

आयकर अपीलीय अधिकरण, विशाखापटणम पीठ, विशाखापटणम
IN THE INCOME TAX APPELLATE TRIBUNAL,
VISAKHAPATNAM BENCH, VISAKHAPATNAM

श्री वी. दुर्गाराव, न्यायिक सदस्य एवं
श्री जी. मंजुनाथा, लेखा सदस्य के समक्ष
BEFORE SHRI V. DURGA RAO, JUDICIAL MEMBER &
SHRI G. MANJUNATHA, ACCOUNTANT MEMBER

आयकर अपील सं./I.T.A.No.243/Vizag/2014
(निर्धारण वर्ष / Assessment Year: 2005-06)

ITO, Ward-3, Rajahmundry	Vs.	M/s. Ganesh Associates & Developers, Rajahmundry [PAN: AAGFG0302B]
(अपीलार्थी / Appellant)		(प्रत्यार्थी / Respondent)

C.O.29/Vizag/2014
(Arising out of I.T.A.No.243/Vizag/2014)
(निर्धारण वर्ष / Assessment Year: 2005-06)

M/s. Ganesh Associates & Developers, Rajahmundry	Vs.	ITO, Ward-3, Rajahmundry
(अपीलार्थी / Appellant)		(प्रत्यार्थी / Respondent)

अपीलार्थी की ओर से / Appellant by	: Shri G.V.N. Hari, AR
प्रत्यार्थी की ओर से / Respondent by	: Shri T.S.N. Murthy, DR
सुनवाई की तारीख / Date of hearing	: 26.07.2016
घोषणा की तारीख / Date of Pronouncement	: 09.09.2016

आदेश / O R D E R

PER V. DURGA RAO, Judicial Member:

This appeal filed by the revenue is directed against the order of CIT(A)-11, Mumbai Camp Office at Visakhapatnam dated 19.3.2014 for the assessment year 2005-06 and the cross objection filed by the assessee is challenging the notice issued u/s 148 of the Income Tax Act, 1961 (hereinafter called as 'the Act').

2. Facts are in brief that the assessee is a firm carrying on the business of real estate. The firm had entered into an agreement with M/s. Vijaya Durga Real Estate, Palakollu and Dr. A. Satyanarayana, Rajahmundry, to develop their land admeasuring 28.01 acres situated near Diwancheruvu abutting to National Highway. As per the development agreement, the assessee has to get Rs.2 lakhs per acre for development of flats as per the pre agreed terms & conditions Further, the assessee firm was also entitled to retain the sale proceeds of land over and above the guideline value of sub-registrar in as much as the additional amount represented the value of amenities provided by the assessee firm. The assessee firm has received a sum of Rs.5,61,60,203/- being the surplus over the guideline value of the sub-registrar from out of total receipts of Rs.6,95,00,000/-. A survey was

taken place at the business premises of the assessee firm on 12.3.2005 and note book was found wherein the details of the receipts by way of sale of flats and the details of the expenditure incurred were recorded. As per the said note book, the total receipts were Rs.6,12,26,833/- up to the date of survey. Thereafter, the assessee had filed a return of income by admitting total income of Rs.11,39,850/-. The return of income filed by the assessee was belated one, to regularize the same, a notice u/s 148 of the Act was issued to the assessee on 2.11.2007. In response to the said notice, the assessee filed a letter dated 5.11.2007 stating that the return filed by the assessee originally be treated as in response to notice issued. In the assessment order, the A.O. has observed that though the sale proceeds of the flats of the assessee at Rs.6.9 crores the assessee not filed audit report as per section 44AB of the Act and neither profit & loss account nor balance sheet for the year ending 31.3.2005 was furnished along with the return of income. Only receipts and expenditure statement are enclosed to the return of income. He further observed that during the course of hearing, the Ld. Counsel for the assessee has explained that no complete and regular books of accounts are maintained by the assessee. Hence, no audit was required u/s 44AB of the Act could be conducted. In the absence of complete and regular books of accounts, income of the assessee may be

