

Mphasis Ltd vs the Joint Commissioner of Income Tax

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Court : Karnataka

Decided On : Sep-19-2025

Judge : M.Nagaprasanna

Appeal No. : WP/51586/2019

Appellant : Mphasis Ltd

Respondent : The Joint Commissioner of Income Tax

Judgement :

Reserved on : 21.08.2025 R

Pronounced on : 19.09.2025

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 19TH DAY OF SEPTEMBER, 2025 BEFORE THE HON'BLE MR. JUSTICE M. NAGAPRASANNA WRIT PETITION No.51586 OF 2019 (T - IT) BETWEEN: MPHASIS LIMITED BAGMANE WORLD TECHNOLOGY CENTRE WTC-3, 1ST FLOOR, KR PURAM MARATHAHALLI OUTER RING ROAD DODDANEKUNDI, BENGALURU - 560 048 REPRESENTED HEREIN BY ITS SENIOR VICE PRESIDENT MR. ARIJIT GANGULY ... PETITIONER (BY SRI

T.SURYANARAYANA, SR. ADVOCATE A/W., SMT. TANMAYEE RAJKUMAR, ADVOCATE) AND:

1. THE JOINT COMMISSIONER OF INCOME TAX (SPECIAL RANGE-4), 2ND FLOOR BMTC BUILDING, 80 FEET ROAD KORAMANGALA, BENGALURU - 560 095.

2. THE ASSISTANT COMMISSIONER OF INCOME TAX SPECIAL RANGE 4, BMTC BUILDING 80 FEET ROAD, KORAMANGALA BENGALURU - 560 095.

3. PRINCIPAL COMMISSIONER OF INCOME TAX-4

5TH FLOOR, BMTC BUILDING 80 FEET ROAD, KORAMANGALA 6TH BLOCK BENGALURU - 560 095. ... RESPONDENTS (BY SRI RAVIRAJ Y. V., ADVOCATE) THIS WRIT PETITION IS FILED UNDER ARTICLE 226 OF THE CONSTITUTION OF INDIA PRAYING TO DECLARE THAT THE IMPUGNED PROCEEDINGS INITIATED BY THE R-1 U/S 147 R/W SEC. 148 OF THE ACT ARE BARRED BY LIMITATION AND OPPOSED TO THE SAID PROVISIONS AND THEREFORE WITHOUT JURISDICTION; QUASH THE ORDER DATED 07.11.2019 (ANNX-P) PASSED BY THE R-2 REJECTING THE PETITIONERS OBJECTION AS TO HIS JURISDICTION AND LIMITATION IN RESPECT OF THE ASSESSMENT YEAR 2012-13. THIS WRIT PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 21.08.2025, COMING ON FOR PRONOUNCEMENT THIS DAY, THE COURT MADE THE FOLLOWING:- CORAM: THE HON'BLE MR JUSTICE M.NAGAPRASANNA

CAV ORDER

The petitioner is before this Court calling in question proceedings instituted under Section 148 r/w Section 147 of the Income Tax Act, 1961 (hereinafter referred to as the Act for short) on the ground of it being barred by limitation and has sought consequential action to be obliterated on the question of jurisdiction as well.

2. Facts, in brief, germane are as follows: -

2.1. The petitioner is a Company incorporated under the Companies Act, 1956 and is engaged in the business of providing information technology solutions and services inter alia to customers outside India. The petitioner is thus, in a contract with foreign client. The petitioner undertakes software designing and executes offshore part of the contract. Certain parts of the contract, according to the averment in the petition, require execution physically at the customers site i.e., onshore/onsite part of the work is sub-contracted to its Associated Enterprises (for short Enterprises). For the said purpose, the petitioner enters into agreements with its Enterprises for provision of onsite software development. Since payments are made to the Enterprises they were not chargeable to tax in India. On an application made by the petitioner, the Additional Commissioner of International Taxation is said to have passed an order under Section 195(2) of the Act approving remittances of payments to the Enterprises without deducting tax at source.

2.2. Things standing thus, during the financial year 2011-12 relevant to the assessment year 2012-13, the petitioner made payments to its Enterprises for provision of services in the nature of on-site development of software to the extent of 3,30,23,97,000/- and an amount of 24,04,78,000/- for services in respect of marketing services in foreign countries. The petitioner files its return of income for the assessment year 2012-13 declaring income of 3,40,40,79,170/- after claiming payment under Section 10A, 10AA, 10B of the Act. Before the return of income filed by the petitioner was taken up for assessment under Section 143(3) of the Act, the Deputy Director of Income Tax (International Taxation) issued a show cause notice under Section 201(1) of the Act for the assessment years 2011-12 and 2012-13 requiring the petitioner to show cause as to why it should not be treated as an assessee in default under Section 201(1) of the Act, on the score that the petitioner had failed to deduct taxes at source on the amounts paid to the Enterprises. The petitioner is said to have made submissions that tax deduction at source was not warranted and the petitioner cannot be treated as an assessee in default for non-deduction of TDS. Thereafter, return of income for the assessment year 2012-13 was taken up under Section 143(3) and various information was sought from the hands of the petitioner. In response to the notice dated 02-05-2014 issued by the Assessing Officer, the petitioner is said to have furnished

entire copies necessary for an order in favour of the petitioner. 2.3. A reference is made by the Assessing Officer to the Transfer Pricing Officer, who in turn issues a notice on 11-12-2015 under Section 92CA of the Act calling upon the petitioner to furnish details of selling commission paid for marketing services availed from the Enterprises. The petitioner is said to have furnished details and after furnishing details, the Transfer Pricing Officer passes an

order on 29-01-2016 determining an aggregate transfer pricing

adjustment at 45,39,63,715/-. The adjustment so made by the Transfer Pricing Officer was on the ground that the petitioner had not demonstrated that the cost incurred by the Enterprises are relatable to specific streams of revenue; no independent business would have paid such huge amount as selling commission without verifiable basis. After thorough examination and verification of material, the Assessing Officer passes an assessment order under Section 143(3) of the Act. Aggrieved by the assessment order dated 21-04-2016, the petitioner files an appeal before the Commissioner of Income Tax (Appeals) challenging the transfer pricing adjustment made in respect of selling commission. The proceedings are yet to be concluded. 2.4. When things stood thus, for the assessment year 2012-13 the Assessing Officer holding jurisdiction over the Company issues a notice on 23-03-2018 under Section 148 of the Act holding that there were reasons to believe that the income of the petitioner chargeable to tax for the assessment year 2012-13 had escaped assessment and proposing to re-assess the income of the petitioner. The petitioner was called upon to file its return of income for the said assessment year. The petitioner responded to the notice on 10-04-2018 contending that no income had escaped assessment and under protest submitted return of income filed on 30-11-2012. The petitioner then requested for reasons recorded for reopening the assessment under Section 147 of the Act, as also sanction granted in terms of Section 151 of the Act. The petitioner does not receive any response from the Assessing Officer. A year thereafter, the petitioner receives another notice dated 29-03-2019 again under Section 148 of the Act proposing to reassess the petitioner for the assessment year 2012-13 under Section 147 of the Act. Once again, the petitioner was called upon to furnish return of income. The petitioner again under protest furnished the same and sought

reasons for reopening the assessment and filed objections to the notice so issued seeking reopening of assessment. The 2nd respondent rejects the objections on 07-11-2019 on the basis that TDS payments made to non-residents ought to have been disclosed in the tax audit report under Section 44AB of the Act. Subsequent orders are passed. Upon the said order, the petitioner is before this Court calling in question the said orders so passed by the respondents, on the score of them being without jurisdiction having barred by limitation.

5. Heard Sri T.Suryanarayana, learned senior counsel appearing for the petitioner and Sri Y.V. Raviraj, learned counsel appearing for the respondents.

6. The learned senior counsel for the petitioner would

vehemently contend that in terms of first proviso to Section 147 of the Act, where a case for scrutiny assessment is completed under Section 143(3) of the Act, the assessment can be reopened after a period of 4 years from the end of the relevant assessment year only, if there is failure on the part of the assessee to make a full and true disclosure of all primary facts. In the case at hand, the learned senior counsel would submit that there can be no failure on the part of the petitioner, as everything is divulged. On this score he seeks to place reliance on several judgments rendered by the Apex Court, coordinate Benches of this Court and other High Courts. He would further contend that while passing the assessment order, the Assessing Officer was well aware of the payments made by the petitioner to Enterprises. The assessment cannot be reopened merely on account of change of opinion. It is his submission that assessment cannot be reopened on account of mistake in review of material on record. On the said submission also, he seeks to place reliance upon several judgments. The third contention of the learned senior counsel is, issuance of a second notice without withdrawing the first notice is impermissible in law. Therefore, the act of the Assessing Officer is without jurisdiction on twin fault - one being it is reopened beyond the period of 4 years and the earlier notice was not withdrawn. On all these contentions, the learned senior counsel seeks quashment of proceedings.

