IN THE INCOME TAX APPELLATE TRIBUNAL
DELHI BENCH "SMC", NEW DELHI
BEFORE SHRI H.S. SIDHU, JUDICIAL MEMBER

	I.T.A. No. 4464/Del/2018		
	A.Y. : 2009-10		
M/S VISHESH INFRASTRUCTURE P. LTD., PUJA HOUSE, 34/1, VIKAS APARTMENT, EAST PUNJABI BAGH, NEW DELHI – 110 026 (PAN: AACCV4079M)	Vs.	ACIT, CIRCLE 26(2), NEW DELHI	
(APPELLANT)		**(RESPONDENT)**	

Assessee by : Shri Tarun Batra, CA
Department by : Sh. SL Anuragi, Sr. DR

ORDER

Assessee has filed this Appeal against the Order dated 04.4.2018 passed by the Ld. Commissioner of Income Tax (Appeals)-9, New Delhi pertaining to assessment year 2009-10 on the following grounds:-

> *"1 The AO erred in reopening the case u/s. 147/148 of the I.T. Act, 1961 and Ld. CIT(A)-9 has erred in confirming the action of the Assessing Authority. The reopening has been against the law as the points raised in reopening of the case had been considered by the Assessing Authority in original assessment vide order dated 21.12.2011 passed u/s. 143(3) of the Act.*

2. The Assessing Authority erred in making an addition of Rs. 7,80,475/- which were spent for repairs and maintenance and Ld. CIT(A) has erred in confirming the addition made.

3. That in the original assessment order of dated 21.12.2011 a disallowance of Rs. 3,00,000/- (Rs. three lacs only) out of repairs and maintenance of Rs. 7,80,435/- was made and now a further addition of Rs. 7,80,475/- has been made and in that way an addition made works out to Rs. 10,78,455/- against the total expenses claim of Rs. 7,80,475/- and thus the authorities below have grossly erred in the order passed and confirmed by CIT(A)-9, New Delhi.

4. The Appellant craves leave to add, alter, amend, and delete any grounds of appeal at the time of hearing of the appeal or before that.

2. The brief facts of the case are that assessee company was engaged in the business of infrastructure facility (BOT Project) and Road construction. In this case the return of income was filed by the assessee on 30.9.2009 declaring a loss of Rs. 39,52,850/-. The case was selected for the scrutiny and in the assessment order dated 21.12.2011 the income was assessed at a loss of Rs. 36,52,850/- after making an addition of Rs. 3,00,000/- on account of various expenses. Notice u/s. 148 of the Income Tax Act, 1961 (in short "Act") was issued after recording the reasons of reopening

and in response to the same, the Assessee filed a letter dated 26.1.2016 in which it was submitted that the return already filed should be considered as return in compliance to the notice u/s. 148 of the Act. The reasons of reopening were provided to the assessee and an opportunity of being heard was given. Notice u/s. 143(2) of the Act was issued on 21.10.2016 and the same was duly served upon the assessee. The AR for the assessee attended the proceedings and furnished the written submission. The objections raised by the assessee against the reopening proceedings have been disposed off vide order dated 28 10.2016. Thereafter, the re-assessment was completed u/s. 147/143(3) at an income of Rs. 7,80,475/- on 29.11.2016 by making addition of Rs. Rs. 7,80,475/- on account of BOT repair and maintenance expenses.

3. Against the order of the Ld. AO, assessee appealed before the Ld. CIT(A), who vide impugned order dated 04.4.2018 has dismissed the appeal of the assessee.

4. Aggrieved with the order of the Ld. CIT(A), Assessee is in appeal before the Tribunal.

5. At the time of hearing, Ld. Counsel of the assessee has submitted that the reopening has been against the law as the points raised in reopening of the case had been considered by the AO in the original assessment vide order dated 21.12.2011 passed u/s.

143(3) of the Act. He further stated that AO did not have any fresh and new material showing that income of the Assessee escaped for chargeable to tax and therefore reopening is unjustified and solely based on change of opinion, which is not permissible under the law settled by the various Courts. To support his contention, he relied upon the following case laws:-

i) Rallis India Ltd. vs. ACIT (2010) 323 ITR 54.
ii) CIT vs. Cheil Communications India (P) Ltd. (2013) 354 ITR 549.
iii) Gujarat Power vs. ACIT (2013) 350 ITR 266
iv) Lanxess ABS Ltd. vs. DCIT (Special Civil Application No. 17530 of 2011 dated 11.4.2012).
v) Ralson India Ltd. Vs. DCIT (2014) 43 taxmann.com 293
vi) CIT vs. Mirza International Ltd. (2015) 54 taxman com 217
vii) CIT vs Orient Craft 354 ITR 536

6. On the other hand, Ld. DR relied upon the order of the Ld. CIT(A) and stated that the Ld. CIT(A) has passed a well reasoned order on the basis of the documentary evidence filed by the assessee as well as prevailing law. He further stated that Notice u/s. 148 has been issued after adopting the prescribed procedure under the law and with tangible material. Therefore, he stated that the question of quashing the reassessment does not arise.