estimated. The A.O. after considering the explanation of the assessee by considering the details filed by the assessee and after visiting the layout executed by the assessee thereafter after comparing the other cases in the similar line of business such as Bijapuri Township, M/s. Suma Estates, he has estimated income of the assessee at Rs.80 lakhs. Accordingly, assessment was completed u/s 143(3) of the Act. Subsequently, the A.O. had issued a notice u/s 148 of the Act dated 25.3.2011 on the ground that income chargeable to tax has escaped assessment. Before A.O. the assessee has submitted that assessment in its case already completed u/s 143(3) of the Act by considering all the facts and the A.O. has estimated the income and submitted that the subsequent notice issued u/s 148 of the Act dated 25.3.2011 is not legal and invalid. However, the assessing officer by following the decision of the Supreme Court in the case of **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. (2007) 291 ITR 500**, he has observed that the power to reopen the proceedings whether to assess, re-assess or re-compute the income, it has predicted on a test where a reasonable person would form a belief that there was relevant material for initiating the proceedings u/s 147 of the Act. He further observed that it is in the discretion of the A.O. to reopen the proceedings as per the above judgement of the Hon'ble Supreme Court the objection raised by the

assessee is overturned and assessment was completed by assessing the total income of the assessee of Rs.3,35,51,689/-.

3. The assessee carried matter in appeal before the CIT(A). It was submitted before the Ld. CIT(A) that the notice issued u/s 148 of the Act by the assessing officer is invalid and liable to be quashed. It was also submitted that the reopening is done by the A.O. based on the change of opinion and it is not permissible under the law. The Ld. CIT(A) after considering the explanation of the assessee has observed that the A.O. on perusal of the information available to him found that the assessee had shown sale of only 203 flats, whereas the Managing Partner admitted in the course of survey of as many as 330 flats had been sold. Based on the above information, A.O. has a reason to believe that income chargeable to tax has escaped assessment. With the Ld. Commissioner's approval the assessment was reopened by issuing a notice u/s 148 on 25.3.2011 and upheld the re-opening of the assessment done by the A.O. The Ld. CIT(A) further observed that there is nothing on the record to show that income tax statement filed by the land owner has been considered by the A.O. in the course of original assessment proceedings. To that extent of it, it cannot be said that the re-assessment proceedings were initiated by the present A.O. based solely on change of opinion on the same set of facts considered in

the course of original assessment proceedings. It is also noted that the disclosure of lower amount of sale consideration in its return of income would amount to a failure on the part of the assessee firm to disclose fully and truly and material facts relevant to its assessment. On that ground also, the proviso to section 147 of the Act would not save the assessee from being subject to re-assessment. Accordingly, he upheld the re-opening order passed by the A.O.

4. So far as merits of the case is concerned, he has observed that the profit ratio of 11.551% is reasonable in the original assessment order, would be a legitimate guide to estimate the profit on the additional turnover that has been hitherto suppressed by the assessee firm applying such a profit ratio to the suppressed turnover of ₹ 2,15,22,186/- identified, the income that had escaped assessment in the original assessment order would come to ₹ 24,77,204/- addition to that extent in the re-assessment order is hereby sustained and the balance is directed to be deleted.

5. On being aggrieved, revenue as well as assessee filed cross appeals before the Tribunal i.e. on merits revenue is in appeal. So far as legal issue of re-opening is concerned, assessee filed a cross objection. The cross objection filed by the assessee is reproduced as under:

- (1)
- (a) *The learned Commissioner of Income Tax (Appeals) is not justified in holding that the notice issued u/s 148 is a valid notice.*
- (b) *The learned Commissioner of Income Tax (Appeals) ought to have quashed the notice issued u/s 148 as illegal and consequently held that the entire reassessment proceedings are void-ab-initio.*
- (2) *Without prejudice to the above, the learned Commissioner of Income Tax (Appeals) is not justified in holding that the profit was under assessed in the original assessment proceedings.*
- (3) *Without prejudice to the above, the profit estimated by the learned Commissioner of Income Tax (Appeals) is on a higher side.*
- (4) *Any other grounds that may be urged at the time of appeal hearing."*

