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessment on mere change of opinion.

It is, Therefore, evident that even according to the CBDT a mere change of opinion cannot form the basis for re-opening a completed assessment.

The submission of Mr. Jolly to the effect that the said Circular cannot be construed in such a manner whereby the jurisdiction of the statutory authority would be taken away is not apposite for the purpose of this case. In **Union of India and Others (supra),** whereupon Mr. Jolly had placed strong reliance, the Apex Court was dealing with an administrative instructions whereby no right was conferred upon the respondents to have the house rent amount included in their emoluments for the purpose of computing overtime allowance. The Apex Court held that otherwise also the Governement's instruction have to be read in conformity with the provisions of the Act. Therein the Apex Court was not concerned with the statutory powers of a statutory authority to issue binding circulars.

Another aspect of the matter also cannot be lost sight of. A statute conferring an arbitrary power may be held to be ultra virus Article 14 of the Constitution of India. If two interpretations are possible, the interpretation which upholds constitutionality, it is trite, should be favored.

In the event it is held that by reason of Section 147 if ITO exercises its jurisdiction for initiating a proceeding for re-assessment only upon mere change of opinion, the same may be held to be unconstitutional. We are Therefore of the opinion that Section 147 of the Act does not postulate conferment of power upon the Assessing Officer to initiate re-assessment proceeding upon his mere change of opinion.

We, however, may hasten to add that if "reason to believe" of the assessing Officer if founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under Section 147 read with Section 148 of the Act.

We also cannot accept submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded on analysis of the materials on the record by itself may justify the assessing officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or

> sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act the judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the assessing officer to reopen the proceeding without anything further, the same would amount to giving premium to an authority exercising *quasi judicial* function to take benefit of its own wrong."

21. In order to appreciate and understand the said observation, it is necessary to examine the facts of the said case. The assessment year in reference was 1987-88 but the reopening notice was issued on 20th April, 1990 after the amended Section 147 was applicable. Original return filed on 29th June, 1987 was revised on 5th October, 1989, along with a letter explaining why the return was being revised. In the letter the assessee had explained and submitted that rent of Rs.1,76,000/- and depreciation of Rs.66,441/- should be allowed in terms of Section 30 and 32 of the Act. This was the reason for revising the return and these facts were specifically brought to the notice of the Assessing Officer who did not, in the original assessment order, make any disallowance or addition on the said account except Rs.91,485/- which was disallowed as submitted in the revised computation. The assessee in support of the revised computation had relied on judgment of Bombay High Court in ***CIT vs. Chase Bright Steel Ltd. (No. 1)*** [1989] 177 ITR 124 (Bom.). On behalf of Revenue, it was contended and submitted that the assessment order did not contain or have any discussion on the issue and therefore, there same was rendered without application of mind. It was submitted, relying upon the decision of Gujarat High Court in ***Prafful Chunni Lal Patel vs. Makwana (M.J.) CIT (ASST.)*** [1999] 236 ITR 832 (Guj.), that

reassessment was permissible as the assessment order itself was silent and an erroneous order was passed.

22. In the last paragraph quoted above, the Full Bench rejected the submission that reassessment proceedings would be justified if the assessment order is silent or does not record reasons or analysis of material on record. This, the Revenue had propounded, would show non application of mind by the assessing officer. It was held that the said submission was fallacious. Full Bench explained that when an assessment order was passed under Section 143(3), a presumption could be raised that the order was passed after application of mind. Reference was made to clause (e) to Section 114 of the Indian Evidence Act, 1872. The contention if accepted would give premium to the authority exercising quasi-judicial function to take benefit of its own wrong i.e. failure to discuss or record reasons in the assessment order. The aforesaid observations have been made in the context and for explaining the principle of "change of opinion". The said principle would apply even when there is no discussion in the assessment order but where the Assessing Officer had applied his mind. A wrong decision, wrong understanding of law or failure to draw proper inferences from the material facts already on record and examined, cannot be rectified or corrected by recourse to reassessment proceedings. Assessee is required to disclose full and true material facts and need not explain and interpret law. Legal inference has to be drawn by the Assessing Officer from the facts disclosed. It is for the Assessing Officer to understand and apply the law. In such cases resort to reassessment proceedings is not permissible but in a given case where an erroneous order prejudicial to the Revenue is passed, option to correct the error is available under Section 263 of the Act.

23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined.

24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not

invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

25. Thus 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 the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, 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.

26. In ***3i Infotech Ltd. Vs. Assistant Commissioner of Income Tax & Others*** *(2010) 329 ITR 257 (Bom.)* it was observed that producing voluminous record before the Assessing Officer does not absolve the assessee and the assessee cannot be heard to say that if the Assessing Officer were to conduct a further inquiry, he would have come into possession of material evidence with the exercise of due diligence. Assessments can be complex and require examination of several subject matter, claims, entries or deductions. The Assessing Officer inspite of best efforts or intention can miss out and not examine and go into a subject matter, claim, entry or deduction. An assessee cannot contend or state that in the reams and plethora of papers, notes and entries, entry, a statement was made, or claim or entry was explained and the principle of better be-ware applies. When a

subject matter, entry, claim or deduction remains hidden or unexamined by the Assessing Officer, be it for any reason, it is not a case of change of opinion.

27. The aforesaid observations in paragraphs 23 to 26 have not to be read in isolation but are to be read with caveat set out in paragraph 39 below. 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.

