

**आयकर अपीलीय अधिकरण "A" न्यायपीठ मुंबई में।**

**IN THE INCOME TAX APPELLATE TRIBUNAL "A" BENCH, MUMBAI**

**BEFORE SHRI JOGINDER SINGH, JUDICIAL MEMBER  
AND SHRI RAMIT KOCHAR, ACCOUNTANT MEMBER**

आयकर अपील सं./I.T.A. No.2600/Mum/2014

(निर्धारण वर्ष / Assessment Year : 2005-06)

Ambuja Cement India Private Ltd. (Since Merged with Holcim India P. Ltd.), 106, Maker Chamber-III, Nariman Point, Mumbai-400021	<b>बनाम/</b>  v.	ACIT CIR 3(1) Aayakar Bhavan, M.K. Road, Mumbai-400020
स्थायी लेखा सं./ PAN : AACCA3390A		
(अपीलार्थी / <b>Appellant</b> )	..	(प्रत्यर्थी / <b>Respondent</b> )
Assessee by:	Shri. Soumen Adak & Shri. Harish Agarwal	
Revenue by :	Shri Satish Chandra Rajore, DR	

सुनवाई की तारीख /**Date of Hearing** : 06.08.2018

घोषणा की तारीख /**Date of Pronouncement** : 27.08.2018

आदेश / ORDER

**PER RAMIT KOCHAR, Accountant Member**

This appeal, filed by the Assessee, being ITA No. 2600/Mum/2014, is directed against appellate order dated 30.01.2014 passed by learned Commissioner of Income Tax (Appeals)-5, Mumbai (hereinafter called "the CIT(A)"), for assessment year 2005-06, the appellate proceedings had arisen before learned CIT(A) from assessment order dated 27<sup>th</sup> November 2012 passed by learned Assessing Officer (hereinafter called "the AO") u/s 143 (3) r.w.s. 147 of the Income-tax Act, 1961 (hereinafter called "the Act") for AY 2005-06.

2. The grounds of appeal raised by the assessee in the memo of appeal filed with the Income-Tax Appellate Tribunal, Mumbai (hereinafter called "the tribunal") read as under:-

*"1(a) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in confirming the action of the AO in initiating the reassessment proceedings u/s 147/148 without appreciating the fact that the same has been done in utter disregard of the express provisions of the Act, on fresh application of mind on the same set of facts, more so when there was no failure on the part of the appellant to disclose truly and fully all the facts necessary for completion of the original assessment u/s 143(3).*

*l(b) That on the facts and in the circumstances of the case, the Ld. CIT(Appeals) erred in not holding that the order u/s 143 r.w.s 147 dated 27-11-2012 passed by the AO is unjustified, erroneous and needs to be summarily cancelled.*

*2. That on the facts and in the circumstances of the case and without prejudice to Ground No. l(a), l(b) & l(c) taken here in above, the Ld. CIT (Appeals) was not justified and grossly erred in confirming the action of A.O. in assessing interest earned on fixed deposits, amounting to Rs. 2,24,06,786/-, under the head "Income from other sources" and not under the head "Profit and Gains from Business and Profession".*

*3. That on the facts and in the circumstances of the case and without prejudice to Ground No. 1(a), 1(b) & 1(c) taken here in above, the Ld. CIT(Appeals) was not justified and grossly erred in confirming the denial of set off of brought forward business loss against interest earned on fixed deposits.*

*4. That on the facts and in the circumstances of the case, necessary direction may please be given to the AO to re-compute the interest u/s 234B on disposal of the appeal or otherwise.*

*5. That the appellant craves leave to add, amend, modify, rescind, supplement or alter any grounds of the grounds stated here-in-above either before or at the time of hearing of the appeal."*

3.1. The assessee company is an investment company which is engaged in making strategic investments in the companies engaged in manufacturing of cement and allied products. The assessee filed its return of income with Revenue on 27.10.2005 declaring 'Nil' income . The assessment was originally framed by the AO u/s. 143(3) of the 1961 Act vide assessment order dated 26.11.2007 wherein additions to the income were made by the AO towards disallowance of

expenditure incurred in relation to the earning of an exempt income u/s 14A of the 1961 Act. The AO while framing aforesaid assessment u/s. 143(3) of the 1961 Act for impugned assessment year observed that the assessee has received dividend income of Rs. 9,86,80,000/- on investments and interest income of Rs. 2,24,06,786/- on Fixed Deposits with banks, which income was credited to Profit & Loss Account. It was observed by the AO while framing original assessment order dated 26.11.2007 passed u/s 143(3) of the 1961 Act that against these income's by way of interest on fixed deposits with banks and dividend received on shares held by it, the assessee had claimed certain expenses by way of salary, operating expenses and depreciation, aggregating to Rs. 8,84,937/-. The AO asked the assessee to explain why disallowance of expenses u/s 14A of the 1961 Act be not made in respect of expenses incurred in relation to earning of an exempt income being dividend income earned by the assessee during relevant previous year to the impugned assessment year. The assessee submitted before the AO that dividend income was earned on its shareholding in Associated Cement Company Ltd. (for short "ACC") and the investments were made out of internal accruals. It was submitted that no direct expenses were incurred for earning dividend income. The AO after considering submissions of the assessee observed that the assessee has incurred expenses for day to day activities and part of these expenses are relatable to the earning of dividend income of Rs. 9,86,80,000/- which was claimed as an exempt income u/s 10 of the 1961 Act. The AO observed that the assessee is maintaining common books of accounts and hence the expenses are to be apportioned between different heads of income. The AO disallowed expenses on proportionate basis to the tune of Rs. 7,21,181/- u/s 14A of the 1961 Act while framing original assessment order dated 26.11.2007 passed u/s 143(3) of the 1961 Act. This assessment order per-se had now attained finality and additions as were made by the AO u/s 14A of the 1961 Act stood affirmed in appellate proceedings.

3.2. Later it transpired that the Revenue was of the view on perusal of the records that income from interest on fixed deposits with banks amounting to Rs. 2,24,06,786/- earned by the assessee during the previous year relevant to the impugned assessment year ought to have been assessed by the AO under the head of income namely 'Income from the other sources' instead of head of income namely 'Profits and Gains of Business or Profession' under which the said income was assessed by the AO originally while framing assessment order dated 26.11.2007 passed u/s 143(3) of the 1961 Act for which reasons were recorded by the AO for reopening of the concluded assessment within mandate of Section 147 of the 1961 Act and notice was issued by the AO to the assessee on 22.03.2012 u/s. 148 of the Act, which was undisputedly duly served on the assessee on 26.03.2012 as detailed hereunder:-

*"In this case, assessment u/s.143(3) of the I.T. Act, 1961 was completed on 26.11.2007, assessing the total income at Rs. Nil under normal provisions of the I.T.Act and Book Profit at Rs.80,18,149/-u/s.115JB of the I.T.Act.*

*2. On perusal of the records, it is seen from the P&L account that the assessee received income of Rs.2,24,06,786/- as interest on fixed deposit in banks. However, this was included under the head 'profits and gains from business or profession' as against the head 'Income from other sources' under which the said interest income is correctly chargeable to tax. During the year, the assessee has claimed and was allowed set-off of business loss of Rs.2,22,50,406/~ against the said interest income. The interest income on fixed deposits should have been considered as income from other sources. As per provision of section 72 of Income Tax Act, 1961 brought forward business loss is not allowed to be set off against income from other sources. Hence, the assessee, suo moto, ought not to have claimed set-off of business loss against interest income and offered the said interest income for tax under the head 'Income from Other Sources'. The issue was also not examined by the Assessing Officer during the course of assessment proceedings u/s.143(3) of the I.T.Act.*

*3. Therefore, the assessee has failed to disclose fully and truly all material facts relevant to the assessment year under consideration.*

*4. In view of the above, I have reason to believe that the income as aforesaid chargeable to tax exceeding Rs. 1 lakh has escaped assessment, resulting into short levy of tax. Hence, the assessee's case is hereby reopened for reassessment u/s.147 r.w.s143(3) of the I.T.Act, 1961 for A.Y.2005-06.*

*The necessary prior approval in this regard has been given by the C.I.T.-3, Mumbai vide letter dated 20.03.2012.”*

3.3. The assessee was served by the AO with the copy of aforesaid reasons for reopening of the concluded assessment . It is undisputed between rival parties firstly that the assessment was originally framed by the AO u/s 143(3) of the 1961 Act which was framed by the AO after taking conscious decision to assess interest income as business income and secondly that the notice u/s 148 for reopening of concluded assessment was issued after the expiry of four years from the end of relevant assessment year and first proviso to Section 147 of the 1961 Act is applicable. The assessee in reply before the AO at the outset submitted that proceedings for reopening of the concluded assessment within provisions of Section 147 of the 1961 Act in the instant case are bad in law . The assessee raised following objections which were summarized by the AO as hereunder:-

- “ (a) Proceedings u/s. 147 are invalid since the notice was issued after expiry of four years from the end of the relevant assessment year.*
- b) There is no failure on the part of the assessee in disclosure of material facts necessary for completing the assessment.*
- (c)The assessment u/s. 143(3) for A.Y.2005-06 has been completed by the A.O. without disturbing the computation of total income shown by the assessee.*
- (d)The facts on the basis of which the proceeding were initiated are available on the records and no new material has been brought on the record after passing of the assessment order.*
- e) Proceedings u/s.147 are barred by limitation and hence need to be dropped.*
- (f) The assessee has also placed reliance on the decisions of various Hon'ble Courts in support of its contention.”*

3.4. The AO disposed of the objection raised by the assessee challenging the legality and validity of reopening of the concluded

assessment and upheld the initiation of reassessment proceedings u/s 147/148 of the 1961 Act, by holding as under:-

*“3. The objections raised by the assessee have been carefully appreciated. It is clear there from that the assessee suffers from a huge obsession of the fact that the reopening of assessment, as done in its case, is nothing but change of opinion and there is no failure on the part of the assessee to disclose fully and truly all material facts necessary for its assessment. The various contentions raised by the assessee clearly indicate its perception that all such re-opening of assessments is unjust, arbitrary and capricious. In fact, that was precisely the highlight of the entire contention of the assessee in its submission given vide letter dated 12-10-2012. However the contentions of the assessee are not found to be acceptable and are rejected on following grounds:-*

*3.1 It is incorrect on the part of the assessee to state that the notice is bad in law as it has been issued beyond the time limit of four years prescribed u/s.147. In this connection attention is invited towards the provisions of section 149 which is reduced as under:*

*149, (1) No notice under section 148 shall be issued for the relevant assessment year,—*

*(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under clause (b);*

*(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.*

*Explanation. —In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 of section 147 shall apply as they apply for the purposes of that section.]*

*A plain reading of the provisions of the section 149 clearly shows that a notice u/s 148 can be issued upto six years from the end of the relevant assessment year if the income chargeable to tax, which has escaped assessment amounts to or is likely to amount to Rs. 1,00,000/- or more for that year. In the case of the assessee company on the basis of material available on record and reasons recorded thereof the escapement of income from tax was in excess of Rs.1 lakhs thereby necessitating the reopening of the assessment u/s. 148. Thus notice u/s 148, which is issued on 22.03.2012 and served on 26.03.2012, is well within the provision of section 149 of the IT Act.*

*3.2 The assessee has further objected that all material facts were fully and truly disclosed at the time of original assessment as such reopening of the assessment is bad in law and requires to be dropped. In this connection the assessee has placed reliance on various judicial decisions and contended that re-opening of assessment in its case is void ab-initio. The contention of the assessee is not acceptable considering the fact that the assessment was re-*