6. The main objection raised by the Ld. Counsel for the assessee is that notice u/s 148 of the Act issued by the A.O. dated 25.3.2011 beyond 4 years and therefore, the proviso to section 147 of the Act is applicable in the assessee's case and as per the proviso the A.O. has to allege that there is a failure on the part of the assessee to disclose all the true particulars before the A.O. if the A.O. has not raised any allegation in the reasons recorded, the re-opening is bad and notice has to be quashed. To support his argument, he has relied on the following judgements:

- 1. General Motors India (P) Ltd. Vs. DCIT (2014) 360 ITR 527 (Guj)**
- 2. Dynacraft Air Controls Vs. Smt. Sneha Joshi and others (2013) 355 ITR 102 (Bom)**
- 3. Mahalakshmi Motors Ltd. Vs. DCIT 265 ITR 53.**
- 4. Sri Sena Vaibagh Sahakari Vs. DCIT (2016) 69 Taxman.com 245 (Gujarat)**
- 5. Sadhbhavana Engineering Ltd. Vs. DCIT (2011) 333 ITR 483 (Gujarat)**
- 6. Grindwell Norton Ltd. Vs. Jagadish Prasad Jangid, ACIT & others 267 ITR 673 (Bom.)**

7. Pennar India Ltd. Vs. DCIT 241 ITR 672 (Mad.)

8. Hindustan Lever Ltd. Vs. RB Wadekar 268 ITR 332 (Bom.)

7. The Ld. Counsel for the assessee has raised a further legal issue that the assessee has filed all the details before the A.O., in the course of original assessment proceedings, the A.O. after considering the entire details, he has estimated the income of the assessee on the basis of very same information, the A.O. again issued a notice on the ground that there is an escapement of income and submitted that it is a clear change of opinion which is not permissible as per law. To support his arguments he has relied on the judgement of Hon'ble Supreme Court in the case of **CIT Vs. Kelvinator of India Ltd. (2010) 320 ITR 561**. The Ld. A.R. has pointed out from the paper book page no.3 question no.22 that where the A.O. has asked the assessee to explain how many flats sold so far and how much amount was received, in response to that, it was answered that we have sold about 330 flats and 51 remain to be sold and out of 330 flats, registration was done for about 200 flats and registration yet to be done for about 130 flats and further submitted that the Ld. CIT(A) in his order, he has observed that the assessee has sold 330 flats but only disclosed 203 flats, it is factually not correct. The A.O. in the original assessment order, he has considered all the details such as profit & loss account (paper book page no.12) capital

introduction by the partners at page no.13 and other details about lay out approval, expenditure capital introduction at paper book page nos.15 & 16 and the A.O. after considering the other assesseees who are involved in the real estate business particularly Bijapuri Township, Rajahmundry & M/s. Suma Estate, Rajahmundry estimation was made. Subsequently, on the very basis of some material another A.O. came to a conclusion that there is escapement of income which is not permissible, which amounting to change of opinion.

8. On the other hand, the Ld. D.R. has pointed out that the assessee has failed to disclose fully, truly all material to complete the assessment, therefore, the A.O. has issued a notice u/s 148 of the Act and re-assessed the income of the assessee which is according to law. The Ld. D.R. has strongly supported the order passed by the CIT(A) in respect of re-opening and submitted that the re-opening orders passed by both the authorities below may be upheld.

9. We have heard both the parties, perused the materials available on record and gone through the orders of the authorities below. The assessee is carrying on the real estate business. The assessee had entered into an agreement with M/s. Vijaya Durga Real Estate, Palakollu and Dr. A. Satyanarayana of Rajahmundry to develop their lands. There

