IN THE INCOME TAX APPELLATE TRIBUNAL,
CUTTACK BENCH, CUTTACK

BEFORE SHRI CHANDRA MOHAN GARG, JUDICIAL MEMBER
AND LAXMI PRASAD SAHU, ACCOUNTANT MEMBER

ITA No.399/CTK/2018
Assessment Year: 2011-2012

DCIT, Corporate Circle -1(1), Bhubaneswar.	Vs.	M/s. Indian Metals & Ferro Alloys Ltd., IMFA Building, Bomikhal, Rasulgarh, Bhubaneswar.
PAN/GIR No.AAAAC 1481 F		
(Appellant)	..	(**Respondent**)

Assessee by : Shri S. Jolly, AR
Revenue by : Shri M.K. Gautam, CIT DR

Date of Hearing : 10 /08/ 2020
Date of Pronouncement : 09/09/2020

O R D E R

Per C.M.Garg,JM

This is an appeal filed by the revenue against the order of the CIT(A),1, Bhubaneswar dated 31.8.2018, in the matter of assessment u/s.147/143(3) of the Income tax Act, 1961 for the assessment year 2011-12.

2. The revenue has raised the following grounds of appeal:

"1. The order of the Ld. CIT(A) is erroneous both on facts and in law.

2. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) is not justified in quashing the reassessment order holding

that reassessment proceedings-initiated u/s. 147 of the I.T. Act, 1961 as bad in law in the case of the assessee.

3. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) is not justified in holding that the reassessment proceeding was initiated on mere change of opinion and without application of mind.

4. On the facts and in the circumstances of the case and in law, the Ld. CIT(A) ought to have disposed off the appeal on merit as it is a case where Revenue Audit objection has been accepted by the Department and the fact that the Assessing Officer reopened the case after being satisfied with the reason recorded by him. Thus, quashing of reassessment order by the Ld. CIT(A) is against the provisions of CBDT Circular No.03 of 2018 dated 11.07.2018[para-10(c)]."

3. Facts in brief are that the assessee filed its original return of income on 29.9.2011 showing total income at Rs.199,01,13,792/- and revised the return of income on 31.3.2012 showing total income at Rs.199,01,13,792/-. The Assessing Officer completed assessment u/s.143(3) of the Act on 14.3.2014 determining the total income at Rs.408,97,86,830/-. After giving appeal effect to the order of the ld CIT(A) dated 7.11.2014, the revised income stands at Rs.209,26,24,384/-.

4. Later on, the Assessing Officer from the profit and loss account, observed that the assessee company had made expenses of Rs.3.59 crore in foreign currency towards " others" (as per schedule 'O' to the balance sheet & P&L accounts). He noticed that the tax was required to be deducted u/s.195(1) of the Act by the assessee from the payments made by it of Rs.8.08 crores and assessee had not filed any application for non-

deduction or lesser deduction of tax u/s.195(2). The assessee failed to deduct TDS and also failed to obtain any no-deduction certificate from the concerned ITO (TDS). Therefore, AO opined that than an amount of Rs.8.08 crores was required to be added to the total income of the assessee u/s.40(a)(i) of the Act. Since, the AO in original assessment completed u/s.143(3) of the Act, had not disallowed the same, the AO issued notice u/s.148 of the Act show causing the assessee to explain as to why addition of Rs.8.08 crores shall not be made to the total income of the assessee. In response to said notice, the A.R. vide its written submission dated 29.2.2016 stated that the original return filed for the above assessment year may be treated as return for the purpose of reopening in the case. The AO issued statutory notice u/s.142(1) to the assessee, which was complied by the assessee. Thereafter, the AO completed the reassessment u/s.143(3)/147 of the Act on 30.12.2016 determining total income at Rs.217,37,15,780/- after disallowing expenses of Rs.8,07,91,391/- u/s.40(a)(i) of the Act, inter alia, observing that (i) the assessee could neither prove that it had made application to the AO to determine the appropriate portion of the sum so chargeable u/s 195(1) of the Act and neither the undertaking nor the CA certificate for the FY 2010-11 as envisaged in the CBDT circulars was referred to in support of the remittance

made abroad and tax was deducted thereon, were in possession of the assessee, which could be produced during the course of hearing proceedings.

