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REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 9107 OF 2012

[Arising out of Special Leave Petition (Civil) No. 22613 of 2012]

SANAND PROPERTIES P. LTD. …APPELLANT

VERSUS

JT. COMMR. OF I.T. RANGE 6 AND ORS. …RESPONDENT(S)

WITH

CIVIL APPEAL NO. 744 OF 2013

[Arising out of Special Leave Petition (Civil) No. 17029 of 2012]

AND

CIVIL APPEAL NO. 19487 OF 2017

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J U D G M E N T

J.B. PARDIWALA, J.

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1. Since the issues raised in all the three captioned civil appeals arise out of the same set of facts and the parties are also the same, those were heard analogously and are being disposed of by this common judgment and order.

2. We shall treat the Civil Appeal No. 9107 of 2012 as the lead matter. The same has been preferred by the Sanand Properties P. Ltd. (hereinafter referred to as "**the SPPL**").

3. Civil Appeal Nos. 744 of 2013 and 19487 of 2017, respectively on the other hand, have been preferred by the Revenue.

4. The central issue involved in these appeals pertains to the validity of reopening of assessment and taxability of the income accrued to the SPPL from the Association of Persons named Fortaleza Developers (hereinafter referred to as "**the AOP**"), being one of the members of the AOP.

5. **Civil Appeal No. 744 of 2013,** arises from Writ Petition (C) No. 1647 of 2011 filed by the SPPL before the Bombay High Court, seeking to challenge the reopening of assessment for the AY 2007-08. The High Court, vide its impugned judgment & order dated 23.09.2011, allowed the writ petition and quashed the notice for reopening of assessment for the AY 2007-08, holding that the Assessing Officer had sought to reopen the assessment on mere change of opinion. The High Court held that the Assessing Officer could not have done so, in the absence of any tangible material to justify such reopening. Aggrieved by the judgment & order of the High Court dated 23.09.2011, **the Revenue preferred SLP(C) No. 17029 of 2012 before this Court**, which culminated in Civil Appeal No. 744 of 2013.

6. **Civil Appeal No. 9107 of 2012,** arises from Writ Petition (C) No. 1648 of 2011, filed by the SPPL before the Bombay High Court, seeking to challenge the reopening of assessment for the AY 2008-09. The High Court, vide its impugned judgment & order dated 19.12.2011, dismissed the writ petition and thereby upheld the validity of the notice of reopening of assessment by distinguishing between the AY 2007-08 and AY 2008-09 respectively on the basis of information derived from the Assessment Order of the AOP for the AY 2008-09. Aggrieved by the judgment & order of the High Court dated 19.12.2011, **the SPPL preferred SLP(C) No. 22613 of 2012 before this Court**, which culminated in Civil Appeal No. 9107 of 2012.

7. **Civil Appeal 19487 of 2017**, arises from the Income Tax Appeal No. 1837 of 2014 and Income Tax Appeal no. 1865 of 2014 respectively **preferred at the instance of the Revenue** before the Bombay High Court seeking to challenge the common judgment & order dated 21.03.2014, passed by the Income Tax Appellate Tribunal ("**ITAT**") with respect to the assessment orders of the AY 2008-09 and AY 2009-10 respectively. By the said order, the ITAT had held that the income received by the SPPL from the AOP, was not liable to be taxed in the hands of the SPPL, as it was a share of the AOP's profit and not its revenue. The High Court, vide its common judgment & order dated 24.03.2017, dismissed the appeals observing that no substantial question of law was involved and besides the issue raised therein had already been decided by a Coordinate Bench *vide* order dated 09.04.2015 in Income Tax Appeal No. 1041 of 2013 titled ***The Commissioner of Income Tax-15 v. M/s Fortaleza Developers*** which pertained to the AOP.

A. FACTUAL MATRIX:

8. The SPPL is a private limited company. The company had entered into an agreement dated 29.04.2003, with one M/s. Raviraj Kothari & Co. (hereinafter referred to as "**RKC**") to constitute the Association of Persons titled Fortaleza Developers, for the purpose of developing a parcel of land in the form of residential housing projects.