is a survey took place at the business premises of the assessee firm on 12.3.2005 and a note book was found wherein the details of the receipts by way of sale of flats and the details of expenditure incurred were recorded. As per said note book, the total receipts are of ₹6,12,26,833/- upto the date of survey. Thereafter, the assessee has filed a return of income for A.Y. 2005-06 admitting total income of ₹ 11,39,850/-. In the assessment order, the A.O. has observed that though the gross receipts of the assessee are at ₹ 6.9 crores, the return of income filed is not accompanied with the audit report u/s 44AB of the Act. The assessee neither filed profit & loss account nor balance sheet. Only a receipt and expenditure statement is enclosed to the return of income. It is submitted before the A.O. that no complete and regular books of accounts were maintained by the assessee, hence no audit is required u/s 44AB of the Act would be conducted. He further stated that on the basis of the register maintained by the assessee with regard to the sale of flats and amount of consideration received, expenditure incurred and other information available the assessee filed a return of income. He pleaded before the A.O. that in the absence of complete and regular books of accounts, the income of the assessee may be determined on the estimate basis. The A.O. after examining the agreement entered by the assessee and also based on the note book filed during the course of

the survey and also taken into consideration of other assessees who are carrying similar line of business at Rajahmundry has estimated the income of the assessee at ₹ 80 lakhs. Thereafter, the A.O. has issued a notice u/s 148 of the Act dated 25.3.2011 for the following reasons:

*"Office of the Income Tax Officer, Ward-3
Rajahmundry, Dt.24.1.2012*

F.No.ITO, Ward-3/RJY/11-12

To

M/s. Ganesh Associates & Developers

D.No.75-6-49, Sarva Residency,

3rd Street, Addepalli Colony,

Rajahmundry

Sir,

Sub: Reasons for issue of notice u/s 148 of the Income Tax Act, 1961 in the case of M/s. Ganesh Associates & Developers, Rajahmundry, for the A.Y. 2005-06 – Intimation – regarding.

Ref: Your letter dt. 9.1.2012 received in this office on 11.1.2012

With reference to the above, the reasons for issue of notice u/s 148 of the I.T. Act, 1961 in the above mentioned case are as under:

On verification of records, it is noticed that the sales admitted by the assessee upto 13.3.2005 i.e. upto the date of survey, out of VDRE land are 125 plots with an extent of 31,147 sq.yards and on-money receipts which fall to the share of the assessee were shown at Rs.2,71,12,917/- while the sale details as per the statements furnished by M/s. VDRE show that 170 of its plots comprising 48,037 sq.yards were sold for the same period. The difference in the land area of these 45 plots is 16891 sq.yards and at the average on-money receipts per sq.yard working out to Rs.876/- per yard, concealment of receipts by the assessee works out to Rs.1,47,96,516/-.

Similarly, there is a vast discrepancy in respect of the land belonging to the other land owner, Sri A. Satyanarayana. Assessee's Managing Partner had admitted in the sworn statement that 330 of the total 381 plots were sold by 13.3.2005. While 170 plots out of VDRE's land were sold as admitted by the firm, the balance of 160 plots sold out of the land of the Sri A. Satyanarayana. However, the assessee has admitted receipts in respect of only 71 plots with a total area of 16741 sq.yards. With an average extent of each plot working out to 240 sq.yards, the extent of land suppressed is [240x89] 21360 sq.yards and assessee's share consideration at Rs.876/- per sq.yard comes to Rs.1,87,11,360/- [21360x876].

Thus, the entire suppressed receipts of Rs.3,35,07,876/- [Rs.147965156 + 18711360] have to be brought to tax for the Asst. year 2005-06.

In view of the above, income chargeable to tax has escaped assessment within the meaning of section 147 of the I.T. Act, 1961.

This is for your kind information.

*Yours faithfully,
Sd/-
(D. SUNDARA RAO)
Income Tax Officer, Ward-3,
Rajahmundry"*

10. In so far as first objection raised by the Ld. Counsel for the assessee is that the notice was issued beyond 4 years and submitted that the proviso to section 147 of the Act will come into play.

11. For the sake of convenience, proviso to section 147 of the Act is extracted as under:

*"**Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year."*

12. It is clear from the above proviso of section 147 of the Act that where assessment is completed u/s 143(3) of the Act if the A.O. of the opinion that there is an escapement of income after 4 years, he has to allege that by reason of the failure on the part of the assessee to make

a return to disclose fully and truly all material facts necessary for assessment for that assessment year. From the above reasons recorded by the A.O., we find that there is no allegation/observation that, the assessee has failed to disclose fully and truly all material facts necessary for his assessment for that assessment year. The proviso to section 147 of the Act has been considered by various courts and the relevant case laws are discussed, which are as under.