5. In first appeal, the reassessment order u/s.147 of the Act was quashed by ld CIT(A). The relevant observations of the ld CIT(A) while quashing the reassessment order are as under:

> "a. The AO during the original assessment under Section 143(3) for AY 2011- 12, had considered the issue of non-deduction of tax u/s 195 of the Act, on payment made to foreign parties and had not made any disallowance after being satisfied with the explanation provided by the assessee. Therefore, the re-assessment proceedings arises out of change of opinion on the part of AO.
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> b. The Hon'ble ITAT Cuttack in the case of the Appellant for AY 2007-08 & 2008-09 in ITA 47, 48, 73, 74/CTK/2014 under similar circumstances, has quashed the re-assessment order for AY 2007-08 & 2008-09.
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> c. Even on merits, the disallowance of the nature made by the AO in the re-assessment proceedings is not sustainable since the impugned payments have been made to foreign companies and have no element of income taxable in India to attract the provisions of Section 195(1). Further, disallowance under Section 40(a)(i) of similar payments by way of export commission, advisory services, VMI services charges has been deleted by ITAT, Cuttack the case of the Appellant for AY 2013-14, 2012-13 and 2007-08 in ITA 412, 342, 405, 312, 411 of 2016 and ITA 220, 230 of 2017.

6. Ld CIT DR assailing the first appellate order submitted that the ld CIT(A) is not justified in quashing the reassessment order. He submitted that in this case, there was a Revenue Audit objection which was also accepted by the Department, it can be seen that the AO while recording the reasons for re-opening u/s.147 of the Act, has independently applied his mind and there is not a whisper about the Revenue Audit objection; It was held by the Hon'ble Supreme Court in the case of CIT vs. P V S Beedies Pvt. Ltd. (237 ITR 13) that reopening u/s.147 is re-valid on the basis of factual error pointed out by the audit party. He submitted that in this case, the Assessing Officer had allowed deduction under section 80G in respect of donation given to a charitable trust. The Audit party gave a factual information that recognition of said Trust had expired before 01.04.1973 and hence deduction under section 80G had been wrongly allowed by the A.O. The Assessing Officer, therefore, reopened the assessment u/s 147 of the Act. Both the Hon'ble Tribunal and High Court held that reopening of assessment under section 147(b) was not permissible on basis of report given by Audit Department. On further appeal, the Hon'ble Supreme Court held that as the audit party had pointed out a fact which had been overlooked by Assessing Officer. Therefore, the reopening of case under

section 147(b) on basis of factual information given by internal audit party was valid in law.

7. He further placed reliance on the decision of Hon'ble Supreme Court in the case of R. K. Malhotra, ITO vs. Kasturbhai Lalbhai (109 ITR 537), wherein, it has been held that the error pointed out by the audit party constitutes "information". The information can be of fact or law. It can be gathered from the assessment records itself. Hence the AO is authorized to re-open the case u/s.147 of the Act.

8. He further relied on the decision of t**he** Hon'ble Gujarat High Court in the case of N. K. Industries vs. ITO (49 taxmann.com 216), wherein, Hon'ble High Court had an occasion to deal with the similar issue. In the cited case, the Assessing Officer had allowed the depreciation at a higher rate. Subsequently there was a Revenue Audit objection and the Assessing Office reopened the assessment by issue of a notice u/s.148 of the Act. On appeal, the Hon'ble Gujarat High Court held that merely on the ground of audit objection, the notice u/s.148 could not be quashed.

9. Ld CIT DR submitted that whether such an issue was addressed by the Assessing Officer in the original assessment or not. Unless it is shown that the Assessing Officer had taken a considered view during completion of original assessment, question of "change of opinion" will not arise. For this proposition, he placed reliance on the decision of Hon'ble Mumbai High Court in the case of Ipca Labs Ltd. vs. DCIT (251 ITR 420). He submitted

that when an issue is not examined by the Assessing Officer or he does not apply his mind then it is a case of no opinion or belief. The question of change of opinion shall not arise in such a case. Reliance is placed on the decision of Hon'ble Mumbai High court in the case of Yuvraj vs. Union (315 ITR 84). Accordingly, ld CIT DR requested that the decision of CIT(A) to quash the reassessment proceedings be reversed and the case be adjudicated on merit.

