IN THE INCOME TAX APPELLATE TRIBUNAL
Hyderabad ' B ' Bench, Hyderabad

Before Smt. P. Madhavi Devi, Judicial Member
AND
Shri S.Rifaur Rahman, Accountant Member

ITA No.944/Hyd/2017
(Assessment Year: 2009-10)

Shri A. Naga Srinivas Hyderabad PAN: AEKPA5809H *(Appellant)*	Vs	Dy. Commissioner of Income Tax, Circle 13(1) Hyderabad *(Respondent)*

For Assessee : Shri A. Srinivas
For Revenue : Shri M.H. Naik, DR

Date of Hearing: 31.05.2018
Date of Pronouncement: 08.06.2018

O R D E R

Per Smt. P. Madhavi Devi, J M.

This is assessee's appeal for the A.Y 2009-10 against the order of the C T (A)-6, Hyderabad, dated 1.11.2016. The assessee has raised the following grounds of appeal:

"*1. The order of the Appellate Commissioner is contrary to law, facts & circumstances of the case.*

2. The Appellate Commissioner ought not to have dismissed the appeal without giving adequate opportunity to the assessee to present its case.

3. Without prejudice to the ground at item No.2 above, the Appellate Commissioner ought not to upheld that the issuance of notice by the AO u/s.148 when all facts were before the AO at the time of original assessment made u/s.143(3).

4. The Appellate Commissioner ought not to have upheld the validity of the notice u/s.148 was correct, when in fact the notice u/s.148 issued by the AO, tantamounted to change of

opinion on the same facts, without any fresh evidence or information being brought on record.

5. Without prejudice to the grounds at 2 3, & 4, above the Appellate Commissioner ought not to have confirmed the order of the AO disallowing an amount of Rs.20,OO,OOO/- u/s.40(a)(ia).

6. The Appellate Commissioner ought not to have upheld the order of the AO in applying the provision u/s. 40(a)(ia) when in fact the amount of Rs.20,00,000/- debited to the profit and loss account was not eligible for TDS".

2. At the time of hearing, the learned Counsel for the assessee submitted that he does not wish to press the ground of appeal No.2 and accordingly, the said ground is rejected as not pressed.

3. Brief facts of the case are that the assessee, an individual, deriving income from the activity of direction of cine films, has filed his return of income for the A.Y 2009-10 originally on 18.02.2010 admitting total income of Rs.45,25,330. The assessment order u/s 143(3) of the Act was passed on 14.12.2011 determining the taxable income at Rs.46,89,333 after making disallowance of 20% of the salary claimed i.e. Rs.1,64,000 only. Thereafter, the AO, on perusal of assessment records, observed that the assessee has debited an amount of Rs.20.00 lakhs in the P&L A/c for the A.Y 2009-10 as payment to M/s. Sumanth Art Production and that though the TDS needs to be made, the assessee has not deducted the TDS. He observed that in view of the above facts and as per section 40(a)(ia) of the Act, the entire expenditure has to be disallowed and brought to tax. Therefore, a show cause notice u/s 148 of the Act was issued to the assessee.

The assessee requested for reasons for the reopening and the same was furnished to the assessee on 1.8.2013.

4. Thereafter, the assessee filed a letter explaining that he has received the sum of Rs.20.00 lakhs as advance for an upcoming project during the financial year 2006-07 relevant to the A.Y 2007-08 and that the TDS certificate was erroneously issued as payment of interest instead of professional fees. The confirmation from M/s Sumant Art Production was filed in support of the said contention. It was further submitted that the said production did not materialize and the advance was returned to the said party in the financial year 2008-09 relevant to the A.Y 2009-10 and by following the cash system of accounting it was debited to the P&L A/c. It was submitted that this transaction is not covered by the TDS provisions. The AO however, was not convinced with the assessee's contentions and held that the return of money was subject to TDS and since no TDS was made, it is to be disallowed u/s 40(a)(ia) of the Act. Accordingly, he brought it to tax. Aggrieved, the assessee preferred an appeal before the CIT (A), who confirmed the order of the AO and the assessee is in second appeal before us.