13. In the case of **General Motor India Pvt. Ltd. (supra)**, the Hon'ble Gujarat High Court has held that when the notice issued by the A.O. after 4 years, the A.O. not recorded a satisfaction that income has escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment, notice is not valid. In the absence of any satisfaction having been recorded by the A.O. that the income has escaped by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment hereunder consideration assumption of jurisdiction u/s 147 of the Act is failure and therefore, the impugned notice u/s 148 of the Act cannot be sustained.

14. In the case of **Dynacraft Air Controls (supra)** the Hon'ble Bombay High Court has observed that once A.O. has issued a notice

after 4 years, the condition precedent is that the A.O. has to state that there was a failure of the assessee to disclose fully and truly all the material facts necessary for assessment for that year if the A.O. failed to give a finding that the re-opening is not valid.

15. In the case of **Mahalakshmi Motors Ltd. (supra)** the Hon'ble jurisdictional High Court has held that the petitioner assessee furnished all the material facts truly and fully before the assessing authority at the relevant point of time when once all the information is furnished to the assessing authority, it is for the assessing authority to decide what inference can be reasonably be drawn and what legal inferences to be drawn ultimately. It is to be noted whether full and true disclosure of the facts was done by the assessee, the department cannot re-open the assessment even after there is a loss of revenue or even after legal inference drawn by the assessing authority was erroneous in the first place. Even mere change of opinion by the assessing authority is not enough to re-open the assessment in view of the various decisions of the Hon'ble Supreme Court.

16. In the case of **Sri Sena Vaibagh Sahakari Vs. DCIT (supra)** the Hon'ble Gujarat High Court has considered the similar issue and has held that in the absence of any failure on the part of the assessee to

disclose all the material facts necessary for assessment, assessing officer could not initiate re-assessment proceedings after expiry of 4 years from the relevant assessment year.

17. In the case of **Sadbhavana Engineering Ltd. (supra)** the Hon'ble Gujarat High Court has held that on plain reading of the reasons recorded it was apparent that they were totally silent as regards any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment for the relevant assessment years. Whether or not there was any failure on the part of the assessee in disclosing fully and truly all material facts necessary for its assessment was a matter of fact and there could be no deemed failure as was sought to be contended on behalf of the income tax authorities. Therefore, in the absence of any failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment, the notice u/s 148 of the Act having been issued after expiry of the period of 4 years from the end of the relevant assessment year, the very initiation of the proceedings u/s 147 of the Act should vitiated and could not be sustained.

18. In the case of **Grindwell Norton Ltd. (supra)** the Hon'ble Bombay High Court has held that "nowhere in the reason recorded by

the A.O., it is stated that there is a failure on the part of the assessee to disclose material facts in the return filed by the assessee. It is not in dispute that in the present case, the re-opening of the assessment is beyond the period of 4 years from the end of the relevant assessment year. In the absence of any failure on the part of the assessee to disclose fully and truly all material facts, the re-opening of the assessment beyond the period of 4 years cannot be sustained.

19. In the case of **Pennar India Ltd. (supra)** the Hon'ble Madras High Court has considered the application of proviso to section 147 of the Act and held that the pre-condition for the exercise of power u/s 147 of the Act, in cases where power is exercised within a period of 4 years from the end of the relevant assessment year is a belief reasonably entertained by A.O. that any income chargeable to tax has escaped assessment for that assessment year. However, when the power is invoked after the expiry of the period of 4 years from the end of the assessment year, a further condition for such an exercise is imposed by the proviso, namely, that there has been a failure on the part of the assessee to make a return u/s 139 of the Act or in response to a notice issued u/s 142 of the Act or section 148 of the Act or failure on the part of the assessee to disclose fully and truly all material facts necessary for