28. The Supreme Court while disposing of the appeal of the Revenue in ***Kelvinator of India*** (supra) & ***Eicher Limited*** (supra), has only referred to the principle of "change of opinion" and held that reassessment proceedings will be bad and invalid if the said principle is violated. The Supreme Court has not made any observation or comment on the presumption under Section 114(e) of the Indian Evidence Act. It appears that the Supreme Court did not make reference to the said observation in view of the context in which the observation was made i.e. to reject the contention of the Revenue that if the assessment order is not speaking and does not deal with the particular issue, it can be assumed that it is case of non-application of mind and therefore a case of no opinion.

29. Section 114 of the Indian Evidence Act is a general provision dealing with presumption of facts, inferences drawn from facts,

patterns drawn from experience and observations based upon habits of the society, human action, usages and ordinary course of human affairs and conduct. The presumption is no evidence or proof. It only shows on whom the burden of proof lies. Section 114 is permissive and not a mandatory provision. Nine situations by way of illustrations are stated. These are by way of example or guidelines. As a permissive provision it enables the Judge to support his judgment but there is no scope of presumption when facts are known. As observed by the Supreme Court in ***Suresh Budharmal Kalyani vs. State of Maharashtra***, [1998] 7 SCC 337 – "A presumption can be drawn only from facts and not from other presumptions by a process of probable and logical reasoning". Presumption of facts under Section 114 is rebuttable. The presumption raised under illustration (e) to Section 114 of the Evidence Act, means that when official act is proved to have been done, it will be presumed to have been regularly done but it does not raise any presumption that an act was done for which there is no evidence or proof (see Law of Evidence by Ratan Lal and Dhiraj Lal, 2002 Edition, pages 986-987).

30. In ***International Woollen Mills vs. M/s Standard Wool (U.K.) Ltd.*** (2001) 5 SCC 265, it has been held that illustration (e) to Section 114 raises a presumption that judicial acts have been regularly performed. It must be presumed that all formalities were complied with. But the presumption is of no help in deciding the question whether the order on merit was correct or not. It can not be applied to defend the conclusion on merits.

31. Mr. Ajay Vohra, Advocate, appearing for the assessee had submitted that the reference should be declined and not answered in view of doctrine of merger as the decision of the Full Bench of this Court in the case of

Kelvinator of India Ltd. (supra) has merged and was approved by the Supreme Court. Reference was made to ***Kunhayammed and Ors. vs. State of Kerala and Anr.*** (2000) 245 ITR 360 (SC) and ***Snowcem India Ltd. vs. Deputy Commissioner of Income Tax*** (2009) ITR 170 (Bom.). We note that these are decisions on the question whether and when an application for review can be filed before the High Court, even after dismissal of Special Leave to Appeal by the Supreme Court. The Supreme Court in their decision in Kelvinator of India (supra) had examined the question whether "change of opinion" can justify reopening of assessing. The Supreme Court has not stated or made any observation with reference to Section 114 of the Evidence Act. The doctrine of merger, if applied, would require that we accept and apply the reasoning and ratio given by the Supreme Court. By applying the "doctrine of merger" we cannot be hold that the reasoning or the ratio given by the Supreme court is the reasoning given by the High Court. Supreme court in the present case has given detailed reasons and ratio why "change of opinion" cannot be a ground to reopen assessment. The said reasoning or ratio are the binding precedent.

32. On the issue/subject raised, it is necessary to refer to the decision of the Supreme Court in ***A.L.A. Firm vs. CIT*** [1991] 189 ITR 285 (SC). The said decision deals with Section 147(b) before it was substituted with effect from 1st April, 1989. Section 147(b) before it was substituted was as under:-

> "147. Income escaping assessment.--If--
>
> XXX

> (b) notwithstanding that there has been no omission or failure as mentioned in clause (a) on the part of the assessee, the Assessing Officer has in consequence of information in his possession reason to believe that income chargeable to tax has escaped assessment for any assessment year,"

33. This decision refers to the decision in ***Kalyanji Mavji and Co. vs. CIT*** [1976] 102 ITR 287 (SC), in which scope of para materia provision i.e. Section 34(1)(b) of the Income Tax Act, 1922 was considered and the following propositions were expounded:-

> "On a combined review of the decisions of this Court the following tests and principles would apply to determine the applicability of Section 34(1)(b) to the following categories of cases:
>
> (1) where the information is as to the true and correct state of the law derived from relevant judicial decisions;
>
> (2) where in the original assessment the income liable to tax has escaped assessment due to oversight, inadvertence or a mistake committed by the Income-tax Officer. This is obviously based on the principle that the taxpayer would not be allowed to take advantage of an oversight or mistake committed by the taxing authority;
>
> (3) where the information is derived from an external source of any kind. Such external source would include discovery of new and important matters or knowledge of fresh facts which were not present at the time of the original assessment;
>
> (4) where the information may be obtained even from the record of the original assessment from an investigation of the materials on the record, or the facts disclosed thereby or from other enquiry or research into facts or law."