*opened on the basis of a concrete reason to believe that the income chargeable to tax has escaped assessment. As stated in para 2 above, the assessee had claimed interest of Rs. 2,24,06,786/- earned on fixed deposits in banks was chargeable under the head 'Business Income' as against the head 'Income from other sources' under which the said interest income is correctly chargeable to tax. By adopting this treatment, the assessee has availed the undue benefit of set-off in respect of business loss of Rs 2,22,50,406/- against the aforesaid interest income, which otherwise would not have been allowed. The interest income on fixed deposits should have been considered as income from other sources. As per provision of section 72 of Income Tax Act, 1961 brought forward business loss is not allowed to be set off against income from other sources. Hence, the assessee, suo moto, ought not to have claimed set-off of business loss against interest income and offered the said interest income for tax under the head 'Income from Other Sources'. This has resulted into escapement of income involving short levy of tax. The issue was also not examined by the Assessing Officer during the course of assessment proceedings u/s. 143(3) of the I.T.Act, thus necessitating reopening of assessment, which is lawfully valid and justified.*

*3.3 As stated above the reassessment proceedings have been initiated after recording reasons to believe only and there is no change of opinion. As a matter of fact, this issue was not examined during the course of original assessment proceedings. In this regard, the provisions of S.147 are squarely applicable in this case , as is evident from the following:*

*As per Explanation 1 to S.147 "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 to S.147, reads as follows:*

*"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).....*

*(b).....*

*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".*

*Therefore, it can be noticed that production before the Assessing Officer of account book or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily*

*amount to disclosure. Hence, the assessment has been correctly reopened as per the provisions of Income Tax Act and there is no change of opinion.*

*3.4 As discussed above the notice u/s 148 was issued in this case on the basis of details available on record, which formed the sufficient basis for reason to believe that the income has escaped from assessment thereby necessitating the issuance of notice u/s 148. The objections raised by the assessee, in this regard vide letters dated 12/04/2012, 18/04/2012 and 20/10/2012 are therefore rejected. While coming to this conclusion the undersigned also places reliance on the decision given by the Hon'ble High court of Punjab & Haryana in the case of Jawand Sons Vs. CIT(Appeals)-II, Ludhiana [326 ITR 39(Pun. & Har. (2010))], The relevant portion the decision given in this case justifying the issuance of notice u/s. 148 is reproduced as under:*

*“After hearing learned counsel for the appellant-assessee and going through the order passed by the IT AT, we do not find any ground to Interfere in this appeal, as in our opinion no substantial question of law is arising in this appeal, because a pure finding of fact has been recorded to the effect that the reassessment proceedings have rightly been initiated after framing the opinion that some income chargeable to tax has escaped assessment. Under section 147 of the Act, after its amendment with effect from 1-4-1989, wide power has been given to the Assessing Officer even to cover the cases where the assessee had fully disclosed the material facts. The only condition for action is that the Assessing Officer should have reason to believe that the income chargeable to tax had escaped assessment. Such belief can be reached in any manner, and is not qualified by a pre-condition of faith and true disclosure of material facts by the assessee as contemplated in the pre-amended section 147(a) of the Act. In the instant case, as far as merits of the case is concerned, with regard to the permissible deduction under section 80-IB of the Act, it is clear position that the assessee was not entitled to claim deduction on account of Duty Draw Back and DEPB incentives, as these incentive profits do not fall within expression "profits derived from industrial undertaking" in section 80-IB of the Act. Therefore, Duty Draw Back and DEPB do not form part of net profits of the industrial undertaking for the purposes of section 80-IB of the Act." [Emphasis Supplied]*

*3.5 The contention of the assessee that all relevant facts and material were already placed before the A.O. and the re-opening is nothing but mere 'change of opinion' is not acceptable in view of the ratio of decision given by Hon'ble High Court of Delhi in the case of Consolidated Photo & Flinvest Ltd. [(2006) 281 ITR 394], wherein the Hon'ble Court has held as under:*

*“it is clear from the above, that the two critical aspects which need to be addressed in any action under section 147 are whether the Assessing Officer has 'reason to believe', that any 'income chargeable to tax has escaped assessment and whether the proposed reassessment is within the period of limitation prescribed under the proviso to section 147. Explanation (1) to the said provision makes it clear that*



*production of account books or other evidence from which the Assessing Officer could with due diligence discover material evidence would not necessarily amount to disclosure within the meaning of the proviso that stipulates an extended period of limitation for action in the cases where the escapement arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment Explanation (2) to section 147 stipulates the circumstances in which income chargeable to tax shall be deemed to have escaped assessment. [Para 8]*

*The cases falling in clause (c) of Explanation (2) in which income chargeable to tax has been under-assessed or assessed at too low a rate or cases in which income has been made the subject of excessive relief under the Act or where excessive loss or depreciation allowance or any other allowance under the Act has been computed, would constitute cases of income escaping assessment. There is considerable authority for the proposition that the jurisdiction of the Assessing Officer to initiate proceedings would depend upon whether he has reasons to believe that any income chargeable to tax has escaped assessment. A long string of decisions rendered by the Supreme Court has emphasized that the belief of the Assessing Officer must be in good faith and must not be a mere pretence. That there must be a nexus between the material before the Assessing Officer and the belief which he forms regarding the escapement of the assessee's income. A writ Court, therefore, is entitled to examine whether the Assessing Officer's belief was in good faith and whether such reasons had a nexus with the action proposed to be taken. [Para 9]*

*It was common ground that, in the instant case, the Assessing Officer had not received any additional information from any outside source or quarter but the fact that there was no such information did not make any material difference. Action under section 147 is permissible even if the Assessing Officer gathered his reasons to believe from the very same record as had been the subject-matter of the completed assessment proceedings. [Para 10]*

*The proviso to section 147 envisages action in the ordinary course within a period of four years from the end of the relevant assessment year. That limitation does not, however, apply to the cases where income chargeable to tax has escaped assessment on account, inter alia, of the failure of the assessee to disclose fully and truly all material facts. The argument that production of the account books and other documentary evidence relevant for assessment must imply a full and true disclosure of all material facts must be rejected out of hand in the light of the provisions of Explanation (C ), according to which mere production of the books of account or other evidence from which the Assessing Officer could have, with due diligence, discovered the material evidence does not necessarily amount to a disclosure within the meaning of the proviso. The action initiated by the revenue did not in that view suffer from any error of jurisdiction to warrant*

*interference from the Court in exercise of its writ jurisdiction. [Para 1 1][Emphasis Supplied]*

3.6 In this connection further reliance is also placed on the decision given by the Jurisdictional High Court of Bombay in the case of Dr. Amin's Pathology laboratory {(2001)(252 ITR 673)}, wherein the hon'ble court has as under:

*As regards the assessee's contention that the impugned notice was issued after expiry of period of limitation, it was seen that the period of four years had since elapsed. Therefore, the proviso, to section 147 came into the picture. Under the said proviso, no action can be taken after four years unless any income chargeable to tax has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The assessee had been following the mercantile system of accounting for all items of expenditure and income except for all collections which were under cash basis. A reading of the assessment order clearly showed that the Assessing Officer failed to notice an important item, viz., an amount of which represented unpaid purchases. The assessee-firm had claimed expenses in respect of all purchases. However, an amount represented unpaid purchases. It was for that reason that the Assessing Officer had come to the conclusion for issuance of notice under section 148 that the assessee-firm had suppressed an income to the extent amount of unpaid purchases. Under Explanation 1 to the proviso to section 147, mere production of account books from which material evidence could have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the proviso. Therefore, mere production of the balance-sheet, profit and loss account or account books will not necessarily amount to disclosure within the meaning of the proviso. In the instant case, the facts showed that the Assessing Officer overlooked the aforesaid item. That, he noticed it subsequently. That, at the time of passing the original order of assessment, he could not be said to have opined on the above item. Consequently, there was no change of opinion. Therefore, in the instant case, the impugned notice was to be sustained. ][Emphasis Supplied]*

3.7 Further, reliance is also placed on the decision of Hon'ble Supreme Court of India in the case of A.L.A. Firm [(1991) (189ITR 285)], wherein the Hon,ble Apex Court has held as under:

*No doubt, in the face of all the details and statement placed before the ITO at the time of the original assessment, it was difficult to take the view that the ITO had not at all applied his mind to the question whether the surplus was taxable or not. It was true that the return was filed and the assessment was completed on the same date. Nevertheless, it was opposed to normal human conduct that an officer would complete the assessment without looking at the material placed before him. It was not as if the assessments record contained a large number of documents or the case raised complicated issues rendering*

*it probable that the ITO had missed these facts. It was a case where there was only one contention raised before the ITO and it was impossible to hold that the ITO did not at all look at the return filed by the assessee and the statements accompanying it. The more reasonable view to take would be that the ITO looked at the facts and accepted the assessee's contention that the surplus was not taxable. But in doing so, he obviously missed to take note of the law laid down in G.R. Ramachari & Co.'s case ('supra') and there was nothing to show that case had been brought to his notice. When he subsequently became aware of the decision, he initiated proceedings under section 147(b). The material which constituted information and on the basis of which the Assessment was reopened was the decision in G.R. Ramachari & Co.'s case (supra). This material was not considered at the time of the original assessment. Though it was a decision of 1961 and the ITO could have known of it had he been diligent, the obvious fact was that he was not aware of the existence of that decision then and, when he came to know about it, he rightly initiated proceedings for assessment.*

*3.8 In view of the facts of the case as discussed above the undersigned finds no merits in the objections raised by the assessee and each of the objection is therefore rejected in the manner as discussed in above paras and the reopening of assessment by way of issue of notice u/s 148 is considered lawfully valid and justified. The objections raised by the assessee are thus disposed off in accordance with the parameters laid down by the Hon'ble Supreme Court in the case of GKN Drive Shaft (India) Ltd [(2002) 125 TAXMAN 963 (SC)] and the issues raised are considered as adequately dealt with."*

4. We are dealing in our order firstly to challenge made by the assessee to the legality and validity of reopening of the concluded assessment u/s. 147 of the Act by Revenue by contending that reopening of the concluded assessment u/s 147 of the 1961 Act was in itself bad in law liable to be quashed, and if we find that reopening of the concluded assessment u/s 147 of the 1961 Act is in itself not sustainable in the eyes of the law which requires our interference by quashing reopening of the concluded assessment itself, then in that situation no occasion will arise for us to discuss the issue's in this appeal on merits as the same will become academic and infructuous but in the eventuality of our upholding the legality and validity of the decision of the learned Assessing Officer of reopening of the concluded assessment u/s. 147/148 of the 1961 Act then in that situation we

will be proceedings to adjudicate the issues arising in this appeal on merits.