7. Per contra, the learned counsel Sri Y.V.Raviraj appearing

for the revenue would seek to dispute the position by contending that the petitioner on earlier orders passed is before the Commissioner (Appeals). There is no bar for the Assessing Officer to reopen the assessment if income has escaped assessment at the time when Section 143(3) proceedings were taken up. The Assessing officer has clearly held what are the reasons to believe as obtaining under Section 147 of the Act. He would further contend that the assessing officer issued first notice, but later found material and therefore, issued the second notice. He would admit the fact that the first notice is not withdrawn, but is only abandoned. He would, but submit the petition be dismissed, leaving open to the petitioner to avail all the remedy available in law.

8. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record.

9. The afore-narrated facts, link in the chain of events and

dates are all a matter of record. In furtherance of the submissions made, what is necessary to be noticed is, whether reopening of assessment under Section 148 of the Act is beyond limitation, for which, the provisions prevailing at the relevant point in time are necessary to be noticed. Sections 143, 147 and 148 of the Act, as was applicable to the assessment year 2012-13, read as follows: 143. Assessment.

(1) Where a return has been made under section 139, or in response to a notice under sub-section (1) of section 142, such return shall be processed in the following manner, namely:-

(a) the total income or loss shall be computed after making the following adjustments, namely:-

(i) any arithmetical error in the return; or

(ii) an incorrect claim, if such incorrect claim is apparent from any information in the return;

(b) the tax and interest, if any, shall be computed on the basis of the total income computed under clause (a);

(c) the sum payable by, or the amount of refund due

to, the assessee shall be determined after adjustment of the tax and interest, if any, computed under clause (b) by any tax deducted at source, any tax collected at source, any advance tax paid, any relief allowable under an agreement under section 90 or section 90A, or any relief allowable under section 91, any rebate allowable under Part A of Chapter VIII, any tax paid on self- assessment and any amount paid otherwise by way of tax or interest;

(d) an intimation shall be prepared or generated and sent to the assessee specifying the sum determined to be payable by, or the amount of refund due to, the assessee under clause (c); and

(e) the amount of refund due to the assessee in pursuance of the determination under clause (c) shall be granted to the assessee:

Provided that an intimation shall also be sent to the assessee in a case where the loss declared in the return by the assessee is adjusted but no tax or interest is payable by, or no refund is due to, him: Provided further that no intimation under this sub-section shall be sent after the expiry of one year from the end of the financial year in which the return is made. Explanation.-For the purposes of this sub-section,-

(a) "an incorrect claim apparent from any information in the return" shall mean a claim, on the basis of an entry, in the return,-

(i) of an item, which is inconsistent with another entry of the same or some other item in such return;

(ii) in respect of which the information required to be furnished under this Act to substantiate such entry has not been so furnished; or

(iii) in respect of a deduction, where such deduction exceeds specified statutory limit which may have been expressed as monetary amount or percentage or ratio or fraction;

(b) the acknowledgement of the return shall be deemed to be the intimation in a case where no sum is payable by, or refundable to, the assessee under clause (c), and where no adjustment has been made under clause (a).

(1A) For the purposes of processing of returns under subsection (1), the Board may make a scheme for centralised processing of returns with a view to expeditiously determining the tax payable by, or the refund due to, the assessee as required under the said sub-section.

(1B) Save as otherwise expressly provided, for the purpose of

giving effect to the scheme made under sub-section (1A), the Central Government may, by notification in the Official Gazette, direct that any of the provisions of this Act relating to processing of returns shall not apply or shall apply with such exceptions, modifications and adaptations as may be specified in that notification; so, however, that no direction shall be issued after the 31st day of March, 2012.

(1C) Every notification issued under sub-section (1B), along with the scheme made under sub-section (1A), shall, as soon as may be after the notification is issued, be laid before each House of Parliament.

(1D) Notwithstanding anything contained in sub-section (1), the processing of a return shall not be necessary, where a notice has been issued to the assessee under sub-section (2).

(2) Where a return has been furnished under section 139, or in response to a notice under sub-section (1) of section 142, the Assessing Officer shall,-

(i) where he has reason to believe that any claim of loss,

exemption, deduction, allowance or relief made in the return is inadmissible, serve on the assessee a notice specifying particulars of such claim of loss, exemption, deduction, allowance or relief and require him, on a date to be specified therein to

produce, or cause to be produced, any evidence or particulars specified therein or on which the assessee may rely, in support of such claim:

Provided that no notice under this clause shall be served on the assessee on or after the 1st day of June, 2003;

(ii) notwithstanding anything contained in clause (i), if he

considers it necessary or expedient to ensure that the assessee has not understated the income or has not computed excessive loss or has not under-paid the tax in any manner, serve on the assessee a notice requiring him, on a date to be specified therein, either to attend his office or to produce, or cause to be produced, any evidence on which the assessee may rely in support of the return: Provided that no notice under clause (ii) shall be served on the assessee after the expiry of six months from the end of the financial year in which the return is furnished.

(3) On the day specified in the notice,-

(i) issued under clause (i) of sub-section (2), or as soon

afterwards as may be, after hearing such evidence and after taking into account such particulars as the assessee may produce, the Assessing Officer shall, by an order in writing, allow or reject the claim or claims specified in such notice and make an assessment determining the total income or loss accordingly, and determine the sum payable by the assessee on the basis of such assessment;

(ii) issued under clause (ii) of sub-section (2), or as soon

afterwards as may be, after hearing such evidence as the assessee may produce and such other evidence as the Assessing Officer may require on specified points, and after taking into account all relevant material which he has gathered, the Assessing Officer shall, by an order in writing, make an assessment of the total income or loss of the assessee, and determine the sum payable by him or refund of any amount due to him on the basis of such assessment:

Provided that in the case of a-

(a) research association] referred to in clause (21) of section 10;

(b) news agency referred to in clause (22B) of section 10;

(c) association or institution referred to in clause (23A) of section 10;

(d) institution referred to in clause (23B) of section 10;

(e) fund or institution referred to in sub-clause (iv) or trust or

institution referred to in sub-clause (v) or any university or other educational institution referred to in sub-clause (vi) or any hospital or other medical institution referred to in sub-clause (via) of clause

(23C) of section 10,

which is required to furnish the return of income under sub-section (4C) of section 139, no order making an assessment of the total income or loss of such research association, news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, shall be made by the Assessing Officer, without giving effect to the provisions of section 10, unless-

(i) the Assessing Officer has intimated the Central Government or the prescribed authority the contravention of the provisions of clause (21) or clause (22B) or clause (23A)

or clause (23B) or sub-clause (iv) or sub-clause (v) or sub-clause (vi) or sub-clause (via) of clause (23C) of section 10, as the case may be, by such research association, news agency, association or institution or fund or trust or university or other educational institution or any hospital or other medical institution, where in his view such contravention has taken place; and

(ii) the approval granted to such research association or other

association or fund or trust or institution or university or other educational institution or hospital or other medical institution has been withdrawn or notification issued in respect of such news agency or fund or trust or institution has been rescinded : Provided further that where the Assessing Officer is satisfied that the activities of the university, college or other institution referred to in clause (ii) and clause (iii) of sub-section

(1) of section 35 are not being carried out in accordance with all or

any of the conditions subject to which such university, college or other institution was approved, he may, after giving a reasonable opportunity of showing cause against the proposed withdrawal to the concerned university, college or other institution, recommend to the Central Government to withdraw the approval and that Government may by order, withdraw the approval and forward a copy of the order to the concerned university, college or other institution and the Assessing Officer:

Provided also that notwithstanding anything contained in the first and the second proviso, no effect shall be given by the Assessing Officer to the provisions of clause (23C) of section 10 in the case of a trust or institution for a previous year, if the provisions of the first proviso to clause (15) of section 2 become applicable in the case of such person in such previous year, whether or not the approval granted to such trust or institution or notification issued in respect of such trust or institution has been withdrawn or rescinded.