10. Replying to above, ld A.R. of the assessee supported the order of the ld CIT(A). Ld A.R. submitted that during the course of original assessment proceedings, the Assessing Officer vide notice dated 20.2.2014 required the assessee to explain as to why disallowance under section 40(a)(i) of the Act should not be made in respect of expenses incurred in foreign currency and referred to in schedule Ó; to the profit and loss account and notice in particular referred to 'other expenses' amounting to Rs..3.59 crores, which has been mentioned inadvertently instead OF Rs.8.59 crores. Ld A.R. submitted that the Assessing Officer on pages 11 to 14 of the assessment order, reproduced the submissions made by the assessee in connection with why such 'other expenses' should not be disallowed. The AO made disallowance under section 40(a)(i) in respect of other payments of Rs.194.85 crores but after having applied his mind, did not disallow expenses booked under the head " other expenses", which is the subject

matter for passing reassessment order. Hence, the reopening of assessment u/s.147 of the Act is merely on change of opinion.

11. Ld A.R. referred to the decision of Hon'ble Supreme Court in the case of CIT vs Kelvinator of India Ltd., 320 ITR 561 (SC) to submit that the AO has power to reopen the assessment provided that there is tangible material to come to his knowledge that there is escapement of income from assessment. He submitted that in this case, the very basis on which, the AO reopen the assessment, was placed before the Assessing officer during original assessment and after going through the details, the AO passed the assessment order. Hence, there is no income chargeable to tax has escaped assessment.

12. We have heard the rival submissions and perused the relevant materials placed on the record of the Tribunal. The Assessing Officer has reopened the assessment u/s.147 of the Act by recording the following reasons:

> "From the profit and loss account of the Assessee and on the basis of further clarification provided, it is observed that, expenditure in foreign currency was incurred to the tune of Rs. 8.59 Crores. Out of this sum, Rs. 8.08 Crores was paid to foreign companies towards "Export Expenses – Finished goods handling", "Export Expenses – Handling Port Expenses" and "Consultancy charges" without making TDS u/s 195 of the Act.
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> b. Further, no application under Section 192(2), 192(3) or 197 of the Act was made by the Assessee for non-deduction or lower deduction of tax u/s 195. The Assessee therefore, has failed to deduct TDS and also failed to obtain any no-deduction certificate from the concerned

> ITO (TDS). In view of the above observations, the AO was of the view that payment of Rs. 8.08 crores to foreign company was required to be added to the total income of the assessee u/s 40(a)(i) of the Act. "

13. From a bare perusal of the reasons recorded by the AO for reopening of assessment it is clear that the AO has reopened the assessment on the ground that the foreign currency was incurred to the tune of Rs.8.08 crores without making TDS u/s.195 of the Act and no application under section 192(2), 192(3) or 197 of the Act was made by the assessee for non-deduction of tax u/s.195 of the Act. On perusal of the relevant materials placed on record, we find that the during the original assessment proceedings, the AO had considered the issue of non-deduction of tax u/s.195 of the Act on payment made to foreign parties and had not made any disallowance. After that no new fact has come to the knowledge of the AO after the original assessment was framed under Section 143(3) of the Act vide Order dated 14.03.2014. The AO has merely re-examined the profit and loss account of the assessee to initiate the reassessment proceedings. In any case, the CIT(A) has in the impugned order at page 8 has recorded a finding of fact that the very same payment has been discussed elaborately in the original assessment order dated 14.03.2014, passed under Section 143(3) of the Act.