5. The learned Counsel for the assessee, reiterated the submissions made before the authorities below and submitted that the Chapter XVIIB of the Act, deals with the deduction of tax at source and the nature of transactions for which TDS is to be made. He submitted that the return of advance, by the assessee, does not fall under any of these categories. Therefore, according

to him, no disallowance u/s 40(a)(ia) can be made. He also drew our attention to the notice issued by the AO dated 15.07.2011 during the assessment proceedings u/s 143(3) of the Act, wherein the assessee was asked to explain, the details of the sum claimed as expenses, and that the assessee has given the details of the expenses, which is placed at page 5 of the paper book wherein the advance returned to M/s Sumant Art Production amounting to Rs.20.00 lakhs is reflected. He also drew our attention to the P&L A/c wherein the assessee has debited the expenses of Rs.20.00 lakhs. Therefore, according to him, the AO was aware of the advance returned to M/s. Sumant Art Production and after considering the said issue also, the AO has not brought it to tax. Therefore, according to him, the reopening of the assessment u/s 147 of the Act on this ground, is nothing but on the change of the opinion which can be permitted not as held in the decision of the Hon'ble Supreme Court in the case of Kelvinator India Ltd reported in 320 ITR 561 (S.C) and also in the case S. Ranjith Reddy *vs.* Deputy Commissioner of Income-tax, Circle -6(1), Hyderabad reported in 144 ITD 461 (Hyd.) at paras 28 to 33. Therefore, according to him, the assessment order is not sustainable both on the legal ground as well as on merits.

6. The learned DR, on the other hand, supported the orders of the authorities below.

7. Having regard to the rival contentions and the material on record, we find that in the case of the assessee, the assessment has been completed u/s 143(3) on 14.12.2011, while

the notice u/s 148 was issued on 4.1.2013 i.e. within four years from the end of the relevant A.Y. We find that the AO, during the original assessment proceedings u/s 143(3), had called for details of the expenditure and the assessee has furnished the details and it is only thereafter, the regular assessment was completed. Therefore, the presumption to be drawn is that the AO was satisfied with the explanation given by the assessee as held by the Hon'ble Delhi High Court in the case of CIT vs. Usha International Ltd reported in (2012) 348 ITR 485 (Del.) and hence has not made any addition and reopening amounts to change of opinion. The reopening of the assessment on the very same ground on which an inquiry was made during the assessment proceedings would amount to reopening on change of opinion as also held by the Hon'ble Supreme Court in the case of Kelvinator India Ltd in 320 ITR 561 (SC) (F.B).

8. The above decision was considered by the Coordinate Bench of the Tribunal at Hyderabad in the case of S. Ranjith Reddy *vs.* Deputy Commissioner of Income-tax, Circle -6(1), Hyderabad reported in 144 ITD 461 (Hyd.) and at paras 28 to 33 it was held as under:

> *"**28.** Now, undoubtedly an order of the assessment which has been passed in subsequent assessment year may furnish a foundation to reopen an assessment for an earlier assessment year. However, there must be some new facts which come to light in the course of assessment for the subsequent assessment year which emerge in the order of the assessment. Otherwise, a mere change of opinion on the part of the Assessing Officer in the course of assessment for a subsequent assessment year would not by itself legitimise reopening of assessment for an earlier year. The point, we make it clear herein is that whether in the course of assessment proceedings for subsequent year certain additional information is obtained by the Revenue which was not available to it in the course of assessment for an earlier year, that may legitimately be utilised as a ground for reopening of assessment of the earlier year. Whether the reopening has taken place within four years that may legitimately give rise to an inference of escapement of income. The new information which has come to the knowledge of the Revenue, therefore, constitutes tangible material. If there is*

a fresh material that that would not preclude the Assessing Officer to reopen the assessment for an earlier year on the basis of fresh material which has come to light in the course of assessment for a subsequent assessment year. Now in the above background, considering the facts of the present case, there is no dispute that the assessee furnished a detailed note annexed to the return of income. For clarity, we reproduce the note appended to the return of income.

"S. Ranjith Reddy s/o. late S. Hanumanth Reddy

PAN No: AOMPS8851D

Assessment Year: 2006-07

Accounting Year: 2005-06

Note appended to and forming part of Return of Income

The Return of the Income for the Accounting year ending on 31-03-2006 relevant to the Assessment Year 2006-07 is submitted.