9. The SPPL had duly filed its return of income for the AY 2007-08 and 2008-09, respectively within the statutory time period. Both the returns came to be selected for scrutiny assessment under Section 143(3) of the Income Tax Act, 1961 (hereafter referred to as "**the IT Act**") and respective orders of assessment were passed dated 21.12.2009 and 20.07.2010 respectively.

10. However, on 11.01.2011, the Revenue issued two notices under Section 148 of the Income Tax Act, 1961, for the purpose of reopening of assessment for the AY 2007-08 and 2008-09 respectively, on the ground that the Assessing Officer had reason to believe that income assessable/chargeable to tax had escaped assessment within the meaning of Section 147 of the IT Act. The reasons for reopening of assessment for the AY 2007-08 and 2008-09 respectively although separately recorded, were nearly identical, except for the numerical figures for the respective AYs.

11. The reasons recorded stated that a Survey under Section 133A of the IT Act had been carried out at the business premises of the SPPL on 23.12.2010 during which the books of account and the following six documents were seized and impounded:

- Original copy of the AOP Agreement dated 29.04.2003.
- Copy of the audited financial statements of M/s Fortaleza Developers for FY 2007-08.
- Books of account of the assessee company showing the treatment of land in its accounts since inception.
- Copy of the development agreement between the Assessee Company and M/s. Yerawada Stud Farm and Agriculture.
- Letter written by Auditor Shri Suresh C. Shah to the Assessee Company dated 19.06.2008, indicating the working of the amount that has to be received by the assessee from M/s Fortaleza Developers.
- Standard agreements in respect of sale of residential units in Fortaleza Complex.

12. Moreover, statement of one Shri Ashok V. Suratwala, Director of the SPPL, was also recorded on oath under Section 131 of the IT Act. According to the 'reasons recorded' under Section 148 of the IT Act, all these materials indicated that the income received by the SPPL from the AOP was not a share of its profit but a share of its revenue, for it was a consideration received against the development rights over the land sold/surrendered by the SPPL in favour of the AOP. The AOP had shown such amount given to the SPPL as a part of its profit to claim it as a deduction under Section 80IB(10) of the IT Act. The SPPL had claimed in its return of income that tax on the income of the AOP being payable in the case of the AOP itself under Section 167B(2) of the IT Act, no tax is liable to be paid by the SPPL in respect of its share of profit from the AOP. However, the Assessing Officer in his 'reasons recorded' concluded that the income received by the SPPL from the AOP being a 35% share of the gross sale receipts and not its profit, is not exempt income but rather taxable in the hands of the SPPL. Such

income having escaped assessment within the meaning of sub-clause (iv) of clause (c) of Explanation 2 to Section 147 of the IT Act, the Revenue was justified in reopening the assessment under Section 148 of the IT Act.

13. In response, the SPPL, vide letter dated 19.03.2011, filed its objections to the reopening of assessment, contending that four out of the six documents impounded during the Section 133A Survey, on the basis of which the assessments were sought to be reopened were already part of the record of the Assessing Officer for finalizing the assessment for the AY 2007-08 and the AY 2008-09, respectively. However, such objections submitted by the SPPL, were dismissed by the Assessing Officer vide a speaking order dated 14.07.2011 holding that the reopening of assessments for the AY 2007-08 and the AY 2008-09 were validly initiated.

14. Aggrieved by the Order dated 14.07.2011, the SPPL challenged the reopening of assessment by filing Writ Petition (C) No. 1647 of 2011 and Writ Petition (C) No. 1648 of 2011 respectively before the Bombay High Court, for the AY 2007-08 and the AY 2008-09 respectively.

15. While the High Court set aside the notice of reopening the assessment for the AY 2007-08 as invalid, it upheld the notice of reopening the assessment for the AY 2008-09 as valid.