34. The Supreme Court thereafter referred to the subsequent decision in ***Indian and Eastern Newspapers Society vs. CIT*** [1979] 119 ITR 996 (SC) wherein it was observed that some of the observations made in ***Kalyanji Mavji*** (supra) were far too wide and the statute did not permit reappraisal of material considered by the Assessing Officer during the original assessment. The observations in ***Kalyanji Maviji*** (supra) that reopening would cover a case "where income has escaped assessment due to the oversight,

inadvertence or mistake" was too broadly expressed and did not lay down the correct law. It was clarified and observed at page 1005 in ***Indian & Eastern Newspapers Society*** (supra) as :-

> "Now, in the case before us, the Income Tax Officer had, when he made the original assessment, considered the provisions of Sections 9 and 10. 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. The Revenue contends that it is open to him to do so, and on that basis to reopen the assessment under Section 147(b). Reliance is placed on Kalyanji Mavji and Co. v. Commissioner of Income Tax : [1976]102ITR287(SC) , where a Bench of two learned Judges of this Court observed that a case where income had escaped assessment due to the "oversight, inadvertence or mistake" of the Income Tax Officer must fall within Section 34(1)(b) of the Indian Income Tax Act, 1922. it appears to us, with respect, that the proposition is stated too widely and travels farther than the statute warrants in so far as it can be said to lay down that if, on reappraising the material considered by him during the original assessment, the Income Tax Officer discovers that he has committed an error in consequence of which income has escaped assessment it is open to him to reopen the assessment. In our opinion, an error discovered on a reconsideration of the same material (and no more) does not give him that power. That was the view taken by this Court in Maharaj Kamal Singh v. Commissioner of Income Tax (supra), Commissioner of Income Tax v. Raman and Company (supra) and Bankipur Club Ltd. v. Commissioner of Income Tax : [1971]82ITR831(SC) , and we do not believe that the law has since taken a different course. Any observations in Kalyanji Mavji and Co. v. Commissioner of Income Tax (supra) suggesting the contrary do not, we say with respect, lay down the correct law."

35. In ***A.L.A. Firm (supra)***, the Supreme Court specifically dealt with propositions (2) and (4) quoted in paragraph 34 above and thereafter elucidated and explained that there was no difference between observations of the Supreme Court in ***Kalyanji Maviji (supra)*** and ***Indian & Eastern Newspapers' case*** (supra), as far as proposition (4) is concerned. It was held that :-

"We have pointed out earlier that Kalyanji Mavji (supra) outlines four situations in which action under Section 34(1)(b) can be validly initiated. The Indian Eastern Newspaper Society's case has only indicated that proposition (2) outlined in this case and extracted earlier may have been somewhat widely stated; it has not cast any doubt on the other three propositions set out in Kalyanji Mavji's case. The facts of the present case squarely fall within the scope of propositions 2 and 4 enunciated in Kalyanji Mavji's case. Proposition (2) may be briefly summarised as permitting action even on a "mere change of opinion". This is what has been doubted in the Indian Eastern Newspaper Society's case (supra) and we shall discuss its application to this case a little later. But, even leaving this out of consideration, there can be no doubt that the present case is squarely covered by proposition (4) set out in Kalyanji Mavji & Co. (supra). This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which the I.T.O. had not earlier been conscious of. To give a couple of illustrations, suppose an I.T.O., in the original assessment, which is a voluminous one involving several contentions, accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the I.T.O. derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose in I.T.O. accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the assessment under Section 147(b) by virtue of proposition (4) of Kalyanji Mavji, The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.

What then, is the difference between the situations envisaged in propositions (2) and (4) of Kalyanji Mavji (supra). The difference, if one keeps in mind the trend of the judicial decisions, is this. Proposition (4) refers to a case where the I.T.O. initiates reassessment proceedings in the light of "information" obtained by him by an

investigation into material already on record or by research into the law applicable thereto which has brought out an angle or aspect that had been missed earlier, for e.g., as in the two Madras decisions referred to earlier. Proposition (2) no doubt covers this situation also but it is so widely expressed as to include also cases in which the I.T.O., having considered all the facts and law, arrives at a particular conclusion, but reinitiates proceedings because, on a reappraisal of the same material which had been considered earlier and in the light of the same legal aspects to which his attention had been drawn earlier, he comes to a conclusion that an item of income which he had earlier consciously left out from the earlier assessment should have been brought to tax. In other words, as pointed out in Indian Eastern Newspaper Society's case, it also ropes in cases of a "bare or mere change of opinion" where the I.T.O. (very often a successor officer) attempts to reopen the assessment because the opinion formed earlier by himself (or, more often, by a predecessor I.T.O.) was, in his opinion, incorrect. Judicial decisions had consistently held that this could not be done and the Indian Eastern Newspaper Society's case (supra) has warned that this line of cases cannot be taken to have been overruled by Kalyanji Mavji (supra). The second paragraph from the judgment in the Indian Eastern Newspaper Society's case earlier extracted has also reference only to this situation and insists upon the necessity of some information which make the ITO realise that he has committed an error in the earlier assessment. This paragraph does not in any way affect the principle enumerated in the two Madras cases cited with approval in Anandji Haridas [1986] 21 S.T.C. 326. Even making allowances for this limitation placed on the observations in Kalyanji Mavji, the position as summarised by the High Court in the following words represents, in our view, the correct position in law:

The result of these decisions is that the statute does not require that the information must be extraneous to the record. It is enough if the material, on the basis of which the reassessment proceedings are sought to be initiated, came to the notice of the Income-tax Officer subsequent to the original assessment. If the Income-tax Officer had considered and formed an opinion on the said material in the original assessment itself, then he would be powerless to start the proceedings for the reassessment. Where, however, the Income-tax Officer had not considered the material and subsequently come by the material from the record itself, then such a case would fall within the scope of Section 147(b) of the Act."