1. *The sources of Income for the Assessment year under consideration consist of (a) Income from House Property (b) Income from Capital Gains (c) Income from Salary and (d) Income from Other Sources.*

2. *My father Sri S Hanumanth Reddy died on 07-07-2005. He was assessed to Income Tax (a) in his individual status under PAN No. AIRPS8649A and (b) in HUF Status PAN No. AADGS8526A. He was in receipt of Property income and Interest income in the Individual status that was being admitted year after year. The HUF was in receipt of Property income, Interest income and Agricultural income that was also being admitted year after year.*

   (a) *Under my late father S. Hanumanth Reddy's Individual status as per the Hindu Succession Act, as legal heir per Schedule I, I became entitled to 1/4th share in his individual property income and his interest income. Accordingly the property income declared in an amount of Rs. 3,39,195/- and interest income in an amount of Rs. 7,658/- thus represents my 1/4th Share as one of the legal heirs of my late father Sri S. Hanumanth Reddy. The said rental income on the property succeeded is for the period from 08-07-2005 to 31-03-2006.*

(b) *Under my late father S. Hanumanth Reddy's HUF status as per the Hindu Succession Act, as legal heir per Schedule I, I became entitled to 1/4th of 1/3rd share of his total HUF property, interest and agricultural income. Accordingly the property and interest income declared in an amount of Rs. 25,821/- and agricultural income of Rs. 15,833/- thus represents my 1/4th Share of 1/3rd share as one of the legal heirs of my late father Sri S. Hanumanth Reddy.*

3. *(a) As a consequence of death of my father I became one of the successor to the interests and rights in the layout at Gachibowli village, Serilingampally Mandal, R.R. District, entrusted for development to M/s. Lumbini Constructions Ltd, a evidenced by the Development Agreement dated 28th February 2006, duly registered with the office of Sub-Registrar, Moosapet on 31st March 2006 (Vide Document No. 5630/2006). I became entitled to 9 plots (bearing Nos. 3, 11, 54, 67, 72, 75, 85 & 95) on which houses shall be constructed and in one plot I am an equal co-owner with my older brother S. Narayan Reddy in the layout (bearing No. 7) in the project that is in progress.*

(b) On one such allotted plots bearing No. 7 that is equally owned by myself and my brother I received an amount of Rs. 2,50,000 as advance towards my 1/2 Share from N. Vasumathi Reddy. The liability to the capital gains, tax will arise in the year in which the property, shall be transferred to the vendee.

4. *In the year under consideration, I jointly purchased 28.75 Guntas of land from S. Suresh Kumar on February 16th, 2006 Vide registered Sale Deed (Doc. No. 2277/2006) in Shamshabad Village, Shamshabad Mandal R.R District. I own 50% share. Towards my share I paid an amount of Rs. 2,87,500 (Vide Cheque No. 559536 drawn from Syndicate Bank Somajiguda) on February 16, 2006 towards the purchase of 28.75 Guntas of land as a co-owner for 50% share to S. Suresh Kumar. The said land is situated in Sy. No. 656/Part*

Shamshabad Village, Shamshabad Mandal, R.R. District. The other 50% share is purchased by Rasuri Satish Kumar Reddy. The sources for the purchase are met from the balance to the credit of savings i.e. my Syndicate Bank Current account (Bearing no. 201/14508) at Somajiguda branch.

5. *During the year I sold 2,02,616 Shares of Mali Florex Limited to my brother S. Narayan Reddy for a consideration of Rs. 2,02,616/-. The said amount is yet to be received. The said Company was not having any activity. The further details for the computation as per section 45 of the Income-tax Act, 1961 are as follows:*

Shares were allotted in 15/12/03) the particulars are as per the information filed before the Registrar of Companies value taken as on date of allotment Rs. 4,40,000

Sale of shares during the year to S. Nararayan Reddy for a consideration of (Date of transfer 30/7/2005) Rs. 2,02,616

As noticed above the transfer resulted in capital loss of Rs. 2,37,384/- that is entitled to be carried forward for set off in future years."