14. The ld first appellate authority allowed the appeal of the assessee on both the counts i.e. on legal grounds holding the initiation of reassessment

proceedings as change of opinion and on merits holding that no disallowance is called for u/s.40(a)(i) of the Act. We find it appropriate and necessary to reproduce the observations and findings of ld CIT(A) which read as follows:

> "2.1 I have given careful consideration to the matter; I have also gone through the reasons recorded by the AO for reopening the assessment and the written submission of the assessee. The case laws relied upon by the assessee and referred to in the written submission have been perused. It is seen that the AO has -initiated proceeding u/s. 147 for the following reasons recorded by him:
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> *"With reference to your petition dtd.01.03.2016, the reasons recorded for reopening of the assessment u/s. 147 of the I.T. Act, 1961 for the A/Y 2011-12 is reproduced as under:*
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> 1. *As per provisions contained in section 195(1) of the I.T. Act, 1961, any person responsible for paying to a non-resident not being a company or to a foreign company, any interest or any other sum chargeable under the provisions of this Act (not being income chargeable under the bead "Salaries") shall, at the time of credit of such income to the account of the payee or at the time of payment thereof in cash or by the issue of a cheque or draft or by any other mode, whichever is earlier, deduct income-tax thereon at the rate in force. For non-deduction of tax or less deduction of tax, the payer or the payee may take the benefit of the provisions contained in sub-section (2) of section 195, sub-section(3) of section 195 and section 197.*
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> 2. *From the profit and loss account of the assessee it is observed that, it was revealed that the assessee company had made expenses of Rs.3.59 crore in foreign currency towards "others" (as per schedule '0' to the Balance sheet Et P.L. Accounts). In course of scrutiny assessment, the assessee submitted that the amount was actually Rs.8.59 crore instead of Rs.3.59 crore. The mistake was committed due to typographical error. Out of Rs. 8.59 crore expenditure in foreign currency, Rs.8.08 crore was paid to foreign companies towards "Export Expenses- Finished goods Handling", "Export Expenses - Handling Port Expenses" and "Consultancy charges" without making 77)5 uls.195.*
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> *3.. It was noticed from the record that the assessee had not filed any application for non-deduction or lesser deduction of tax U/s 195(2). There was no evidence forthcoming from the record that any certificate u/s. 192(2)1 192(3)/197 was Issued by the A.O. in r/o payment to ^nonresident foreign Company. The assessee had failed to deduct TDS and*

also failed to obtain any no-deduction certificate from the concerned ITO (TDS). Therefore, the payment of Rs.8.08 crore to foreign company was required to be added to the total income of the assessee u/s.40a(i) of the 1. T. Act, 1961.

In view of the above, I have reason to believe that income chargeable to tax has escaped assessment as far as there is underassessment of income to the above extent (as discussed in para 1, 2 & 3 above), within the meaning of section 147 of the 1.7: Act, 1961."

2.2 It is clear from the reasons that the AO was of the view that tax was required to be deducted u/s. 195(1) by the assessee from the payments made by it of Rs.8.08 crores (Rs.8,07,91,391/-) is the actual amount) in foreign currency to foreign companies and categorized under the head "others" in schedule 'O' to the P&L account. Since the assessee had failed to deduct tax at source on the above payments in foreign currency as per requirement of section 195(1) and had not obtained non-deduction certificate in accordance with the provisions of section 195(2), the AO was of the view that an amount of Rs.8.08 crores was required to be added to the total income of the assessee u/s.40(a)(i). The assessee's contention is that in the course of original assessment proceeding all the details pertaining to the expenses in foreign currency were furnished before the AO along with a detailed explanation- as to why no tax was required to be deducted u/s.195(1), and the AO, after examining the explanation of the assessee was satisfied with the same and did not make any disallowance u/s.40(a)(i). Going by the assessment order, it appears that the above contention of the assessee is correct. From the assessment order, it is found that the AO has incorporated therein verbatim the explanation of the assessee as regard non-deduction of tax u/s.195(1) on the impugned payments in foreign currency. After considering the explanation of the assessee, the AO has finally made disallowance u/s.40(a)(i) of Rs. 194,85,45,670/- Which does not include the expenses incurred in foreign currency under the head "others". After having done so in the assessment order, the AO has reopened the assessment on the ground that the expenses in foreign currency under the head "others" were also required to be disallowed u/s.40(a)(i). This is clearly a change of opinion on the part of the AO and it is settled law that no assessment can be reopened u/s.147 on mere change of opinion. In the case of **CIT v. Eicher Ltd. 294 ITR 310, the Hon'ble Delhi High Court** has reiterated its decision delivered in many other cases that reassessment based on mere change of opinion, where the material facts are already in record, is bad in law. The Hon'ble Delhi High Court has observed as under in this connection:

"16. Applying the principles laid, down by the Full Bench of this Court as well as the observations of the Punjab and Haryana High Court, we find that if the entire material had been placed by the assessee before the assessing officer at the time when the original assessment was made and

the assessing officer applied his mind to that material and accented the view canvassed by the assessee, then merely because he did express this in the assessment order, that by itself would not give him a ground to conclude that income has escaped assessment and, therefore, ***the*** *assessment needed to be reopened. On the other hand, if the assessing officer did not apply his mind and committed a lapse, there is no reason why the assessee should be made to suffer the consequences of that lapse."*

2.3 It is also well settled that the AO has no power to review the assessment made by him by taking recourse to the provisions of section 147. The AO has power to reopen an assessment provided there is "tangible material" available with him to conclude that there is escapement of income from assessment. The foundation of section 147 is "reason to believe", and not "reason to suspect", that income chargeable to tax has escaped assessment. In the case of **CIT v. Kelvinator of India Ltd. 320 ITR 561 (SC)** the Hon'ble Supreme Court has held that the concept of change of opinion must be treated as an inbuilt test to check the abuse of power by the AO and that even after 1.4.1989, the date from which the amended provisions of section 147 came into force, the AO has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. The relevant portion of the judgment of the Hon'ble Supreme Court in the above case is reproduced below:

"On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to Direct Tax Laws (Amendment) Act, 1987, re-opening could be done under above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the Assessing Officer to make a back assessment, but in section 147 of the Act [with effect from 1st April, 1989], they are given a go-by and only one condition has remained, viz., that where the Assessing Officer has reason to believe that income has escaped assessment, confers jurisdiction to re-open the assessment. Therefore, post-lst April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the Assessing Officer to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to reassess. The Assessing Officer has no power to review; he has the power to re-assess. But reassessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the Assessing Officer., Hence, after 1st April, 1989, Assessing Officer has power to re-open, provided there is "tangible material" to come to the

conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief."

2.4 The Hon'ble ITAT, Cuttack Bench in the case of Manas Kumar Swain vide their order dt.30.6.2017 in ITA No.360/CTK/2018 has quashed the reassessment proceeding initiated for the AY 2009-10 holding that the AO cannot reopen an assessment unless he has "tangible material" with him to show that income chargeable to tax has escaped assessment.' Hon'ble Tribunal has held in this case that the AO has no power to review the assessment in the garb of reassessment u/s.147. Similar view has been expressed by the Hon'ble jurisdictional ITAT in several other cases such as M/s. Shree Builders (order dt.23.11.2017 in ITA 120/CTK/201;and Smt. Pinky Agarwal (order dt.5.1.2017 in ITA No.390/CTK/2016.

2.5 It is also seen from the records that in the case of the assessee company itself, the Hon'ble ITAT, Cuttack Bench, Cuttack, on similar facts, vide their order dt.25.10.2017, has quashed the reassessment proceeding initiated for the AYs 2007-08 & 2008-09 holding that no reassessment can be legally made on mere change of opinion. The relevant portion of the order of ITAT is reproduced below for proper appreciation of the matter:

"17. A perusal of the recorded reasons shows that nowhere it records any fresh tangible information, which came to the notice of the Assessing Officer after completion of assessment under section 143(3) on 30.12.2009 for the assessment year 2007-08 and on 29.12.2010 for the assessment year 2008-09 and before recording of aforesaid reasons. Rather, the recorded reasons show that the reasons have been recorded based on very same materials which were already available before the Assessing Office prior to completion of assessment u/s. 143(3) on 30.12.2009 for the assessment year 2007-08 and on 29.12.2010 for the assessment year 2008-09. It shows that on the basis of very same materials, the Assessing Officer has now formed a different opinion. In our considered View, the above action of the Assessing Officer cannot be sustained. In this connection, it is noticed that the Hon'ble Supreme Court in the case of CIT vs. Kelvinator of India Ltd., 320 ITR 561 (SC) has held that the concept of "change of opinion" must be treated as an in-built test to check abuse of power by the Assessing Officer. Hence, after 1st April 1989, the Assessing, Officer has power to reopen an assessment, 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. In this context, the observations of Hon'ble apex Court at page 564 are very relevant, which are reproduced as follows:

"Therefore, post-lst April, 1989, power to re-open is much wider. However, one needs to give a schematic interpretation to the words "reason to

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

18. The opinion of the CIT(A) is that simply because the Assessing Officer latter on formed a belief that provisions of section 195(1),(2) & (3) are attracted in respect of a transaction on the basis of the very same materials, which were available before the Assessing Officer at the time of making original assessment will empower the Assessing Officer to reopen the assessment even in absence of fresh tangible material. In our considered view, it is contrary to the above stated decision of Hon'ble Supreme Court in the case of Kelvinator of India Limited (supra)."

That apart, the reasons recorded by the AO proceed on the erroneous assumption that that all payments to non-resident are subject to withholding taxes under section 195 of the Act and, therefore, income has escapement assessment for failure to withhold tax u/s 195(1) r/w 40(a)(i), which is in complete disregard of the decision of Supreme Court in the case of GE India Technology Centre (P) Ltd. v. CIT: 327 ITR 456, wherein it has been held by the apex Court that the provisions of section 195 of the Act are attracted only if the payments made to the non-resident recipient are chargeable to tax in India. Furthermore, in light of binding CBDT Instruction No. 02/2014 dated 26.02.2014, which states that the provisions of section 195(1) of the Act would apply only if the payments made to a non-resident are chargeable to tax in India. As such, it is submitted that the assessing officer could not have initiated reassessment proceedings under section 147/148 of the Act for alleged default/violation section 40(a)(1) of the Act, without pointing out which part Of the payments made by the appellant to non-resident parties were chargeable to tax in India and hence subject to withholding tax under section 195 of the Act,

In view of the above, it is submitted that the initiation of reassessment under section 147/148 by the Ld.AO on erroneous assumption that the payments made to non-residents are taxable in India, is bad in law and liable to be quashed at the threshold."

2.6 Even on merits, the disallowance u/s.40(a)(i) for which reassessment proceeding has been initiated is not justified in the case of the assessee since the impugned payments have been made to foreign companies and have no element of income taxable in India to attract the provisions of section 195(1). It is found that disallowance u/s.40(a)(i) of similar payments by way of export commission, advisory services, VMI service charges and other export services, made for the AY 2012-13 and confirmed by the CIT(A), has been deleted recently by the Hon'ble ITAT, Cuttack Bench, Cuttack vide their consolidated order dt.10.8.2018 in ITA Nos.412 & 342/CTK/2016, 220/CTK/2017, 405 & 312/CTK/2016, 230/CTK/2oA7 and 411/CTK/2016 for the AYs 2013-14, 2012-13 and 2007-08. The operative part of the order of the ITAT while deleting the disallowance u/s.40(a)(i) is as under:

"33. In regard to ground No.3 to 3.4, we find that the issues involved in the present appeal of the assessee are covered by the order of this bench of the Tribunal in the case of Paradeep Phosphates Limited, ITA No.289/CTK/2014 & ITA NO.264/CTK/2015, order dated 04.08.2017 and in the case of CIT Vs. Eon Technology P. Ltd., 343 ITR 366 (Delhi). Accordingly, we deleted the addition confirmed by the CIT(A) on account of advisory services, export commission, VMI Charges and other export services and allow the grounds raised by the assessee in Hence, even- on merits, no disallowance u/s.40(a)(i) is ca expenses of Rs.8.08 crores incurred in foreign currency under "others" which is comprised of export commission, VMI consultancy charges, training & seminar expenses/and other commission.