(4) Where a regular assessment under sub-section (3) of this section or section 144 is made,-

(a) any tax or interest paid by the assessee under sub-section (1) shall be deemed to have been paid towards such regular assessment ;

(b) if no refund is due on regular assessment or the amount

refunded under sub-section (1) exceeds the amount refundable on regular assessment, the whole or the excess amount so refunded shall be deemed to be tax payable by the assessee and the provisions of this Act shall apply accordingly.

(5) Omitted by the Finance Act, 1999, w.e.f. 1-6-1999. . . .

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:

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year: Provided also that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment. 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.
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 ;

(ba) where the assessee has failed to furnish a report in respect of any international transaction which he was so required under section 92E;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been underassessed ; 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;]

(d) where a person is found to have any asset (including financial interest in any entity) located outside India.

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. Explanation 4.-For the removal of doubts, it is hereby clarified that the provisions of this section, as amended by the Finance Act, 2012, shall also be applicable for any assessment year beginning on or before the 1st day of April, 2012.

148. - Issue of notice where income has escaped

assessment :- (1) Before making the assessment, reassessment or recomputation under section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under section 139 :

Provided that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2)

of section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, re-assessment or recomputation as specified in sub-section (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response

to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of

sub-section (2) of section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of section 143, but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in subsection (2) of section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.-For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under

this section, record his reasons for doing so. (Emphasis supplied) Proviso to Section 147 mandates that, where a scrutiny assessment has been completed under Section 143(3), such assessment can be reopened only after the period of four years from the end of the relevant assessment year, if there is failure on the part of the assessee to make full and true disclosure on all primary facts, failing which reopening of assessment is impermissible in law.

10. Therefore, it becomes necessary to notice the show cause notice issued by the Assessing Officer on 23-03-2018. It reads as follows: PAN:AAACB6820C Dated: 23/03/2018

To, The Principal Officer/Managing Director, M/s Mphasis Ltd., Bagmane World Technology Centre, WTC-3 Block B, 1st Floor K R Puram Marathahalli Outer Ring Road Doddanekkundi, Bengaluru - 560048 ***** Whereas I have reason to believe that your income chargeable to tax for the assessment Year 2012-13 has escaped assessment within the meaning of section of 147 of Income Tax Act I therefore propose to assess/reassess the income for the said assessment year and hereby require you to deliver to me a return in the prescribed form of your income in respect of which you are assessable for the said assessment year within

15 days from the date of service of the notice.

Yours faithfully. Sd/- (SHASHIDHAR S.SHET) Asst. Commissioner of Income Tax, Circle-4(1)(2), Bengaluru. (Emphasis added) The Assessing Officer indicates that he has reason to believe that the income chargeable to tax for the assessment year 2012-13 has escaped assessment within the meaning of Section 147 of the Act. Therefore, the Assessing Officer is wanting to reopen the assessment for the year 2012-13. Four years period for reopening the assessment of 2012-13 comes to an end on 31-03-2017. The notice is issued on 23-03-2018. Therefore, it becomes necessary to notice as to what were the reasons to believe indicated in the notice for reopening the assessment. The notice is quoted hereinabove. Not a word of reason is indicated therein. Therefore, on the face of it, it stood foul of Section 147. The petitioner gave detailed reply by way of objections and sought reasons that formed for issuance of a notice under Section 147. There is stark silence on the part of the department. No reply is given for one year. What comes about is another notice on 29-03-2019 one year thereafter for the very same assessment year 2012-13, under the very same provision of law. The petitioner again furnishes reply under protest, files the return of income for the year 2012-13 and seeks reasons. Reasons are communicated now by the respondent on 27-08-2019. The reasons that are germane to be noticed are as follows: . . .

2. Assessee has made payments to its Associated Enterprises

("AEs") for on-site services which are in the nature of software development services and for marketing of its products and services in overseas countries. On winning a contract for a project assessee subcontracts a certain part of the project to its AEs and in turn the AEs are paid for the services rendered to the assessee company. The AEs also render market services in overseas countries and due to marketing efforts of the AEs, if a contract is won by ML, a certain percentage of contract value is paid as selling commission to the AEs for the services rendered. The details of total payments made to the AEs for AY 2012-13 is as under.

Software Marketing Total Development Services 330,23,97,435/- 6,74,38,638
336,98,35,977/-

3. Assessee was required to deduct tax at source on the

payments made to the AEs. But no tax had been deducted by the assessee thereon either at the time of crediting or subsequently. As per the Act the liability to deduct tax on payment to the AEs rest on assessee. Hence, non-compliance to TDS provisions results in a direct gain to the ML, as it is able to enhance its profits by not deducting tax at source, assessee has thus failed to discharge its duty which results in loss to the exchequer. It is a fact that no application was tendered by it u/s 195(2) especially in where huge remittances to non-residents were involved with massive tax effect and also, when such payments are not explicitly declared exempt by the provisions of the IT Act. Since these payments made by assessee to the AEs are taxable under the Act and the DTAA either as FTS/Royalty and as per section 195 of the IT Act the

order u/s 201(1) and 201(1A) of the IT Act was

passed on 27/2/2013 by the Assessing Officer of International Taxation, Bangalore, holding assessee as assessee-in-default/ Same was communicated to this office with letter dated 10/3/2016.

(Emphasis added) The reason is that payments made by the assessee to the Enterprises are taxable under the Act and as per Section 195 of the Act, order under Section 201 was passed on 27-02-2013 by the Assessing Officer of International Taxation holding the assessee in default and was communicated to the assessee on 10-03-2016. The said notice is ostensibly issued in the year 2019 and the reason rendered for reopening the assessment is an order dated 27-02-2013.

11. As observed hereinabove, the assessment can be

reopened only if true and primary facts are not divulged while filing the return of income. The learned senior counsel has taken through the return of income so filed, insofar as it concerns the software packaging services or development charges paid to the Enterprises. The relevant portion of it reads as follows: (`000s)

Year ended	Year ended 31 March 2012	31 March 2011
Software development	3,302,397	3,509,759

charges paid to entities where control exist

-MphasiS USA	2,739,627	2,638,108	-MphasiS UK	217,315	3,65,392	-Others	345,455	506,259		
Software development	69,417	71,678	charges paid to other related parties	-Hewlett-Packard Globalsoft	4,137	48,413	Private Limited	-HP Services (Singapore)	65,280	23,265
Pte Limited	Software support and	1,056,118	1,052,284	annual maintenance charges paid to other related parties*						

12. The notice would run foul on the following reasons:

The details of the payments made to the Enterprises were disclosed in the audited financial statements, Form No.3CEB as also Form No.3 CD, all of which were furnished to the Assessing Officer. The deduction claimed under Section 10AA of the Act included the payments made to the Enterprises and this claim was examined by the Assessing Officer. The Transfer Pricing Officer examined the payments made to the Enterprises and made an adjustment in respect of the sales commission paid to the Enterprises.

The Assessing Officer while passing the assessment order

incorporated the adjustment made by the Transfer Pricing Officer. It is not in dispute that deduction was claimed by the petitioner under Section 10AA of the Act. While so claiming the payments made to the Enterprises were also examined by the Assessing Officer. After having so done for the year 2013, it was not open to the Assessing Officer to have reopened the assessment beyond four years, as obtaining under Section 147 of the Act.