29. *The contention of the Department is that there is no assessment u/s. 143(3) of the Act for this assessment year 2006-07 and only return was processed u/s 143(1) and the Assessing Officer is within the jurisdiction of reopening the assessment and there is no change of opinion. The Department to say that there is no change of opinion, it should be incumbent upon the Department to demonstrate that during the course of assessment proceedings for A.Y. 2007-08 some new information had been brought on record, which wa not available when the return of income was processed for A.Y. 2006-07 or before the expiry of time limit to complete the assessment for A.Y. 2006-07 in regular course. That indeed is not the case of the Revenue. All the material which was relevant to determine the income were available with the Assessing Officer when the regular assessment was to be completed for A.Y. 2006-07. There is requisite material to complete the assessment, the Assessing Officer has not considered the same and there was no assessment. Consequently, mere formation of another view in the course of assessment proceedings for A.Y. 2007-08 would not justify the Revenue for reopening the assessment for A.Y. 2006-07 though the reopening of assessment has taken place within the period of 4 years. The power to reopen assessment is structured by law. Guiding principles which were laid down by the Supreme Court in the case of Kelvinator of India Ltd. (supra) must be fulfilled. In the present case, there is no tangible material, no new information and no fresh material which came before the Revenue in the course of assessment for A.Y. 2007-08 to justify reopening of assessment for A.Y. 2006-07. The Department Representative taken a plea before us that in view of judgement in the case of Rajesh Jhaveri Stock Brokers Pvt. Ltd., (cited supra), the return was processed only u/s. 143(1) of the Act and there is no regular assessment and reopening of assessment is justified. The DR submitted that the judgement in the case of Kelvinator of India*

Ltd. (cited supra) covers cases where the first assessment was made u/s. 143(3) and that it does not apply to cases where the return was processed u/s. 143(1) of the Act. This proposition cannot be acceptable because the Supreme Court was expounding the provisions of section 147 and the words "reason to believe" appearing therein. It was held that schematic interpretation has to be given to these words - failing which section 147 would give arbitrary powers to the Assessing Officer to reopen assessments on the basis of a mere change of opinion. It was further held that there is a conceptual difference between the power to review and the power to reassess and section 147 cannot be interpreted in such a manner to give a power of review. The contention of the Department before us is that where no view has been taken as to the correctness of the return in the first instance, the Assessing Officer cannot be said to exercise a power of review when he reopens the assessment which has been earlier passed under 143(1). This argument is similar to the argument that if no opinion can be said to have been formed by the Assessing Officer when the return was merely processed under section 143(1), by issuing notice under section 148 he cannot be said to have changed his opinion. But it needs to be remembered that section 147 applies both to section 143(1) as well as section 143(3) and therefore, except to the extent that the reassessment notice issued unde section 148 in a case where the original assessment was made under section 143(1) cannot be challenged on the ground of a mere change of opinion, still it is open to an assessee to challenge the notice on the ground that there is no reason to believe that income chargeable to tax has escaped assessment. The reason to believe must have a live link with the formation of the belief that income chargeable to tax had escaped assessment when the return was processed and accepted under section 143(1). To hold that in every case where a return was processed and accepted under section 143(1) the Assessing Officer will be free to reopen the same under section 148 even in the absence of a live link between the reasons recorded and the formation of the belief would be to make the conditions of section 147 and section 148 as regards notices of reopening issued in cases where the return was originally processed under section 143(1). There is no exclusion in section 147 to the effect that where the return was earlier proc ssed under section 143(1} it is not necessary for the Assessing Officer to hold or entertain a belief that income chargeable to tax had escaped assessment for he reasons recorded by him. Therefore, the condition that the Assessing Office must have reason to believe and the further condition that those reasons must have a live link with the formation of the belief is applicable equally to cases where the return was processed under section 143(1) as also to cases where the return was examined and an assessment was made by a speaking order under section 143(3). The only distinction recognized in section 147 between the two is where it is provided by the proviso that where the earlier assessment was made under section 143(3), no action for reopening the assessment can be taken after the expiry of four years from the end of the relevant assessment year unless income chargeable to tax has escaped assessment because of the failure on the part of the assessee to file a return or to disclose fully and truly all material facts necessary for the assessment. Such an exception has not been provided for in a case where the return has been processed under section 143(1) in which case the proviso will have no application. If it is correct that an intimation under section 143(1) as well as an assessment order under section 143(3) are both amenable to section 147, it should also be conceded that even in a case where the original return was merely processed under section 143(1) the Assessing Officer must have reason to believe that income chargeable to tax has escaped assessment. He has also to record reasons under section 148(2) for reopening the earlier assessment made under section 143(1). All that has been excluded is that the assessee, in whose case the

