* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

\+ **WRIT PETITION (CIVIL) No. 2036/2016**

Date of decision: 15th January, 2019

BHARTI INFRATEL LIMITED ..... Petitioner

Through Mr. Ajay Vohra, Sr. Advocate with Mr.Gaurav Jain, Mr. Aniket D. Agrawal and Ms. Deepika Agarwal, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX AND ANOTHER ..... Respondents

Through Mr. Zoheb Hossain, Sr. Standing Counsel, Mr. Deepak Anand & Mr. Piyush Goyal, Advocates.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J.:

Bharti Infratel Limited ('Petitioner/BIL', for short) by this writ petition impugns legality and validity of notice for re-assessment dated 31st March, 2015 issued under Section 148 read with Section 147 of the Income Tax Act, 1961 ('Act', for short) for the Assessment Year 2008-09. BIL has also challenged the order dated 23rd February, 2016 passed by the Assessing Officer, Deputy Commissioner of Income Tax, Circle-4(2), the first respondent to the writ petition, rejecting its objections to reopening of the assessment.

2. For convenience, it is observed and recorded that the Principal Commissioner of Income Tax is the second respondent to the present writ petition and that BIL is a company and a subsidiary of Bharti Airtel Limited (BAL, for short).

3. BIL in its return of income for the Assessment Year 2008-09 filed on 15th October, 2008 had declared a loss of Rs.157,27,09,173/- under the normal provisions and book profits of Rs.63,54,91,170/- under Section 115 JB of the Act. Revised return filed on 31st March, 2010 had enhanced the book profits to Rs. 63,89,40,500/-

4. Return for Assessment Year 2008-09 was taken up for scrutiny assessment vide issue of notices under Section 143(2) and 142 of the Act. Questionnaires were issued to which BIL had responded by furnishing details and documents which would be referred subsequently, culminating in the order of assessment dated 20th December, 2010 under Section 143(3) of the Act.

5. Thereafter, reassessment proceedings were initiated by the first respondent by issue of impugned notice under Section 148 read with Section 147 of the Act, which was served on BIL on 1st April, 2015. BIL by letter dated 8th April, 2015 had informed the assessing officer that the revised return filed by them on 31st March, 2010 may be treated as return filed in response to notice under Section 148 of the Act. By the same letter BIL had requested the first respondent to furnish copy of the 'reasons to believe' recorded for initiation of re-assessment proceedings. 'Reasons to believe' were furnished vide letter dated 13th April, 2015.

6. BIL had filed objections to reopening both on facts and law vide reply/objections dated 5th May, 2015 which, *inter alia*, had challenged assumption of jurisdiction under Section 147/148 of the Act.

7. The objections have been rejected by the first respondent by the impugned order dated 23rd February, 2016, resulting in filing of the present writ petition impugning the said order as well as notice dated 31st March, 2015 initiating re-assessment proceedings under Section 147/148 of the Act.

8. The relevant portion of the 'reasons to believe' recorded by the Assessing Officer for re-opening of assessment read as under :-

> "During proceedings u/s 143(3) read with Section 263 of Income-tax Act, 1961 in case of M/s Bharti Airtel Ltd. for A.Y. 2008-09, it has been observed that M/s Bharti Airtel Ltd. (hereinafter referred to as 'transferor') had transferred its telecom infrastructure assets worth Rs.5739.60 crores to its subsidiary company M/s Bharti Infratel Ltd. (hereinafter referred to as 'transferee') on 31.01.2008 for Nil value under the Scheme of Arrangement approved by Hon'ble Delhi High court.
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> Further, as per scheme, the transferee company had revalued the said assets to Rs.8218.12 crores in the asset side of its Balance Sheet for the year ending on 31.03.2008 and the corresponding amount is added under General Reserves on the liability side of its Balance Sheet as per Part-III of the scheme of arrangement which clarified the accounting treatment in the books of transferee company. The relevant part of the scheme is reproduced as under:
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> Part III ISSUE OF SHARES AND ACCOUNTING TREATMENT IN THE BOOKS OF THE TRANSFEROR COMPANY AND THE TRANSFREE COMPANY

3.1 ***

3.2 ACCOUNTING TREATMENT IN THE BOOKS OF THE TRANSFEREE COMPANY

3.2.1 Upon the Scheme becoming effective, the Transferee Company shall record the Telecom infrastructure at their respect fair values as on the Appointed Date.

3.2.2 The transferee company will credit an amount equal to the fair values of Telecom Infrastructure as general reserve, which shall constitute Free Reserves available for all purposes as the Transferee Company at its own discretion considers proper including in particular for off-setting any additional depreciation that may be charged by the Transferee company.

Explanation: Additional depreciation means depreciation provided, charged or suffered by the Transferee Company on the assets transferred by the Transferor Company under the Scheme in excess of what would be chargeable on the original book value of these assets as if there had been no revaluation on transfer of these assets and basing the cost of these assets on the historical cost as appears in the books of the Transferor Company. The reserve as above shall be treated as arising from this Scheme and shall not be treated as a reserve created by the Transferee Company.

3.3 ******

During the assessment proceedings for the A.Y. 2008-09 in the case of M/s Bharti Airtel Ltd. (BAL), the entire scheme of transfer of assets from BAL to Bharti Infratel Limited (BIL) was examined in the light of Scheme of Arrangement (SOA) approved by the Hon'ble High Court of Delhi. During the examination of the scheme, it is seen from the relevant portion of the Share Holders Agreement dated 8.12.2007, Annual Report of Bharti Infratel Limited (BIL) for F.Y. 2007-

08 & F.Y. 2008-09, Annual Report of Bharti Airtel Limited and Agreement made in the entire process, that neither the BAL nor the BIL disclosed the full and true intention in the SOA approved by the Hon'ble High Court. In the SOA, it was mentioned that the passive infrastructure of BAL is being transferred to wholly owned subsidiary and as there is no movement of assets to any company outside the group, neither any shares are to be issued, nor any consideration is to be paid to the shareholders for transfer of the assets. However, within less than 15 days of approval of SOA by the Hon'ble High Court, and even before the transfer of assets by BAL to BIL, a shareholder agreement dated 08.12.2007 is entered into. In fact, as per the Shareholder's Agreement, the passive infrastructure transferred by transferor company, before the effective date and after the effective date (Effective date as mentioned in Indefeasible Right to Use Agreement IRU) is to be managed and operated by Indus Tower Limited only and not even for single day to be handled by Bharti Infratel Limited as submitted before the Hon'ble High Court through the SOA filed.

From the entire scheme, it is seen that the assets which can be directly transferred from BAL to ITL were routed through BIL and BIVL for the purpose of evasion of tax because the assets, WDV of which in the books of BAL on the date of transfer was Rs.5739.60 crores were transferred at NIL value to BIL and, immediately after transfer, were revalueed at Rs.8218.12 crores. The difference of the amount of Rs.2478.51 crores (Rs.8218.12 crores – Rs.5739.60 crores) between the value of assets and revaluation of investment has already been taxed in the hands of BAL under the provision of Income-tax Act, 1961. But the assets whose value on the date of transfer from BAL to BIL was Rs.5739.60 crores were received by BIL at Nil value, thereby resulting in gain of Rs.5739.60 crores in

the hands of BIL, which is income within the provisions of Section 2(24) of the Income-tax Act, 1961.

Therefore I have reason to believe that the WDV of the assets, received by BIL at Nil, i.e., Rs.5739.60 crores is the income of the BIL which has escaped assessment due to failure on the part of the assessee to disclose truly and fully all material facts necessary for its assessment.

Since period of four years has expired from the end of the relevant assessment year, sanction for issue of notice u/s 148 of the Income-tax Act, 1961 as prescribed under proviso to Section 151(1) of the Income-tax Act, 1961, may kindly be accorded.

Submitted for kind perusal and approval."