5.1 Aggrieved by the decision of the learned AO, the assessee filed first appeal before learned CIT(A) and challenged inter-alia reopening of the concluded assessment u/s. 147 of the Act after the expiry of the four years from the end of the assessment year. The assessee during the appellate proceedings before learned CIT(A) submitted following submissions challenging legality and validity of reopening of the concluded assessment u/s. 147 and 148 of the Act by the AO, by submitting as under:-

*“3] Ground No. 2(a), 2(b) & 2(c) : Initiation of reassessment proceedings is bad in law: The appellant has filed its return of income on 27-10-2005 determining Total Income at Nil computed under the provisions of the Act other than Section 115JB. In the said return, Book Profit as per the provisions of section 115JB was computed at Rs. 72,96,968/-. The said return was processed vide Intimation u/s 143(1) dated 12-10-2007 accepting the returned income.*

*Subsequent to the aforesaid proceedings, the Deputy Commissioner of Income Tax (here in after referred as 'Ld. DCIT') passed order u/s 143(3) on 26-11-2007. In the said order, the Ld. DCIT made disallowance u/s 14A and accordingly total income under the provisions of the Act other than Section 115JB was computed at nil and Book Profit u/s Sec. 115JB was computed at Rs. 80,18,149/-.*

*3.1] Subsequent to the above, proceedings u/s 147/148 was initiated vide notice dated 22-03-2012. In response to the said notice, the appellant vide letter dated 12-04-2012, asked for the reasons for initiating the reassessment proceedings. Copy of the letter dated 12-04-2012. During the course of reassessment proceedings the appellant was served with letter dated 17-04-2012 stating the reasons for initiation of reassessment proceedings, wherein it was stated that the appellant has wrongly shown interest earned on fixed deposits amounting to Rs. 2,24,06,786/- as business income instead of income from other source. Further, it was contended that the appellant had wrongly claimed set off of brought forward business loss against the said interest income which is against the provisions of Sec. 72 of the Income tax Act.*

*3.2] In response to the same the appellant vide letter dated 12-10-2012 objected to the initiation of reassessment proceedings and also explained that interest from fixed deposits should be classified under the head 'Profits and Gains from Business or Profession'. Without prejudice to the above, the appellant also submitted that even if for the purpose of computation of income,*

*interest on fixed deposit is separately classified under the head 'Income from Other Source', then also the same does not cease to be income of the business and the appellant would be entitled for set off of brought forward business loss against the said income in terms of Sec. 72 of the Act.*

*3.3] Disregarding the submissions made by the appellant, the Ld. Assistant Commissioner of Income Tax (here in after referred to as Ld. ACT) passed order u/s 147 r.w.s 143(3) on 27-11-2012 determining total income at Rs. 2,22,50,410/-computed under the provisions of the Act other than Sec. 115JB and raising a demand of Rs. 1,32,78,039/-. In the said order, among others, the Ld. ACIT has taxed interest earned on fixed deposits as 'Income from other sources' instead of income under the head ' Profit and Gains from Business and Profession', while computing the total income under the normal provisions of the Act.*

*3.4] Proceedings u/s 147 is time barred : At the outset, it is pertinent to note the provisions of section 147 which provides as under:*

*"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....."*

*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 subsection (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year"*  
(Emphasis added)

*3.5] On perusal of the above, it is apparently clear that an assessment made u/s 143(3) can be reopened after the expiry of 4 years from the end of the relevant assessment year only if any of the following conditions are satisfied.*

- a. Non-filing of return u/s 139(1)*
- b. Non-appearance in response to notice u/s 142(1) or 148.*
- c. Non- disclosure of material facts necessary for the assessment.*

*3.6] In the present case the notice initiating reassessment proceedings have been issued and served on 22-03-2012 i.e., much after expiry of four years from the end of the assessment year. Further, in the instant case, the appellant*

*had filed its return of income on 27-05-2005 u/s 139(1) and there has been no default in compliance with the notices u/s 142(1).*

*3.7] As regards disclosure of material facts necessary for completing the assessment, it is submitted that there is no failure on the part of the appellant in this regard. All the material on the basis of which the AO has reasons to believe was available on record at the time of the completion of the original assessment u/s 143(3).*

*3.8] In this regard, it is pertinent to note that in the instant year the appellant has earned dividend income of Rs. 9,86,80,000/- and interest on fixed deposits from bank of Rs. 2,24,06,786/-. The same was reflected on the face of the Profit and Loss A/c under the head " Income". In this regard, relevant extracts of the audited accounts for the financial year ended 31-03-2005. Further, in the return of the income filed on 27-10-2005, the appellant claimed the interest income on fixed deposits amounting to Rs. 2,24,06,786/- under the head of 'Profits and Gains from Business or Profession' and dividend income of Rs 9,86,80,000/- under the head 'Income from other sources'. Thereafter, the appellant has set off brought forward loss of Rs. 2,15,29,225/- against income under the head Profits and Gains of Business or Profession.*

*3.9] Further, the case was selected for scrutiny and order u/s 143(3) dated 26-11-2007 was passed wherein the AO has clearly stated the fact that in the instant year the appellant has earned dividend of Rs. 9,86,80,000/- and interest on fixed deposit of Rs. 2,24,06,786/- which has been duly credited in the Profit and Loss A/c. In the order u/s 143(3), after considering all the material facts available on records, the AO made a solitary disallowance u/s 14A of Rs. 7,21,181/-. Thereafter the AO started the computation of total income by taking net profit as per P&L A/c and after making various adjustments computed 'Profits & gains from Business/Profession' which was subsequently set off with brought forward business loss. Thereafter it computed 'Income from Other Sources' wherein dividend income was only included. Copy of the assessment order u/s 143(3) dated 26-11-2007 is already enclosed as Annexure - 1 (Refer Page No 31 to 35 of W/S).*

*3.10] In view of the above, it could be seen that the reasons mentioned in the notice dated 22-03-2012 for initiating the reassessment proceedings have been made on the basis of certain facts, all of which were available in the assessment records and no new material has been brought to the notice of the Ld. ACIT subsequent to the passing of assessment order. Thus, by virtue of the express provisions of the statute, as enumerated here-in above, proceedings initiated u/s 147 is barred by limitation.*

*3.11] Attention in this regard is drawn to the decision of the Hon'ble Bombay High Court in the case of ICICI Securities Ltd. -vs.-ACIT (W.P. No 1919 of 2006) Bom) ( Copy of the aforesaid decisions is enclosed as Annexure - 8 ) (Refer page No 60 to 65 of WS). In the said case reassessment was made since the assessee had treated loss on trading in shares as business loss and not as speculative loss. After examining the facts of the case, it was held as under:-*

*"In the facts of the present case, there is nothing new which has come to the notice of the revenue. The accounts have been furnished by the petitioner when called upon. Thereafter the assessment was completed under section 143(3) of the Income Tax Act, Now, on a mere relook, the officer has come to the conclusion that the income has escaped assessment and he is of course justified in his analyses. In our view, this is not something which is permissible under the provision to section 147 of the Income Tax Act which speaks about a failure on the part of the assessee to make a proper return. In the present case, no such case is made out on the record."..*

*The decision of the jurisdictional High Court has since been affirmed by the Apex Court in ACIT - vs. - ICICI Securities Primary Dealership Ltd. (2012) 348 ITR 299 (SC).*

*3.12] Reliance in this regard is placed on the decision in the case of Bhavesh Developers -vs.- AO (2010) 229 CTR 160 (Bom) wherein the AO reopened the assessment after expiry of four years on the contention that deduction u/s 80IB is not to be allowed on other income which mainly comprises of society deposit, stilt parking and sundry credit balance. The Hon'ble High Court in arriving at the decision held that reasons which have been disclosed to the appellant shows that the findings is based on the details filed by the appellant and the P&L A/c. There was no failure on the part of the appellant to fully and truly disclose all necessary facts for the purpose of assessment and hence reopening of assessment after four years is not valid in the present case.*

*3.13] Reliance can also be placed in the case of Nihilent Technologies Pvt Ltd -vs.- DCIT (2011-TIOL-451-HC-Mum-IT) wherein it has been held that if there is no failure to disclose fully and truly all material facts necessary for the purpose of assessment, then, as per the proviso to section 147 of the Act reopening of the assessment beyond four years from the end of the relevant assessment year cannot be sustained.*

*3.14] Further, in the case of Supreme Treves Pvt. Ltd.-vs.-DCIT (2009) 23 DTR 215(Bom) the AO reopened the assessment after expiry of four years on the contention that the goodwill is not an intangible asset eligible for depreciation and the assessee has not disclosed the nature of goodwill on which depreciation has been provided in assessment. The Hon'ble High Court has held that, if according to Revenue, no depreciation is allowable on the goodwill, then, it would be wholly irrelevant to consider the nature of the goodwill, further the return of income filed by assessee, particularly the notes and schedule attached to the balance sheet clearly showed that all facts relating to claim of depreciation on goodwill had been fully disclosed by the assessee. As there was no failure on the part of the assessee to disclose all facts, the reopening of assessment after the expiry of four years could not be sustained.*

*3.15] Reliance in this regard is also placed on the decision in the case of Idea Cellular Ltd, -vs.- DCIT & Ors. (2008) 301 ITR 407 (Bom) wherein the AO reopened the assessment after expiry of four years on the contention that*

*amalgamation reserve credited directly to Reserves and Surplus Account has escaped assessment. The Hon'ble Bombay High Court has held that, since the petitioner has mentioned the accounting entry for amalgamation reserve in the return itself and also answered queries raised by AO during assessment on the issue, there was no failure on the part of the petitioner to disclose fully and truly all material facts necessary for assessment of the relevant assessment year. The pre-requisite condition contained in the proviso to sec. 147 has to be met before initiating reassessment proceedings after the expiry of the period of 4 years from the end of the relevant assessment year. Once all the material was available before the AO and he chose not to deal with the several contentions raised by the petitioner in his final assessment order, it cannot be said that he had not applied his mind when all the materials was placed by the petitioner before him.*

*3.16] Further, reliance is also placed on the decision in the case of Gango Saran & Sons Pvt. Ltd, -vs.- CIT (1981) 130 ITR 01(SC) wherein it was held that it is well settled that two distinct conditions must be satisfied before issue of notice u/s. 147(a). Firstly, the AO must have reason to believe that income has escaped assessment and secondly, he has the reason to believe that such escapement is made by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts. If either of these conditions is not fulfilled, the notice of the ITO would be without jurisdiction.*

*3.17] Reliance is also placed on the decision of Bombay High Court Kimplas Trenton Fittings Ltd, -vs.- ACIT (2012) 340 ITR 299(Bom), wherein it has been held that the assessee having disclosed during the assessment proceedings the fact that under an MoU with a Swiss company lender the outstanding loan was settled at Swiss Francs 4,80,000 as against the outstanding balance of 8,00,000 Swiss Francs and that it has written back an amount of Rs. 1.10 crores equivalent to swiss Francs 3,20,000 and relied upon a case law in support of the submission that the writing back of the loan did not constitute income all material facts and such facts are were within the knowledge of the AO, it cannot be held that there was a failure on the part of the assessee to disclose fully and truly all the material facts necessary for assessment and, therefore, reopening of assessment after expiry of four years from the end of the relevant assessment year is not valid.*

*3.18] In this regard reliance is also placed on the decision of Bombay High Court in the case of German Remedies Ltd, -vs.- PCIT (2006) 287 ITR 494 (Bom). wherein it has been held that where the assessee has disclosed all the relevant facts supported by statutory audit as well as tax audit reports, the mere fact that valuation of closing stock may have to be different would not justify a reassessment notice after four years.*

*3.19] In this regard, reliance is placed on the decision of the Full Bench of the Delhi High Court in the case of CIT -vs.- Kelvinator of India Limited (2002) 256 ITR 1 (Del)(FB) wherein it has been held that initiation of re-assessment proceedings on the basis of information in the Tax Audit Report is not acceptable since the same was submitted by the appellant along with the return of income. It is one thing to say that the AO had received information*



*from an audit report which was not before him, but it is another thing to say that such information can be derived by the material which had been supplied by the appellant himself. While arriving at the said decision the Hon'ble Delhi High Court referred to the CBDT Circular No. 549 dated 31.10.1989 which, while explaining the scope and effect of section 147, made it very clear that a mere change of opinion cannot form the basis of reopening a completed assessment and also held that the circular issued by the board is legally binding on the revenue. The Hon'ble Delhi High Court further added that in the event the Income Tax officer exercises its jurisdiction u/s 147 upon a mere change of opinion the same may be held to be unconstitutional since a statute conferring an arbitrary power may be held to be ultra vires Article 14 of the Constitution of India. It was also held that when a regular order of assessment is passed in terms of section 143(3), a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act, 1872, judicial and official acts have to be regularly performed. The aforesaid view has been fortified by the Apex court in case of CIT -vs.- Kelvinator of India Ltd. (2010) 320 ITR 561 (SO) wherein the Hon'ble Apex Court has held that, after 01-04-1989, the A.O. has power to re-open, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief. The Apex court further held that, one needs to give a schematic interpretation to the words 'reason to believe' failing which, section 147 would give arbitrary power to the A.O. to reopen assessment on the basis of mere change of opinion which cannot be per se reason to reopen.*