return was first processed under section 143(1) cannot challenge the notice of reopening on the ground that it is prompted by a mere change of opinion. Only to this limited extent there is a disability on the part of the assessee to challenge the notice of reopening in a case where his return was earlier processed under section 143(1) of the Act.

30. *The reliance placed by the learned DR on the judgment of the Supreme Court in Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) would be apposite in all cases where the return was processed under section 143(1) but later notice was issued under section 148 and the assessee challenges the notice on the ground that it is prompted by a mere change of opinion, In this judgment it was held that there was no assessment under section 143(1) in the sense that the return is scrutinized and an opinion is formed about the assessee's claims and contentions and, therefore, it is not possible to say that when the Assessing Officer reopens the assessment under section 148, it was prompted by a mere change of opinion. Except to this limited extent, the notice of reopening issued in a case where the return was first processed under section 143(1) is open to challenge on all grounds available to the assessee, including the ground that there was no reason to believe that income chargeable to tax had escaped assessment or that the materials before the A sessing Officer had no live link or nexus with the formation of such belief o that the reasons are based on gossip or rumour or were a mere pretence. This is made clear by the observations of the Court at page 512 of the report where it was held' that "so long as the ingredients of section 147 are fulfilled" the Assessing Officer can reopen the proceedings even where intimation under section 143(1) had been issued. Thus fulfilment of the conditions of section 147, including the one that there should be "reason to believe", is essential for the validity of the notice under section 148. It is while expounding the words "reason to believe" that the Supreme Court in the later judgment in Kelvinator of India Ltd. (supra) held that there should be "tangible material" to come to the conclusion that income had escaped assessment. Thus, while resorting to section 147 even in a case where only an intimation had been issued under section 143(1)(a it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment.*

31. *The assessee contended before us that there was no such tangible material before the Assessing Officer from which he can entertain the belief that there is transfer u/s 2(47)(v) of the Act resulted in escapement of income chargeable to tax. In the reassessment order the Assessing Officer has stated that originally the return was processed. It was noticed that the assessee has understated its income by non-disclosing the income from capital gains. He has not referred to any tangible material before him, in terms of the judgment of the Supreme Court in Kelvinator of India Ltd. (supra), on the basis of which he entertained the prima facie belief that income chargeable to tax has escaped assessment. Though it is not possible to challenge the action of the Assessing Officer on the ground of a change of opinion because in the present case the return was earlier merely processed under section 143(1), his action can be challenged on the basis of the law declared by the Supreme Court in the aforesaid judgment. In our opinion, on a proper understanding of the judgments of the Supreme Court both in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) and Kelvinator of India Ltd. (supra), it is still open to an assessee to challenge the notice under section 148, in a case where the return was earlier processed under section 143(1) on the ground that there was no tangible material before the Assessing Officer to enable him to entertain a prima facie belief that income chargeable to tax has escaped assessment. We may also add that before us*

the Department has not produced any tangible material on the basis of which the reasons were recorded to demonstrate that there was a live link or nexus between them and the requisite belief. Being so, the reopening cannot be held as valid.

32. *Same view was taken by the Third Member Mumbai Bench in the case of Telco Dadajee Dhackajee Ltd. v. Dy. CIT, ITA No. 4613/Mum/2005 dated 12th May 2010 . Further same view was taken by Delhi High Court in the case of CIT v. Orient Crafts Ltd. [2013] 29 taxmann.com 392 and also by Gujarat High Court in the case of Inductotherm (India) (P.) Ltd. v. Dy. CIT in Special Civil Application 858 of 2006 dated 6.8.2012. Further, Bombay Bench in the case of Delta Airlines Inc.v. ITO(International Taxation) [2013] 33 taxmann.com 192 (Mum.) wherein it was held as follows:*

'8. We have considered the rival submissions and perused the material on record. It IS observed that in the return of income originally filed for the year under consideration on 18.10.2001, exemption was claimed by the assessee in respect of interest income as per provisions of Article-7 of Indo-US treaty and this fact was clearly mentioned in the Note (copy placed at page No .16 of the paper book) filed along with the said return. The said return was initially process d by the Assessing Officer u/s. 143(1) on 2.1.2003. Subsequently, he howev r reopened the assessment for the following reasons recorded u/s. 148(2).