Accordingly, he requested that the Appeal filed by the Assessee may be dismissed.

7. I have heard both the parties and perused the records especially the orders of the Revenue authorities alongwith the Paper Book filed by the assessee and the case laws relied by him. I find that the Assessee filed Return of Income on 30/09/2009 declaring a Loss of Rs 39,52,850/-. The case was selected for scrutiny and after various proceedings order u/s 143(3) of the Income Tax Act, 1961, was passed on 21/12/2011 wherein disallowance of Rs 3,00,000/- was made out of Total Repair and Maintenance Expenses of Rs. 7,80,475/-. Though all the details in respect of Repair and Maintenance expenses were given to the Assessing Officer and all the books of accounts have been duly audited by a Chartered Accountants, the addition was made for Rs. 3,00,000/- out of the same. This addition was made after considering the detail of expenses incurred by the assessee for maintenance of BOT. It is noted that the Expenses were mostly paid to the labourers who do not have Bank Accounts and that's why cash payment was made to them certain amounts were spent for purchases of material. In view of above, it is crystal clear that the Assessing Officer did not have any Fresh and New Material showing that Income of the Assessee escaped for chargeable to tax and

therefore re-opening is unjustified. It is apparent that the reasons for reopening of the assessment was without any base and without any explanation that income has escaped assessment. The matters on which the case was reopened has already been assessed and all the materials were available on record. It is also apparent that not only the Assessing Officer had no reason to believe that the income has escaped assessment but also, he was on the contrary of the opinion that there was inconsistent stand adopted by him to reopen the assessment. Section 147 permits initiation of reassessment proceedings only when the Assessing Officer has a reason to believe that income has escaped the assessment whereas in this case there was no reason to believe that has escaped assessment and the matters which has been stated in the reasons has already been explained at the time of initial assessment under section 143(3) of the Income Tax Act 1961. Therefore the Assessing Officer has wrongly reopened the case under section 147/148 of the Income Tax Act 1961. It is also noted that the sine qua non for the initiation of proceedings in terms of section 147 is "reason to believe" on the part of the assessing officer that income chargeable to tax has escaped assessment. The reason recorded by the Assessing officer are as follows :-

Re-opening the case was made on two points.

Claim of Depreciation Expenses of Repair & Maintenance

7.1 A perusal of the reasons would indicate that the Assessing officer has proceeded solely on the basis of return of income, enclosures and information submitted by the assessee company at the time of initial assessment and all the material and information were available with the assessing officer at the time of initial assessment under section 143(3) and the assessing officer was completely satisfied and on that very basis after considering all the details and documents made addition of Rs.3,00,000/- by disallowing expenses under repair and maintenance expenses. The Reason for Reopening of the case was not based on any other new or tangible material and without any such material, the reopening of the case is not in accordance with law and is null and void ab-initio. Thus, reopening done by the Assessing Officer in the absence of fresh tangible material is invalid and bad in law. The phrase 'reason to believe' in section 147 relates to such other new or tangible material as may have come to the knowledge of the Assessing Officer pursuant to the original proceedings for assessment. Once the assessment has been done and there is no such other new or tangible material as may have come to the knowledge of Assessing Officer pursuant to the original proceedings and that also under section 143(3) the Income Tax Act 1961.

7.2 In the case of Rallis India Ltd. v. Asstt. CIT f20io1 323 ITR 54/190 Taxman 1 (Bom.) the Hon'ble Court holds that validity of a reopening notice has to be adjudicated on the basis of reasons recorded at the time of reasons recorded and not by subsequent amendments.