(i) <u>The Impugned Order in Civil Appeal No. 744 of 2013:</u>

16. With respect to the AY 2007-08, the High Court while referring to this Court's decision in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Limited*** **[(2010)320ITR561]** observed that although the power of the

Assessing Officer to reopen assessment under Section 148 is much wider than the position which existed prior to the amendment brought about by the Direct Tax Laws (Amendment) Act, 1987, yet the power to reopen an assessment is conditional on the existence of a reason to believe that income has escaped assessment. Post the Direct Tax Laws (Amendment) Act, 1989, the Assessing Officer has no power to review his assessment, nor can an assessment be reopened merely on the basis of change of opinion. For the Assessing Officer to validly reopen an assessment in law, there must be tangible material on the basis of which he comes to the conclusion that income has escaped assessment.

17. The High Court then went on to observe that the material on record indicates that the return of income by the SPPL contains a disclosure of the profits received by the SPPL from the AOP and which the SPPL claims to be exempt in light of Section 167B(2) of the IT Act. The High Court placed reliance on the note appended to the return of income as well as the profit and loss account and ledger extract of the SPPL's capital account with the AOP, which contained a disclosure of the share of profits received from the AOP.

18. More particularly, the High Court focused on two points in the Section 143(3) Assessment Order dated 21.12.2009: first, that paragraph 4 of the Assessment Order stated that the SPPL had earned an income of INR 3.49 Crore in the form of profits from the AOP; and secondly, the Assessment Order contained a statement reflecting the awareness of the Assessing Officer of the fact that the gross sale proceeds were liable to be shared between the SPPL and its collaborator in the proportion of 35% and 65% respectively. Although the High Court clearly observed that the Assessment Order had made reference to the 35:65 proportion of dividing the gross sale proceeds with respect to a

Joint Venture agreement dated 26.08.2002 between the SPPL and one M/s Raviraj Kothari and Associates (hereinafter referred to as "**RKA**"), and not with respect to the AOP Agreement dated 29.04.2003, yet such statements , according to the High Court, significantly demonstrated that the Assessing Officer was aware of the fact that (i) the SPPL had returned an income of INR. 3.49 Crore in the form of a share of profit by the AOP; and (ii) under the terms of the agreement, the SPPL was to have a 35% share in the gross sale proceeds.

19. The High Court went on to further note that the order dated 14.07.2011, passed by the Assessing Order, rejecting the objections filed by the SPPL, did not dispute the factual position that except for the two documents (i.e. an internal audit note and a standard sale agreement, both of which, according to the High Court did not carry the matter further), the material was in fact submitted during the course of the assessment proceedings.

20. The High Court further observed that since the AOP had been duly assessed and the same had been subjected to an order of assessment where the existence or validity of the AOP was not questioned, the SPPL was not liable to pay income tax with respect to its share in the income of the AOP as per Section 86 read with Section 67A and Section 167B of the IT Act, respectively.

21. In the aforesaid view of the matter, the High Court held that the Assessing Officer had purported to reopen the assessment for the AY 2007-08, in the absence of any valid or tangible material and the same was nothing but a mere change in opinion. In such circumstances, the High Court quashed the

Section 148 notice dated 11.01.2011, with respect to the reopening of assessment for the AY 2007-08.

(ii) <u>The Impugned Order in Civil Appeal No. 9107 of 2012:</u>

22. Thereafter, when the writ petition challenging the reopening of assessment for the AY 2008-09 came up for hearing before the High Court, the SPPL argued that since the grounds of reopening assessment were substantially similar to those of the AY 2007-08 and that there were no material differences in the factual matrix between the two AYs, the notice of reassessment for the AY 2008-09 should similarly be set aside.

23. However, with respect to the reopening of assessment for the AY 2008-09 respectively, the High Court reached a conclusion different from that of the AY 2007-08. This time around, the High Court held that the Section 148 notice seeking reopening of assessment for the AY 2008-09 was valid.