(emphasis supplied)

36. The aforesaid observations are complete answer to the submission that if a particular subject matter, item, deduction or claim is not examined by the Assessing Officer, it will nevertheless be a case of change of opinion and the reassessment proceedings will be barred.

37. We are conscious of the fact that the aforesaid observations have been made in the context of Section 147(b) with reference to the term 'information' and conceptually there is difference in scope and ambit of reopening provisions incorporated w.e.f. 1st April, 1989. However, it was observed by the Supreme Court in ***Kelvinator India (supra)*** that amended provisions are wider. What is important and relevant is that the principle of "change of opinion" was equally applicable under the unamended provisions. The Supreme Court was therefore conscious of the said principle, when the observations mentioned above in ***A.L.A. Firm*** (supra) were made.

38. It will be appropriate to reproduce the succeeding passage from ***A.L. A. Firm*** (supra):

> "We think there is force in the argument on behalf of the assessee that, in the face of all the details and statement placed before the I.T.O. at the time of the original assessment, it is difficult to take the view that the Income-tax Officer had not at all applied his mind to the question whether the surplus is taxable or not. It is true that the return was filed and the assessment was completed on the same date. Nevertheless, it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It is not as if the assessment record contained a large number of documents or the case raised complicated issues rendering it probable that the I.T.O. had missed these facts. It is a case where there is only one contention raised before the I.T.O. and it is, we think, impossible to hold that the

> Income-tax Officer did not at all look at the return filed by the assessee or the statements accompanying it. The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee's contention that the surplus was not taxable. But, in doing so, the obviously missed to take note of the law laid down in Ramachari which there is nothing to show, had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under Section 147(b). The material which constituted information and on the basis of which the assessment was reopened was the decision in Ramachari. This material was not considered at the time of" the original assessment. Though it was a decision of 1961 and the I.T.O. could have known of it had he been diligent, the obvious fact is that he was not aware of the existence of the decision then and, when he came to know about it, he rightly initiated proceedings for reassessment."

39. In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject matter, claim etc, because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the question or subject matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually. Some matters may require examination of the assessment order or queries raised by the Assessing Officer and answers given by the assessee but in others cases, a deeper scrutiny or examination may be necessary. The stand of the Revenue and the assessee would be relevant. Several aspects including papers filed and submitted with the return and during the original proceedings are relevant and material. Sometimes application of mind and formation of opinion can be ascertained and gathered even when no specific question or query in writing had been raised by the Assessing Officer. The aspects and questions examined during the course of assessment

proceedings itself may indicate that the Assessing Officer must have applied his mind on the entry, claim or deduction etc. It may be apparent and obvious to hold that the Assessing Officer would not have gone into the said question or applied his mind. However, this would depend upon the facts and circumstances of each case.

40. Accordingly, we answer the questions of law referred to the larger Bench. The ITA will be placed before the regular Bench as per the Roster for disposal of the same keeping in mind the elucidation of law made above.

41. List before the regular Bench as per the Roster on 4th October, 2012.

Sd/-
(SANJIV KHANNA)
JUDGE

Sd/-
ACTING CHIEF JUSTICE

(R.V. EASWAR)
JUDGE

SEPTEMBER 21st, 2012
Kkb/VKR

R.V.EASWAR, J.:

1. The new provisions of section 147 engrafted with effect from 1-4-1989 reveal an interesting feature. The difference between failure on the part of the assessee to disclose fully and truly all material

particulars necessary for his assessment, which was the subject-matter of the erstwhile clause (a) and cases of reopening prompted by "information" coming to the possession of the AO governed by clause (b) of the section has been done away; the section as it now stands makes a distinction based only on the lapse of time from the end of the assessment year – if four years have elapsed from the end of the assessment year, the assessment can be reopened only if there is such failure on the part of the assessee as stated earlier. This is the effect of the first proviso.

2. Under the new provisions of section 147, an assessment can be reopened if the AO has "reason to believe" that income chargeable to tax has escaped assessment; but if he wants to do so after a period of four years from the end of the assessment year, he can do so only if the assessee has fallen short of his duty to disclose fully and truly all material facts necessary for his assessment. It does not follow that he cannot reopen the assessment even within the period of four years as aforesaid if he has reason to believe that the assessee has failed to make the requisite disclosure. All that the section says is that in a case where the assessment is sought to be reopened after the period of four years, the only reason available to the AO is the non-disclosure on the part of the assessee.

3. The Act places a general duty on every assessee to furnish full and true particulars along with the return of income or in the course of the assessment proceedings so that the AO is enabled to compute the correct amount of income on which the assessee shall pay tax. I think this thread runs through the various provisions of the Act. But Explanation 1 to the section confines the duty to the disclosure of all

primary and material facts necessary for the assessment, fully and truly. As to what are material or primary facts would depend upon the facts and circumstances of each case and no universal formula may be attempted. The legal or factual inferences from those primary or material facts are for the AO to draw in order to complete the assessment and it is not for the assessee to advise him, for obvious reasons. The Explanation however cautions the assessee that he cannot remain smug with the belief that since he has produced the books of account before the AO from which material or evidence could have been with due diligence gathered by him, he has discharged his duty. It is for him to point out the relevant entries which are material, without leaving that exercise to the AO. The caveat however is that such production of books of account may, in the light of the facts and circumstances, amount to full and true disclosure; this is clear from the use of the expression "not necessarily" in the Explanation. Thus, the question of full and true disclosure of primary or material facts is a pure question of fact, to be determined on the facts and circumstances of each case. No general principle can be laid down.