13. The Apex Court in the case of CALCUTTA DISCOUNT COMPANY LIMITED v. INCOME TAX OFFICER¹ has held as follows: .. .

5. The only point raised before us is that the courts

below were wrong in holding that the first ground that the notices were issued without the existence of the necessary conditions precedent which confers jurisdiction under Section 34 had not been made out. As it is no longer disputed that Section 34 as amended in 1948 applies to the present case we have to consider the section as it stood after the amendment in 1948, in deciding this question of jurisdiction. The relevant portion of the section was in these words:

34. Income escaping assessment.- (1) If-

(a) the Income Tax Officer has reason to

believe that by reason of the omission or failure on the part of an assessee to make a return of his income under Section 22 for any year or to disclose fully and truly all material facts necessary for his assessment for that year, income, profits or gain chargeable to income tax have escaped assessment for that year, or have been under-assessed, or assessed at too low a rate, or have been made the subject of excessive relief under the Act, or excessive loss or depreciation allowance has been computed, or

(b) notwithstanding that there has been no

omission or failure as mentioned in clause (a) on the part of the assessee, the Income Tax Officer has in consequence of information in his possession reason to believe that income, profits or gains chargeable to

(1961) 41 ITR 191 (SC)

income tax have escaped assessment for any year, or have been under-assessed, or assessed at too low a rate or have been made the subject of excessive relief under this Act, or that excessive loss or depreciation allowance has been computed. He may in cases falling under clause (a) at any time

within eight years and in cases falling under clause (b) at any time within four years of the end of that year, serve on the assessee, or, if the assessee is a company, on the principal officer thereof, a notice containing all or any of the requirements which may be included in a notice under subsection (2) of Section 22 and may proceed to assess or reassess such income, profits or gains or recompute the loss or depreciation allowance; and the provisions of this Act shall, so far as may be, apply accordingly as if the notice were a notice issued under that sub-section:

Provided that- (i) the Income Tax Officer shall not issue a notice under this sub-section, unless he has recorded his reasons for doing so and the Commissioner is satisfied on such reasons recorded that it is a fit case for the issue of such notice;

(ii) the tax shall be chargeable at the rate at which it would have been charged had the income, profits or gains not escaped assessment or full assessment, as the case may be; and

(iii) where the assessment made or to be made

is an assessment made or to be made on a person deemed to be the agent of a non-resident person under Section 43, this sub-section shall have effect as if for the periods of eight years and four years a period of one year was substituted. Explanation.- Production before the Income Tax Officer of account-books or other evidence from which material facts could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure within the meaning of this section.

6. To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years,

from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income Tax Officer must have reason to believe that income, profits or gains chargeable to income tax have been under-assessed. The second is that he must have also reason to believe that such underassessment has occurred by reason of either (i) omission or failure on the part of an assessee to make a return

of his income under Section 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material

facts necessary for his assessment for that year. Both

these conditions are conditions precedent to be satisfied before the Income Tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years but within the period of eight years, from the end of the year in question.

7. No dispute appears to have been raised at any

stage in this case as regards the first condition not having been satisfied and we proceed on the basis that the Income Tax Officer had in fact reason to believe that there had been an under-assessment in each of the assessment years, 1942-43, 1943-44 and 1944-45. The appellant's case has all along been that the second condition was not satisfied. As admittedly the appellant had filed its return of income under Section 22, the Income Tax Officer could have no reason to believe that underassessment had resulted from the failure to make a return of income. The only question is whether the Income Tax Officer had reason to believe that there had been some omission or failure to disclose fully and truly all material facts necessary for the assessment for any of these years in consequence of which the under-assessment took place.

8. Before we proceed to consider the materials on

record to see whether the appellant has succeeded in showing that the Income Tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are omission or failure to disclose fully and truly all material

facts necessary for his assessment for that year. It

postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. What

facts are material, and necessary for assessment will differ

from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise - the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out what primary

facts have been proved, what other facts can be inferred

from them, and taking all these together, to decide what the legal inference should be.

9. There can be no doubt that the duty of

disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents. His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents,

which are relevant, amount to omission to disclose fully and truly all material facts necessary for his assessment.

Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far as primary facts are concerned, it is the assessee's duty to disclose all of them - including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

10. Does the duty however extend beyond the

full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the

assessing authority what inferences whether of facts

or - law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law he would draw from the primary facts.

11. If from primary facts more inferences than

one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?

12. It may be pointed out that the Explanation to the sub-section has nothing to do with inferences and deals only with the question whether primary

material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income Tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose inferences to draw the proper inferences being the duty imposed on the Income Tax Officer.

13. We have therefore come to the conclusion

that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this.

14. The position therefore is that if there were in

fact some reasonable grounds for thinking that there had been any non-disclosure as regards any primary fact, which could have a material bearing on the question of underassessment that would be sufficient to give jurisdiction to the Income Tax Officer to issue the notices under Section 34. Whether these grounds were adequate or not for arriving at the

conclusion that there was a non disclosure of material facts would not be open for the court's investigation.

In other words, all that is necessary to give this special jurisdiction is that the Income Tax Officer had when he assumed jurisdiction some prima facie grounds for thinking that there had been some non- disclosure of material facts. (Emphasis supplied) A coordinate bench of this Court in the case of EIT SERVICES INDIA PRIVATE LIMITED v. THE DEPUTY COMMISSIONER OF INCOME TAX² while considering the entire spectrum of law has

held as follows:

.. . . 24. The analysis of the points for consideration raised hereinabove is as follows:-

(i) Whether the petitioner assessee has failed to

disclose fully and truly all material facts

assessment?

25. In W.P.No.15061/2013, for the purpose of initiating

proceedings under Section 147 of the I.T. Act, as the Assessment Year in question is 2005-2006 and notice at Annexure-G seeking to initiate proceedings was issued on 29.03.2012, in terms of the proviso to Section 147 of I.T. Act, any action taken after the expiry of four years from the end of relevant assessment year would require that the assessee has failed to disclose fully and truly all material facts necessary for assessment.

26. The relevant extract of Section 147 of I.T. Act prior to its substitution reads as follows:-

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

Provided that where an assessment under sub section

(3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken W.P.No.15061 of 2013 decided on 19th December, 2023

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:

xxx Accordingly, the jurisdiction to re-open the assessment is only if there is statement of income filed by the petitioner failing to fully and truly disclose all material facts necessary for assessment.

27. The law laid down by the Constitution Bench of the

Apex Court in *Calcutta Discount Company Ltd. v. Income Tax Officer*, [(1961) 41 ITR 191 (SC)] on the above aspect regarding disclosure requires to be noticed. The validity of notice under Section 34 of Indian Income Tax I.T. Act, 1922 (corresponding to Section 147 of the Income Tax Act, 1961), whereby re-assessment proceedings was sought to be initiated was called in question by the assessee on the ground that the said notice was issued without the existence of necessary condition precedent which confers jurisdiction under Section 34 of Indian Income Tax I.T. Act, 1922. The relevant observations are as follows:-

"8. Before we proceed to consider the materials on record to see whether the appellant has succeeded in showing that the Income Tax Officer could have no reason, on the materials before him, to believe that there had been any omission to disclose material facts, as mentioned in the section, it is necessary to examine the precise scope of disclosure which the section demands. The words used are omission or failure to disclose fully and truly all material facts necessary for his assessment for that year. It postulates a duty on every assessee to disclose fully and truly all

material

facts necessary for his assessment. What facts are

material, and necessary for assessment will differ from

case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise-the assessing authority has to draw inferences as regards certain other facts; and

ultimately, from the primary facts and the further facts

inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, or revenue receipt, the assessing authority has to find out

what primary facts have been proved, what other facts

can be inferred from them, and taking all these together, to decide what the legal inference should be.

9. There can be no doubt that the duty of disclosing all

the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example - I have produced the account books and the documents: You, the assessing officer examine them, and find out the facts necessary for your

purpose : My duty is done with disclosing

these account-books and the documents. His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to omission to disclose fully and truly all material facts necessary for his assessment. Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that so far

as primary facts are concerned, it is the assessee's duty to disclose all of them-including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed.

10. Does the duty however extend beyond the full and

truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of

facts can be reasonably drawn and what legal

inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences whether of facts or - law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences - whether of facts or law he would draw from the primary facts.

11. If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee

should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?

12. It may be pointed out that the Explanation to the subsection has nothing to do with inferences and deals only

with the question whether primary material facts not disclosed could still be said to be constructively disclosed on the ground that with due diligence the Income Tax Officer could have discovered them from the facts actually disclosed. The Explanation has not the effect of enlarging the section, by casting a duty on the assessee to disclose inferences to draw the proper inferences being the duty imposed on the Income Tax Officer.

13. We have therefore come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this."

28. From the above, it can be stated as follows:-

a) Assessee is to disclose the primary facts in his possession and the Assessing Authority on the basis of such recovery or facts discovered on the basis of facts disclosed or otherwise, could draw inferences regarding such other facts. b) The duty to disclose does not extend beyond full and truthful disclosure of all primary facts. c) It is not the duty of the assessee to tell the Assessing Authority what inferences whether of

facts or law should be drawn.

d) There is no duty cast on the assessee to disclose inferences which is a duty imposed on the Income Tax Officer. e) The duty to disclose primary facts extends to making a disclosure which is full and true and excludes falsity.