9. The 'reasons to believe' state that BAL had transferred telecom infrastructure assets worth Rs.5739.60 crores to its subsidiary and the present petitioner-BIL on 31st January, 2008 for nil consideration under a Scheme of Arrangement ('SOA', for short) approved by the Delhi High Court. As per SOA, BIL had re-valued the said assets to Rs.8218.12 crores on the assets side of their balance sheet for the year ending 31st March, 2008. Contemptuously Rs.8218.12 crores were added to the general reserve on the liability side of BIL's balance sheet as per Part III of the SOA. Thereafter, Part III of SOA has been quoted to state that the amount credited to the reserves on account of transfer of telecom infrastructure assets constituted free reserves that would be available to BIL as a company in its discretion with liberty to set-off against the reserve created against additional depreciation that may be charged/claimed by the BIL. The reserve was to be treated as arising from the SOA and not created by BIL. Paragraph 3.3 of the reasons states that the entire scheme of transfer of

assets was examined in the assessment proceedings for AY 2008-09 of BAL by the Assessing Officer in the light of SOA approved by the Delhi High Court and that- "during examination of the scheme it was seen from the relevant portion of Share Holders Agreement dated 8.12.2007, annual report for the petitioner company for Financial Year 2007-08 and 2008-09, annual report of Bharti Airtel Limited and agreement made in the entire process that neither BIL nor BAL disclosed full and true intention in the SOA approved by the Hon'ble High Court". SOA had mentioned transfer of passive infrastructure of BAL to BIL, a wholly owned subsidiary, and that there was no transfer of assets to a company outside the "group". It was stipulated that shares were not to be issued and no consideration was to be paid to the shareholders for transfer of assets. Contrary to the SOA approved by the High Court, within fifteen days of the approval of SOA, a shareholder's agreement on 8th December, 2007 was entered into by BIL whereby the passive infrastructure was transferred by it to a third party, namely, M/s Indus Tower Limited. This transfer was made before the effective date, which was the date by which BIL would have acquired indefeasible right to use the passive infrastructure. On/or before the effective date, M/s Indus Tower Limited had acquired indefeasible right to use the passive infrastructure transferred to BIL by BAL. BIL had not for even a single day used the passive infrastructure, contrary to what was stated in the SOA filed before the Delhi High Court. Thus, the entire scheme had actually envisaged transfer of passive infrastructure assets from BAL to M/s Indus Tower Limited, which were routed through subsidiary of BAL, i.e., the petitioner/BIL's subsidiary Bharti Infratel Ventures Limited. The entire purpose behind the scheme was evasion of taxes, as passive infrastructure

assets of BAL having written down value of Rs.5739.60 crores were transferred at nil value to BIL and were immediately re-valued at Rs.8218.12 crores. The difference between the two figures of Rs.8218.12 crores and Rs.5739.60 crores, i.e., the written down value of the assets transferred by BAL to BIL and the re-valuation of investment had been taxed in the hands of BAL. Re-assessment in the case of BIL was necessary and required as gain of Rs.5739.60 crores in the form of transfer of assets from BAL to BIL had escaped assessment. This was taxable income under Section 2(24) of the Act as the declared written down value of the assets received from BAL was nil, thereby resulting in gain of Rs.5739.60 crores being the written down value. Thus, there was failure on the part of the petitioner to disclose truly and fully all material facts.

10. The petitioner has challenged reopening primarily on four grounds:-

(i) Absence of rational and intelligible nexus between material relied upon in the reasons to believe and escapement of income.
(ii) Change of opinion.
(iii) Non-satisfaction of pre-conditions specified in the proviso read with Explanation 1 to Section 147 of the Act.
(iv) Lack/ absence of valid sanction under Section 151 of the Act.

11. Fourth objection was not pressed. First objection we would observe would relate to merits and is not being examined as we find that BIL should succeed in view of the second and third objections, which are interconnected. For the sake of convenience, we would like to examine and consider them together to avoid prolixity and repetition.

12. In order to decide the second and third contentions, we begin by reproducing relevant portion of Section 147 of the Act, which reads as under:-

> "**Income escaping assessment.**
>
> **147.** 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 (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year) :
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> **Provided** that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:
>
> *XXXXX*
>
> *Explanation 1*.—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."

13. For the purpose of examining two contentions, we are primarily concerned with the main section, the proviso and Explanation 1. Proviso comes into operation when there is already an earlier assessment under Section 143(3), i.e., the Assessing Officer has earlier scrutinized and applied his mind on the return of income filed, the material facts stated therein, documents produced and the relevant facts ascertained and examined to pass the assessment order. Proviso stipulates that if re-assessment is initiated after expiry of four assessment years from the date of the relevant assessment year, an additional requirement in the form of satisfaction of one of the three preconditions; failure to file return under Section 139; failure to respond to notice under Section 142(1) or 148; or failure to disclose fully and truly material facts necessary for assessment, must be satisfied. First Explanation states that mere production of account books or other evidence before the Assessing Officer from which material evidence could have been discovered with due diligence by the Assessing Officer would not necessarily amount to disclosure within the meaning of the proviso. We would elaborate and discuss the effect of the Explanation 1 with the proviso.

14. Explanation 1 and proviso to Section 147 have to be interpreted harmoniously and are not to be treated as ante-thesis, to ensure that both the proviso and the Explanation 1 are applied and given effect to without negating or nullifying one of them and making one override the other. Proviso clearly states that no action under Section 147 will be taken by the Assessing Officer unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee (i) to file a return under Section 139, (ii) to respond to notice under Section 142(1) or 148 and

(iii) failure to disclose fully and truly material facts necessary for assessment for that year. Emphasis on the third part of proviso is on the assessee's failure to fully and truly disclose all material facts necessary for assessment. Therefore, when the proviso applies, the Assessing Officer must satisfy himself and state that there has been failure on the part of the assessee to fully and truly disclose all material facts necessary for assessment or another jurisdictional preconditions. In absence of failure or lapse to disclose fully and truly all material facts or one of the other pre-conditions, re-opening is impermissible and barred under the statute. In such cases, it does not matter whether the Assessing Officer has applied his mind to the material facts stated, but had failed to draw legal or other factual inferences. Pertinently, the words used in the first Explanation are material evidence and not legal and factual inferences and conclusion predicated on the evidence/material on record. Explanation 1 has limited operation and would apply to cases where the assessee has produced account books or other evidence before the Assessing Officer, but the Assessing Officer had failed to discover 'material evidence' that was available or was inferable but was not examined or considered. In such cases, mere production of account books and other evidence would not necessarily amount to disclosure under the proviso. Such situations would arise in cases where the disclosure of material fact is not direct and apparent, *albeit* the Assessing Officer on exercise of due diligence could have deduced or found out relevant material evidence. The expression 'material facts' refers to primary facts and it is in this context that Explanation 1 has been enacted to protect the interest of the Revenue for earlier judicial pronouncements had held that the assessee's duty to fully and truly disclose material facts would only relate to disclosing primary facts,

which would mean and imply full and true disclosure and not duty to indicate or draw attention to factual, legal or other inferences which can be drawn from the primary facts disclosed. It is in this legal background we would have to examine whether or not the petitioner-assessee had disclosed the primary facts, reference to which has been made in the 'reasons to believe'. Secondly, we have to examine, whether this is a case of 'change of opinion', which as recorded above, is a different aspect and jurisdictional requirement for the law relating to reopening under Section 147 of the Act does not permit re-opening on 'change of opinion'.

15. Full Bench of this Court in majority judgment authored by one of us (Sanjiv Khanna, J.) in ***Commissioner of Income Tax-VI, New Delhi versus Usha International Limited,*** (2012) 348 ITR 485 (Delhi)(FB) had drawn distinction between cases where re-opening is done within four years of the end of the assessment year and cases where re-opening is post four years of the end of the assessment year. This distinction was drawn, as earlier Full Bench of this High Court in ***Commissioner of Income Tax, Delhi versus Kelvinator of India Limited***, (2002) 256 ITR 1 Delhi (FB) and in appeal the Supreme Court of India in ***Commissioner of Income Tax, Delhi versus Kelvinator of India Limited***, (2010) 2 SCC 723 had held that re-opening is impermissible on 'change of opinion' and in that context had drawn distinction between disclosure/declaration of 'material fact' by an assessee and legal effect thereof when the first proviso and Explanation 1 to Section 147 applies; and the principle of 'change of opinion'; in the following words:-

"23. The said observations do not mean that even if the Assessing Officer did not examine a particular subject matter, entry or claim/deduction and therefore had not formed any opinion, it must be presumed that he must have formed an opinion. This is not what was argued by the assessee or held and decided. There cannot be deemed formation of opinion even when the particular subject matter, entry or claim/deduction is not examined.