*3.20] Recently, the full bench of the Hon'ble Delhi High Court in the case of CIT -vs. Usha International Ltd (2012)348 ITR485(Del) on the issue of validity of initiation of reassessment proceedings has held that even in case where the Assessing Officer has not raised any particular query, if the issue is so apparent and obvious that to say that the AO has not formed an opinion would be contrary and opposed to normal human conduct.*

*3.21] Similar view has also been expressed in the following cases:-*

- India Steamship Co. Ltd -vs.- JCIT and others (2005) 275 ITR 155 (Cal)*
- Appolo Hospital Enterprises -vs.- ACIT (2006) 287 ITR 25 (Mad)*
- Garden Silk Mills Pvt Ltd, -vs.- DCIT(1999) 237 ITR 663.675 (Gui)*
- Ballarpur Paper and Straw Board Mills Ltd. (1975) 101 ITR 55 (Cal)*

*3.22] In the case of ICICI Bank Ltd, -vs.- DCIT & Ors. (2004) 268 ITR 203 (Bom) wherein it was held that concluded assessments can be reopened beyond a period of four years from the end of the relevant assessment years only if there is failure on the part of the assessee to disclose fully and truly all material facts necessary for the purpose of assessment.*

*3.23] Further, in the case of Jashan Textile Mills (P) Ltd, -vs.- DCIT & Ors. (2006) 284 ITR 542 (Bom) wherein it has been held that reopening of assessment after expiry of four years solely based on materials already on*

*record in the absence of any allegation of failure on the part of the assessee to disclose fully and truly all material facts cannot be sustained. It was further held that reassessment cannot be made beyond four years from the end of relevant assessment year unless it is established that there was failure on the part of the assessee to disclose fully and truly all material facts. Similar view has been taken in the case of Himson Textile Engineering Industries Ltd, -vs.- N. N. Krishnan Or His Successors To Office (2013) -83 DTK 132 (Gui) wherein it has been held that merely by adding a line in the reasons recorded by the AO that the petitioner had failed to disclose fully and truly all material facts, the requirement of the proviso to section 147 of the Act would not be satisfied for the purpose of reopening the assessment u/s 147.*

*3.24] Reliance is also placed in the case of Fenner (India) Ltd, -vs.- DCIT (2000) 241 ITR 672 (Mad). In the said case the reassessment was made beyond four years from the end of the relevant assessment year. The Hon'ble High Court while deciding the case held as under:*

*"The duty of an assessee is limited to fully and truly disclose all the material facts. The assessee is not required thereafter to prepare a draft assessment order. If the details placed by the assessee before the AO was in conformity with the requirements of all applicable laws and known accounting principles, and materials details had been exhibited before the AO, it is for the AO to reach such conclusions as he considered was warranted from such data and any failure on his part to do so cannot be regarded as assessee's failure to furnish the material facts truly and fully. Any lack of comprehension on the part of the AO in understanding the details placed before him cannot confer a justification for reopening the assessment, long after the period of four years had expired. On the facts of this case, it is clear that the escapement of income if any on this account is not on account of any failure on the assessee's part to disclose the material facts fully and truly. The notice issued by the AO in exercise of his power under s. 147, therefore, cannot be sustained."*

*3.25) In Sita World Travel (India) Ltd. - vs. - CIT (2004) 274 ITR 186 (Del) it was held that from the original assessment orders as well as order made by the appellate authority, it is very clear that the AO was well aware about the primary facts, namely, the claim made by the assessee, the circumstances under which the claim was made and the provisions of law which could be applied while granting the benefits. A decision may be wrong or right is none of the concern of the subsequent officer. If the primary facts were not available or there was concealment or there was no application of the mind at all, then a case for reopening the assessment could be made out. But when all the facts were placed before the AO and the AO consciously considered the facts and arrived at a decision then it cannot be reopened merely because subsequently he changes his opinion or some other officer takes a different view. The relevant facts were taken into consideration by the AO while making the assessment which is indicated hereinabove and, therefore, there is no question of any escapement of income chargeable to income-tax. Therefore, this is a case of wrongful assumption of jurisdiction and as such the notices, the*

*speaking orders and the assessment orders made in pursuance to the notices are required to be quashed and set aside and are accordingly set aside.*

*3.26] Further reliance is also placed on the decision in the case of India Steamship Co. Ltd, -vs.- JCIT and others (2005) 275 ITR 155 (Cal) wherein it has been held that it could be seen from recorded reasons that there is no allegation whatsoever of any nature of any fact not being disclosed by the assessee in any of the assessments. In the Balance Sheets which were filed along with the returns, all the facts relating to the expenses were fully disclosed in several assessment years and Assessing Officer after considering such facts had allowed the deduction. The re-assessment proceedings could not be sustained as they had been initiated on a mere change of opinion on the same set of facts. Similar view has also been taken by the jurisdictional High Court in the case of Raliis India Ltd -vs.- ACIT (2010) 323 ITR 54 (Bom).*

*3.27] The Hon'ble Delhi High Court in the case of HCL Corporation Ltd, -vs.- ACIT (2012) 66 DTR 473 (Delhi), held that the petitioner having supplied relevant information in its return indicating that it had received dividend income and that it had incurred expenses for the purposes of earning the said dividend income and also filed details by way of a letter, and there being no specific averment or allegation that any particular expense has not been mentioned by the petitioner at the time of original assessment proceedings, impugned notice under s. 148 issued beyond the period of four years from the end of the relevant assessment year as well as all proceedings pursuant thereto are contrary to law and the same are set aside.*

*3.28] Reliance is also placed on the decision of Hon'ble Bombay High Court in the case of Godrej Agrovet Ltd, -vs.- ACIT (2007) 290 ITR 252(Bom) wherein the AO has reopened the assessment on the ground that he has failed to consider the effect of section 80IB(13) r.w.s. 80IA(9) in regular assessment. In the said case on similar facts it has been held that there were no reasons on the basis of which prima facie it could be said that income had escaped assessment. Although it was alleged that there was failure on the part of the assessee to disclose fully and truly all material facts, in fact the reopening was based on the facts which were already on record. Therefore, it could not be said that the assessee had failed to disclose fully and truly all material facts and the notice was liable to be quashed. Hence, in view of the decision of Jurisdictional High Court, initiation of reassessment proceedings on this issue is not tenable.*

*3.29] The issue relating to the taxability of interest income earned on fixed deposits is already taken into consideration by the DCIT, while framing the original assessment order u/s 143(3) and such issue has attained finality. Further in view of the aforesaid factual and legal position and in absence of any failure of the nature referred to in proviso to section 147, it is humbly submitted that the order passed u/s. 143(3) r.w.s 147 needs to be summarily cancelled.”*

5.2. The Ld. CIT(A) rejected the contention of the assessee vide appellate order dated 30.01.2014 passed by learned CIT(A) wherein

learned CIT(A) upheld the reopening of the concluded assessment by the AO u/s 147/148 of the 1961 Act, by holding as under:-

“ 4.2 Ground No (2): Through this ground [i.e. 2a, 2b & 2c] the assessee has challenged the re-assessment proceedings u/s 147. It has been contended that the AO was not justified in reopening of assessment as there was fresh application of the mind on his part to the same set of facts and there was no failure on the part of the assessee to disclose truly and fully facts necessary for the completion of the assessment. Briefly the facts are that the assessee company is engaged in business of investment / acquisition in / of the company engaged in the business of manufacture and / or sale of cements; the assessee company holds substantial shares of two major cement manufacturing companies' viz. ACC Ltd and Ambuja Cements Ltd. The source of its income is dividend from the said two companies and the interest on fixed deposits in bank. During the year the assessee company received dividend of Rs 9,86,80,000/- [which is exempt u/s 10(34)] and the interest on bank FDs of Rs 2,24,06,786/-. The expenditure claimed totaled to Rs 8,84,937/- [salary Rs 4,66,870/-, operating expenses - Rs 3,50,478/-and depreciation Rs 67,589/-]. In the statement of computation of total income, the assessee has claimed entire dividend of Rs 9.86,80,000/- as exempt u/s 10(34) and computed its total income for the year at Rs 2,15,29,225/-. Thus, in effect the total income so computed consisted of interest income on Bank FDs only. Rather the entire expenses on account of salary, operating expenses and depreciation has been claimed as deduction against that interest income, as if all its expenses were incurred for earning the interest on Bank FDs and no expense was incurred in managing & control of the two said companies ACC Ltd and Ambuja Cements Ltd wherein it has invested its substantial funds. The fixed deposits in bank were of surplus fund only and in that transaction hardly any effort and expense would be made. Further, against that total income of Rs 2,15,29,225/-, the assessee claimed set off of unabsorbed business loss pertaining to AY 2000-01 to that extent and offered its income under the normal provision as NIL. The AO in the course of original assessment proceedings disallowed Rs 7,21,181/- u/s 14A. The assessment was completed in the routine manner without examining as to under which head the interest income was to be taxed.

4.2.1 In the course of re-assessment proceedings, the assessee raised the issue of legality of proceedings initiated u/s 147. The basic plea taken by it are summarized by the AO in the assessment order and that were - (a) proceedings u/s 147 are invalid since the notice was issued after expiry of four years from the end of the relevant assessment year; (b) there is no failure on the part of the assessee in disclosure of material facts necessary for completing the assessment; and (c) the facts on the basis of which the proceedings were initiated are available on the records and no new material has been brought on the record after passing of the assessment order. The AO dealt with the various issues / objections raised by the assessee on the legality of the proceedings. The AO observed that as per the provisions of Section 149 the notice u/s 148 can be issued upto six years from the end of the assessment year if the income chargeable to tax, which has escaped assessment amounts to or is likely to amount to Rs 1 lacs or more for that year; and that in the present case the amount that had escaped assessment was more than Rs 1 lac; that

*interest from bank FDs was chargeable under the head, 'income from sources' and as per the provisions of Section 72 of the I T Act, the brought forward business loss was not allowed to be set off against income from other sources. The AO also observed that as per the provisions of the I T Act, the assessee, suo moto, ought not to have claimed set off of business loss against interest income and offered the said interest income under the head, 'income from other sources'. The AO also took note of the fact that in the original assessment proceedings, the issue of taxability of interest income on Bank FDs vis-a-vis the head of income was neither examined nor assessee had given any explanation, based on any judicial pronouncements, either while filing the return or during the assessment proceedings; and therefore, there was no change of opinion on the issue. The AO also took note of the Explanation 1 to Section 147 which provides that the production before the AO of account books or other evidence from which material evidence could with due diligence have been discovered by the AO will not necessarily amount to disclosure. In the context, the AO also placed reliance onto the decisions in cases of Jawand Sons [(2010) 326 ITR 39 (P & H)], Consolidated Photo a Finvest Ltd [(2006) 281 ITR 394 (Del)], Dr Amin's Pathology Laboratory [(2001) 252 ITR 673 (Bom)] and ALA Firm [(1991) 189 ITR 285 (SC)]. I have considered the issue and gone through the detailed submissions filed by the assessee during the appeal proceedings, which finds place in Para 3 of this order above. The issue of chargeability of interest income earned on bank fixed deposits, out of surplus funds [or even out of borrowed funds] under the head "Income from other sources" has reached to finality as per number of judicial decisions. In the case of Tuticorin Alkali Chemicals a Fertilizers Ltd (1997) 227 ITR 172 (SC) the Hon'ble Supreme Court had held that interest on fixed deposits [out of investment of borrowed funds] prior to commencement of business is assessable u/s 56. The ratio of this decision was again approved by the Hon'ble Supreme Court in the case of Autocast Ltd [2001] 248 ITR 110 (SC) wherein it was held that interest earned on short term deposits in banks is assessable as income from other sources u/s 56. The ratio of Supreme Court decision in these two cases were applied by various other courts in the cases of CIT V/s Gimpex P Ltd [2004] 268 ITR 377 (Mad); Chandpur Sugar Company Ltd V/s CIT [2006] 280 ITR 612 (All); Ferro Concrete Constructions (I) Pvt Ltd V/s CIT [2007] 290 ITR 713 (MP); CIT V/s Winsome Dyeing a Processing Ltd [2008] 306 ITR 340 (HP) and Shipping Corpn of India Ltd V/s Addl CIT [2012] 020 ITR Trib (332) ITAT, Mumbai. The provisions of the I T Act are also crystal clear. The assessment year under consideration is 2005-06 and by then the decisions of the Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilisers Ltd and Autocast Ltd (supra) were duly available. In the context, the mere claim of the taxability of the interest income as business income by way of computation shown in the statement of total income cannot be considered as full disclosure. Nowhere in the return or even during the original assessment proceedings, the assessee gave any explanation as to why in its case the interest income from Bank FDs was to be taxed under the head, business income and not as income from other sources inspite of the decisions given by the Hon'ble Supreme Court in the aforesaid two cases. Thus, I agree with the AO's view that reopening of the case u/s 147 has been in accordance with law and the provisions of the I T Act and therefore, the ground raised by the assessee is rejected."*