its assessment for that assessment year. Unless the condition in the proviso is satisfied, the A.O. does not acquire jurisdiction to initiate any proceedings u/s 147 of the Act after the expiry of 4 years from the end of the assessment. The A.O. must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate notice and the entire proceedings. Whenever a notice is issued by the A.O. beyond a period of 4 years from the end of the relevant assessment year, such a notice being issued without recording the reasons for his belief that income escaped assessment, it cannot be presumed in law that there is also a failure on the part of the assessee to file the returns referred to in the proviso or a failure to fully and truly disclose all material facts. The reasons referred to in the main part of section 147 of the Act would, in cases where the proviso is attracted, including reasons referred to in the proviso and it is necessary for the A.O. to record that any one or all circumstances referred to in the proviso exist before the issue of notice u/s 147 of the Act. If A.O. chooses to entertain the belief that the assessment has been made in the background of assessee's failure to disclose truly and fully all material facts it is necessary for him to record that fact, and in the absence of record to that effect, it cannot be held that a notice without recording

such fact, is capable of being recorded as a valid notice. As to whether the material fact disclosed by the assessee are full and true is always a question of fact unless the fact disclosed had been examined in relation to the extent of failure, if any, on the part of the assessee, it is not possible to confirm the opinion that there had been a failure on the part of the assessee to truly and fully disclosed the material facts. Notice issued without a record of AO's reasonable belief that there was such a failure on the part of the assessee would be indicating the AO's failure to apply his mind to material facts and on that ground the notice issued could be vitiated and held that notice issued by the A.O. u/s 147 of the Act cannot be sustained.

20. In the case of Hindustan Lever Ltd. (supra) the Hon'ble Bombay High Court has observed that "reasons recorded by the A.O. nowhere stating that there was a failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment, re-opening of assessment made u/s 143(3) of the Act after expiry of 4 years from the end of the relevant assessment year was invalid.

21. In the present case the re-opening notice was issued after 4 years, relevant to the assessment year. The assessing officer has recorded the reasons for re-opening, he has not alleged that there is a failure on the

part of the assessee to disclose fully, truly all material facts relevant to complete the assessment in that assessment year. Therefore, as per the proviso to section 147 of the Act when the assessment is re-opened beyond 4 years, it is necessary to allege that there is a failure on the part of the assessee to disclose fully and truly all the material facts to complete the assessment of such assessment year. The A.O. has not alleged that there is a failure on the part of the assessee. No doubt that each case has to be examined by considering the facts and circumstances of the case and also reasons recorded. In the present case, by considering facts and circumstances and also reasons recorded by the A.O. and by following the judicial precedents, we hold that the notice issued by the A.O. by recording the reasons not in accordance with the proviso to section 147 of the Act, thus, the notice is quashed and consequently held that the assessment is invalid.

22. So far as another legal issue raised by the assessee is that the assessee has filed all the details and the A.O. after considering all the details he has estimated the income of the assessee. Subsequently on the basis of same material, the A.O. after issuing a notice u/s 148 of the Act re-assessed the income and submitted that it is a change of opinion which is not permissible in accordance with law. So far as this issue is

concerned in the course of assessment proceedings, the A.O. has called various details i.e. joint development agreement, what are the flats sold, what are the flats unsold and lay out, and all other details and also A.O. inspected personally the lay out and also considered the other assessees i.e. Bijapuri Township, Rajahmundry and M/s. Suma Enclave carrying similar lines of business, he has estimated income of the assessee. On the basis of very same information, the A.O. is of the opinion that there is an escapement of income. There is nothing on the record to suggest that some material came to the notice of the A.O. and accordingly re-opening was made. When the assessee has raised an objection in respect of the re-opening proposed by the A.O., the A.O. has observed that as per the judgement of the Hon'ble Supreme Court in the case of **ACIT Vs. Rajesh Jhaveri Stock Brokers (P) Ltd. 291 ITR 500**, A.O. has every power to assess, re-assess, re-compute the income of the assessee u/s 147 of the Act. We find that the A.O. has failed to notice that in the case of **Rajesh Jhaveri Stock Brokers (P) Ltd. (supra)**, the Hon'ble Supreme Court has considered section 143(1) of the Act and held that it is a mere process and the question of expressing the opinion does not arise and therefore there is no change of opinion. In the present case the assessment was completed u/s 143(3) of the Act and notice u/s 148 of the Act was issued after 4 years, therefore,