24. Distinction between disclosure/declaration of material facts made by the assessee and the effect thereof and the principle of change of opinion is apparent and recognized. Failure to make full and true disclosure of material facts is a precondition which should be satisfied if the reopening is after four years of the end of the assessment year. The explanation stipulates that mere production of books of accounts and other documents, from which the Assessing Officer could have with due diligence inferred facts does not amount to full and true disclosure. Thus in cases of reopening after 4 years as per the proviso, conduct of the assessee and disclosures made by him are relevant. However, when the proviso is not applicable, the said precondition is not applicable. This additional requirement is not to be satisfied when re-assessment proceedings are initiated within four years of the end of the assessment year. The sequitor is that when the proviso does not apply, the re-assessment proceedings cannot be declared invalid on the ground that the full and true disclosure of material facts was made. In such cases, re-assessment proceedings can be declared invalid when there is a change of opinion. As a matter of abundant caution we clarify that failure to state true and correct facts can vitiate and make the principle of change of opinion inapplicable. This does not require reference to and the proviso is not invoked. The difference is this; when proviso applies the condition stated therein must be satisfied and in other cases it is not a prerequisite or condition precedent but the defence/plea of change of opinion shall not be available and will be rejected.

> 25. Thus if a subject matter, entry or claim/deduction is not examined by an Assessing Officer, it cannot be presumed that he must have examined the claim/deduction or the entry, and therefore, it is the case of "change of opinion". When at the first instance, in the original assessment proceedings, no opinion is formed, principle of "change of opinion" cannot and does not apply. There is a difference between change of opinion and failure or omission of the Assessing Officer to form an opinion on a subject matter, entry, claim, deduction. When the Assessing Officer fails to examine a subject matter, entry, claim or deduction, he forms no opinion. It is a case of no opinion.
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> 26. In *3i Infotech Ltd.* v. *Assistant Commissioner of Income Tax* (2010) 329 ITR 257 (Bom.) it was observed that producing voluminous record before the Assessing Officer does not absolve the assessee and the assessee cannot be heard to say that if the Assessing Officer were to conduct a further inquiry, he would have come into possession of material evidence with the exercise of due diligence. Assessments can be complex and require examination of several subject matter, claims, entries or deductions. The Assessing Officer inspite of best efforts or intention can miss out and not examine and go into a subject matter, claim, entry or deduction. An assessee cannot contend or state that in the reams and plethora of papers, notes and entries, entry, a statement was made, or claim or entry was explained and the principle of better be-ware applies. When a subject matter, entry, claim or deduction remains hidden or unexamined by the Assessing Officer, be it for any reason, it is not a case of change of opinion."

16. Supreme Court in ***State of Uttar Pradesh and Others versus Aryaverth Chawal Udyog and Others,*** (2015) 17 SCC 324 had referred to the principle of 'change of opinion' and legal requirement for valid re-opening of tax assessment under U.P. Trade Tax Act, 1948. Reference was made to Supreme Court decisions in ***Kelvinator of India Limited*** (supra),

Aslam Mohammad Merchant versus Competent Authority, (2008) 14 SCC 186, ***Commissioner of Income Tax versus Rajesh Jhaveri Stock Brokers (P) Limited,*** (2008) 14 SCC 208, ***S. Narayanappa versus CIT,*** (1967) 1 SCR 590 and other cases, to hold:-

> "28. This Court has consistently held that such material on which the assessing authority bases its opinion must not be arbitrary, irrational, vague, distant or irrelevant. It must bring home the appropriate rationale of action taken by the assessing authority in pursuance of such belief. In case of absence of such material, this Court in clear terms has held the action taken by the assessing authority on such "reason to believe" as arbitrary and bad in law. In case of the same material being present before the assessing authority during both, the assessment proceedings and the issuance of notice for reassessment proceedings, it cannot be said by the assessing authority that "reason to believe" for initiating reassessment is an error discovered in the earlier view taken by it during original assessment proceedings. (See Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan [Delhi Cloth and General Mills Co. Ltd. v. State of Rajasthan, (1980) 4 SCC 71 : 1980 SCC (Tax) 348] .)
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> 29. The standard of reason exercised by the assessing authority is laid down as that of an honest and prudent person who would act on reasonable grounds and come to a cogent conclusion. The necessary sequitur is that a mere change of opinion while perusing the same material cannot be a "reason to believe" that a case of escaped assessment exists requiring assessment proceedings to be reopened. (See Binani Industries Ltd. v. CCT [Binani Industries Ltd. v. CCT, (2007) 15 SCC 435]; A.L.A. Firm v. CIT [A.L.A. Firm v. CIT, (1991) 2 SCC 558] .) If a conscious application of mind is made to the relevant facts and material available or

existing at the relevant point of time while making the assessment and again a different or divergent view is reached, it would tantamount to "change of opinion". If an assessing authority forms an opinion during the original assessment proceedings on the basis of material facts and subsequently finds it to be erroneous; it is not a valid reason under the law for reassessment. Thus, reason to believe cannot be said to be the subjective satisfaction of the assessing authority but means an objective view on the disclosed information in the particular case and must be based on firm and concrete facts that some income has escaped assessment.

30. In case of there being a change of opinion, there must necessarily be a nexus that requires to be established between the "change of opinion" and the material present before the assessing authority. Discovery of an inadvertent mistake or non-application of mind during assessment would not be a justified ground to reinitiate proceedings under Section 21(1) of the Act on the basis of change in subjective opinion (CIT v. Dinesh Chandra H. Shah [CIT v. Dinesh Chandra H. Shah, (1972) 3 SCC 231] ; CIT v. Nawab Mir Barkat Ali Khan Bahadur[CIT v. Nawab Mir Barkat Ali Khan Bahadur, (1975) 4 SCC 360 : 1975 SCC (Tax) 316])."

17. Majority decision of the Full Bench of this Court in ***Usha International Limited*** (supra) had also drawn distinction between erroneous application/interpretation/understanding of law and cases where a fresh or new factual information comes to the knowledge of the Assessing Officer, after passing of the assessment order, in the following words:-

"16. Here we must draw a distinction between erroneous application/interpretation/understanding of law and cases

where fresh or new factual information comes to the knowledge of the Assessing Officer subsequent to the passing of the assessment order. If new facts, material or information comes to the knowledge of the Assessing Officer, which was not on record and available at the time of the assessment order, the principle of "change of opinion" will not apply. The reason is that "opinion" is formed on facts. "Opinion" formed or based on wrong and incorrect facts or which are belied and untrue do not get protection and cover under the principle of "change of opinion". Factual information or material which was incorrect or was not available with the Assessing Officer at the time of original assessment would justify initiation of reassessment proceedings. The requirement in such cases is that the information or material available should relate to material facts. The expression 'material facts' means those facts which if taken into account would have an adverse affect on the assessee by a higher assessment of income than the one actually made. They should be proximate and not have remote bearing on the assessment. The omission to disclose may be deliberate or inadvertent. The question of concealment is not relevant and is not a precondition which c*onfers jurisdiction to reopen the assessment."*

18. The ratio in ***Kelvinator of India Limited*** (supra) has been reiterated by the Supreme Court in ***Income Tax Officer, Ward No. 16(2) versus Techspan India Private Limited and Another***, (2018) 6 SCC 685 to observe:-

"14. The language of Section 147 makes it clear that the assessing officer certainly has the power to reassess any income which escaped assessment for any assessment year subject to the provisions of Sections 148 to 153. However, the use of this power is conditional upon the fact that the assessing officer has some reason to believe that the income has escaped assessment. The use of the words "reason to believe" in Section 147 has to be

> interpreted schematically as the liberal interpretation of the word would have the consequence of conferring arbitrary powers on the assessing officer who may even initiate such reassessment proceedings merely on his change of opinion on the basis of same facts and circumstances which has already been considered by him during the original assessment proceedings. Such could not be the intention of the legislature. The said provision was incorporated in the scheme of the IT Act so as to empower the assessing authorities to reassess any income on the ground which was not brought on record during the original proceedings and escaped his knowledge; and the said fact would have material bearing on the outcome of the relevant assessment order.
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> 5. Section 147 of the IT Act does not allow the reassessment of an income merely because of the fact that the assessing officer has a change of opinion with regard to the interpretation of law differently on the facts that were well within his knowledge even at the time of assessment. Doing so would have the effect of giving the assessing officer the power of review and Section 147 confers the power to reassess and not the power to review.
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> 16. To check whether it is a case of change of opinion or not one has to see its meaning in literal as well as legal terms. The words "change of opinion" imply formulation of opinion and then a change thereof. In terms of assessment proceedings, it means formulation of belief by an assessing officer resulting from what he thinks on a particular question. It is a result of understanding, experience and reflection.