6.1. Aggrieved by the appellate order dated 30.01.2014 passed by learned CIT(A) , the assessee has filed an appeal before the tribunal. The assessee has filed written submissions by way of synopsis and has also filed paper book before the tribunal. The assessee has cited large number of judicial precedents in written submissions to support its contentions. The said written submissions are reproduced hereunder:

“AMBUTA CEMENT INDIA PRIVATE LIMITED

(Since merged with Holcim (India) Pvt. Ltd, and subsequently with Ambuja Cements Limited)

Assessment Year 2005-06

Assessee's Appeal before the Hon'ble ITAT against order u/s 143(3)/147

I.T.A. No. 2600/M/2014; Bench - 'A'

Synopsis of Grounds

Gr No.	Particulars	Key submissions Precedence
1(a) & 1(b)	<p>Validity of reassessment proceedings u/s 147/148 of the Act</p> <p>Brief Facts: Return of income for the instant assessment year was filed on 27-10-2005 disclosing total income at Rs. NIL as per normal provisions and Rs. 72,96,968/- u/s 115JB. In the said Return, interest income earned on short term deposits of surplus funds was offered to tax under the head 'Profit and Gains from Business/ Profession' and was set off against business loss brought forward from earlier years [Refer PB Pg. No. 13],</p> <p>Order u/s 143(3): Interest earned on fixed deposits was assessed under the head business income and the same was set off with the brought forward business loss [Refer Annexure - 1, Pg. No. 6-10 at Pg. No. 9-101.</p>	<p>Reassessment beyond 4 years without failure to disclose material facts is invalid</p> <p>Assessment for the year under consideration was made u/s 143(3) vide order dated 26-11-2007 [Refer Annexure -1, Pg. No. 6-10].</p> <p>Notice u/s 148 was issued on 22-03-2012 [Refer PB Pg. No. 17] i.e. after the expiry of four years from the end of the relevant AY [last date being 31-03-2010] and before the expiry of 6 years [last date being 31-03-2012]</p> <p>Reasons for re-opening the assessment [Refer PB Pg. No. 18-19] was assessing interest earned on fixed deposits under the head 'Income from Other Sources' instead of income under the head 'profits and gains from business or profession' and non-set off of brought forward business loss against such income.</p> <p>As per 1st proviso to Sec. 147, reassessment can be made after the expiry of 4 years on failure on the part of the assessee of the following :-</p>

	<p>Order u/s 147: On scrutiny of the assessment records, it is noticed that interest earned on fixed deposits has been included under the head 'Profits &amp; Gains from business or profession' as against the head 'Income from Other Sources'. As per Sec. 72, brought forward business loss is not allowed to be set off against 'Income from Other Sources'. [AO's order Pg. No. 4]</p> <p>Order of CIT(A): Nowhere in the return of income or even during the course of original assessment proceedings, the assessee gave any explanation as to why interest income earned on fixed deposit shall be taxable under the head business income. The reassessment is accordingly upheld. [CIT(A)'s order Pg. No. 32-34]</p>	<p>(i) Make a return u/s 139 - ROI was duly filed on 27-10-2005 u/s 139(1) [Pg 12 of PB]</p> <p>(ii) Make a return in response to notice issued u/s 142(1)/148 - No such notice was issued or there is no such allegation. [Pg 1, Para 2 of order u/s 143(3)] [Refer Annexure -1, Pg. No. 6-10]</p> <p>(iii) To disclose fully and truly all material facts necessary for assessment for that AY- In the instant year, the assessee has earned interest on fixed deposits of Rs. 2,24,06,786/- and the same is reflected on the face of the Profit and Loss A/c. The said income was treated as profits &amp; gains from business &amp; profession. [Refer PB Pg. 1-11 at Pg. No. 5]</p> <p>In the assessment order u/s 143(3) dated 26-11-2007, the AO has acknowledged the fact that the assessee has earned interest on fixed deposit to the tune of Rs. 2,24,06,786/- which is credited to the P&amp;L A/c. While computing taxable income, the AO has also considered interest income as 'Business Income.' [Refer Annexure -1, Pg. No. 6-10 at Pg. No. 9]</p> <p>On perusal of the above, it can be seen that all the material facts were available before the AO at the time of passing of the assessment order and no new information came to the possession of the AO. In fact, the AO has also applied his mind on the same set of facts while assessing interest income under the head business income.</p> <p>Hence, Re-opening of assessment after 4 years is invalid as:</p> <p>i) All the material facts were available on record</p> <p>ii) No failure to disclose fully and truly all material facts.</p> <p>iii) No new material/information came to the possession of the AO.</p> <p>iv) It is merely fresh application of mind to the same set of facts, v) Reassessment is based on mere change of opinion.</p>
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		<p>The proposition that when all material facts were available on record and there is no failure on the part of the assessee to disclose all material facts reopening of assessment is not valid is supported by the following decisions:-</p> <p>ICICI Securities Ltd, -vs.- ACIT (W.P. No 1919 of 2006)&lt;Bom) [A mere re-look at the same set of facts which has been disclosed in the assessment proceedings is not permissible under the proviso of Sec. 147. The decision of the jurisdictional High Court has since been affirmed by the Apex Court in ACIT -vs.- ICICI Securities Primary Dealership Ltd. (2012) 348 ITR 299 (SOI Bhavesh Developers -vs.- AO (201Q) 229 CTR 160 (Bom) [Where 'reasons to believe' shows that income has escaped assessment based on the disclosures made by the assessee itself and there being no finding to the effect that the assessee has failed to fully and truly disclose all necessary facts for the purpose of assessment recourse to power u/s 147 cannot be sustained]</p> <p>Panchratna Co.-op. Housing Society Ltd, -vs.- AO (2015) 376 ITR 404 (Bom)</p> <p>[Where all the documents were furnished during the course of assessment and the reasons do not show that there was failure to disclose fully and truly all material facts, reassessment in such case is bad in law]</p> <p>Similar view has also been expressed in the following cases:-</p> <ul style="list-style-type: none"> <li>- DCIT-vs.-Aristocrat Luggage Ltd. fITA No. 5422/Murn/2013 dtd. 07-03-2016)</li> <li>- Shashi Agarwal -vs.- DCIT (ITA No. 4949/Mum/2016 dtd. 18-12-2017)</li> <li>- CIT-vs.-Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)</li> <li>- ICICI Bank Ltd, -vs.- DCIT &amp; Ors. (2004) 268 ITR 203 (Bom)</li> <li>- ACIT -vs.- Tata Chemicals Ltd. (2017) 185 TTT123 (Mum)</li> <li>- Mumbai Mazdoor Sabha -vs.- ACIT (2016) 75 Taxmann.com 134 (Mum Trib)</li> <li>- Supreme Treves Pvt. Ltd.-vs.-DCIT (2009) 23</li> </ul>
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		<p>DTR 215(Bom)</p> <p>- Kimplas Trenton Fittings Ltd, -vs.- ACIT (2012) 340 ITR 299 (Bom)</p> <p>- German Remedies Ltd, -vs.- DCIT (2006) 287 ITR 494 (Bom)</p> <p>Reassessment cannot be initiated on mere change of opinion as it was based on fresh application of mind on the same set of facts:</p> <p>Apex Court in CIT-vs. Kelvinator of India Ltd. (Supra) held that the AC<sup>^</sup> has the power to re-assess and not the power to review.</p> <p>Reassessment on the basis of "mere change of opinion" cannot be per se reason to re-open. If the concept of 'change of opinion' is removed, then, in the garb of reassessment, review would take place.</p> <p>Similar view has been taken in the following judgments: - CIT -vs.- Usha International Ltd. (2012) 348 ITR 485 (Del)(FB)</p> <p>Asian Paints Ltd. -vs.- DCIT (2009) 308 ITR 195 (Bom)</p> <p>DCIT -vs.- Intelnet Global Services (P.) Ltd. (2017) 79 taxmann.com 177 (Mum) (ITAT)</p> <p>Without prejudice to the above, it is to be noted that in response to the reason provided for re-opening the assessment, the assessee vide letter dated 12-10-2012 [Refer PB Pg. 23-33] objected to the reasons for reopening. The AO without disposing off the objections separately by passing a speaking order, had disposed off the said objections in the reassessment order itself. Hence the reassessment order deserves to be quashed since the assessee was not given sufficient opportunity to challenge the order before the High Court.</p> <p>The aforesaid view is fortified by the following decisions:-GKN Driveshafts (India) Ltd. -vs.- ITO and Ors. (2003) 259 ITR 19(SC)</p> <p>Once the reason for reopening assessment is furnished, the assessee is entitled to file objections to issuance of the notice and the AO</p>
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		<p>is required to dispose of the objection by passing a speaking order before proceeding with the reassessment]</p> <p>General Motors India (P) Ltd -vs.- DCIT (2013) 354 ITR 0244 (Guj)</p> <p>It is not open for the AO to decide the objection to notice issued u/s 148 by a composite reassessment order. The assessee shall be given sufficient time to challenge the order in the Writ. If this is not done, reassessment order passed deserves to be quashed]</p> <p>Similar view has been taken in the following judgments:-</p> <p>Vijava Woven Sacks P. Ltd. -vs.- ITO (2016) 47 CCH 207 (Bang Trib)</p> <p>Ferrous Infrastructure Pvt Ltd -vs- DCIT (2015) 120 DTR 0281(del)</p> <p>Smt Kamlesh Sharma -vs.- ITO &amp; ORS (2006) 287 ITR 337 (Delhi)</p> <p>Banaskantha District Oilseeds Growers Co-op. Union Ltd. -vs.ACIT (2015) 59 Taxmann.conm 328 (Guj)</p>
2.	<p>Interest income earned on fixed deposits treated as "Income from other sources" and not as "Profit &amp; Gains from Business &amp; Profession" (Rs. 2,24,06,786/-)</p> <p>Brief facts - The assessee has earned interest income on fixed deposits in bank. The same was offered to tax under the head "Profit and Gains from Business/ Profession." [PB Pg. No. 5]</p> <p>Order u/s 147: Interest income earned from Bank FDs is assessable as "Income from Other Sources". [AO's order Pg. No. 12]</p> <p>Order of CIT(A) - Interest earned out of surplus funds invested in fixed deposits is taxable under the head Income from Other Sources. Hence, the disallowance made by the AO is upheld. [CIT(A)'s order Pg. No. 34]</p>	<p>The assessee has earned interest income on surplus money which it has earned during the course of business and which shall subsequently be utilized for the purpose of business. Hence such income shall be assessed under the head 'Profit &amp; Gains from Business &amp; Profession' and not as 'Income from other sources'.</p> <p>Reliance is placed on the following decisions:-CIT -vs.- Indo Swiss Tewels Ltd. &amp; Anr. (2006) 284 ITR 389 (Bom)</p> <p>[Interest earned on the short-term deposits of the money kept for the purpose of business has to be treated as income earned from business and cannot be treated as income from other sources]</p> <p>CIT -vs.- Lok Holding (2009) 308 ITR 356 (Bom)</p> <p>Interest earned out of such monies accruing from the business of the assessee company and the same is further utilized for the purpose of the business shall be assessable under the head business income</p> <p>CIT -vs.- Green Infra Ltd. (2017) 392 ITR 7 (Bom)</p>