29. It is to be noted that as the profits derived from

export of computer software is eligible for deduction under Section 10A of the I.T. Act which has been claimed by the petitioner, at the same time profits derived from business of rendering technical services outside India are eligible for deduction under section 80HHE of the I.T. Act.

30. Further, in terms of Explanation-2 to Section

10A(iv), the term export turnover excludes expenses, if any incurred in foreign exchange in providing the technical services outside India. Section 80HHE provides for deductions in respect of profits from export of computer software where the business entity provides technical services outside India in connection with developments or production of computer software. Hence, the aspect of deduction under Section 10A or under Section 80HHE of the I.T. Act as the case may be, has been a subject matter of litigation between the petitioner and the Revenue. Whether the petitioner is eligible for deduction under Section 10A under the head of Profits derived from

export of computer software or under the head of rendering technical services outside India and having a nexus with export outside India of computer software is an unresolved issue between the petitioner and the Revenue. It is the case of Revenue that unless a nexus is shown, the assessee cannot claim deduction and that the tangible material that was made available during the assessment proceedings for the Assessment Year 2008-2009 including MSAs, Work Orders, SCWs and Invoices has led to the initiation of proceedings under Section 147 of the I.T. Act. The case made out by the Revenue is that there is non-disclosure as contemplated under Section 147 of the I.T. Act of the tangible material that was placed before the assessing authority with respect to the proceedings in Assessment Year 2008-2009 and on such ground of non-disclosure fully and truly, that the re-assessment proceedings have been initiated. It is in such context that a finding is to be recorded as to whether the assessee has failed to disclose fully and truly all material facts necessary for assessment.

31. In the present case, the assessee has filed his

declaration in Form-56F in terms of Rule 16D of the Income Tax Rules, 1962 whereby, assessee who seeks to claim deduction under Section 10A of the I.T. Act has to make a declaration in Form-56F in the form of report of an accountant along with the return of income⁴. The omission of Rule 16D was only later and was in existence on the relevant date when the assessee has filed the return of Income. In terms of the declaration, the accountant has certified that the petitioner was engaged in export of computer software and the relevant details relating to deduction under Section 10A of the I.T. Act has been detailed in Annexure-A. The further declaration in Annexure-1 annexed to Annexure-A which provides details relating to claim by the exporter for deduction under Section 10A of the I.T. Act contains a declaration as follows:-

Name of the	Software	Software	Softwa
Contact Centre Unit-V			
Location and	Digital	Digital GlobalSoft	Digital G
Bangalore-560			
Nature of	Development	Development of	Developme
services Date of Initial	October 21, April 22, 1996	December 18, March 10, March	
22, Registration 1992	1997 2000 2002 in FTZ/EPZ/SEZ		
Date of	September	September 1,	September
Manufacture or production	Number of Note 1	Nine Seven Six third consecutive	
years of which deduction is claimed			
Amount of	13,484,517	163,088,699	231,579,8
credited to	permission	permission	permission
reference number of Reserve Bank of India according	permission for the same		

32. The obligation of disclosure extends to disclosing

fully and truly material facts necessary for assessment. Pursuant to the order passed by CIT, Bangalore-1 under Section 263 of the I.T. Act dated 22.12.2009 the assessment proceedings were directed to be re-done by recording a finding as to eligibility of deduction under Section 10A/80HHE of the I.T. Act. In the fresh assessment proceedings initiated culminating in passing of the Assessment Order by the order dated 24.12.2010 as regards the expenditure relating to providing technical services outside India, the material was placed before the Assessing Officer on such aspect as is revealed from the observations at paras-9 and 10 of the order, which are extracted hereinbelow:

9. When the above issues are raised before the AR of the assessee, AR of the assessee made a detailed submission. The gist of the submission made by the assessee are that the activities regarding which the expenditure incurred in foreign exchange do not amount to providing of technical services outside India regarding exclusion of communication expenses from both export turn over and total turn over, the same was claimed to be done on the basis of parity between export turn over and total turn over and also on the basis of definition of total turn over elsewhere in the provisions of the IT Act.

10. In light of the above submissions, on verification of the details collected in respect of expenditure incurred in foreign

exchange, it is clear that the companys employees visit the clients location and provide software development services to the clients which are group companies. Therefore all these services rendered by the company are of the nature of technical services and therefore expenditure incurred in providing these services amounting to Rs.263,01,80,361/- are required to be reduced from the export turn over as per the definition of export turn over contained in the provisions of Section 10A of the I.T. Act.

33. Accordingly, it is clear that there has been declaration

including of expenditure relating to providing technical services. Once such primary facts have been declared and the assessee had made the declaration and claimed deduction under Section 10A of the I.T. Act, there was no further obligation on the assessee. If the Assessing Officer was of the view that details furnished would fall within Section 80HHE and not under Section 10A of the I.T. Act and accordingly, assessee was not entitled to claim such expenditure under Section 10A of the I.T. Act, the non- drawing of such legal inference by the assessing officer at the relevant point of time cannot result in holding that there is no true and full disclosure of primary facts.

(Emphasis supplied) In the light of the judgment of the Constitution Bench of the Apex Court in the case of CALCUTTA DISCOUNT *supra*, as followed by the coordinate bench of this Court, what would unmistakably emerge is that, reopening of assessment can happen only if full and true facts are not divulged by the assessee. The facts in the case at hand are identical, as complete facts are already divulged by the assessee, which is clear from the chart quoted hereinabove. Therefore, the proceeding instituted does not comply with the requirement of Section 147 of the Act.

14. Now, let me answer the second contention, whether

review or change of opinion of the Assessing Officer can result in a proceeding of the kind impugned in the subject petition. It is an admitted fact that the Assessing Officer had assessed the return of income of the petitioner completely. He was well aware of the payments made by the petitioner to the Enterprises. An order was passed under Section 201 of the Act, before passing the original assessment order. Having been aware, for over five years the Assessing Officer does not make any disallowance as obtaining under Section 40 of the Act, which clearly indicates that the Assessing Officer had formed an opinion that no such disallowance was warranted. If disallowance was not warranted, tax deduction at source also was not warranted. The Assessing Officer changes his opinion 5 years thereafter and

reopens the assessment on such change of opinion, which is the impugned notice in the case at hand. If this could be done or otherwise, need not detain this court for long or delve deep into the matter. 14.1. The Apex Court in the case of COMMISSIONER OF INCOME-TAX v. KELVINATOR OF INDIA LIMITED³ has held as follows: . . .

6. We must also keep in mind the conceptual

difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of change of opinion is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. 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 1-4-1989, the assessing officer has power to reopen, provided there is tangible material to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words reason to believe but also inserted the word opinion in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words reason to believe, Parliament reintroduced the said expression and deleted the word opinion on the ground that it would vest arbitrary powers in the assessing officer.

(2010) 320 ITR 561 (SC) : (2010) 2 SCC 723

8. We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, 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 the 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.

(emphasis supplied) (Emphasis supplied) 14.2. The coordinate bench in the case of EIT SERVICES supra considers this aspect as well and holds that mere change of opinion cannot result in reopening of assessment. The coordinate bench follows the judgment of the Apex Court in the case of KELVINATOR OF INDIA supra. The coordinate bench has held as follows:

(ii) Whether the re-assessment notice under Section 147 r/w Section 148 of the I.T. Act is merely a product of change in opinion and accordingly is impermissible in law?

35. It is the contention of Sri Percy Pardiwalla, learned

Senior Counsel appearing on behalf of Ms.Tanmayee Rajkumar for the petitioner/assessee, that the reasons for re-opening would indicate the stand of the Revenue that the deputation of technical man-power relating to software development activity conducted abroad had no link with the STP units in India. Further, that such activity was known as body shopping and eligible for deduction under Section 80HHE of the I.T. Act and was not an activity that was eligible for deduction as regards expenses under Section 10A of the I.T. Act.

36. It is submitted that this very aspect has been a

subject matter of consideration by the Assessing Officer while passing a fresh Assessment Order on 24.12.2010 consequent to the directions made in the order under Section 263 of the I.T. Act dated 22.12.2009 vide F.No.17/263/CIT-1/2009-10

(Annexure-C). It is submitted that in the Assessment Order

passed, while computing deduction under Section 10A there was exclusion of expenditure relating to the visits of the Companys employees as well as expenses incurred relating to software

development services to the clients amounting to Rs.263,01,80,361/-. Accordingly, it is contended that the very aspect of profits from rendering technical services in context of export of computer software having been examined and a decision based on legal appreciation having been arrived at, cannot be reconsidered subsequently in reassessment proceedings, as it is impermissible to reopen assessment on the basis of mere change of opinion.