19. Having examined the legal position, we would turn to the factual matrix in question and would reproduce the averments made in the writ

petition with reference to the queries raised and issues examined in the original assessment as well as primary or 'material facts' disclosed in the return, documents and papers filed during the original assessment. The former would be relevant when we examine whether it is a case of 'change of opinion' and the latter aspect would be relevant when we examine the question of applicability of the proviso and the first Explanation. The relevant paragraphs of the writ petition being paragraphs 38 to 56 are reproduced for convenience in entirety:-

> "Re: (b) Reassessment proceedings barred by limitation in terms of proviso to Section 147 of the Act.
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> 38. Section 147 of the Act authorizes an assessing officer to assess or reassess income chargeable to tax if he has "reason to believe" that income for any assessment year has escaped assessment. Proviso to the said section places fetters on the powers of the assessing officer to initiate reassessment proceedings beyond the period of four years from the end of the relevant assessment year, where assessment has been previously completed under Section 143(3) of the Act unless the income has escaped assessment by reason of "failure of the assessee to disclose fully and truly all material facts necessary for assessment".
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> 39. The Courts have in this context consistently held reassessment proceedings initiated beyond four years from the end of the relevant assessment year to be invalid, in terms of the proviso to Section 147 of the Act, where there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. The Courts, including this Hon'ble Court have consistently held that where there was no case of any failure on the part of the assessee to truly disclose all material facts and it was only a

question of drawing an inference from these facts, reopening of assessment beyond the period of four years from the end of the relevant assessment year was invalid.

40. Reliance in this regard is placed on the following judicial pronouncements:

-CIT vs. Foramer France:264 ITR 566 (SC)

-CIT vs. Purolator India Ltd: 343 ITR 155 (Del.)

-CIT vs. Motor and General Finance: 184 Taxman 465 (Del.)

-CIT vs. Fenner India Ltd.: 241 ITR 672 (Del)

-Avtec Ltd. vs. DCIT: 370 ITR 611 (Del)

-D.T. and T.D.C. Ltd. vs. ACIT: 232 CTR 260 (Del.)

-Atma Ram Properties P. Ltd. vs. DCIT: 343 ITR 141 (Del)

-Titanor Components Ltd. vs. ACIT: 343 ITR 183 (Bom.)

-Haryana Acrylic Manufacturing Company vs. CIT: 308 ITR 38 (Del.)

-German Remedies Ltd. vs. DCIT : 287 ITR 494 (Bom.)

-Hindustan Lever Ltd. vs. ACIT : 268 ITR 339 (Bom.)

-Grindwell Norton vs. ACIT : 267 ITR 673 (Bom.)

-Orient Beverages Ltd. vs. ITO : 208 ITR 509 (Cal.)

-Peico Electronics and Electricals Ltd. vs. DCIT : 210 ITR 991 (Cal.)

-Kaira District Cooperative Milk Producers Union Ltd. vs. ACIT : 216 ITR 371 (Guj.)

-Garden Silk Mills Ltd. vs. DCIT: 222 ITR 27 (Guj.)

-CIT vs. Veer Overseas Ltd. ITA No. 510 of 2009 (P and H).

41. In the case of Calcutta Discount Co. Ltd vs. ITO: (1961) 41 ITR 191, the Hon'ble apex Court, held that - (1) it is the assessee's duty to disclose primary facts, including particular entries in account books, particular portions of documents and other evidence disclosed; (ii) once all primary facts are before the assessing authority, the assessing officer requires no further assistance by way of disclosure, (iii) it is for the assessing officer to decide what inferences of fact can be reasonably drawn and what legal inferences have ultimately to be drawn and (iv) it is not for the assessee to tell the assessing authority what inferences, whether of fact or law, should be drawn.

42. To the same effect are the following precedents:

-CIT vs. Bhanji Lavji: 79 ITR 582 (SC)

-CIT vs. Burlop Dealers Ltd.: 79 ITR 609 (SC)

-ITO vs. Lakhmani Mewal Das : 103 ITR 437 (SC)

- Parashmam Pottery Works Ltd. vs. CIT: 106 ITR 1 (SC)

43. The Hon'ble Rajasthan High Court in the case of CIT vs. A.R. Enterprises: 255 ITR 121, explained the meaning of expression "material facts" in the following words:

"The expression "material facts" referes only to primary facts. There is no duty cast on the appellant to indicate or draw the attention of the AO to what

factual or legal or other inferences can be drawn from primary facts. Relying on the decision of the apex Court in Calcutta Discount Co Ltd v ITO and Anr: (1961) 41 ITR 191 (SC) the apex Court in a letter decision, viz. Associated Stone Industries (Kotah) Ltd. v. CIT (1997) 138 CTR (SC) 260 : (1997) 224 ITR 560 (SC), held that the duty of the assessee is only to fully and truly disclose all material facts. Explaining the expression "material facts" as contained in s 34 (1) (a), the Court observed that it refers only to the primary facts and the duty of the assessee is to disclose such primary facts. The court further observed that there is no duty cast on the assessee to indicate or draw the attention of the ITO to what factual or legal or other inferences can be drawn from the primary facts disclosed. There is not a word in the order of assessment if the respondent-assessee omitted to disclose any material fact."

(emphasis supplied)

44. Reliance in this regard is also placed on the following judicial pronouncements:

-Oriental Carpet Manufactures (India) Ltd vs. ITO: 168 ITR 296 (P and H)

-CIT vs. Fenner India Ltd.: 241 ITR 672 (Mad.)

-Tata Business Support Services vs. DCIT: W.P. No 2959/2015 (Bom)

45 In the present case, as pointed above, original assessment was completed under Section 143(3) of the Act vide order dated 20.12.2010. The impugned notice under Section 148 was issued on 31.03.2015, i.e. much beyond the period of four years from the end of the relevant assessment year 2008-09. The bar of limitation contained in proviso to Section 147 of the Act was thus clearly attracted.

46. Although the reasons recorded by Respondent No. 1 allege failure on the part of the Petitioner to fully and truly disclose all facts necessary for assessment in relation to the transaction in dispute, which, according to the Respondents, has resulted in income escaping assessment, it is the humble submission of the Petitioner that all 'material facts' were fully and truly disclosed during the course of assessment proceedings under Section 143(3) of the Act, both in relation to (i) receipt of telecom infrastructure assets through a scheme of arrangement without consideration as also (ii) the factum of entering into Shareholder/JV agreement dated 08.12.2007 with other telecom companies. The Petitioner had made full disclosure of the SOA, accounting treatment thereof in the books, tax treatment thereof in the return of income, entering into shareholder/JV agreement dated 08.12.2007, at several places in the audited financial statements, i.e., auditors report/Director's report, notes to accounts, etc., notes to computation of income appended with return of income, relevant clauses of tax audit report under Section 44AB of the Act, and accountant's report under Section 115JB of the Act, in the following manner:

(A) In the audited financial statements of the Petitioner for year ending 31.03.2008, relevant to assessment year 2008-09, the Petitioner has made the following disclosures:

a) In the Director's Report dated 24.04.2008, complete disclosure regarding the SOA between BAL and the Petitioner for transfer of tower business and subsequent transfer of assets to Indus Towers Ltd. through Joint Venture Agreement has been made under the head 'Business Review'. The relevant portion of the aforesaid disclosures are reproduced hereunder for ready reference:

"During the year, the scheme for demerger of tower business from Bharti Airtel Ltd to Bharti Infratel Ltd was sanctioned by Delhi High Court. The Company has now more than 52000 towers infrastructure as on 31/03/2008.