		<p>Interest earned on short term deposits on the money kept for the purpose of business is taxable under the head business income CIT -vs.- Paramount Premises (P) Ltd. (1991) 190 ITR 259 (Bom)</p> <p>Interest earned on advances/ deposits received from prospective customers shall be assessable under the head business income</p> <p>Similar views have also been expressed in the following cases CIT -vs.- Shriram Investments (Firm) Moogambika Complex (2015) 229 Taxman 179 (Madras) CIT -vs.- Tirupati Woollen Mills Ltd (1992) 193 ITR 252 (Cal) The Shipping Corp. of India Ltd. -vs.- ACIT (2011) 133 ITD 290 (Mum)</p>
3.	<p>Denial of Set-off of brought forward losses against 'Income from other Sources</p> <p>Brief facts -During the previous year, the appellant has shown interest on fixed deposit in banks amounting to Rs. 2,24,06,786/- under the head 'Profit and Gains from Business and Profession' and has set off brought forward business loss against the said income.</p> <p>Order u/s 147: Interest income earned from Bank FDs is assessable as "Income from Other Sources". Hence brought forward business loss cannot be set-off against income from other sources. [AO's order Pg. No. 16-17]</p> <p>Order of CIT (A) - Interest earned out of surplus funds invested in fixed deposits is taxable under the head Income from Other Sources. Hence brought forward business loss cannot be set-off</p>	<p>Interest earned on fixed deposits shall be assessed under the head 'Profits and gains from business or profession'. Even if for the purpose of computation of income, interest on fixed deposit is separately classified under the head 'Income from other sources then also the same does not cease to be in the nature of business income and the assessee shall be entitled to set off brought forward business losses against the said income.</p> <p>On perusal of Sec. 72A, it can be seen that while the loss to be carried forward has to be under the head 'Profits and gains of business &amp; profession', the gains against which such loss can be set off shall be profits from any business or profession carried on by the assessee and assessable in that assessment year.</p> <p>Reliance is placed on the following decisions:- CIT -vs.- Chugandas &amp; Co. (1965) 55 ITR 17 (SC) Business income is broken up under different heads only for the purpose of computation of total income. The breaking up of income does not cease the income to be of business nature since the different heads of income are only classification prescribed by the I.T. for the purpose of computation] CIT -vs.- Cocanada Radhaswami Bank Ltd. (1965)</p>

	against income from other sources. [CIT(A)'s order Pg. No. 35]	<p>57 ITR 306 (SC)</p> <p>As long as income is in the nature of business income, then even if these income are liable to be taxed under a head other than income from business and profession, the loss carried forward can be set off against such income of the assessee</p> <p>Snam Proeetti S.P.A. - vs.- ACIT (1981) 132 ITR 70(Del)</p> <p>Interest earned from depositing of spare funds in bank is in the nature of business income though taxed under a separate head and the same is eligible for set off against brought forward business loss</p> <p>Similar view has been held in:-</p> <p>Western States Trading Co Pvt Ltd -vs.- CIT (1971) 80 ITR 21(SC)</p> <p>DCIT -vs.- Canara Bank (2007) 11 SOT 763 (Bang)</p> <p>CIT -vs.- Excellent Commercial Enterprises &amp; Investments Ltd. (2006) 282 ITR 423 (Del)</p> <p>Sri Padmabathi Srinivasa Cotton Ginning &amp; Pressing vs.- DCIT (2009) 29DTR I(Visakha) (IT AT)</p>
4.	Imposition of interest u/s 234B of Rs.35,77,341/-	Consequential in nature.

The Ld. Counsel for the assessee contended that the assessee is challenging legality and validity of reopening of the concluded assessment u/s. 147 and grounds of appeal no. 1(a) and 1(b) filed with memo of appeal with tribunal are directed towards challenging legality and validity of reopening of concluded assessment u/s. 147 of the Act. It was submitted by learned counsel for the assessee that return of income was filed by assessee with Revenue u/s 139(1) of the 1961 Act on 27.10.2005. It was submitted that original assessment was framed by the AO u/s. 143(3) of the 1961 Act on 26.11.2007 wherein the assessee duly co-operated with revenue and all notices issued by Revenue were duly complied with. The original order of assessment u/s 143(3) is placed on record in file. It was submitted that notice u/s. 148 of the 1961 Act was issued by the AO on 22.03.2012 (pb/page17) which was issued after expiry of four years from the end of the relevant assessment year . It was submitted that

the said notice dated 22.03.2012 was issued at fag end when the time period as provided u/s 149 of the 1961 Act for issuing notice u/s 148 was coming to an end . It was submitted since the notice u/s 148 was issued after the expiry of four years from the end of the relevant assessment year and originally the assessment was framed u/s 143(3), first proviso to Section 147 will be applicable and concluded assessment can be reopened only if there is an failure on the part of assessee to fully and truly disclose materials facts in the return of income filed with the Revenue . It was submitted that the assessee made true and complete disclosures of all material facts while filing return of income u/s 139(1) of the 1961 Act . It was submitted that return of income was filed u/s 139(1) and the assessee duly co-operated in assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act and there was no failure on part of the assessee in complying with notices issued u/s 142(1) of the 1961 Act. It was submitted that reasons recorded by the AO for reopening of the concluded assessment u/s 147 are placed in paper book at page no. 18 and the same were furnished to the assessee on 17.04.2012. It was submitted by learned counsel for the assessee that as per audited Profit and Loss Account of the assessee which is placed in paper book at page no. 5/pb, the assessee has credited dividend income of Rs. 9,86,80,000/- and interest income of Rs. 2,24,06,786/- to Profit and Loss Accounts which was truly and fully declared and disclosed to Revenue in the original return of income filed by the assessee with the Revenue u/s. 139(1) of the 1961 Act as also during the course of assessment proceedings conducted by the AO u/s 143(3) r.w.s. 143(2) of the 1961 Act. It was submitted that originally assessment was framed by AO u/s. 143(3) of the Act vide assessment order dated 26.11.2007 which is placed in the file and our attention was drawn to the assessment order where the Assessing Officer has consciously stated that Dividend Income and Interest Income are credited to Profit and Loss account and expenses are claimed against these income in

para 3 of the aforesaid assessment order dated 26.11.2007 passed by the AO u/s 143(3) of the 1961 Act as under:-

*“3. The assessee company is an investment company making strategy investment in cement manufacturing business. During the previous year the assessee received dividend of Rs. 9,86,80,000/- on investment and interest of Rs. 2,24,06,786/- on fixed deposits which were credited in the P&L account. Against these income expenses on account of salary of Rs. 4,66,870/- operating expenses of Rs. 3,50,473/- and depreciation of Rs. 67,589/- was claimed. The total expenses claimed amounted to Rs. 8,84,937.....”*

Our attention was also drawn to income finally assessed by the Assessing Officer vide original assessment order dated 26.11.2007 u/s 143(3) , wherein computation of income after making additions by the AO as found mentioned in the said assessment order dated 26.11.2007, read as under:-

**“Income from Business**

Net profit as per Profit & Loss A/c Rs.10,17,67,466

Add: Expenses disallowable/considered Separately:

1. Donation Rs. 50,000  
2. Depreciation Rs. 67,589  
3. Provision for taxation Rs.6,00,000

4. Share issue Expenses written off Rs.36,56,003

5. Legal & Prop Chgs Rs.1,41,48,075

6. Disallowance u/s. 14A Rs.7,27,181 Rs.1,92,42,848

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Rs.12,10,10,514

Less: Expenses allowable/ considered separately:

1. Depreciation u/s. 32 Rs. 67,959

2. Deduction u/s. 35DD Rs. 11,949

Rs. 79,908

Rs.12,09,30,406

Less: Dividend

Rs. 9,86,80,000

Rs.2,22,50,406

Less: Set off of unabsorbed Business

Rs. 2,22,50,406

Nil

Income other sources

Dividend Rs. 9,86,80,000

Less Exempt u/s 10(34) Rs.9,86,80,000 NIL

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*Total income Nil*  
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*Computation of tax liability u/s. 115JB:*

<i>Book profit as per above discussion</i>	<i>Rs.80,18,149</i>
<i>Tax @ 7.5%</i>	<i>Rs. 6,01,361</i>
<i>Add: Surcharge @ 2.5%</i>	<i>Rs. 15,034</i>
<i>Education cess @ 2%</i>	<i><u>Rs. 12,027</u></i>
	<i>Rs.6,28,422</i>

The said disclosure of dividend income and interest income as was made by the assessee in its audited Profit and Loss Account (PB/page5) are reproduced here under:-

*“AMBUJA CEMBNT INDIA LIMITED**PROFIT & LOSS ACCOUNT FOR THB VEAR ENDED 31\$T MARCH, 2005*

		Year ended March 31, 2005	Year ended March 31, 2004
	Schedule		
Income			
Dividend Received (tax deducted at Source Rs. Nil, previous year Rs.7, 771,,050)		98,688,000	61,675,000
Interest Received			
Inter Corporate Deposits (Tax deducted at Source Rs. Nil, previous year Rs. 24,263)		-	118,356
Fixed Deposit(Tax deducted at Source Rs. 4,565,796 Previous year Rs. 4,234,549/-)		22,406,786	20,607,123
Others		-	<u>5,940</u>
		121,086,786	82,406,419
Expenditure			
Salary		466,870	745,865
Legal & Professional fees		14,178,380	295,740
Operating Expenses	H	358,478	411,873
Share issue expenses written off		3,656,903	6,853,876
Preliminary Expenses written off		-	5,278
Exchange Rate difference (Net)		-	-
Project and preoperative expenses written off		-	-
Advances written off		-	674,169
Depreciation	C	<u>67,589</u>	<u>91,015</u>
		<u>18,719,320</u>	<u>9,077,816</u>
Profit before tax and prior period time		102,367,466	73,328,603
Less: Prior period item- project development expenses written off		-	<u>1,305,975</u>
Profit before tax		102,367,466	72,022,628
Less: Provision for taxation		600,000	1,320,750
Profit after Tax		101,767,466	70,701,878
Balance as per last Account		<u>54,560,302</u>	<u>(16,141,576)</u>

Balance carried to Balance Sheet	<u>156,327,768</u>	<u>54,560,302</u>
Basic and diluted Earnings per share	0.21	0.15
Weighted average number of shares outstanding during the year	476,866,666	476,866,666
Nominal value per share (Rs.)	10	10

NOTES FORMING PART OF THE ACCOUNTS"

Thus it was submitted that the assessee was engaged as investment company in making investments in the shares of cement manufacturing companies and allied business , while surplus funds available with the assessee were invested in FD's with the banks. The assessee company as an investment company is making investments in various instruments and it was submitted that income arising from these instruments is nothing but an income from business which was rightly offered to tax under the head of income 'Profits and Gains of Business or Profession' . It was submitted that their was brought forward business loss of earlier years which was rightly sought to be adjusted by the assessee against the income from business for the impugned assessment year

6.2 Per contra Ld. DR relied upon the orders passed by AO during reassessment proceedings and the appellate order passed by Ld. CIT(A). The LD. DR relied upon the judgment of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals & Fertilizers Ltd. v. CIT (1997) 227 ITR 172(SC) and decision of Hon'ble Supreme Court in the case of CIT v. Autokast Limited (2001) 248 ITR 110 (SC) and it was submitted that the assessee has made strategic investments in cement manufacturing companies and allied businesses while no business per-se was carried out by the assessee itself and hence income from these investments by way of dividend income and interest income from surplus funds deployed with FDR's cannot be brought to tax under the head of income 'Profits and Gains of Business or Profession' and it was correctly brought to tax under the head of income 'Income from other sources' by the AO during the reassessment proceedings



which was later upheld by learned CIT(A). It was submitted that the authorities below rightly disallowed adjustment of brought forward business losses as the same cannot be adjusted against losses of the impugned assessment year being assessed under the head 'Income from other sources'. Thus, in nut-shell the learned DR would justify the reopening of the concluded assessment u/s. 147 of the 1961 Act as was done by AO which was later upheld by learned CIT(A) vide his appellate order.