2.7 In view of the discussion made above, it is held that reassessment proceeding initiated in the case of the assessee legally invalid and, therefore, the reassessment order is quashed**."**

15. The decision of the Hon'ble Supreme Court in the case of P V S Beedies Pvt Ltd (supra) relied by ld CIT DR is misplaced as in that case, the Revenue Audit Party had brought on record a fresh fact, which was not available with the AO at the time of original assessment proceedings. The relevant observations of the Court are as under:

"The audit party has merely pointed out a fact which has been overlooked by the Income Tax Officer in the assessment. The fact that the recognition granted to this charitable trust had expired on 22-9-1992 was not noticed by the Income Tax Officer. This is not a

> case of information on a question of law. The dispute as to whether reopening is permissible after audit party expresses an opinion on a question of law is now being considered by a larger Bench of this Court. There can be no dispute that the audit party is entitled to point out a factual error or omission in the assessment. Reopening of the case on the basis of a factual error pointed out by the audit party is permissible under law."

16. In the case of Kasturbhai Lalbhai (supra), the opinion of the audit party was held as constituting information for reopening the assessment order u/s.147(b) of the Act on the view that the audit department was the proper machinery to scrutinize the assessment of the ITOs and point out of the error, if any, in law. But in the case at hand, all the details were furnished by the assessee during original assessment proceedings and after having considered the same, the AO has passed the assessment order.

17. Similarly, in the case of N.K. Industries (supra), the AO had allowed the depreciation at a higher rate and on the basis of audit objection, the AO reopened the assessment and the Hon'ble High Court held that merely on the ground of audit objection, notice u/s.148 could not be quashed, which is not issue in the present case.

18. We find that ld CIT(A) has followed the decision of Hon'ble Supreme Court in the case of CIT vs Kelvinator of India ltd., 320 ITR 561 (SC), wherein, it was held that the concept of change of opinion must be treated as an inbuilt test to check the abuse of power by the AO and that even after 1.4.1989, the date from which the amended provisions of section 147 came

into force, the AO has power to reopen an assessment, provided there is tangible material to come to the conclusion that there is escapement of income from assessment. However, in this case, no tangible material has come to the knowledge of the AO to reopen the assessment. Ld CIT(A) has also followed the decisions of this Tribunal in assessee's own case under similar facts in quashing the reassessment order.

19. Further, in the reasons recorded for reopening of assessment, there is no whisper, what to speak of any allegation, that the assessee had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen the assessment. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken.

20. Considering the facts and circumstances of the case, we are of the opinion that there is nothing to suggest that all the primary facts were not disclosed by the assessee at the time of original assessment completed u/s 143(3) of the Act nor any failure on the part of the assessee to disclose fully and truly all the material facts has been ascribed in the circumstances

narrated before us. It cannot be said that the assessee suppressed any material facts. Thus, we are of the considered opinion that the ld CIT (A), in the operative para (supra) 2.2 was right in holding that, from the assessment order, it is found that the AO, after considering the reply/explanation of the assessee has made disallowance of Rs.194.85 crores which does not include the expenses incurred in foreign currency under the head " others" and passed assessment order dated 30.12.2016 u/s.143(3) of the Act Thereafter, there was no new tangible materials, as discernible from the reasons recorded by him for initiation of reassessment proceedings in his hands, thus, it is a case of change of opinion. It is well-settled that if a notice under section 148 of the Act has been issued without the jurisdictional foundation u/s 147 of the Act new tangible materials which was not with him during original proceedings being available to the AO, the notice and the subsequent proceedings will be without jurisdiction and thus, liable to struck down. In view thereof, we have no hesitation in confirming the findings of the ld. CIT(A) in quashing the reassessment order.

21. In the result, appeal of the revenue is dismissed.

Order pronounced on 09 /09/2020.

Sd/-	sd/-
(Laxmi Prasad Sahu)	**(Chandra Mohan Garg)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Cuttack; Dated 09/9/2020
B.K.Parida, SPS(OS)

Copy of the Order forwarded to :

1. The Appellant : DCIT, Corporate Circle -1(1), Bhubaneswar

2. The Respondent. M/s. Indian Metals & Ferro Alloys Ltd., IMFA Building, Bomikhal, Rasulgarh, Bhubaneswar
3. The CIT(A)-1, Bhubaneswar
4. Pr.CIT- 1, Bhubaneswar
5. DR, ITAT, Cuttack
6. Guard file.

//True Copy//

By order

Sr.Pvt.secretary
ITAT, Cuttack