24. The High Court distinguished between the AY 2007-08 and the AY 2008-09 respectively on the basis of the Assessment Orders passed in the case of the AOP for the AY 2007-08 and the AY 2008-09 respectively. The High Court laid emphasis on the following three points with respect to its decision taken for the AY 2007-08: (i) the Assessment Order of the AOP for the AY 2007-08, contained no discussion with respect to the nature of the receipt accrued to the SPPL, (ii) the High Court in its order dated 23.09.2011 with respect to the AY 2007-08 had noted that the existence or validity of the AOP was not questioned and (iii) that the Revenue had not sought to reopen assessment of the AOP for the AY 2007-08.

25. In sharp contrast however, the Assessment Order of the AOP for the AY 2008-09 dated 29.12.2010 contained a detailed elaboration of the nature of the AOP agreement and a conclusion that the AOP agreement was based on revenue sharing. Since such detailed observations with regard to the nature of the AOP agreement were made in the Assessment Order of the AOP for the AY 2008-09, the High Court in such circumstances held that the reopening of assessment of the SPPL for the AY 2008-09 was based on tangible material and dismissed the writ petition accordingly. The relevant observation of the High Court in its order dated 19.12.2011 in Writ Petition no. 1648 of 2011 read as follows:

> *"10. Counsel appearing on behalf of the Assessee has submitted that in the judgment delivered by the Division Bench of this Court on 23 September 2011, the petition filed by the assessee questioning the reopening of an assessment for Assessment Year 2007-08 was allowed and that this Petition is on the same basis. There is merit in the submission which was urged on behalf of the Revenue by Learned Counsel that* ***there is a material difference between the reopening that took place for Assessment Year 2007-08 and the reopening in the present case for Assessment Year 2008-09.*** *A copy of the order of the Assessing Officer in the case of the AOP for Assessment Year 2007-08 has been placed for the perusal of the Court in these proceedings.* ***Reading the order of the Assessing Officer for Assessment Year 2007-08, it is evident that there was no discussion in that case at all, in regard to the nature of the receipt which has accrued to the assessee representing 35% in the share of the gross receipts from the sale of residential flats. On the contrary, in the case of the AOP for the Assessment Year in question, Assessment Year 2008-09, the order of the Assessing Officer dated 29 December 2010 contained a detailed elaboration of the nature of the agreement and concluded that the agreement was based on revenue sharing. In other words, the share***

representing 35% in the gross receipts was not a share in profits, but a share in revenue. *Counsel appearing on behalf of the Assessee submitted that it is always open to the parties to devise their own formula or arrangement for determining the manner in which profits should be distributed. Whether the arrangement is in fact, an arrangement for distribution of profits or otherwise, is a matter which will fall for determination of the Assessing Officer on merits after the reopening takes place, in the course of reassessment proceedings. However, the point to be noted is that in the judgment of this Court dated 23 September 2011, the Court had in paragraph 12 noted that the existence or validity of the AOP is not questioned; the AOP had been assessed as such and it was on that basis that the Department had approved the assessment proceedings pertaining to the AOP. The Court also observed that the assessment of the AOP was not sought to be reopened.* ***The facts of Assessment Year 2008-09 are materially different because in the assessment proceedings pertaining to the AOP, the Assessing Officer has taken note of the nature of the agreement between the parties****. The reopening in the present case is within a period of four years and is based on tangible material.*

11. For these reasons, we do not find it appropriate in the exercise of our jurisdiction under Article 226 of the Constitution to interfere with the reopening of the assessment. The Petition shall accordingly stand dismissed. No order as to costs."