37. The Apex Court in Commissioner of Income Tax,

Delhi v. Kelvinator of India Ltd, [(2010) 2 SCC 703] [Kelvinator] has reiterated the settled position that mere change of opinion cannot be a ground for re-opening concluded assessments. The observations made at paras-5, 6, 7 and 8 are extracted as herein below:

5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening 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 1-4 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 reopen the assessment. Therefore, post-1-4-1989, power to reopen 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 reopen assessments on the basis of mere change of opinion, which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual

difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of change of opinion is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

7. 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 1-4-1989, the assessing officer has power to reopen, provided there is tangible material to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words reason to believe but also inserted the word opinion in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words reason to believe, Parliament reintroduced the said expression and deleted the word opinion on the ground that it would vest arbitrary powers in the assessing officer.

8. We quote herein below the relevant portion of Circular No. 549 dated 31-10-1989, 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 the 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.

(Emphasis supplied)

43. It is clear that the Assessing Officer excluding the

expenditure incurred by the assessee in connection with the provision of technical services outside India and specifically expenditure involved relating to Companys employees visit to clients location to provide software development services to the clients have been excluded [see para 10]. If that were to be so, revisiting the decision arrived at once again to further reduce the eligible deduction under Section 10A of the I.T. Act would amount to a review on the ground of change of opinion which is impermissible.

44. Though in Kelvinator (supra), the observation is that

where there is tangible material to come to the conclusion

that there is escapement of income from assessment, in the present case, the tangible material as asserted by the Revenue is itself not complete.

45. A perusal of Section 148 of I.T. Act, the notice along with

the reasons for reopening make it clear that the tangible material relied upon are the MSAs, Works contracts/SCWs, Invoices and other details relating to the deduction claimed under Section 10A of the I.T. Act. All of which is stated to have come to the notice of the Department relating to the Assessment Year 2008-2009. However, even on a perusal of para-2.10 of the Assessment Order relating to the Assessment Year 2008-

2009, the assessee as has been asked on innumerable occasions to submit MSAs and SOWs that it had with its clients the assessee has only been able to provide some of the sample MSAs and SOWs. Similar observation is made at para-2.12, which reads as follows, the assessee has not been able to submit all the SOWs and MSAs entered for software contract services. The finding by the Assessing Authority is by placing the burden on the assessee regarding correlation between the MSA, SOW/ work

order vis-a-vis work carried out by STP/SCZ unit.

46. In light of the above, the tangible material sought to be relied upon itself not being complete, it cannot be held that the MSAs and SCWs would demonstrate that the declaration made by the assessee leads to a

conclusion that there has been escapement of income.

It is also a settled position that reassessment proceedings cannot be in the nature of review and accordingly, the material as has come to light in the assessment proceedings for the Assessment Year 2008- 2009 cannot be a sufficient ground to resort to reassessment proceedings.

(Emphasis supplied) In the light of the judgment of the coordinate bench, the change of opinion of the Assessing Officer cannot result in a proceeding under Section 148 of the Act. 14.3. A Full Bench of this Court in the case of DELL INDIA PRIVATE LIMITED v. JOINT COMMISSIONER OF INCOME- TAX⁴ was considering a reference being made, as to whether there could be a review based upon change of opinion of the Assessing Officer. The issue referred to the Full Bench is as follows:

By the order dated September 2, 2015, a Division Bench of this court in Joint CIT (LTU) v. Dell India Pvt. Ltd.

[2016] 382 ITR 310 (Karn) directed that this writ appeal

should be placed before the Chief Justice for considering the issue of referring the following three questions to a larger Bench. The said three questions are as under:
"1. Whether the Division Bench judgment in the case of CIT v. Rinku Chakraborty (2011) 242 CTR (Karn) 425 lays down good law ?

2. Whether the judgment in the Rinku Chakraborty

(supra) is per incurium in view of the fact that it relies upon the judgment of the apex court in the case of Kalyanji Mavji and Co. v. CIT [1976] 102 ITR 287 (SC); [1976] CTR 85 (SC), which has been specifically overruled by the apex court in the case of Indian and Eastern Newspaper Society v. CIT [1979] 119 ITR 996 (SC)?

3. Whether 'reason to believe' in the context of section 147 of the Income-tax Act, 1961 can be based on mere 'change of opinion' of the Assessing Officer?" The Full Bench answers the issues in the following manner:

16. At this stage, we may make a useful reference to a subsequent decision of the apex court in the case of CIT v. Kelvinator of India Ltd. (supra). It is a decision of the Bench of three hon'ble judges. In paragraphs 3.1 and 3.2 of the said decision, the apex

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court has quoted section 147 which existed prior to April 1, 1989 and after April 1, 1989. Paragraphs 3.1 and 3.2 of the said decision read thus (page 563 of 320 ITR) : "3.1 After enactment of Direct Tax Laws (Amendment) Act, 1987, i.e., prior to April 1, 1989, section 147 of the Act, reads as under : '147. Income escaping assessment.-If the Assessing Officer, for reasons to be recorded by him in writing, is of the opinion 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).'

3.2 After the Amending Act, 1989, section 147 reads as under :

'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 recomputed 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)." (underlines supplied)

We are concerned with the provision of section 147 as amended with effect from April 1, 1989. In

paragraph 4 of the said decision, the apex court held

thus (page 564 of 320 ITR) :

"On going through the changes, quoted above, made to section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment 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 April 1, 1989), they are given a goby and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers

jurisdiction to reopen the assessment. Therefore, post-April 1, 1989, power to reopen 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 reopen assessments on the basis of 'mere change of opinion', which cannot be per se reason to reopen. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of 'change of opinion' is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place. One must treat the concept of 'change of opinion' as an in-built test to check abuse of power by the Assessing Officer. Hence, after April 1, 1989, Assessing Officer has power to reopen, provided

there is 'tangible material' to come to the conclusion

that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. Our view gets support from the changes made to section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words 'reason to believe' but also inserted the word 'opinion' in section 147 of the Act. However, on receipt of representations from the companies against omission of the words 'reason to believe', Parliament reintroduced the said expression and deleted the word 'opinion' on the ground that it would vest arbitrary powers in the Assessing Officer.

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 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'." (underlines supplied)

17. Thus, what is held by the apex court is that

when a power under section 147 is to be exercised, concept of change of opinion must be treated as an inbuilt test to check abuse of power of the Assessing Officer. Further, it is held that after April 1, 1989, the Assessing Officer has power to reopen provided there is a tangible material to come to the conclusion that there is escapement of income from assessment. The apex court held that mere change of opinion on consideration of the same material is no ground to invoke section 147 of the said Act.

18. As noted earlier, the decision in the case of Rinku Chakraborty (supra) is based only on what is held in clause

(2) of paragraph 13 of the decision in the case of Kalyanji

Mavji and Company (supra). The decision rendered in the case of Kalyanji Mavji and Company (supra) was by a Bench of two hon'ble judges. Subsequently, a larger Bench of three hon'ble judges in the case of Indian and Eastern Newspaper Society (supra) has clearly held that oversight, inadvertence or mistake of the Assessing Officer or error discovered by him on the reconsideration of the same material does not give him power to reopen a concluded assessment. It was expressly held that the decision in the case of Kalyanji Mavji and Company (supra), on this aspect does not lay down the correct law. The decision in the case of Rinku Chakraborty (supra) is based solely on the decision of the apex court in the case of Kalyanji Mavji and Company (supra) and in particular what is held in clause (2) of paragraph 13. The said part is held as not a good law by a subsequent decision

of the apex court in the case of Indian and Eastern Newspaper Society (supra).

19. Therefore, in the light of law laid down in the case

of Indian and Eastern Newspaper Society (supra), the first question will have to be answered in the negative by holding that the decision in the case of Rinku Chakraborty does not lay down correct position of law to the extent to which it follows what is held in clause (2) of paragraph 13 of the decision of the apex court in the case of Kalyanji Mavji and Company (supra). The second question will have to be answered in the affirmative. In view of the consistent decisions of the apex court holding that "reason to believe" in the context of section 147 of the Income- tax Act cannot be based on mere change of opinion of the Assessing Officer, the third question will have to be answered in the negative. In fact, in view of the settled law, framing of question No. 3 was not warranted at all.