"30.9.2005: The assessee filed its return of income on 18.10.2001, declaring NIL income. The return was processed u/: 143(1)(a) of the 1 T Act, 1961 on 2.1.2003, accepting the Nil income declared by the assessee and a refund of Rs. 1,58,701/- was determined and issued to the assesse . The assessee has received interest which is not connected with operation of aircrafts but claimed exemption on all income under Article 8 of Indo-US DTAA and that the interest should be taxed under Article 11 of the DTAA @ 15%. Since no prima facie adjustment can be made under the statutory provisions hence the retuned income was accepted while processing the return. However, remedial action by reopening the assessment u/s. 148 of the IT Act, 1961 is suggested. The last date for issuing of notice u/ s. 148 is 31.3.2008. Submitted for your kind approval please."

9. As is clearly evident from the reasons recorded by the Assessing Officer as above, there was no new material coming to the possession of the Assessing Officer on the basis of which assessment completed u/s. 143(1) was reopened and this position has not been disputed even by learned Departmental Representative. She however had submitted that the assessments completed in the case of the assessee for the earlier years were available on record before the Assessing Officer and they formed the basis for reopening the assessment. There is however no mention whatsoever to any such assessment in the reasons recorded by the Assessing Officer. It is well settled that the validity of reopening has to be judged on the basis of reasons recorded by the Assessing Officer and the document or material referred to therein and not on the basis of any exterior material which has not been referred to in the reasons recorded. Learned Departmental Representative has also relied upon the decision of Hon'ble Gujarat High Court in the case of Praful Chunilal Patel (supra) in support of the revenue's case on the issue under consideration which has been relied upon by learned CIT(A) in his impugned order. As pointed out by learned counsel, the view expressed by Hon'ble Gujarat High Court in the said case that there is no necessity for the Assessing Officer to have fresh facts coming to his notice subsequent to original assessment to justify reopening has not been subscribed to by the Full Bench of Hon'ble Delhi High Court in the case of Kelvinator of India Ltd. (supra) which has been affirmed by Hon'ble Supreme Court. As held by Hon'ble

Delhi High Court, if the contention of the revenue based on the decision of Hon'ble Gujarat High Court in the case of Praful Chunilal Patel (supra) is accepted, the same would confer an arbitrary power upon the Assessing Officer to reopen the proceedings only on the slightest pretext, which is not permissible.

10. Learned Departmental Representative has also relied on the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) to contend that the reopening of assessment completed originally ujs. 143(1) is permissible without there being any new material coming to the possession of the Assessing Officer if the reasons recorded for reopening of assessment are otherwise valid. The learned counsel for the assessee, on the other hand, has relied on Third Member decision of the Tribunal in the case of Telco Dadaji Dhackjee Ltd. (supra) stating that a similar issue involved in the said case has been decided by the Third Member in favour of the assessee after taking into consideration the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) relied upon by the learned OR. In the said case, the return filed by the assessee was originally accepted u/s. 143(1). In the said return the assessee had claimed deduction for payment of non-compete fees of Rs. 75 lakhs which included payment of Rs. 15 lakhs to Directors. The assessee had also claimed depreciation of Rs. 1,41,848/ - on lease premises. The Assessing Officer issued notice u/s 148 on the ground that these were not allowable expenses and income chargeable to tax had escaped assessment. He accordingly disallowed both the items in the reassessment order. When the matter reached to the Tribunal, the learned Judicial Member took the view that there was no fresh material to support the formation of the belief of the Assessing Officer that income chargeable to tax had escaped assessment and in the absence of any fresh tangible material, he came to the conclusion that it was not permissible for the Assessing Officer to reopen the assessment. The learned Accountant Member, however, took a different view relying on the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) and the matter, therefore, was referred to a Third Member for resolving inter alia, the following point of differen e :-

"Whether on the facts and circumstances of the proceedings initiated by the AO u/ s 147 is liable to be confirmed or quashed when there was no fresh material available with the AO and the assessment had been completed originally u/ s 143(1)."