4. Calcutta Discount Co. Ltd Vs ITO (1961) 41 ITR 191 is the '*locus classicus*' on the subject of the duty of the assessee. The principle or ratio of the decision holds good even today.

5. I have searched in vain the provisions of the Act to find out if there is any provision therein laying guidelines as to how an assessment order shall be drafted. However, considering the onerous duty placed on the assessee as outlined above, one would expect the assessment order to be drafted in sufficient detail, where at least the basic features of the assessment are brought out. But due to several

constraints – it is beyond the scope of this opinion to discuss them – it has been observed, and it has also been the general experience, that assessment orders are so drafted that they contain a discussion, briefly or in detail, only on points on which there is a difference of opinion between the assessee and the assessing authority. Where the contention or claim of the assessee is accepted, seldom do we find any discussion in the assessment order as to why it is being accepted. This has prompted the Commissioner of Income Tax in several cases to invoke the provisions of section 263 on the footing that the assessment so completed is erroneous and prejudicial to the interest of the revenue. It is significant to note that the CIT under section 263 is empowered to call for the record of the proceedings before making up his mind as to the justification for the revision. The reason is not far to seek: the question whether the AO had applied his mind to a particular claim made by the assessee and had accepted it rightly can be judged only on the basis of what material or evidence was led before him, and not on the basis of what was written in the assessment order. This is an implicit recognition in the Act that the emphasis is on the furnishing of full and true particulars and primary facts by the assessee, rather than on the manner in which the AO deals with them in the assessment order. Moreover, the assessee, as it was urged, has no say or control over the manner in which the assessment order is drafted.

6. The facts of the present case show that the assessee is a company which is subject to book profit tax under section 115JB. Our attention has been drawn on behalf of the assessee to the various financial accounts, documents, notes to accounts etc. furnished either along with the return or in the course of the assessment proceedings.

There is no dispute that full and true particulars were furnished. The original assessment was finalised under section 143(3) – what is called a "scrutiny assessment" - without any discussion of the claims made by the assessee in the assessment order, which claims are now the subject-matter of reassessment. The question is whether the reopening of the assessment is prompted by a mere change of opinion.

7. In Kelvinator (2002) 256 ITR 1 (FB), a Full Bench judgment of this court, this question has been answered in the affirmative on the ground that an assessment order passed under section 143(3) of the Act must be presumed to be one passed after full scrutiny and formation of opinion on the points raised in the return and in the course of the assessment proceedings. It has been observed that section 114(e) of the Evidence Act comes into operation and it must be presumed that the AO had performed his duty in the manner expected of him, that is, after examining and forming an opinion on all aspects of the return, though he has not been articulate about it in the assessment order. It has also been held that if such a presumption is not drawn, that would amount to putting a premium on a perfunctory discharge of duties by the assessing authority and permitting him to take advantage of his own wrong. The contention of the revenue to the contrary was rejected in terms. I do not therefore think that in a case where failure to furnish full and true particulars is not shown in the reasons recorded for reopening the assessment, albeit within four years, the assessment made under section 143(3) can be reopened on the ground that no opinion was formed by the assessing authority in the original assessment in respect of matters that are the subject-matter of the notice under section 148. That question, in my opinion, stands concluded by the Full Bench judgment of this court in Kelvinator

(supra). It may be added that *Kelvinator (supra)* was also a case of the assessment being reopened within four years.

8. Much of the debate before us involved the question of merger of the judgment of the Full Bench of this court in Kelvinator (supra) with that of the Supreme Court (2010) 320 ITR 561, which affirmed the judgment. I agree that the debate is not relevant for resolution of the issues before us. What is however relevant is that the Supreme Court, while affirming the judgment, made observations that are far-reaching in the context of the power given to the AO to reopen an assessment completed earlier under section 143(3). Before proceeding to justify my understanding of the judgment, I wish to reproduce the relevant part:-

> *"6. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in Section 147 of the Act [with effect from 1st April,1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-1st April, 1989, power to re-open is much wider. 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-conditions 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, the 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. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the Companies against omission of the words "reason to believe", Parliament re-introduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the Assessing Officer. We quote herein below the relevant portion of Circular No.549 dated 31st October, 1989 ([1990] 182 ITR (St.) 1, 29), which reads as follows:

> *"7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression 'has reason to believe' in place of the words 'for reasons to be recorded by him in writing, is of the opinion'.*

Other provisions of the new Section 147, however, remain the same."

For the aforestated reasons, we see no merit in these civil appeals filed by the Department; hence, dismissed with no order as to costs."

9. The Act, I believe, zealously protects the finality of an assessment and whenever there have been unauthorised inroads into it, the courts have come down on such attempts. The Privy Council in *CIT v. Khemchand Ramdas*, (1938) ITR 414 ruled that an assessment, once completed, is final and can be disturbed only by a process known to law. The Supreme Court has reaffirmed the principle in *ITO v. Habibullah*, (1962) 44 ITR 809.