proviso to section 147 of the Act comes into operation. The A.O. without considering the factual matrix of the case simply by following the judgement of the Supreme Court rejected the objection raised by the assessee. On appeal, though the Ld. CIT(A) has considered proviso to section 147 of the Act, he failed to consider the reason recorded by the assessee, wherein any allegation is made against the assessee that the assessee has failed to disclose truly all material facts to complete the assessment for the assessment year, without considering simply confirmed the order of the A.O. In our opinion, there is nothing on the record to suggest that there is any material came to the light of the A.O. to come to the conclusion that there is an escapement of income. In the original assessment order, in the absence of books of accounts A.O. came to the conclusion that after examining the entire project came to a conclusion that estimation is reasonable in this case, accordingly he has estimated Rs.80 lakhs as the income of the assessee. The A.O. in the re-assessment proceedings on the basis of very same material, he has come to a difference of opinion that there is escapement of income. This is a clear case of change of opinion and therefore, it cannot be permissible as per law. The Hon'ble jurisdictional High Court in this context has observed in the case of **Mahalakshmi Motor Pvt. Ltd. (supra)** that the petitioner assessee had furnished all material facts

truly and fully before the assessing authority at the relevant point of time when once all the information is furnished to the assessing authority, it is for the assessing authority to decide what inference can be reasonably be drawn and what legal inferences to be drawn ultimately. It is to be noted whether full and true disclosure of the facts was done by the assessee, the department cannot re-open the assessment even after there is a loss of revenue or even after legal inference drawn by the assessing authority was erroneous in the first place. Even mere change of opinion by the assessing authority is not enough to re-open the assessment in view of the various decisions of the Hon'ble Supreme Court.

23. In the case of **Kelvinator of India Ltd. (supra)** the Hon'ble Supreme Court has held that after 1st April, 1989, A.O. has power to re-open the assessment u/s 147 of the Act provided A.O. has reasonably believed that income has escaped assessment and there must be a tangible material to come to such conclusion that there is an escapement of income. That mere change of opinion cannot be per se reason to re-open. Keeping in view of the facts and circumstances of the case and by following the Hon'ble jurisdictional High Court as well as the judgement of the Hon'ble Supreme Court, we hold that the

re-opening done by the A.O. u/s 147 of the Act, on the basis of same information not valid. Accordingly, the same is set aside. In view of the above, the notice issued u/s 148 of the Act is quashed, consequently the assessment order passed by the A.O. is declared as invalid.

24. In the result, the Cross objection filed by the assessee is **allowed**.

25. So far as appeal filed by the revenue is concerned, in view of our decision above it become academic and therefore **dismissed**.

The above order was pronounced in the open court on 9th Sept'16.

Sd/-
(जी. मंजुनाथा)
(G. MANJUNATHA)

Sd/-
(वी. दुर्गराव)
(V. DURGA RAO)

लेखा सदस्य/ACCOUNTANT MEMBER न्यायिक सदस्य/JUDICIAL MEMBER

विशाखापटणम /Visakhapatnam:

दिनांक /Dated : 09.09.2016

VG/SPS

आदेश की प्रतिलिपि अग्रेषित/Copy of the order forwarded to:-

1. अपीलार्थी / The Appellant – The ITO, Ward-3, Rajahmundry
2. प्रत्यर्थी / The Respondent – M/s. Ganesh Associates & Developers, D.No.73-17-1, Srinivasa Gardens, A.V. Appa Rao Road, Rajahmundry
3. आयकर आयुक्त / The CIT, Rajahmundry
4. आयकर आयुक्त (अपील) / The CIT(A)-11, Mumbai, Camp Office Visakhapatnam
5. विभागीय प्रतिनिधि, आय कर अपीलीय अधिकरण, विशाखापटणम /
DR, ITAT, Visakhapatnam
6. गार्ड फ़ाईल / Guard file

आदेशानुसार / BY ORDER

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वरिष्ठ निजी सचिव (Sr.Private Secretary)
आय कर अपीलीय अधिकरण, विशाखापटणम /
ITAT, VISAKHAPATNAM