7.3 I further find that the Hon'ble Delhi High Court in CIT v. Cheil Communications India (P.) Ltd. [2013] 354 ITR 549/217 Taxman 275/33 taxmann.com 170 has decided validity of a reopening notice issued followed by a re-assessment framed resulting in additions on issues not forming part of section 148 reassessment. The relevant assessment year there is 2006-07. There was no addition in response to the reasons stated in reopening notice. Their lordships have upheld the tribunal's order holding the said reopening to be invalid in section 143(1) case. Section 147 Explanation 3, has also been reproduced and considered. This is a case of neither escapement of any assessable income nor is there any jurisdiction vested with the Assessing Officer to advert to other issue of capital expenditure and 'ALP' adjustment hereinabove by taking shelter under section 147 Explanation 3 since the same applies only with effect from 1-4-2009 much after the reopening notice and the TPO reference. The assessee's latter two arguments are accepted. So far as the revenue's plea are concerned, the same is not found not to

be justifiable in view of the fact that the above stated conditions of existence of tangible material for reopening of an assessment and not making out the case of review from a section 143(3) apply even if reopened within four years from the end of the impugned assessment year.

7.4 I further find that in case of Gujarat Power v. Asstt. CIT (2013) 350 ITR 266/(2012/ 26 taxmann.com 51 (Gui.). The Hon'ble Court also had an occasion to consider similar question of law where the reopening of the assessment on the very same claim was made on the basis of the same material which was held a mere change of opinion and impermissible

7.5 I further note that in case of Lanxess ABS Ltd. v. Dy. CIT [Special Civil Application No. 17530 of 2011, dated 11-4-2012] the Hon'ble Court had dealt with an identical issue in a writ petition. The Court, after a detailed reasonings held in similar circumstances that the notice was illegal for having been issued without any tangible material to exercise jurisdiction under section 147 of the Act. Profitable, it would be, to reproduce some of the relevant portions of this decision:

> Where Assessing Officer passed assessment order under section 143(3) after considering assessee's explanation in respect of documents seized in

course of search proceedings initiation of reassessment proceedings on basis of same material already available on record could not be upheld [Assessment year 1991-1992] [In favour of assessee]

7.6 In the case of Raison India Ltd.v.Dy. CIT [2014] 43 taxmann.com 293/366 ITR 103 (Delhi). the Court has held that since entire material was available on record at time of completion of assessment proceedings, impugned notice seeking to reopen assessment was to be quashed.

7.7 In the case of CIT v. Mirza international Ltd. [2015] 54 taxman.com 217/229 Taxman 443 (All.). Where the Assessing Officer having completed assessment under section 143(3), initiated reassessment proceedings after expiry of four years from end of relevant assessment year, since it was not revenue's case the that assessee had failed to disclose truly and fully all material facts necessary for assessment, impugned reassessment proceedings deserved to be set aside.

8. Keeping in view of the facts and circumstances of the case and in view of the decisions cited above, in my considered opinion, the action of the AO is a change of opinion case because the original assessment has been framed in the case of the assessee u/s.

143(3) of the I.T. Act, after making detailed enquiry and the AO has accepted the version of the assessee. Therefore, I am of the considered view that assessee had made full and true disclosure during the original assessment proceedings. I am also of the view that reopening had been done merely on change of opinion in as much as that in the original assessment made u/s. 143(3) of the I.T. Act. I also find that AO has no fresh material to form his opinion regarding escapement of assessment and he has also not found any tangible material to record the reasons for reopening of the assessment of the assessee. It is a settled law that merely change of opinion is not permissible under the law. This view is supported by the Hon'ble Delhi High Court decision in the case of Commissioner of Income Tax vs. Usha International Ltd. [2012] 348 ITR 485 (Delhi) [Full Bench] and the decision of the Hon'ble Supreme Court of India in the case of CIT vs. Kelvinator of India Limited in Appeal Nos. 2009-2011 of 2003 reported in 320 ITR 561.

8.1 Therefore, respectfully following the aforesaid precedents, I am of the view that both the authorities below have gone wrong in deciding the reopening as valid. Hence, I quash the orders of the authorities below on this legal issue and decide the same in favor of the assessee.

8.2 Since I have already quashed the reassessment proceedings as aforesaid, raised in the Assessee's Appeal, in my considered opinion, there is no need to adjudicate the issues on merits.

9. In the result, the Appeal filed by the Assessee stand allowed.

Order pronounced on 04/12/2018.

Sd/-

[H.S. SIDHU]
JUDICIAL MEMBER

Date 04/12/2018

"SRBHATNAGAR"

Copy forwarded to: -

1. Appellant -
2. Respondent -
3. CIT
4. CIT (A)
5. DR, ITAT

TRUE COPY

By Order,

Assistant Registrar,
ITAT, Delhi Benches