7. We have considered rival contentions and have perused the material on record including case laws relied upon by both the rival parties. We have observed that the assessee is an investment company engaged in investing in cement manufacturing companies and/or allied businesses. Before proceeding further, it will be profitable to reproduce the Main Object clause of the assessee company as is set out in the Memorandum of Association of the assessee company(pb/page 37), which are reproduced hereunder:

*“III. The Objects for which the company is established are:*

*A. MAIN OBJECTS OF THE COMPANY TO BE PERSUED BY THE COMPANY ON ITS INCORPORATION:*

- 1. To carry on the business of an investment holding company of companies and businesses engaged in producing, manufacturing, treating, processing, importing, exporting, buying, selling or otherwise dealing in clinker, cement of all kinds and types and its all other allied products and by-products.”*

The main object clause of the assessee company per Memorandum of Association has only one object clause which is reproduced above. On perusal of the aforesaid main objects of the assessee per Memorandum of Association as reproduced above, the assessee was established to carry on the business of an investment holding company of companies and businesses engaged in cement and/or allied businesses. The perusal of the assessee's Audited Financial

Statements for the year ended 31<sup>st</sup> March 2005 (which are placed in paper book/page 4-11 filed with the tribunal) corroborates and substantiate that the assessee is in-fact an investment company which is engaged in investing in cement manufacturing companies and other allied businesses and hence the activities of the assessee are in sync with its main objects as stipulated in Memorandum of Association . The perusal of the Audited Financial Statements of the assessee company ( placed in paper book filed by the assessee with the tribunal) for the year ended 31.03.2005 reveals that Shareholders funds ( Share Capital + Reserves & Surpluses) invested by assessee in cement companies were to the tune of 1444.23 crores (Rs. 1434.05 crores as at 31.03.2004) . There are no loans raised by the assessee which are outstanding as at 31.03.2005 and also no loans were outstanding to be payable as at 31.03.2004. Thus, there were no borrowings appearing in the audited financial statements of the assessee company as at 31.03.2005 as well as at 31.03.2004. The Fixed Block of Assets as at 31-03-2005 is miniscule to the tune of Rs. 18.55 crores (Rs. 18.49 crores as at 31.03.2004) while Investments in cement companies held by the assessee are to the tune of Rs. 1377.88 crores as at 31.03.2005 ( Rs. 1377.88 crores as at 31.03.2004) . The cash and bank balance held by the assessee are to the tune of Rs.46.95 crores as at 31.03.2005 while the same was Rs. 35.74 crores as at 31.03.2004. Out of cash and bank balance as stated above, the assessee mainly held fixed deposit with its bankers to the tune of Rs. 40 crores as at 31.03.2005 ( Previous year Rs. 35.73 crores as at 31.03.2004 ) . Perusal of Schedule of Investments reveal that the total investments as at 31.03.2004 and 31.03.2005 were unchanged at Rs. 1377.88 crores which constituted three investments made by assessee in cement companies viz. (a) investments of Rs.928.19 crores in Associated Cement Companies Limited (ACC) as at 31.03.2004 and 31.03.2005 (b) Investment of Rs. 449.64 crores in Ambuja Cement Eastern Limited as at 31.03.2004 and 31.03.2005 and (c) Investment of Rs. 0.05 crores in Kakinada Cements Limited as at 31.03.2005

(Previous Year- Rs. Nil as at 31.03.2004) . The two companies namely Ambuja Cement Eastern Limited and Kakinada Cement Limited are stated in its audited financial statements ( schedule 'D'-Investments (page 8/pb) to be subsidiaries of the assessee company , while the assessee holds large investment of Rs. 928.19 crores in ACC Limited wherein it holds 2,46,70,000/- equity shares of Rs. 10 each fully paid up shares of ACC Limited which is around 13.76% of the issued and subscribed capital of ACC Limited which was in aggregate 17,95,81,512 equity shares of Rs. 10 each fully paid up as at 31.03.2005 which by no means is a small shareholding keeping in view that ACC Limited is a large cement manufacturing company having consolidated turnover of Rs. 4328.50 crores for the financial year 2004-05. It is pertinent to mention that these three investments are classified in audited financial statements as 'Long Term Investments" and sub-classified under the sub-heading 'Non Trade Investments' , meaning thereby that these investments are held by the assessee in these three investee companies with an objective to hold it for a horizon of long term period for non trade purposes. Thus, the main objective of making investments by the assessee in these three cement companies is not to sell or take exit with a short term vision to make quick profits but to hold it with an horizon for long period of time with an objective to assert and control over the management , businesses and affair of these cement companies by virtue of its shareholding ( two of the three investee companies happened to be assessee's subsidiary companies) which is in sync with its main objects in Memorandum of Association wherein it provides that the assessee company is established/incorporated to act as an investment holding company of companies engaged in cement and allied products. It is also a matter of fact that the assessee did not undertake directly any business of cement or allied businesses which is substantiated and corroborated from the audited financial statements which are placed on record by the assessee. The assessee received dividend income of Rs.9.86 crores during financial year 2004-

05 ( Previous Year-Dividend income of Rs. 6.16 crores in financial year 2003-04 ) from its aforesaid investments in cement companies, while interest income received was Rs. 2.24 crores during financial year 2004-05 ( Previous Year Rs. 2.06 crores for financial year 2003-04) which was from fixed deposits held by it with Banks. This constituted the major stream of revenue of the assessee for the financial year 2003-04 and 2004-05. This was also the consistent stand of the assessee through out before all the authorities below as well before us that the assessee is an investment company engaged in investing in cement manufacturing companies and/or allied businesses. This stand of the assessee that it is an investment company engaged in investing in companies/businesses engaged in cement and / or allied businesses is undisputedly corroborated and substantiated by its Main Object clause in Memorandum of Association as well by its Audited Financial Statements ( both are placed in paper book filed with tribunal ). The assessee also claimed expenses against the said dividend income and interest income in its audited financial statements as also while filing its return of income with Revenue u/s 139(1) of the 1961 Act , wherein income earned from interest from bank fixed deposits was claimed as business income while dividend income by virtue of exemption provisions as are contained in Section 10(34) of the 1961 Act was claimed to be an exempt income. The assessee also set off certain expenses incurred during the relevant year against the said interest income while at the same time also claiming exemption of dividend income u/s 10(34) in the return of income filed with the Revenue . The Revenue while framing original assessment u/s 143(3) vide orders dated 26.11.2007 disallowed expenditure of Rs.7,21,181/- u/s. 14A of Act . The Assessing Officer while framing original assessment u/s. 143(3) went through details of income and made conscious decision of bringing to tax income from interest under the head 'Profits and Gains of business or Profession' and thereafter expenses incurred during the relevant year were allowed to be set off against interest income , while expenditure to

the tune of Rs.7,21,181/- was disallowed u/s. 14A of the Act as relatable to earning of an exempt income by way of dividend to the tune of Rs. 9,86,80,000/- by the assessee during the relevant period which was claimed as an exempt income u/s 10(34) of the 1961 Act. Thereafter, the Assessing Officer consciously set off of business losses brought forward from earlier years against the remaining interest income which remained after setting off of current year expenses and disallowance of expenditure u/s 14A which was consciously assessed by the AO under the head of Income 'Profits & Gains of Business or Profession'. One thing is very clear from perusal of the financial statements that the accounts of the assessee are not complex and it could not be said that large number of transactions were entered into by the assessee during the relevant period under our consideration and to contend that the accounting entries skipped the attention of the AO due to large magnitude of entries will not be correct. We have already seen the contents of the assessment order wherein consciously AO treated income of the assessee under the head 'Profits and Gains of Business or Profession'. The Assessing Officer has consciously stated that Dividend Income and Interest Income are credited to Profit and Loss account and expenses are claimed against these income in para 3 of the aforesaid assessment, as under:-

*"3. The assessee company is an investment company making strategy investment in cement manufacturing business. During the previous year the assessee received dividend of Rs. 9,86,80,000/- on investment and interest of Rs. 2,24,06,786/- on fixed deposits which were credited in the P&L account. Against these income expenses on account of salary of Rs. 4,66,870/- operating expenses of Rs. 3,50,473/- and depreciation of Rs. 67,589/- was claimed. The total expenses claimed amounted to Rs. 8,84,937....."*

The computation of income after making additions by the AO as found mentioned in the said assessment order dated 26.11.2007 passed by the AO u/s 143(3) of the 1961 Act, read as under:-

**"Income from Business"**

Net profit as per Profit & Loss A/c

Rs.10,17,67,466

*Add: Expenses disallowable/considered**Separately:*

1. Donation	Rs. 50,000	
2. Depreciation	Rs. 67,589	
3. Provision for taxation	Rs.6,00,000	
4. Share issue Expenses written off	Rs.36,56,003	
5. Legal & Prop Chgs	Rs.1,41,48,075	
6. Disallowance u/s. 14A	Rs.7,27,181	Rs.1,92,42,848
		<u>Rs.12,10,10,514</u>

*Less: Expenses allowable/ considered**separately:*

1. Depreciation u/s. 32	Rs. 67,959	
2. Deduction u/s. 35DD	<u>Rs. 11,949</u>	<u>Rs. 79,908</u>
		Rs.12,09,30,406
Less: Dividend		<u>Rs. 9,86,80,000</u>
		Rs.2,22,50,406
Less: Set off of unabsorbed Business		<u>Rs. 2,22,50,406</u>
		Nil

*Income other sources*

Dividend	Rs. 9,86,80,000	
Less Exempt u/s 10(34)	Rs.9,86,80,000	Nil
		-----
Total income		Nil
		-----

*Computation of tax liability u/s. 115JB:*

Book profit as per above discussion	Rs.80,18,149
Tax @ 7.5%	Rs. 6,01,361
Add: Surcharge @ 2.5%	Rs. 15,034
Education cess @ 2%	<u>Rs. 12,027</u>
	Rs.6,28,422"

It is undisputed that the assessee filed its return of income u/s 139(1) of the 1961 Act and the assessee duly co-operated during the assessment proceedings conducted by the AO u/s 143(3) r.w.s. 143(2) of the 1961 Act wherein all replies as to the information sought by the AO to complete assessment were given by the assessee. It is also undisputed fact that no fresh tangible incriminating material has come into knowledge or possession of the AO which culminated in re-opening of the concluded assessment by invoking provisions of

Section 147/148 of the 1961 Act rather it is the re-appreciation of the existing material on record which led Revenue to reopen the concluded assessment . The perusal of reasons for re-opening of the concluded assessment which were communicated to the assessee by Revenue are reproduced hereunder for better understanding, which are detailed as hereunder:

*"In this case, assessment u/s.143(3) of the I.T. Act, 1961 was completed on 26.11.2007, assessing the total income at Rs. Nil under normal provisions of the I.T.Act and Book Profit at Rs.80,18,149/-u/s.115JB of the I.T.Act.*