The Third Member agreed with the view taken by the learned Judicial Member relying mainly on the decision of Hon'ble Supreme Court .in the case of Kelvinator of India Ltd. (supra) and Eicher Ltd. 320 ITR 561. It was held by the Third Member that section 147 applies both to section 143(1) as well as section 143(3) and, therefore, except to the extent that a reassessment notice issued u/s 148 in a case where the original assessment was made u/s 143(1) cannot be challenged on the ground of a mere change of opinion, it is open to an assessee to challenge the notice on the ground that there is no reason to believe that income chargeable to tax has escaped assessment. As regards the decision of Hon'ble Supreme Court in the case of Rajesh Jhaveri Stock Brokers (P) Ltd. (supra) cited by the Revenue and relied upon by the Accountant Member, the Third Member held that the same was applicable in cases where the return was processed u/s 143(1) but later on notice was issued u/s 148 and the assessee challenges the notice on the ground that it is prompted by a mere change of opinion. The Third Member then referred to the decision of Hon'ble Supreme Court in the case of Kelvinator of India Ltd. (supra) wherein it was held that there should be "tangible material" to come to the conclusion that income had escaped assessment. Relying on the said decision, it was

held by the Third Member that while resorting to section 147 even in a case where only an intimation had been issued u/s 143(1)(a), it is essential that the Assessing Officer should have before him tangible material justifying his reason to believe that income had escaped assessment. Since there was no such tangible material before the AO from which he could entertain the belief that income of the assessee chargeable to tax had escaped assessment, the Third Member held that reassessment proceedings initiated by the Assessing Officer were liable to be quashed on the ground that there was no tangible material before the Assessing Officer even though the assessment was completed originally u/s 143(1). In our opinion, the Third Member decision of the Tribunal in the case of Telco Dadajee Dhackjee Ltd. (supra) is squarely applicable in the present case and respectfully following the same, we hold that the initiation of reassessment proceedings by the Assessing Officer itself was bad in law and the reassessment completed in pursuance thereof is liable to be quashed being invalid. We order accordingly and allow ground No. 1 of the assessee's appeal.

11. As a result of our decision rendered above on the preliminary issue quashing/cancelling the assessment made by the Assessing Officer u/s. 143(3) read with section 147, the other issues raised in the appeals of the assessee in respect of addition made in the said assessment have become infructuous and we do not deem it necessary or expedient to decide the same.'

***33.** The facts before us suggest that the information what is considered by the Assessing Officer to reopen the assessment was already on record and if AO fails to consider the same for framing the assessment by issuing notice u/s. 143(2) of the Act he is precluded from considering the same material for reopening of the assessment u/s. 147 read with section 148 of the Act. Accordingly, we are inclined to quash the assessment".*

9. The facts and circumstances of the case before us being similar, we are inclined to accept the contention of the assessee and hold that the re-assessment proceedings are not valid. The grounds of appeal Nos. 3 & 4 are accordingly allowed.

10. Even on merits, we find that the advance received by the assessee towards his professional fee, when it is returned, is not covered by any of the provisions of Chapter XVIIB requiring TDS. However, in view of our holding that the re-assessment proceedings are not valid, the grounds against the disallowance u/s 40(a)(ia) of the Act need no adjudication. Therefore, grounds 5 & 6 are not adjudicated at this stage.

11. In the result, assessee's appeal is partly allowed.

Order pronounced in the Open Court on 8th June, 2018.

Sd/-	**Sd/-**
(S.Rifaur Rahman)	**(P. Madhavi Devi)**
Accountant Member	**Judicial Member**

Hyderabad, dated 8th June 2018.
Vinodan/sps

Copy to:

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2 Dy.CIT, Circle 13(1) Hyderabad
3 CIT (A)-6 Hyderabad
4 Pr. CIT – 6 Hyderabad
5 The DR, ITAT Hyderabad
6 Guard File

By Order