10. It would therefore be appropriate and befitting the controversy to understand the observations of the Supreme Court, while affirming the Full Bench judgment of this court in Kelvinator, in a wholesome manner and in the context of a power given to the assessing authority to disturb the finality of a completed assessment made under section 143(3). Abuse of power to reopen an assessment made under section 143(3) arises when the assessing authority, despite being possessed of full and true particulars furnished by the assessee, makes no reference to them in the assessment order framed under section 143(3) but merely reopens the assessment on the ground that he did not form any opinion when he made the assessment. I come back to the Full Bench judgment of this court, as affirmed by the Supreme Court, to hold that this would be a classic instance of abuse of power.

11. It was observed by the Supreme Court that there should be some "tangible material" coming into the possession of the AO in such cases to enable him to resort to section 147. Despite being a case

of full and true disclosure, tangible material coming to the possession of the AO after he made the original assessment under section 143 (3), would influence the opinion, formed or presumed to have been formed earlier, of the assessing authority; he can with justification change it, but that would not be a case of a "mere change of opinion" unguided by new facts or change in the legal position. It will be a case of the assessing authority having "reason to believe", notwithstanding that full and true particulars were furnished by the assessee which were examined, or presumed to be examined, by him. The observations of the Supreme Court are a protection against abuse of power; they also protect the revenue which can, in the light of subsequent coming into light of facts or law, reopen the assessment.

12. The Supreme Court emphasised the difference between the power to reassess and the power to review and in terms stated that the Assessing Officer has no power to review, but has only the power to reassess. If the contention of the revenue is to be accepted, then all that is required of the assessing officer is a statement in the reasons recorded which could run like this: -

> "*The assessee has no doubt disclosed fully and truly all material facts necessary for the assessment. The assessment was also completed under section 143 (3). However, I have not examined those particulars while completing the assessment. I, therefore, did not form any opinion. I now want to reopen the assessment so that I can take the opportunity to examine the full and true particulars furnished by the assessee and form an opinion. I am, therefore, issuing notice under section 148.*"

13. The dangerous consequence that would follow need hardly be stated. This is a clear and present danger, not merely an unfounded apprehension. The two vices, namely, the power to review masquerading as the power to reassess and an abuse of the power to reopen the assessment (only on satisfaction of certain stipulated conditions), as pointed out by the Supreme Court, would come into full play if such a contention is accepted.

14. The Supreme Court has affirmed the judgment of the Full Bench of this court in *Kelvinator (supra)*. The controversy should end there and can admit of no debate. The Full Bench has unequivocally held that when the assessing officer completes an assessment under section 143(3) of the Act, he is presumed to have accepted the contentions of the assessee even if there is no express reference to them in the assessment order; and if within 2 years he issues a notice to reopen the assessment, it is nothing but a change of opinion. The Supreme Court has held that a change of opinion cannot be introduced in the garb of reopening the assessment, which would be nothing but a review, which power the assessing officer does not possess. I demur to the proposition that the observations of the Full Bench of this court vis-as-vis section 114(e) of the Evidence Act and its applicability to an assessment order passed under section 143(3) were not expressly referred to and approved by the Supreme Court. That would introduce an undesirable element of uncertainty even when finality has been accorded by the decree of Supreme Court. That way, matters could be reargued and re-agitated till the end of time.

15. In *Srikrishna Pvt. Ltd. Etc. v. Income Tax Officer & Ors.*, (1996) 221 ITR 538, the Supreme Court, while dealing with Section 147 as it stood prior to 01.04.1989 observed as under: -

> *"To be more precise, he can issue the notice under Section 148 proposing to reopen the assessment only where he has reason to believe that on account of either the omission or failure on the part of the assessee to file the return or on account of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that year, income has escaped assessment. The existence of the reason(s) to believe is supposed to be check, a limitation, upon his power to re-open the assessment. [See the leading decision on this subject in* Barium Chemicals Ltd. v. Company Law Board *(1966) 36 Comp Cas 639; [1966] Suppl. S.C.R.311 at page 361 ; A.I.R.1967 S.C.295 at 324)]. Section 148(2) imposes a further check upon the said power, viz., the requirement of recording of reason for such re-opening by the Income Tax Officer. Section 151 imposes yet another check upon the said power, viz., the Commissioner or the Board, as the case may be, has to be satisfied, on the basis of the reasons recorded by the Income Tax Officer, that it is a fit case for issuance of such a notice. The power conferred upon the Income Tax Officer, by Sections 147 and 148 is thus not an unbridled one. It is hedged in with several safeguards conceived in the interest of eliminating room for abuse of this power by the Assessing Officers. The idea was to save the assessees from harassment resulting from mechanical re-opening of assessment but this protection avails only those assessees who disclose all material facts truly and fully."*