The Company has entered into a Joint Venture to from a tower infrastructure company viz. Indus Tower Ltd with Vodafone Essar Ltd and Idea Cellular Ltd to maintain and operate tower infrastructure business within equity structure of 42:42:16 respectively."

b) In point 3 of Auditors' Report, the auditors have specifically pointed out, without any qualifications, that the passive infrastructure assets transferred from BAL have been recorded at fair market value and an equivalent amount has been credited to the General Reserve in accordance with the scheme of arrangement approved by this Hon'ble Court. The relevant portion of the aforesaid disclosures are reproduced hereunder for ready reference:

"Note 1(a) on Schedule 16 to the financial statement relating to the account pursuant to the Scheme of Arrangement ('the Scheme') for the transfer of the passive infrastructure of Bharti Airtel Limited ('Bharti Airtel') ('the transferor Company') to the Company, approved by the Hon'ble High Court of Delhi effective from January 31, 2008. The transfer has been accounted for in accordance with the purchase method referred to Accounting Standard 14-Accounting for Amalgamation (ÁS 14'). In accordance with the Scheme, the passive infrastructure transferred from Bharti Airtel has been recorded at fair value of Rs. 82,359,656 thousand and a similar amount has been credited to the general reserve. In accordance with the generally accepted accounting principles, the capital reserve is lower by Rs. 82,359,656 thousand, general reserve is higher by

Rs. 81,971,448 thousand and depreciation charge is higher by Rs. 388,208 thousand."

c) A note providing the details of the SOA between BAL and the Petitioner as well as the accounting treatment of such transferred assets in the books of accounts of the Petitioner was appended as Note 1 (a) to Schedule 16: Notes to the Financial Statements. The relevant portion of the aforesaid disclosures are reproduced hereunder for ready reference:

"The Scheme of Arrangement ("the Scheme") under section 391 to 394 of the Companies Act, 1956, between Bharti Airtel Limited (BAL) and BIL for transfer of telecom infrastructure undertaking from BAL to BIL was approved by the Hon'ble High Court of Delhi vide order dated November 26, 2007 and filed with the Registrar of Companies, Delhi and Gurgaon on January 31, 2008 i.e the Effective date of the Scheme. Pursuant to the scheme, the telecom infrastructure undertaking were transferred to and vested in the Company with effect from January 31, 2008, the Effective Date, accordingly, the Scheme has been given effect to in these financial statements.

Pursuant to the terms of the Scheme, the Telecom Infrastructure undertaking, comprising of wireless and broadcast towers, all right, titles, deposits, interest over the land on which such towers have been or are proposed to be constructed or erected or installed, current assets and current liabilities (including liabilities) relating to the towers and related telecom assets/liabilities, whether movable, immoveable or incorporeal and all plant and equipment as forming part telecom infrastructure including electrical power connections are recorded by the Company at their respective fair values and an equivalent amount is credited to General Reserve.

The General Reserve shall constitute free reserve available for all purposes of the Company and to be utilised by the Company at its own discretion as it considers proper including in particular for off-setting any additional depreciation that may be charged by the Company. The additional depreciation means depreciation provided, charged or suffered by the Company on the respective assets transferred by BAL under the Scheme in excess of that which would be chargeable on the original book value of these assets, as if there had been no revaluation or transfer of these assets under the aforesaid scheme sanctioned by the Hon'ble Delhi High Court.

The Assets and liabilities have been recorded at following fair values [based on independent fair valuation report for asssets and capital work-in progress and management estimate for current assets, liabilities and deferred tax liability] and the amount of the General Reserve is computed as below:-

Particulars	Amount
Fair Value of Assets and Liabilities	
Fixed Assets	89,600,620
Capital Work in Progress (including Capital Advances)	2,502,324
Current Assets	2,423,048
Current Liabilities	(10,608,193)
Deferred Tax liability	(1,558,143)
	82,359,656

Had the scheme not provided for the above accounting the general reserve would have been lower and capital reserve would have been higher by

Rs.82,359,656 thousand, in accordance with accounting standard 14 'Accounting for Amalgamation' and depreciation charge for the period from February 1, 2008 to March 31, 2008 would have been higher by Rs. 388,208 thousand being the additional depreciation, in accordance with Accounting Standard 6 issued by the Institute of Chartered Accountant of India."

d) A note providing details of the subsequent joint venture agreement dated 08.12.2007 entered into between VEL, Idea and the Petitioner, resulting in formation of Indus and proposed transfer of PI assets in 16 telecom circles across India, out of assets in 23 circles received from BAL, has been appended as Note 1(b) to Schedule 16: Notes to the Financial Statements. The relevant portion of the aforesaid disclosures are reproduced hereunder for ready reference:

"The Company has entered into a joint venture agreement on December 8, 2007 with Vodafone Essar Limited and Idea Cellular Limited to form an independent tower company ("Indus Tower Limited") to provide passive infrastructure service in 16 circles of India. The Company and Vodafone Essar Limited will hold approximately 42% each in the Indus Tower Limited and the balance 16% will be held by Idea Cellular Limited. For this purpose Bharti Infratel Ventures Limited has been incorporated as a wholly owned subsidiary of Bharti Infratel Ltd wherein the relevant assets are to be transferred for ultimate merger in the Indus Towers Limited. Pursuant to the aforesaid agreement, the Company has acquired 50,000 equity shares of Rs.10 each on December 17, 2007 for an aggregate value of Rs.500,000"

The Company's share of the assets, liabilities, income and expenses of the jointly controlled entity are as follows:-

	As at March 31, 2008 (Rs'000)
Assets	4,956
Liabilities	19,933
Expenses	15,477
Loss before tax	15,477

(B) In the Notes to Return of income, filed along with the return of income (both original and revised) for the relevant assessment year, complete details regarding sanction accorded to the SOA for transfer of telecom infrastructure undertaking and depreciation claimed on such assets were disclosed under Point No.3.

(C) In Annexure 2 to Clause 14 of the Tax Audit Report in form No. 3CD, relating to particulars of depreciation allowable as per the Act, complete details regarding the written down value of assets transferred from BAL, aggregating to Rs.5371.67 crores, comprising of WDV of Rs.5229.32 crores, and additional depreciation of Rs.142.36 crores claimed by the petitioner on such transferred assets, under the fifth proviso to Section 32 of the Act. The aforesaid details were duly examined at the time of original assessment proceedings, while allowing the claim of depreciation of the Petitioner."

The Petitioner craves leave to rely upon the audited financial statements, tax audit report under Section 44AB of the Act, return and computation of income, at the stage of hearing.

Copy of accountant's report under Section 115JB of the Act, is annexed hereto and marked as Annexure 'L'.

47. Further, during the course of assessment proceedings under Section 143(3) of the Act, the concerned assessing officer (i.e. Deputy Commissioner of Income Tax, Circle-2(1), New Delhi, hereinafater referred to as 'assessing officer') vide questionnaire dated 10.02.2010, inter alia, directed the Petitioner to provide "a brief note on the business activity and history of the assessee company", in reply to which, the Petitioner vide letter dated 21.04.2010, duly mentioned that the PI assets of BAL were demerged into the Petitioner vide scheme of arrangement under Sections 391-394 of the Companies Act, 1956, which had been accorded approval by this Hon'ble Court.

Copies of the questionnaire dated 10.02.2010 and reply dated 21.04.2010 are annexed hereto and marked as Annexure 'M' and Annexure 'N' respectively.

48. Further, the Petitioner was also specifically directed to provide details of depreciation claimed on assets transferred from BAL as well as documents in support of written down value of assets received which was duly replied by the Petitioner vide letter dated 15.11.2010, also enclosing copy of the SOA.

Copy of the reply dated 15.11.2010 is annexed hereto and marked as Annexure 'O'.

49. Further, the assessing officer, during the course of assessment proceedings had raised specific query qua the basis of transfer of assets from BAL under the SOA, which was also replied to by the Petitioner wherein it was clearly stated that assets were acquired without any consideration and the Petitioner was not required to issue any shares or pay any consideration to BAL.

Copy of the aforesaid reply is annexed hereto and marked as Annexure 'P'.

50. In addition to the exhaustive documentary evidence submitted by the Petitioner during the course of proceedings under Section 143(3) of the Act, it is also pertinent to note that the factum of demerger of assets by BAL to the Petitioner without consideration, was duly mentioned in the SOA, duly approved by this Hon'ble Court, and both the aforesaid documents were duly filed before the assessing officer during the course of assessment proceedings, which was duly taken note in the original assessment order.