[Emphasis supplied]

(iii) The Impugned Order in Civil Appeal 19487 of 2017

26. Following the High Court's decision upholding the reopening of assessment for the AY 2008-09 as valid, the Assessment Order dated 30.12.2011 (hereinafter referred to as "**the Reassessment Order for the AY 2008-09**") under Section 143(3), read with Section 147 of the IT Act, came to be passed. The Reassessment Order for the AY 2008-09 stated that from a reading of the

AOP agreement as a whole and its Clause 7 in particular, it could be seen that the SPPL would be entitled to 35% of the gross sale proceeds as its share of revenue and out of the balance 65%, all the required and relevant expenditure for the purposes of the business of the AOP would have to be met with. The net balance that remained thereafter, would constitute the share of revenue/income of RKC. The deduction on account of income received by the SPPL from the AOP being a share of revenue, did not figure in the categories of deductions mentioned under the Explanation to Section 115JB, which prescribes certain additions and deductions from "Net Profit" to arrive at "Book Profit" for the purposes of computing minimum alternate tax (MAT). Moreover, the Assessment Order further stated that the provisions of Section 167B of the IT Act were not applicable because the shares of the individual members of the AOP were determinate. Thus, the reassessment order for the AY 2008-09 concluded on the note that the income received by the SPPL from the AOP amounting to INR. 14,18,52,156/- was its share of revenue from the AOP and was not exempt, and thus, the amount was accordingly added to the total income of the SPPL for the AY 2008-09. Moreover, penalty proceedings were also initiated for concealment of income and furnishing of inaccurate particulars of income under Section 271(1)(c) of the IT Act.

27. In the meantime, the same question whether clause 7 of the AOP Agreement is a profit sharing clause or a revenue sharing clause emerged in the course of a parallel set of proceedings between the AOP and the Revenue. On 12.10.2012, the ITAT vide its order in the matter ***M/s Fortaleza Developers v. The Commissioner of Income Tax-15, Mumbai*** **[ITA No. 2648/MUM/2012 (A.Y. 2007-08)]** held that the AOP had been assessed as a

distinct assessable entity and was held to be eligible for deduction of its profits under Section 80IB(10) of the IT Act. The quantum of deduction under Section 80IB(10) would depend on the income earned from eligible project and not upon the mode of distribution of shares amongst the members of the AOP. The manner in which the AOP distributes its profit has no bearing on the eligible quantum of deduction under Section 80IB(10) as the eligible quantum will be gross receipts from the project reduced by expenses incurred on the project. The ITAT further held that the 35% share received by the SPPL from the AOP was not in the nature of overriding title to the revenue, but was only a share of profit of the SPPL. Thus, the ITAT unequivocally held that the entire quantum of deduction which the AOP sought to deduct under Section 80IB(10), including the 35% of gross sale receipts accrued to the SPPL, was the profit of the AOP.

28. Based on this Order of the ITAT dated 12.10.2012 referred to above regarding the AOP's Assessment for the AY 2007-08, the ITAT vide order dated 13.09.2013, similarly held with respect to the AOP's Assessment for the AY 2008-09 that Clause 7 of the AOP Agreement was a profit sharing clause and not a revenue sharing clause, and that the amount accrued to the SPPL from the AOP was part of the AOP's profit.

29. Aggrieved by the ITAT's Order dated 13.09.2013 with respect to the AOP, the Revenue preferred Income Tax Appeal No. 635 of 2014 and Income Tax Appeal No. 641 of 2014 respectively before the Bombay High Court, with respect to the AOP's assessment for the AY 2008-09 and the AY 2009-10, respectively.

30. However, the High Court, vide order dated 09.04.2015, in Income Tax Appeal No. 1041 of 2013, affirmed the ITAT's Order regarding the AOP's assessment for the AY 2007-08, upholding the interpretation of Clause 7 given by the ITAT and affirming the ITAT's ruling that the income received by the SPPL from the AOP is a share of the AOP's profit and not its revenue.

31. Similarly, on 03.10.2016, the High Court dismissed both the appeals filed by the Revenue with respect to the AOP's assessment for the AY 2008-09 and the AY 2009-10, respectively by following its earlier Order dated 09.04.2015 passed with respect to the AOP's assessment for the AY 2007-08. The High Court concluded that the appropriate interpretation of clause 7 of the AOP Agreement would be that the SPPL received 35% of the profit made by the AOP, by following the finding of fact arrived at by the ITAT in the case of the AOP for the AY 2008-09 and the AY 2009-10, respectively.