16. Frankly, I am unable to see any difference between a case where a query is raised by the assessing officer which is replied to by the assessee with supporting evidence or material, but the opinion of the assessing officer on the assessee's reply is not recorded in the

assessment order, and a case where even without a query from the assessing officer, the assessee voluntarily discloses full and true particulars necessary for his assessment, which are not referred to in the assessment order and the opinion of the assessing officer has not been expressly recorded therein. The distinction which was sought to be made on behalf of the revenue between the two types of cases was that in the former the assessing officer has manifested his intention to examine the matter by raising a query, whereas in the latter type of cases he has not even done that. The distinction is too simplistic for acceptance. The question is not whether any query was raised or not. The question is whether the assessee fulfilled his duty of disclosing fully and truly, all material particulars and primary facts necessary for the assessment of his income. Even in a case where a query is raised and a reply is furnished with all supporting material, if the assessing officer chooses to keep silent in the assessment order, what difference does it make that he did not even raise a query and also chose to be silent in the assessment order? In both the cases the basic requirement that the assessee should have adduced all material particulars and primary facts fully and truly, stands satisfied. The raising of a query may only indicate that the assessing officer had inquired into the matter; but if nothing is recorded in the assessment order, that would still not show what opinion he took of the matter, and one has to only presume that he did accept the assessee's version, which is what the Full Bench has held. In my opinion, there is thus qualitatively no difference between the two types of cases. The ruling of the Full Bench of this Court would apply with equal force to both types of cases, since the assessee has furnished, fully and truly, all material

particulars and primary facts necessary for his assessment. The presumption under section 114(e) is applicable to both types of cases.

17. In my understanding of the judgment of the Full Bench of this court in *Kelvinator (supra),* the ruling is applicable to all cases where the assessment was completed under section 143(3) of the Act, subject only to the condition that the assessee has furnished fully and truly all material particulars and primary facts necessary for the assessment. It is not a question of deemed formation of opinion alone; it goes beyond that, and the substratum of the ruling is that the assessing officer cannot take advantage of the perfunctory manner in which he completed the assessment. This does not necessarily mean that wherever the assessing officer has completed the assessment under section 143(3) it must be taken as if he has discharged his duties in a perfunctory manner. The ratio of the judgment is rooted to the salutary principle that the assessees shall not be subjected to harassment if they have furnished full and true particulars at the time of the original assessment, which is what the Supreme Court observed in the judgment in *Srikrishna Pvt. Ltd. (supra)*. It certainly does not imply that every assessment order passed under section 143 (3) without an elaborate discussion of various contentions and claims put forth by the assessee is necessarily a wrong order to be corrected later by resorting to section 147. Making an assessment to income tax represents the quantification of the charge to tax; it is a serious task. Legal consequences follow. A return of income is not a mere scrap of paper. It is to be treated with the respect it deserves. I think the real principle laid down by the Full Bench in Kelvinator (supra) is that if the

assessee has discharged his duty of furnishing full and true particulars at the time of the assessment, it may be fairly taken that the assessing officer has equally discharged his functions in the manner required of him. If he passes an assessment order under section 143(3) of the Act, it hardly matters that he has not recorded his agreement with the assessee on every issue or point; that could be reasonably inferred.

18. We are not concerned here with the case of a derelict assessee who has failed to furnish full and true particulars at the time of assessment. It is nobody's case that the assessee did not do so. As noted by me earlier, the first proviso to section 147 can be resorted to only if the assessee has not discharged the duty. Where the assessee has discharged his duty and the assessment completed under section 143 (3) is reopened within the period of 4 years from the end of the assessment year, the assessing officer has to either show that the disclosure is not full and true or he has come into possession of some "tangible material", to borrow with respect the expression used by the Supreme Court in *Kelvinator (supra),* to come to the conclusion that there is escapement of income. The material must have a live link with the formation of the belief regarding escapement of income. When there is no failure on the part of the assessee to furnish full and true particulars and there is no tangible material on the basis of which the assessing officer can allege escapement of income, the only consequence would be that the assessing officer was exercising the power of review on the very same materials which he is presumed to have examined. This would amount to abuse of the power to re-assess and has to be checked. The solution to this problem lies in deciding

the question whether there was full and true disclosure by the assessee. It does not lie in pigeon-holing the ruling of the Full Bench of this court in *Kelvinator (supra)*, affirmed by the Supreme Court, only to cases where there is overt evidence in the assessment order framed under section 143(3) to show that the assessing officer had originally formed an opinion in favour of the assessee. That, with respect, would water down the ratio of not only the Full Bench judgment of this court in *Kelvinator (supra)*, but also the judgment of the Supreme Court which affirmed the Full Bench judgment and would also introduce an area of uncertainty despite the categorical pronouncements. I do not think that within the parameters of judicial discipline and comity I can take the liberty of putting such gloss or embellishment upon those binding rulings. To argue or hold that when the assessing officer fails to examine a subject matter, entry, claim or deduction, he forms no opinion, notwithstanding that the assessee had made a full and true disclosure and notwithstanding that the assessment was completed under section 143 (3) and to further hold that it would be a case of "no opinion", would be to fly in the teeth of the two rulings. It is not even open to the revenue to urge such a proposition.

19. I must now refer to the judgment of the Supreme Court in *A.L.A Firm Vs. CIT* (1991) 189 ITR 285, wherein the provisions of section 147(b) of the Act as they stood before 01.04.1989 were being examined. That case was predominantly concerned with the question as to what would constitute "information" within the meaning of section 147(b). It was held that the statute does not require that the

information must be extraneous to the record and that it is sufficient that if the material, on the basis of which the assessment is sought to be reopened, came to the notice of the assessing officer subsequent to the original assessment and that such material may come to the notice of the assessing officer from the record itself. It was also observed that if the income tax officer had considered the material in the original assessment and formed an opinion, then he would be powerless to reopen the assessment. These observations do not in any way – in my humble understanding – impinge on the question before us. What was decided by the Full Bench of this court in *Kelvinator (supra)* is that when once an assessment order is framed under section 143(3) and the assessee had undisputedly furnished full and true particulars at the time of original assessment, then he must be presumed to have formed an opinion; and if he reopened the assessment within two years without proving any failure on the part of the assessee to furnish full and true particulars, that would only amount to a change of opinion not permissible in law.