51. Further, during the course of proceedings for sanction of scheme of transfer of infrastructure assets in 12 circles from the Petitioner to BIVL before this Hon'ble Court, the assessing officer vide affidavit sworn in February, 2010 (much before the date of passing the original assessment order under Section 143(3) on 20.12.2010), made detailed submissions/objections before this Hon'ble Court, wherein at para 10, it was clearly stated that the object of transfer of assets to BIVL was to ultimately transfer the assets to Indus by way of amalgamation of BIVL with Indus. Thus, it is evident beyond any doubt that all information relating to receipt of assets from BAL through a SOA, without consideration and subsequent transfer of few assets in 12 circles to Indus, through BIVL, was already on record and the Respondents were fully conscious of the same before passing the original assessment order.

Copy of affidavit filed by the assessing officer before this Hon'ble Court in Joint Company Petition No. 324/2009 is annexed hereto and marked as Annexure 'Q'.

52. On the basis of the aforesaid, it is clearly evident that all facts/details/documents in respect of

subject scheme of demerger of assets from BAL to the Petitioner and subsequent transfer to Indus were duly placed on record by the Petitioner and thus, there can be no doubt that the Petitioner had disclosed fully and truly all material facts necessary for assessment of its income for the assessment year 2008-09.

53. As regards allegation of Respondent No. 1 regarding non-disclosure in the notes to accounts, etc. of transfer of assets by BAL to the Petitioner being made without consideration, it is submitted that, the disclosures in the accounts read with the SOA, elaborately dealt with hereinbefore, which were placed on record during the course of original assessment proceedings, would unequivocally show that assets were received from BAL without consideration in as much as there was increase in assets without any corresponding outflow, including increase in share-capital. On the contrary, the corresponding increase in general reserves was made only because assets were received without consideration, which was fully and properly explained in the accounts, through notes at several places. In any case, the SOA specifically stated that the transfer of PI assets by BAL to the Petitioner was without consideration. That apart, in the reply filed before the assessing officer during the course of assessment proceedings, too, it was specifically pointed out that assets had been received by the Petitioner from BAL, without any consideration. In that view of the matter, the allegation made in the impugned order disposing objections, are factually incorrect and made on surmises and conjectures, simply to justify the action of initiating reassessment proceedings under Section 147 of the Act.

54. There can thus, be no basis for any conclusion, howsoever remote, that the Petitioner had failed to fully and truly disclose its material facts, calling for

exercise of jurisdiction under Section 147 beyond a period of four years from the end of relevant assessment year.

55. Reliance in this regard is also placed on the following judicial pronouncements:

-Atma Ram Properties (P) Ltd. Vs. DCIT:343 ITR 141 (Del.)

-CIT vs. Shri Tirath Ram Ahuja (HUF): 306 ITR 173 (Del.)

-Haryana Acrylic Manufacturing Company vs. CIT: 308 ITR 38 (Del.)

-CIT vs. Indian Farmers Fertilizers Cooperative Ltd.: 171 Taxman 379 (Del.)

-Wel Intertrade (P) Ltd vs. ITO: 308 ITR 22 (Del.)

-CIT vs. Purolator India Ltd.: 343 ITR 155 (Del.)

-Fenner India Ltd. Vs. DCIT (Mad): 241 ITR 672 (Mad)

56. Applying the aforesaid settled legal position to the facts of the present case, it is submitted that since the Petitioner had duly disclosed all primary facts in relation to the aforesaid scheme for transfer of assets, as well as duly replied to the specific queries raised in this regard during the course of assessment proceedings furnishing all supporting evidences in respect of the same, the present proceedings initiated vide the impugned notice dated 31.03.2015, beyond a period of four years from the end of the relevant assessment year, is barred by limitation in terms of proviso to Section 147 of the Act and, therefore, calls for being quashed."

20. We would also like to reproduce verbatim the counter affidavit filed by the first respondent to the aforesaid paragraphs, which is as under: -

"23. The contents of para 38 to 44 are denied. In these paras, the petitioner argues that the re-opening of the assessment in this case is invalid as it was done beyond 4 years from the end of the relevant assessment year. However, as per Section 151(1) of the Income Tax Act, 1961 no notice shall be issued u/s 148 by an Assessing Officer after the expiry of a period of 4 years from the end of the relevant Assessment Year, unless Pr. Chief Commissioner or Chief Commissioner or Pr. Commissioner or Commissioner is satisfied on the reasons recorded by the Assessing Officer, that it is a fit case for the issue of such notice. The provisions of this section have been duly complied with in this case as the Pr. Commissioner had accorded his satisfaction on the reasons recorded for re-opening of assessment by the Assessing Officer.

24. The contents of para 45 and 46 are denied. The petitioner has argued that it had fully and truly disclosed all material facts necessary for assessment during assessment proceedings u/s 143(3) by way of submission of audited financial statements and thus the limitation u/s 147 is upto the expiry of four year from the end the end of the relevant Assessment year. However, production before the Assessing Officer of the account books or other evidence from which material evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure with the meaning of the foregoing proviso. In view of the above legal position it is held by the AO that the assessee had not made true and full disclosure during the assessment proceedings u/s 143(3).

25. The contents of para 47, 48, 49 & 50 are denied. In these paras the Petitioner has referred to its various submissions made during the assessment proceedings u/s 143(3). However, it may be noted that nowhere in these submissions the Petitioner had given

any information regarding the subsequent transfer of PI to any company outside the group controlled by the transferor company.

26. The contents of para 51 are denied. It is submitted that that the proceedings for sanction of transfer of scheme of transfer of PI from petitioner to BIVL before this Hon'ble Court and the assessment proceedings u/s 143(3) were two separate proceedings and thus any fact brought forward in one proceeding would not amount to disclosure in the other proceeding.

27. The contents of 52, 53, 54 require no reply."

21. As we had observed that the assertions made in the counter affidavit were vague and not specific, albeit BIL had placed reliance on documents/papers referred to in the writ petition, we had passed the order dated 5th March, 2018, which reads as under: -

" The question arises whether the assessee had made full and true disclosure of material facts. Reasons to believe state that the assessee had not disclosed subsequent transfer of the passive infrastructure/assets to Indus Towers Ltd. with effect from 01.04.2009, though the transfer by Bharti Airtel Ltd. to the petitioner was with the intent and purpose to transfer the passive infrastructure/assets to Indus Towers Ltd.

Learned senior counsel for the petitioner submits that the reasons to believe falsely and wrongly state that the information or material fact was not on record. He relies upon Director's reports and the Note to Accounts for the AY 2008-09 and states that this factum was duly disclosed. Reference is also made to the affidavit filed by the assessing officer in February, 2010 before the Company Judge opposing the scheme. The assessment order under Section 143(3) was passed on 20.12.2010.

> Counsel for the respondent prays for some time to obtain instructions and also file an affidavit of the then Assessing Officer, namely, Mr.Raghuveer Singh Dagur on whether or not the said material and information was known and available on record when the assessment order dated 20.12.2010 was passed. The said affidavit would be filed within three weeks. Response thereto may be filed within two weeks thereafter.
>
> Re-list on 16th May, 2018."

22. Pursuant to the said directions, Mr. Raghuveer Singh Dagur, who is now working as Additional Commissioner of Income Tax, Audit, Jaipur has filed compliance affidavit. In this affidavit, he has stated that the assessment order dated 20th December, 2010 was passed by him on the information submitted by the assessee in the form of Director's report along with notes on accounts. He has stated on oath that information with regard to value of assets transferred initially by BAL to BIL and re-valuation was not mentioned in the Director's report or the notes on accounts. Secondly, no specific query with regard to tax on valuation of assets and subsequent transfer to M/s Indus Tower Limited was made in the notice issued to the assessee under Section 143(2) of the Act. Thirdly, the facts "with respect to taxability and transfer of assets worth Rs.5739.60 crores to the Petitioner Assessee at nil value" were never disclosed in specific terms and hence the same could not be examined. Neither the Director's report nor the notes on accounts nor the affidavit contained the fact of valuation of assets at Rs.5739.60 crores. Thus, the petitioner/BIL had not disclosed fully and truly all material facts and reliance is placed on Explanation 1 to Section 147. Reference is made to the order under Section 263 of the Act dated 30th

March, 2014 passed by the Commissioner of Income Tax in the case of BAL, to plead that fact of transfer of assets of Rs.5739.60 crores at nil valuation and re-valuation of the same came to notice only from careful due diligence of this order. Lastly, reference is made to the order passed by the High Court dated 26th November, 2007 approving the SOA between BAL and BIL for re-structuring of the group companies controlled by the former. Paragraph 4 of the said scheme is reproduced to the effect that BIL was a wholly owned subsidiary of the BAL and the scheme intended re-structuring within the group companies controlled by BAL, holding of the telecom infrastructure undertaking in an efficient manner consistent with the diverse needs of business. This scheme had not envisaged involvement or any movement of assets and liabilities to a company outside the group and hence BAL was not required to issue shares or pay a consideration.