32. In the aforesaid backdrop, the challenge to the reassessment order for the AY 2008-09 and the assessment order for the AY 2009-10 respectively of the SPPL reached the Bombay High Court in Income Tax Appeal No. 1837 of 2014 and Income Tax Appeal no. 1865 of 2014 respectively. The High Court, *vide* its common order dated 24.03.2017, dismissed the appeals filed by the Revenue and upheld the decision of the ITAT in favour of the SPPL. The High Court held that since the question with respect to the correct interpretation of Clause 7 of the AOP Agreement was already decided in the case of the AOP by a Coordinate Bench with respect to the assessment matters of the AOP, the two appeals filed by the Revenue in the matter of the SPPL did not give rise to any substantial question of law that could be adjudicated upon. The High Court observed that following the finding of fact arrived at by the ITAT in the case of the AOP for the subject assessment years

that there was no surrender of development rights by the SPPL to the AOP and that the SPPL received only its share of profit, would hold good even in the present set of appeal because the interpretation of Clause 7 of the AOP agreement would not change depending upon the assessee concerned. Observing thus, the High Court upheld the ITAT's order that the income accrued to the SPPL from the AOP, on the basis of Clause 7 of the AOP agreement was not in the nature of overriding title to the revenue generated by the AOP but only a share of profit of the SPPL in the AOP and accordingly dismissed the appeals filed by the Revenue. Hence, aggrieved by the High Court's order dated 24.03.2017, the Revenue preferred the present Civil Appeal no. 19487 of 2017 before this court, seeking that the impugned order of the High Court be set aside and the respective assessment orders be upheld as having validly computed the income accrued to the SPPL from the AOP.

33. In such circumstances referred to above, the SPPL and the Revenue, are before this Court by way of three captioned appeals.

B. SUBMISSIONS ON BEHALF OF THE PARTIES

(i) Submissions on behalf of the Assessee:

34. Ms. Manisha T. Karia, the learned senior counsel appearing for the SPPL, submitted that the reasons recorded for reopening of assessment for both the AY 2007-08 and the AY 2008-09 respectively, were purely on the basis of change of opinion since no valid or tangible material existed based on which the reassessment could have been made. In the absence of such tangible information, the review was being conducted in the garb of reassessment, and hence such reopening of assessment is impermissible in law.

35. To fortify the submission that there was no new and tangible material for reopening, the learned counsel sought to rely on the fact that the SPPL had already disclosed about the existence of the AOP and the income derived from it while filing the return and revised return for the AY 2008-09 on 27.09.2008 and 03.10.2008, respectively through a declaration which reads thus:

> "*1. The Assessee is a member in the Association of Persons doing business under the name and style of "Fortaleza Developers". The tax on the income of AOP being payable in the case of the AOP itself under section 167B(2) of the Act, no tax is payable by the Assessee in respect of its share of income from the AOP.*
>
> *2. For computation of book profit u/s. 115JB of the Income-tax, 1961 share of profit from AOP has been considered as a 'non-income' category as spelt out in Mumbai Tribunal decision in the case of Income-tax officer v. Suraj Jewellery India Ltd. As such this income is deducted from book profit to arrive at profit chargeable under that section."*

36. Similar disclosures were made by the Assessee in the returns for the AY 2007-08. These disclosures indicated that the Revenue was made aware of the existence of the AOP and the income derived by the SPPL from the AOP at the time of filing of return and revised return.

37. The learned counsel further pointed out that during the course of scrutiny assessment under Section 143(3) of the IT Act for the AY 2008-09, the SPPL had submitted the AOP Agreement, the books of account including the appropriation account of the AOP, as well as the ledger extract account of the AOP which actually represented the share of profit received by the SPPL from the AOP. Since the Assessment Order under Section 143(3) had been

passed after considering such documents, reopening of assessment based on revisiting the same issue tantamount to review of the assessment order, which is impermissible in law.