20. However, the further observations of the Supreme Court in *A.L.A. Firm (supra)* broadly support the view taken by the Full Bench of this court. These observations are as under: -

> *"We think there is force in the argument on behalf of the assessee that, in the face of all the details and statement placed before the Income-tax Officer at the time of the original assessment, it is difficult to take the view that the Income-tax Officer had not at all applied his mind to the question whether the surplus is taxable or not. It is true that the return was filed and the assessment was*

completed on the same date. Nevertheless, it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It is not as if the assessment record contained a large number of documents or the case raised complicated issues rendering it probable that the Income-tax Officer had missed these facts. It is a case where there is only one contention raised before the Income-tax Officer and it is, we think, impossible to hold that the Income-tax Officer did not at all look at the return filed by the assessee or the statements accompanying it. The more reasonable view to take would, in our opinion, be that the Income-tax Officer looked at the facts and accepted the assessee's contention that the surplus was not taxable. But, in doing so, he obviously missed to take note of the law laid down in G.R. Ramachari and Co. [1961] 41 ITR 142 (Mad) which, there is nothing to show, had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under section 147(b). The material which constituted information and on the basis of which the assessment was reopened was the decision in G.R. Ramachari and Co. [1961] 41 ITR 142 (Mad). This material was not considered at the time of the original assessment. Though it was a decision of 1961 and the Income-tax Officer could have known of it had he been diligent, the obvious fact is that he was not aware of the existence of that decision then and, when he came to know about it, he rightly initiated proceedings for reassessment.

We may point out that the position here is more favourable to the Revenue than that which prevailed in the Madras cases referred to earlier. There, what the Income-tax Officer had missed earlier was the true purport of the relevant statutory provisions. It seems somewhat difficult to believe that the Income-tax Officer could have failed to read properly the statutory provisions applicable directly to the facts before him (though that is what seems to have happened). Perhaps, an equally plausible view on the facts could have been taken that he had considered them and decided, in one case, not to apply them and, in the other, on a wrong

> *construction thereof. In the present case, on the other hand, the material on which the Income-tax Officer has taken action is a judicial decision. This had been pronounced just a few months earlier to the original assessment and it is not difficult to see that the Income-tax Officer must have missed it or else he could not have completed the assessment as he did. Indeed it has not been suggested that he was aware of it and yet chose not to apply it. It is, therefore, much easier to see that the initiation of reassessment proceedings here is based on definite material not considered at the time of the original assessment."*

21. Quite apart from the fact that *A.L.A. Firm (supra)* was a case where a binding judgment of the jurisdictional High Court was overlooked when the original assessment was made, the earlier part of the observations of the Supreme Court in the aforesaid paragraph show the reluctance or disinclination of the court to accept the broad proposition, that even if full and true particulars had been furnished by the assessee at the time of the original assessment, it cannot be said that the assessing officer had applied his mind to the claims or contentions put forth by the assessee. The observation of the court that "*.....it is opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him*" is in substance and effect echoed in the judgment of the Full Bench of this court in *Kelvinator (supra)*. Again the emphasis is as to whether the assessee has discharged his duty, and if so, he should not be asked to go over the grind again merely on the ground that the assessing officer has not examined the facts disclosed fully and truly and, therefore, was in no position to form an opinion.

22. I find it difficult to assent to the contention of the revenue that section 114(e) of the Evidence Act was incorrectly invoked by the Full Bench of this court in *Kelvinator (supra)*. It has been held by the Full Bench that the section applies to an assessment order made under section 143(3) of the Act and the judgment has been affirmed by the Supreme Court. The last word on the subject has been said. The contention cannot even be heard.

23. On the first question referred to this Full Bench as to the meaning of the term "change of opinion", I have nothing to add to the draft proposed. As to the first part of the second question my answer would be that the assessment proceedings cannot be validly reopened under section 147 of the Act even within four years, if an assessee has furnished full and true particulars at the time of original assessment with reference to the income alleged to have escaped assessment, if the original assessment was made u/s 143(3). My answer to the second part of the second question is that the issue is concluded by the judgment of the Full Bench of this court in *Kelvinator (supra)*.

24. My answer to the third question is this. So long as the assessee has furnished full and true particulars at the time of original assessment and so long as the assessment order is framed under section 143(3) of the Act, it matters little that the assessing officer did not ask any question or query with respect to one entry or note but had raised queries and questions on other aspects. Again the answer to this question stands concluded by the judgment of the Full Bench of this court in *Kelvinator (supra)*. My answer to question No.(iv), in

respectful agreement with the judgment of the Full Bench of this court in *Kelvinator (supra)*, is a limited answer. It is that section 114(e) of the Evidence Act can be applied to an assessment order framed under section 143(3) of the Act, provided that there has been a full and true disclosure of all material and primary facts at the time of original assessment. In such a case if the assessment is reopened in respect of a matter covered by the disclosure, it would amount to change of opinion. I do not in the circumstances consider it necessary to answer the broad question as to what are all the circumstances under which section 114(e) of the Evidence Act can be applied.

Sd/-

(R. V. EASWAR)
JUDGE

SEPTEMBER 21, 2012
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