20. We make it clear that we have not made any

adjudication on the controversy on the merits of writ appeal and now the appeal will have to be placed before the concerned Division Bench for deciding the same on merits in the light of what we have held above. The questions whether a case for reopening of the assessment in accordance with section 147 of the said Act is made out and whether a writ court ought to interfere with the impugned notice, are left to be decided by a Division Bench.

(Emphasis supplied) In the light of the judgment of the full bench and the order passed by the coordinate bench, the proceedings instituted would become unsustainable. This is the second limb of unsustainability of the impugned proceedings.

15. The third limb is, whether issuance of a second notice

without withdrawing the first notice is invalid. It is a matter of record that the first notice was issued on 23-03-2018. The petitioner files his return under protest and sought reasons to be divulged. Nothing happens over a year. Then comes the

second notice. Therefore, in the teeth of subsistence of the first notice under Section 148 of the Act, the second notice under the same provision, a year later, cannot emerge. Again, this need not detain this Court for long or delve deep into the matter. 15.1. The High Court of Calcutta in the case of INDIAN TUBES COMPANY LIMITED v. INCOME TAX OFFICER⁵ has

held as follows:

Dr. Pal first contends that the first two notices dated February 11, 1983, should be declared invalid, in view of the fact that without taking the necessary satisfaction of the Commissioner of Income-tax/Central Board of Revenue, the Income-tax Officer issued such notice for reopening an assessment after the expiry of more than four years as required under the law.

As regards the other two notices dated March 29, 1983, Dr. Pal contends that pursuant to the earlier invalid notices dated February 11, 1983, the petitioner having already filed

(2005) 272 ITR 439 (Calcutta)

the returns, there was no scope for giving further notices under section 148 of the Act when no assessment had been made on the basis of the subsequent returns filed by the petitioner, in compliance with the earlier notices dated February 11, 1983. In support of such contention, Dr. Pal relies upon a Supreme Court decision in the case of CIT v. S. Raman Chettiar [1965] 55 ITR 630.

This application is opposed by the income-tax authority and Mr. Mitra, learned counsel appearing on behalf of the Revenue, has opposed the aforesaid two contentions raised by Dr. Pal.

Mr. Mitra contends that the first two notices dated February 11, 1983, were patently illegal, inasmuch as, by those notices the Income-tax Officer tried to reopen assessments made more than four years earlier without taking the required satisfaction of the Commissioner of Incometax/Central Board of Revenue. Mr.

Mitra contends, in view of such mistake, the Income-tax Officer concerned after taking satisfaction from the aforesaid authority issued the subsequent two notices dated March 29, 1983. According to Mr. Mitra, if any return is submitted by the petitioner in obedience to the earlier notice dated February 11, 1983, those are to be ignored, inasmuch as those returns were filed pursuant to an illegal demand. Mr. Mitra, thus, contends that there was no illegality in initiating fresh proceeding by giving fresh notice dated March 29, 1983, after complying with the formalities required under the Income-tax Act. In support of such contention, Mr. Mitra, relies upon two decisions of the Allahabad High Court, one in the case of Ashok Kumar Dixit v. ITO [1992] 198 ITR 669 and the other in the case of Sukhlal Ice and Cold Storage Co. v. ITO [1993] 199 ITR 129.

The only question that arises for determination, therefore, in this writ application is whether the Income-tax Officer could initiate fresh proceeding under section 148 of the Act on March 29, 1983, when pursuant to the earlier invalid notice dated February 11, 1983, the petitioner had already submitted the returns.

After hearing the learned advocates for the parties and after going through the aforesaid materials, I find that the question involved herein has practically been answered by the Supreme Court in the case of CIT v. S. Raman Chettiar [1965] 55 ITR 630 relied upon by Dr. Pal. In the said case, an invalid notice under section 34 of the Indian Income-tax Act, 1922, which is equivalent to section 148 of the present Income-tax Act, was served and the return was submitted pursuant to such notice. The question was whether that was a valid return and whether the notice of assessment ignoring such return could be upheld.

In such facts, the Supreme Court was of the view that although the notice under section 34 was invalid, the return submitted pursuant to that invalid notice was a return within the meaning of section 22(3) of the said Act and the Income-tax Officer could not ignore or disregard that return and issue a fresh notice under section 34 on the assumption that there had been an omission or failure on the part of the assessee to make a return of his income under section 22, and on that ground the assessment under section 34 was held to be invalid. In the said case, the Supreme Court further

held that there was no warrant in the Income-tax Act

for treating returns as voluntary returns and nonvoluntary returns and whatever be the impelling cause or motive, if a return, otherwise valid, is filed by an assessee before the receipt of a valid notice under section 34, it is to be treated as a return within the meaning of section 22(3) of the 1922 Act.

Applying the aforesaid principles to the facts of the case, it is clear that when the petitioner filed returns in compliance with the invalid notice dated February 11, 1983, under section 148 of the 1961 Act, those returns should be treated as returns and as such before making assessment on the basis of those returns, no further notice under section 148 of the Act could be passed.

I now propose to deal with the two decisions cited by Mr. Mitra. In the case of Sukhlal Ice and Cold Storage Co. [1993] 199 ITR 129 (All), for re- assessment, the Income-tax Officer issued a notice under section 148 of the Income-tax Act, 1961, for the assessment year 1982-83 but the Tribunal held that the notice was illegal because the reason for the issue of the notice was not on record. Subsequently, the Income-tax Officer issued another notice under section 147 of the Act for the same assessment year by setting out the necessary reason and after removal of defects pointed out earlier. In such a case, it was held that since the Tribunal had recorded a finding to the effect that the very initiation of the proceeding under section 147 by the earlier notice was without jurisdiction, there was no earlier proceeding subsisting when the second notice was served upon the assessee.

In the case before us, the earlier notice has not been declared by any Tribunal as invalid and at the same time the returns submitted pursuant to the earlier notices have not been assessed and thus the earlier proceedings were pending at the time of issuing the second notice and as such the principles laid down in the said decision cannot have any application to the facts of the present case.

In the case of Ashok Kumar Dixit [1992] 198 ITR 669 (All), during the pendency of a proceeding in pursuance of a notice issued earlier against the petitioner under section 148, a second notice under section 148 had been issued ; but it does not appear from the judgment passed in the said case whether the assessee filed any

return pursuant to such notice. Under such circumstances, the Division Bench of the Allahabad High Court was of the view that only because the earlier notice had been issued, that by itself in law cannot be a bar for issuing the second notice. Therefore, the said decision cannot have any application to a case, where pursuant to the first notice a return has already been filed. I have already pointed out that in this case, the second notice under section 148 was issued at a point of time when the

assessee had already filed the return for the self-same period and no assessment had been made on the basis of such return. Therefore, in the case of Ashok Kumar Dixit [1992] 198 ITR 669 (All), the court had no occasion to deal with a situation like the one involved herein. (Emphasis supplied) 15.2. A division bench of the High Court of Gujarat in the case of MARWADI SHARES & FINANCE LIMITED v. DEPUTY COMMISSIONER OF INCOME-TAX⁶ has held as follows:

11. Though in our opinion the petition could have been decided on only one of the several contentions raised by the petitioner, in view of the possibility that the aggrieved party may carry the matter further, we would like to express our opinion on all contentions raised before us. For consideration of such contentions, we would club all arguments except of withdrawal of the first notice of reopening which would be considered separately. We may recall, the Department previously issued a notice dated March 31, 2015. We have reproduced the reasons recorded by the Assessing Officer for issuing such notice. This notice was challenged by the petitioner before this court. After some discussion at the bar, counsel for the Revenue, under instructions, stated that the notice of reopening of the assessment would be withdrawn by the Assessing Officer with a view to issuing a fresh notice after recording fresh reasons. Thereupon, fresh notice came to be issued on March 29, 2017. We have also reproduced reasons recorded by the Assessing Officer for issuance of such notice. In the previous notice, the reasons recorded merely stated that the information was received by the office in response to fictitious losses created by some broker by misusing client code modifications facility.