23. Challenging the assertions made by Mr. Raghuveer Singh Dagur in the above affidavit, BIL has relied upon an earlier affidavit filed by Mr. Raghuveer Singh Dagur sworn on 12th February, 2010. This affidavit in nature of objections to the second scheme i.e. demerger and transfer of infrastructure assets in 12 circles by BIL to Bharti Infratel Ventures Limited, was sworn and filed before the passing of the original assessment order under Section 143(3) by none other than Mr. Raghuveer Singh Dagur, as recorded above on 20th December, 2010. In the said affidavit, Mr. Raghuveer Singh Dagur as an Assessing Officer had stated as under:-

> "10. The passive infrastructure assets amounting to Rs.5371.67 crores were received by the Petitioner at NIL consideration. Thereafter, the Petitioner revalued the said assets at Rs.8218.12 crores and the gain on

> revaluation was transferred to a General Reserve. The said reserve, could be employed by the Petitioner in a manner it so deemed fit, inter-alia, for the purposes of setting-off additional depreciation on the revalued assets. It is equally significant to consider that the said passive infrastructure assets were not handled by the Petitioner for a single day and were transferred to the Indus JV. The petitioner also claimed proportionate depreciation on the revalued assets for the Assessment Year 2008-09 ('the relevant period')."

24. Clearly the affidavit of the assessing officer Mr. Raghuveer Singh Dagur not only refers to transfer of assets in the form of towers, etc., called passive infrastructure, for NIL consideration paid by BIL to BAL for book value of infrastructure asset was Rs. 5371.67 crores, on revaluation the assets were valued at Rs. 8218.12 crores and gain on revaluation was transferred to the reserve to be employed in a manner deemed fit. It also states that passive infrastructure was not handled by BIL for a single day and was transferred to Indus JV. BIL could claim proportional depreciation was stated. Similarity between the factual assertions made in the affidavit of Mr. Raghuveer Singh Dagur and the factual narration in the 'reasons to believe' are apparent. What was stated in this affidavit of Mr. Raghuveer Singh Dagur sworn on 12th February, 2010 was known to him on 20th December, 2010 when he had passed the original assessment order.

25. The formation of Bharti Infratel Ventures Limited and transfer of infrastructure assets in 12 circles to that company with the object that this newly formed company would specifically transfer these assets to M/s. Indus Towers Limited by way of amalgamation was something that was hidden and/or concealed. It was openly and clearly stated and known. It

was a fact duly informed and within the knowledge of the then Assessing Officer, Mr. Raghuveer Singh Dagur, who had referred to the transfer made to Indus JV. Further, during the course of the original assessment proceedings Mr. Raghuveer Singh Dagur had issued questionnaire dated 10th February, 2010 to provide a brief note on the business activity and history of the assessee company. The petitioner/BIL, vide reply dated 21st April, 2010 stated and informed Mr. Raghuveer Singh Dagur the following facts:-

> 1. Bharti Infratel Limited, an Indian company incorporated under the provisions of Companies Act, 1956; is a wholly owned subsidiary of Bharti Airtel Limited and having its registered office at H-5/12, Qutab Ambience, Mehrauli Road, New Delhi-110030.
>
> The company was incorporated on 30th November 2006 by Registrar of Companies NCT Delhi & Haryana, having corporate identity number U64201DL2006PLC156038. The company has obtained Certificate of commencement of business with effect from 10th April 2007. The Bharti Airtel Limited had demerged the passive infrastructure into Bharti Infratel Limited under the scheme of demerger under Section 391 to 394 of Companies Act 1956. The scheme had been approved by the order of Delhi High Court dated 26th November 2007 and the appointed date for demerger was 31 January 2008.
>
> The company being a passive infrastructure service provider is engaged in providing Telecom Infrastructure Support services to Telecommunication companies providing mobile services. The support services are being provided by offering passive equipments installed at sites on non-

exclusive basis. Passive equipments comprise of towers, green shelters, DG Sets, UPS etc.

x x x x x x

8. The copy of Audited annual accounts and Tax Audit report has been submitted to your good office vide our submission dated 24 September 2009. However, the same is being enclosed herewith for your reference.

9. The amount of Rs. 157,27,09,173/- is being carried forward as unabsorbed depreciation pertaining to AY 2008-09.

10. The year under question is first year of operation, hence comparative GP / NP rates are not available."

26. BIL has also relied upon audited financial statement for the year ending 31st March, 2008 submitted to the Assessing Officer in the original assessment proceedings making the following disclosures: -

(a) Director's report dated 24th April, 2008 in which there was complete disclosure recording the SOA between BIL and BAL for transfer of tower business and subsequent transfer of a portion of the assets to M/s Indus Tower Limited, a joint venture under the head "Business Review". The Relevant portion of the disclosure has been quoted in the writ petition which states and refers to the Scheme of Demerger of tower business from BAL to BIL on the scheme being sanctioned and accordingly the petitioner had acquired 52000 towers infrastructure. BIL had subsequently entered into joint venture with Vodafone Essar Limited and Idea Cellular Limited to maintain and operate tower

infrastructure business with the equity structure of 42:42:16 respectively.

(b) Point 3 in the auditor's report had specifically stated that the passive infrastructure acquired from BAL had been recorded in the books of accounts at fair market value and the equivalent amount was transferred to the general reserve in accordance with the SOA. The notes refer to Accounting Standard-14 for amalgamation and stated that the fair market value of Rs.8235.96 crores was credited to the general reserve. The capital reserve has been reduced by Rs.8235.96 crores and the general reserve was increased by Rs.8197.14 crores after depreciation of Rs.388.20 crores.

(c) Details of SOA as well as the accounting treatment given to the transferred assets in the books of accounts were also noted in Note 1(a) to Schedule 16 of the financial statement.

(d) It was informed that the SOA under Sections 391-394 of the Companies Act, 1956 for transfer of telecom infrastructure undertaking was approved by the High Court vide order dated 26th November, 2007 and filed with the Registrar of Companies on 31st January, 2008. Details of the asset transferred, i.e., telecom infrastructure comprising of wireless and broadcast towers, all rights, title, interest in land on which the towers had been constructed, etc. for plant and equipment forming part of the telecom infrastructure were recorded in the books of BIL at their respective fair value and the equivalent amount credited to the general reserve. This general reserve would constitute as a free reserve, which would be available to the petitioner for all purposes and to be utilized at its own

discretion, including in particular for setting off of additional depreciation. In the table, full value of the details of the fixed asset, capital, work in progress, etc. particulars of higher depreciation have been mentioned.

(e) Notes with the audit report had mentioned subsequent joint venture agreement dated 8th December, 2007, entered into between BIL, Vodafone Essar Limited and Idea Cellular Limited for the purpose of setting up and formation of M/s Indus Tower Limited. It was stated that telecom infrastructure assets, described as passive infrastructure assets in 16 telecom circles across India, out of telecom assets in 23 circles acquired from BAL were proposed to be transferred to M/s Indus Tower Limited. Thus, note on disclosures had referred to the joint venture agreement dated 8th December, 2007 and that the Indian tower company, M/s Indus Tower Limited would provide passive infrastructure services in 16 circles in India. BIL would acquire 42% stock/shares in M/s Indus Tower Limited and shares of equal status would be acquired by M/s Vodafone Essar Limited, and balance 16% shares would be held by M/s Idea Cellular Limited. It was stated that "for this purpose M/s Bharti Infra Venture Limited has been incorporated as wholly owned subsidiary of BIL wherein relevant assets are to be transferred for ultimate merger in M/s Indus Tower Limited". Pursuant to the aforesaid agreement, the BIL had acquired 50000 equity shares of Rs.10/- each on 17th December, 2007 in M/s Bharati Infratel Venture Limited for aggregate value of Rs.5,00,000/-.

(f) Tax audit report in Annexure-2 to clause 14 again gave complete details regarding written down value of the assets transferred by BAL

having aggregate of Rs.5371.67 crores comprising of written down value of Rs.5229.32 crores and additional depreciation of Rs.142.36 crores claimed by BIL.