*2. **On perusal of the records,** it is seen from the P&L account that the assessee received income of Rs.2,24,06,786/- as interest on fixed deposit in banks. However, this was included under the head 'profits and gains from business or profession' as against the head 'Income from other sources' under which the said interest income is correctly chargeable to tax. During the year, the assessee has claimed and was allowed set-off of business loss of Rs.2,22,50,406/~ against the said interest income. The interest income on fixed deposits should have been considered as income from other sources. As per provision of section 72 of Income Tax Act, 1961 brought forward business loss is not allowed to be set off against income from other sources. Hence, the assessee, suo moto, ought not to have claimed set-off of business loss against interest income and offered the said interest income for tax under the head 'Income from Other Sources'. The issue was also not examined by the Assessing Officer during the course of assessment proceedings u/s.143(3) of the I.T.Act.*

*3. Therefore, the assessee has failed to disclose fully and truly all material facts relevant to the assessment year under consideration.*

*4. In view of the above, I have reason to believe that the income as aforesaid chargeable to tax exceeding Rs. 1 lakh has escaped assessment, resulting into short levy of tax. Hence, the assessee's case is hereby reopened for reassessment u/s.147 r.w.s143(3) of the I.T.Act, 1961 for A.Y.2005-06.*

*The necessary prior approval in this regard has been given by the C.I.T.-3, Mumbai vide letter dated 20.03.2012."*

On Perusal of the above reasons so recorded by Revenue for reopening of the concluded assessment it is very much clear that these reasons emanated from the **perusal of the records** which were already before the authorities below and based on it the Revenue is

contemplating reopening of the concluded assessment u/s 147/148 of the 1961 Act. It is undisputed that original assessment in this case was framed by Revenue u/s 143(3) of the 1961 Act and secondly that reopening of the concluded assessment u/s 147/148 of the 1961 Act was done after the expiry of four years from the end of relevant assessment year and the first proviso to Section 147 of the 1961 Act is applicable. Thus, it is to be seen whether it is a case of change of opinion by the authorities below leading to review of its own earlier decision which led to reopening of the concluded assessment u/s 147 of the 1961 Act or was the stand of the assessee in bringing to tax interest income after setting off of current year expenses under the head 'Profits and Gains of Business or Profession' was perverse that under no circumstance the AO could have formed an opinion to bring to tax the said interest incomes under the head 'Profits and Gains of Business or Profession' contrary to provisions of the statute and any such opinion so formed which is contrary to statute is unsustainable in the eyes of law and constituted formation of no opinion. This is an mixed question of law and fact which is to be necessarily decided keeping in view the legal provisions as are applied to contextual factual matrix surrounding each case and the same cannot be universally applied to all situations in an uniform manner de hors the factual matrix of the case. The AO after going through the entire factual matrix of the assessee being engaged in investing in businesses of cement companies and allied business took one of the possible and plausible view which cannot be termed as a perverse view by bringing to tax interest income on fixed deposit as business income and the said view of the AO is supported by the decision of Hon'ble Bombay High Court in the case of CIT v. Lok Holdings (2009) 308 ITR 356(Bom). By bringing to tax interest income earned on fixed deposit with banks as business income, the AO has taken one of the plausible and possible view keeping in view factual matrix of the case and such a view of the AO cannot be termed as perverse view more-so the assessee is an investment company engaged in investing in



cement and other allied businesses. It held fixed deposit of Rs. 40 crores with the bankers while it had investments in three cement companies aggregating to Rs. 1377.88 crores . The assessee's main business activity per main object clause is to invest as investment holding company of companies engaged in cement and allied businesses. The assessee has investments in three cement companies of which two were subsidiaries of the assessee while the third investee company namely ACC Limited, the assessee held substantial investments. The assessee did not manufacture or deal in cement and/or allied products but certainly through these investments in cement companies, the assessee was in a position to assert control over the management and affairs of these investee companies who were engaged in cement business wherein assessee was in a position to exercise its predominant position through its shareholding to participate in decision making processes of these companies through shareholders meeting and / or influencing decision making through nominating Directors and participating in management of affairs of these investee company . Keeping in view nature of its activities specified in main objects of Memorandum of Association, it has also to keep available funds ready for new opportunities coming in its way for making fresh investments in companies engaged in cement and other allied businesses and /or enhancing its stake in existing investee companies . This view of the Assessing Officer in assessing income of the assessee under the head 'Profits and Gains of Business or Profession' is a possible and plausible keeping in view factual matrix of the instant case and cannot be treated and classified as an altogether perverse view which is totally unsustainable in the eyes of law calling for interference within mandate of Section 147 of the 1961 Act. It is no more res-integra that powers under Section 147 of the 1961 Act is to re-assess the escaped income and not to review the earlier decisions. Now revenue by invoking provision of section 147 and 148 of the 1961 Act is trying to re-appreciate the existing material on record without having any fresh tangible incriminating material

coming into its by taking an altogether different view which no doubt is also a possible view , but this re-appreciation of the material already existing on record and forming another opinion which is also a possible view is nothing but is merely a change of opinion which is not permissible within purview of provisions of Section 147/148 of the 1961 Act. The learned DR relied on the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Limited(supra). In this case the Hon'ble Supreme Court was seized of the issue of taxability of interest income from short term investment made while factory of the tax-payer was being constructed and it was a stage prior to commencement of business , the question before the Hon'ble Supreme Court was as to taxability of the said interest income wherein Hon'ble Supreme Court held that the interest income would be taxable under the head 'Income from Other Sources' keeping in view provisions of Section 56 of the 1961 Act and it would not go on to reduce the interest paid on borrowings which would be capitalised. We are afraid that this case has no applicability to factual matrix of the case before us. In the instant case before us , the assessee is engaged in investing in cement companies which is supported by main object clause of the assessee and the financial statements reflecting actual activities undertaken by the assessee supports that it is in-fact pursuing the main objects as are specified in the main object clause of investing in cement companies and it is not a case of pre-commencement stage of the business and also we are not presently dealing with merits of the case and are adjudicating the challenge to legality and validity of invocation of Section 147 of the 1961 Act to factual matrix surrounding the case. The keeping of surplus funds in fixed deposits with the bankers could be with a view to make funds readily available in liquid form to enable assessee to seize any fresh new opportunity coming its way to invest in cement companies or to expand its investments in existing investee companies and hence such investment of surplus funds are possibly in sync with its main objects and the view taken by the AO falls within the realm of a possible and

plausible view. We clarify that we have not conclusively adjudicated on the merits of the case so far as chargeability of interest income under the heads of income specified in Section 4 of the 1961 Act as we are presently adjudicating challenge to legality and validity of reopening of the concluded assessment by Revenue by invocation of Section 147 of the 1961 Act. The learned DR has relied upon the decision of Hon'ble Supreme Court in the case of Autokast Limited (supra), where also factual matrix was similar to the decision of Hon'ble Supreme Court in the case of Tuticorin Alkali Chemicals and Fertilizers Limited (supra) and hence has no applicability to the factual matrix of the case before us. Thus, keeping in view entire factual matrix of the case we are inclined to quash reassessment proceedings initiated by the AO u/s. 147 of the Act and declaring the same to be bad in law due to cumulative effect of followings reasons firstly the assessee has truly and fully disclosed and declared the material facts while filing return of income with the Revenue u/s 139(1) of the 1961 Act as well during assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act, secondly the Revenue has framed original assessment u/s 143(3) of the 1961 Act, Thirdly the accounts of the assessee as we elaborated above are not complex accounts and rather had very few transactions during the impugned assessment year, fourthly the AO while framing original assessment u/s 143(3) of the 1961 Act duly deliberated on the income earned by the assessee and after careful consideration of material on record has come to the conclusion that income of the assessee from interest on fixed deposits is to be assessed to tax under the head 'Profits and Gains of business or profession' while dividend income was held to be exempt u/s 10(34). The AO assessed interest income under the head 'Profits and Gains of Business' which was conscious decision of the AO and opinion was formed which was a plausible and possible view taken by the AO keeping in view factual matrix of the case and now taking a different stand that the said interest income is to be taxed under the head 'income from other source' which no doubt is also a possible view is nothing but a

change of opinion based on re-appreciation of same material on record which is not permissible within provision of Section 147/148 of the 1961 Act as it is no more res-integra that powers u/s 147 of the 1961 Act is to reassess the escaped income and not to review the assessments already framed , fifthly , no fresh tangible incriminating material has come into possession of the Revenue and the reopening of the concluded assessment u/s 147 is sought to based on re-appreciation of the material already on record which is not permissible . The proceedings u/s 147 of the 1961 Act are not proceedings to review the assessment already framed but is only an power to reassess the escaped income. The decision of Hon'ble Supreme Court in the case of CIT v. Kelvinator of India Limited (2010) 320 ITR 561(SC) is relevant , 'We must also keep in mind the conceptual difference between power to review and power to reassess.'. The recent decision of jurisdictional Hon'ble High Court in the case of PCIT v. Inarco Limited in ITA No. 102 of 2016, judgment dated 23-07-2018 also supports the stand of the assessee , and lastly, more than four years have expired since the end of the relevant assessment year and first proviso to Section 147 is applicable and the reassessment proceedings can be validly initiated only if there is an failure on the part of the assessee to truly and fully declare and disclose material facts which we hold that there was no failure on the part of the assessee to declare and disclose fully and truly material facts in the return of income filed with Revenue u/s 139(1) or during the course of assessment proceedings u/s 143(3) r.w.s. 143(2) of the 1961 Act. The return of income was filed by the assessee with Revenue u/s 139(1) and it fully co-operated during the assessment proceedings conducted by the AO u/s 143(3) r.w.s. 143(2) and it could not be said notices issued by Revenue u/s 142(1) were not complied with as there is no adverse material on record to take an different view. Thus, we have no hesitation in quashing the reassessment proceedings initiated by the Revenue against the assessee u/s 147 of the 1961 Act by holding the same to be bad in law being not sustainable in the eyes of law. The

assessee succeeds in this appeal and orders of the authorities below are set aside. The ground no. 1(a) and 1(b) as were raised by the assessee in memo of appeal filed with the tribunal are decided in favour of the assessee for reasons detailed in this order. We are order accordingly.

8. Since we have adjudicated the legal ground raised by the assessee by holding that reopening of concluded assessment u/s. 147 of the Act by Revenue was bad in law being unsustainable in the eyes of law by quashing the said reopening u/s. 147 of the Act vide detailed reasoning given in this order. Thus, now no occasion will arise for us to adjudicate the issues in this appeal on merits as are raised in ground number 2 and 3 as were raised by the assessee in memo of appeal filed with the tribunal as the same have become infructuous and academic. Thus, ground no. 2 and 3 as were raised by the assessee in memo of appeal filed with the tribunal are dismissed as being infructuous. The ground no. 4 as was raised by the assessee in memo of appeal filed with the tribunal is consequential in nature. The ground no. 5 as was raised by the assessee in memo of appeal filed with the tribunal is general in nature and is dismissed. We order accordingly.

9. In the result appeal of the assessee is allowed as indicated above.

order pronounced in the open court on 27.08.2018

आदेश की घोषणा खुले न्यायालय में दिनांक: 27.08.2018 को की गई ।

Sd/-

(JOGINDER SINGH)  
JUDICIAL MEMBER

Sd/-

(RAMIT KOCHAR)  
ACCOUNTANT MEMBER

Mumbai, dated: 27.08.2018

*Nishant Verma*  
*Sr. Private Secretary*

copy to...

1. The appellant
2. The Respondent
3. The CIT(A) – Concerned, Mumbai
4. The CIT- Concerned, Mumbai
5. The DR Bench,
6. Master File

// Tue copy//

BY ORDER

DY/ASSTT. REGISTRAR  
ITAT, MUMBAI