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Shares and Finance Ltd. was reported to be one of the beneficiaries of misuse of such facility. Such fictitious losses had been adjusted by the assessee against the profits of other years. Thus, it could be argued that the Assessing Officer had merely proceeded on the information received by him. His approach was therefore possible of being faulted as having acted on bare information without his own application of mind and thus relying on borrowed satisfaction. In the fresh reasons, he gave some background facts which, to be honest, were highly jumbled up. He referred to the past litigation and recorded that the High Court had directed recording of fresh reasons. This obviously was a clear error. Ordinarily, we would not give any such direction. In any case, the order of the High Court which is reproduced in this

judgment nowhere records any such direction. However, this

by itself would not be fatal to the cost of the Revenue. The background facts are clearly severable from the reasons which succeed which formed the core of the recorded reasons by the Assessing Officer. Thus, the reasons summarized the information available with the Assessing Officer principally suggesting that there was systematic misuse of the client code modification facility with a view to buy losses to be offset against the profit of the year. The Assessing Officer has taken note of the investigation report and, in particular, cited instance of such exercise in case of the assessee. He formed a belief that the assessee had claimed fictitious losses of Rs. 5.69 crores (rounded off) through this process.

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16. The law on subject is sufficiently clear. There

can be only one process of assessment or reassessment. Pending any such assessment or reassessment, there cannot be a notice of reopening. The courts have held that there cannot be reopening of assessment which is not yet complete. The counsel for the petitioner has referred to several decisions in this

regard which we have noted. Reference to only one of them would be sufficient. This court in the case of Aditya Medisales Ltd. (supra) had occasion to take into consideration various judgments of the High Courts and Supreme Court in the background of facts which were thus. The petitioner had filed the return of

income for the assessment year 2005-06. Notice of reopening the assessment issued by the Assessing Officer. Such notice was challenged by the petitioner before the High Court. The High Court had admitted the petition and granted interim relief staying further proceedings pursuant to such notice. When the petition was pending, the Assessing Officer issued yet another notice under section 147 of the Act seeking to reopen the petitioner's assessment for the same

assessment year, however, on the basis of independent reasons possibly upon availability of fresh material. This second notice of reopening was challenged on various grounds including on the ground that in face of the pendency of the first notice of reopening, there could not be successive second reopening of the assessment. The court held and observed as under:

"7. There cannot be two parallel assessments based on two notices. As long as first assessment is not completed, question of reassessment would not arise. Once a notice is issued under section 148 of the Act, it triggers initiation of proceedings for assessment or reassessment of income which may have escaped assessment earlier. During such assessment, any income which may come to the notice of Assessing Officer may also be brought to tax. Till this assessment is not completed, it would not be possible for him to form a belief that income chargeable to tax had escaped assessment. Until the assessment, be it original or reopened, is pending before the Assessing Officer, the question of issuing notice for reopening would not arise. As noted, in the case of CIT v. Ranchhoddas Karsondas [1959] 36 ITR 569 (SC), the Supreme Court had taken a view that till the assessment proceedings are pending, it cannot be stated that there was escapement of income. To our mind, there is no distinction whether the pending assessment is pursuant to the return filed by the assessee originally or in response to the notice of

reassessment issued by the Assessing Officer. In either case within the contours of the provisions for assessment, the assessment of the

income of the assessee at the hands of the Revenue is at large.

8. We are conscious that the conclusion that we have

arrived at, may lead to a piquant situation for the Revenue. In a given case, it may so happen that notice for reopening may have been issued within the period of four years from the end of relevant assessment year, on the reasons recorded, which may have no relevance to non-disclosure of material facts. After four years it is entirely possible that the Revenue may chance upon further materials not disclosed by the assessee in the original return or during the assessment proceedings which may have a bearing on income escaping assessment. The suggestion that if additional information is available with the Revenue later on, it is always open for the Assessing Officer to withdraw the first notice and issue second notice including both sets of reasons, would fail in such an example. In the example cited, the Revenue would have a difficult choice to make whether to rest on the notice already issued and the reasons recorded for the same which would deprive the Revenue of the additional grounds to support reopening or after withdrawing the first notice to issue a fresh notice which would be beyond a period of four years and thereby sacrifice the reasons already recorded, which would not sustain the test of failure on part of the assessee to disclose truly and fully all material facts. However, such difficulty in making a choice, would not govern the interpretation of statutory provisions or would permit us to enlarge the scope of reassessment by holding that the second notice of reopening pending reassessment would also be permissible. We do not discern any concept of alternative or protective notice of reassessment. In the result, impugned notice of reopening is bad in law. This is despite the fact that the first notice came to be quashed on the ground that on the basis of reasons recorded, it cannot be stated that income chargeable to tax had escaped assessment.

9. To this conclusion, we may however add a

caveat. In a given case, if it is found that the notice itself is invalid being non est or ab initio void, it would be no valid notice in eye of law, pursuant to which any valid assessment proceedings would initiate. For example, if the notice is issued by an authority who was simply not competent or was issued without the

sanction of the Commissioner when so required, the notice would be void, non est and having no effect in eye of law. Such a notice would not reopen an assessment, would not commence assessment proceedings and whenever so declared, such a declaration would relate back to the original issuance thereof. In such a situation, if the Revenue has issued a second notice for reopening, the same would not be rendered invalid. In this context we may recall, the

Supreme Court in the case of CIT v. Ranchhoddas Karsondas (1959) 36 ITR 569 (SC), in the context of notice of reopening issued pending a return of nil income filed by the assessee linked the validity of the notice to the validity of the return observing that if the return filed by the assessee was no return, the conditions of section 34 (of the Act of 1922) would apply and the Assessing Officer could carry out the assessment."

17. When therefore in the present case the first

notice of reopening of assessment was not withdrawn, there was no scope, nor permissible in law to issue fresh notice of reopening. The counsel for the Revenue, however, vehemently contended that such withdrawal of notice of reopening must be deduced

from facts and attendant circumstances. His contention was that the Revenue had, all along, intended to withdraw the notice and the fact, that such notice was abandoned, was sufficient to establish withdrawal thereof. We, however, hold a slightly different belief. A notice of reopening which is once issued would remain in operation unless it is specifically withdrawn, quashed or gets time barred. First instance would be at the volition of the Assessing Officer as the person who had issued the notice. He can recall the notice for valid reasons and may even issue a fresh notice which is not impermissible in law. Nevertheless, there has to be an action of withdrawal. Mere intention, a stated intention or even an intention which

is otherwise put in practice cannot be equated with withdrawal of the notice. By mere intention to abandon the proceedings arising out of the notice, the Assessing Officer cannot bring about the desired result of withdrawing the notice. The notice was either

withdrawn or is stood as it is, may be without any follow up action on the part of the Assessing Officer.

18. The material on record would clearly demonstrate

that the Assessing Officer in the present case did not travel beyond expressing his clear intention to withdraw the notice. He had so stated before the High Court through his advocate on June 21, 2016 when Special Civil Application No. 2120 of 2016 was being disposed of. He has so stated at multiple places in the reply dated November 20, 2017 filed before us. At no stage, either he passed and communicated the order of withdrawal of the notice to the petitioner. Even the files do not show any such formal withdrawal of the notice with or without communication thereof to the petitioner. The

conclusion that we have reached would invariably result in

frustrating the Revenue's attempt to reopen the assessment and may have been seen to be based on somewhat technical reasons. Having succeeded on all other grounds, the Revenue may legitimately feel somewhat disappointed. Nevertheless, our duty is to give effect to the legal principles. The law does not recognize two parallel assessments. In absence of withdrawal of the first notice of reassessment, the proceedings would survive making the subsequent notice of reopening invalid.

(Emphasis supplied) In the light of the afore-quoted judgments of the High Courts of Calcutta and Gujarat, to which I am in respectful agreement, the notice so issued, which is second in line, in the teeth of subsistence of the notice, first in

line, is contrary to law. If the notice itself was contrary to law, the proceedings taken up in a notice that was invalid, are all nullity in law. In view of the issues being answered by the Apex Court, coordinate bench of this Court and various High Courts, the orders impugned are rendered unsustainable.

16. The learned counsel for the respondents has placed

reliance upon several judgments of the Apex Court and different High Courts which are all distinguishable without much ado, as they were clear cases of escaped assessment and the Apex Court holds that if there were reasons to believe, it could be reopened.

17. In the light of the above-said reasons, the following:

ORDER

(i) Writ Petition is allowed.

(ii) Notice dated 29-03-2019 issued by the 1st respondent and the order dated 07-11-2019 passed by the 2nd respondent stand quashed. Sd/-
(M.NAGAPRASANNA) JUDGE Bkp/CT:SS

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