(g) Note 3 of the notes of return of income reads as under: -

> "3) The company had entered in to a scheme of arrangement for transfer of the Telecom Infrastructure undertaking from Bharti Airtel Limited ("BAL"), which has been approved by the Hon'ble High Court of Delhi vide order dated November 26, 2007 and filed with the Registrar of Companies, Delhi & Gurgaon on January 31, 2008 i.e. the Effective Date of the Scheme. Pursuant to the scheme, the telecom infrastructure undertaking were transferred to and vested in the Company with that date.
>
> The depreciation on assets transferred from BAL have been computed in accordance with the fifth proviso to section 32 of the Act, since assets have been used by both the legal entities during the year. Hence the depreciation on such assets for the assessment year 2008-09 has been apportioned between the two Companies in the ratio of number of days for which the assets were used by the respective Companies, computed as follows;
>
> a. Total Depreciation on assets transferred from BAL for F/Y 2007-08= Rs.8,683,809,952/-
>
> b. Depreciation on above assets for 60 days (i.e. from Feb 1st to March 31st) = Rs.1,423,575,402
>
> The aforesaid depreciation of Rs.1,423,575,402/- have been claimed by the company under section 32 of the Act in respect of assets transferred from Airtel.
>
> c. The balance depreciation for 306 days amounting to Rs.7,260,234,550/- has been claimed by BAL in its return of income."

27. Director's report as mentioned above at the first page under the heading "Business Review" had referred to demerger of tower business from BAL to BIL, which was sanctioned by the Court pursuant to which BIL had acquired 52000 tower infrastructures on 31st March, 2008. It is also stated that BIL had entered into a joint venture of tower infrastructure business with M/s Indus Tower Limited, Vodafone Essar Limited and Idea Cellular Limited to maintain and operate tower infrastructure business with equity structure of 42:42:16 respectively. Under the head "Subsidiary Company", it was stated that the petitioner was incorporated as a wholly owned subsidiary of M/s Bharti Infratel Ventures Limited for restructuring of the tower business. Copy of the balance sheet, profit and loss account, Director's report, Auditor's report of Bharti Infratel Ventures Limited was an integral part of the said report. The Chartered Accountant's report had mentioned full details.

28. Aforesaid documents show that the contention of BIL/petitioner is factually correct for note 3 had specifically referred to the fact that passive infrastructure was transferred from BAL had been recorded in the accounts of BIL at its fair value of Rs.8235.96 crores and credited to the general reserve, etc. Balance sheet under the head "Reserve and Surplus" also reflects the said position. Further, an addition made to the general reserve arising from the SOA. Reference can be made to Note 1(a) of Schedule 16. Schedule 4 relating to fixed assets refers to addition made during the year and gives full details after referring to Notes 3, 4 and 10 of Schedule 15 and Note 4 of Schedule 16. Schedule 16 is very detailed and refers to the entire SOA between BIL and BAL. It states that BIL was incorporated on 30th

November, 2006 with the object of, *inter alia*, setting up, operating and maintaining wireless communication towers, provide network development facilities and to engage in video and voice data and internet transmission business in and out of India. SOA between BIL and BAL, the orders passed by the Court, the details of the terms of the scheme, general reserve, assets and liabilities (based upon independent fair valuation report) are elucidated and stated. With regard to fair market value, etc. details in form of fixed assets, liabilities etc. were given. Under heading (b), reference is made to the Joint Venture Agreement dated 8th December, 2007 with M/s Vodafone Essar Limited and M/s Idea Cellular Limited to form an independent tower company, namely, M/s Indus Towers Limited, which was to provide passive infrastructure services in 16 circles and BIL and M/s Vodafone Essar Limited would hold approximately 42% each in M/s Indus Towers Limited and the remaining 16% would be owned by M/s Idea Cellular Limited. For this purpose M/s Bharati Infratel Ventures Limited was incorporated as a wholly owned subsidiary of BIL, wherein relevant assets were transferred for subsequent partial merger of the assets in M/s Indus Tower Limited.

29. The Assessing Officer had also asked BIL to provide details of depreciation claimed on the assets transferred by BAL and documents in support of the written down value of the assets. BIL along with the reply dated 15th November, 2010 had enclosed copy of the SOA. Assessing Officer had also raised a specific query as to the basis on which the assets have been transferred, to which an undated reply was given by the petitioner, the relevant portion of which reads as under: -

3. During the assessment proceedings, we have been asked to provide details of depreciation amounting to Rs. 142,35,75,402/- claimed on assets transferred from Bharti Airtel Limited and evidences in support of assets written down value (WDV) received.

In this regard it is submitted that the company has entered into a scheme of arrangement for transfer of the telecom infrastructure undertaking from Bharti Airtel Limited ("BAL") , which has been approved by the Hon'ble High Court of the Delhi vide order dated November 26, 2007 and filed with the registrar of the companies, Delhi & Gurgaon on January 31, 2008 i.e. the effective date of the scheme. Pursuant to the scheme, the telecom infrastructure undertaking were transferred to and vested in Bharti Infratel Limited ("BIL") with that date.

The depreciation on assets transferred from BAL have been computed in accordance with the fifth proviso to Section 32 of the Act, since assets have been used by the both the legal entities during the year. Hence the depreciation on such assets for the Assessment year 2008-09 has been apportioned between the two companies in the ratio of number of days for which the assets were used by the respective companies, computed as follows;

a. Total depreciation on WDV of assets trans from BAL for FY 2007-08 Rs 868,38,09,952

b. Depreciation on the above assets for 60 days (1 Feb'08 to 31Mar'08) Rs 142,35,75,402.

c. Depreciation on the same assets for 306 days (1 Apr'07 to 31'Jan'08) Rs 726,02,34,550.

The details of circle wise WDV of assets transferred along with computation of total depreciation of Rs 868,38,09,952/- is enclosed as "Annexure 2".

30. The petitioner has also stated that a note on the factum of demerger of assets by BAL and transfer to BIL and the fact that it was without consideration as mentioned in the SOA duly approved by the High Court, was furnished to the Assessing Officer by producing and filing on record both SOA's and the orders passed by the High Court, which was taken note of and considered.

31. In the aforesaid factual background and the legal position elucidated, it has to be held that BIL had made full and true disclosure of material facts i.e. all primary facts which are mentioned and stated in the 'reasons to believe'. Nothing was concealed, withheld and nothing was left to be factually discovered in the form of 'material' mentioned in detail in accounts and other evidence, that was not disclosed/stated but could have been discovered by due diligence. In fact as noted above, reading of the 'reasons to believe' i.e. evidence and material in form of facts and figures were duly stated and mentioned in the affidavit sworn by Mr. Raghuveer Singh Dagur on 12th February, 2010, opposing the second scheme of demerger and transfer of infrastructure assets in 12 circles by BIL to M/s Bharti Infratel Ventures Ltd. and language, facts and figures in the 'reasons to believe' are similar, if not identical.

32. In view of the aforesaid discussion, the writ petition has to be allowed as the jurisdictional pre-conditions in the form of proviso to Section 147 is not satisfied in the facts of the present case. Explanation 1 would not apply as all primary facts were disclosed, stated and were known and in knowledge of the Assessing Officer. Further, this would be a case of 'change of opinion' as the assessee had disclosed and had brought on record

all facts relating to transfer of passive infrastructure, its book value, fair market value as was mentioned in the SOA as also that the transferred passive assets to become property of M/s. Indus Infrastructure Ltd. including the dates of transfer and the factum that one-step subsidiary Bharti Infratel Ventures Ltd. was created for the said purpose. These facts were within the knowledge of the Assessing Officer when he had passed the original assessment order for the Assessment Year 2008-09 on 20th December, 2010.

33. The writ petition is accordingly allowed and Writ of Certiorari is issued quashing the notice for re-assessment dated 31st March, 2015 issued under Section 148 read with Section 147 of the Act for the Assessment Year 2008-09. Writ of Certiorari is also issued quashing the order dated 23rd February, 2016, passed by the Assessing Officer, rejecting objections filed by the petitioner. In the facts of the case, there would be no order as to costs.

(SANJIV KHANNA)
JUDGE

(CHANDER SHEKHAR)
JUDGE

JANUARY 15th, 2019
VKR