38. With respect to the statement of the SPPL's director recorded under Section 133A of the Act, the learned counsel submitted that the statement merely reiterated the existence of the AOP between the SPPL and RKC respectively for joint development of the said plot of land. The fact relating to sharing of 35% of the gross sale proceeds was within the knowledge of the Assessing Officer since such information was referred to in the AOP Agreement and the Auditor's comments in Form 29B. The same was with the Revenue at the time of assessment, and hence did not amount to any new and tangible material at the time of formation of belief with respect to escapement of income for reopening of assessment. Thus, the belief as formed by the Assessing Officer with respect to escapement of income was nothing but mere change of opinion and not tenable in law.

39. As regards the interpretation of clause 7 of the AOP Agreement, the learned counsel submitted that the same was a subject matter of adjudication in the case of ***CIT v. Fortaleza Developers*** **[ITA NO. 1041 of 2013],** whereby the Bombay High Court had upheld the ITAT's interpretation that the 35% share received by the SPPL was not in the nature of overriding title to the revenue but is a share of profit of the SPPL from the AOP. The ITAT had observed that the AOP is a separate and distinct assessable entity and is entitled to claim the deductions permitted under the Act, provided it fulfils the conditions laid down in the relevant provision of the Act. Since the AOP fulfils the requirements of Section 80IB(10) of the Act and is therefore

eligible to claim its profits as deduction under the said provision, the quantum of the deduction would not depend upon the mode of distribution of shares amongst the members of the AOP. The eligible quantum of deduction under Section 80IB(10) will be the gross receipts from the project, reduced by the expenses incurred on the project.

40. The above interpretation was again relied upon by the High Court in its order dated 03.10.2016 in ***CIT-15 v. Fortaleza Developers*** **[ITA no. 635 of 2014 and 641 of 2014]** with respect to the AOP's assessments for the AY 2008-09 and the AY 2009-10, respectively. The High Court's order dated 03.10.2016 is significant for two reasons: (i) it forms the basis of the impugned order in the present Civil Appeal No. 19487 of 2017 before this Court with respect to the Assessment Order for the AY 2008-09 and the AY 2009-10, respectively and (ii) one of the material circumstances relied upon by the High Court to uphold the validity of the reopening of the SPPL's assessment for the AY 2008-09 was the Assessment Order of the AOP dated 18.12.2009. Notably, this very Assessment Order culminated in the High Court order dated 03.10.2016, wherein it has been held that the income accrued to the SPPL constitutes a share of profit. The learned counsel argued that since no appeal has been filed by the Revenue in respect of this order of the High Court dated 03.10.2016, it has become final and thus the basis on which the belief with respect to escapement of income was formed in the present case does not survive, rendering the grounds of reopening as illegal and erroneous in law.

41. The learned counsel vehemently argued that there is no difference in the arrangement between the SPPL and RKC by way of formation of the AOP between the AY 2007-08 and the AY 2008-09 respectively and that the reasons recorded for reopening assessments of the SPPL for both the years

were the same. Thus, the High Court's decision of questioning the notice of reopening assessment for the AY 2007-08 should have also been followed with respect to the AY 2008-09 and the Section 148 notice of reopening assessment should have seen quashed.

42. Furthermore, the learned counsel relied upon this Court's judgment in ***ITO v. Atchaiah*** **[(1996) 1 SCC 417]**, to argue that the income earned by an association of persons is to be separately assessed in the hands of the AOP as an independent person. Since the income accrued to the SPPL from the AOP is a share of the AOP's profit, such income had already suffered taxation in the hands of the AOP, albeit as a deduction under Section 80IB(10). Thus, in light of Section 86 read with Section 67A and Section 167B(2) of the IT Act, respectively the said income could not be taxed again in the hands of the SPPL. In the absence of any income chargeable to tax having escaped assessment, the assumption of jurisdiction by the Assessing Officer to reassess the SPPL's income for the AY 2007-08 and the AY 2008-09 respectively were illegal. Accordingly, the learned counsel submitted that the income accrued to the SPPL from the AOP is not to be subjected to tax liability of SPPL for the AY 2008-09 and the AY 2009-10 respectively.

43. Having put forth the submissions as mentioned hereinabove, the learned counsel prayed that the impugned order in the captioned Civil Appeal no. 9107 of 2012 be set aside, whereas the impugned orders in the captioned Civil Appeal no. 744 of 2013 and Civil Appeal no. 19487 of 2017 respectively be upheld, holding the notices of reopening of assessment for the AY 2007-08 and the AY 2008-09 respectively as invalid, and that the income accrued to the SPPL from the AOP is not required to be taxed again at the hands of SPPL.

(ii) Submissions on behalf of the Revenue:

44. Mr. Raghavendra P Shankar, the learned A.S.G. appearing for the Revenue submitted that the short issue that falls for consideration in the present case is the proper construction of Clause 7 of the AOP Agreement and in particular the nature and character of the amount received by the SPPL from the AOP. If the amount received by the SPPL from the AOP is in the nature of share of the revenue/gross receipts of the AOP, such amount is taxable in the hands of the SPPL. On the other hand, if the amount received by the SPPL from the AOP is in the nature of a share of the profits of the AOP, such amount has already suffered tax in the hands of the AOP and cannot be taxed again in the hands of the SPPL by virtue of Section 86 read with Section 67A of the Act respectively.

45. The learned ASG argued that the salient features of Clause 7 of the AOP Agreement are as follows:

i. The housing units were to be sold by the AOP to the purchasers. All payments were to be received into the account of the AOP.
ii. The assessee was entitled to retain 35% of such receipts of the AOP and was also entitled to withdraw for its own use an amount equivalent to 35% of the gross receipts of the AOP.
iii. The balance 65% receipts of the AOP were first to be applied to defray the expenses incurred by the AOP for the purposes of the business (construction of flats). The balance would constitute the revenue share of RKC, which RKC was at liberty to withdraw for its own use.

46. The learned ASG argued that on a plain reading of the said Clause 7 of the AOP Agreement, it is evident that the amount received by the SPPL from the AOP is in the nature of a revenue share of 35% of the gross receipts of the AOP from sale of flats to buyers. As such, such amount constitutes taxable income in the hands of the SPPL.

47. The learned ASG argued that it is not in dispute that the AOP agreement was actually implemented by the parties in a manner consistent with the above interpretation of Clause 7 and he pointed out illustrations from the facts on record. For instance, in the AY 2008-09, the gross receipts of the AOP from the sale of housing units was an amount of approximately INR 41.26 crore. As per the AOP agreement, the SPPL was entitled to 35% of the gross receipts of the AOP during the AY, which is an amount of INR 14.44 crore approximately (i.e. 35% of INR 41.26 crore). The appropriation account of the AOP, which is reproduced in the order of the Assessing Officer , as also in the order of the CIT(A) reflects that the amount actually paid to the SPPL by the AOP during the AY (albeit under the caption "net profit/loss"), was an amount of INR 14.18 crore, which approximates its revenue share of 35% of gross receipts, not profits. Plainly therefore, the amount actually received by the SPPL from the AOP in each of the AYs in issue was nothing but an amount corresponding to 35% of the gross receipts of the AOP during that AY. This factual position emerging from the record, the learned ASG argued, cannot be altered by the nomenclature adopted by the AOP in characterising the payment made by it to the SPPL. The substance of this payment, regardless of its form, is that it is a share of gross receipts and is therefore taxable in the hands of the SPPL.

48. The learned ASG further bolstered up his above submission by delving into the rationale for characterising the payment made by the AOP to the SPPL as a profit. He submitted that under Section 80IB(10) of the Act, an undertaking developing and building housing projects approved before a specified date was entitled, in computing its taxable income, to a deduction of 100% of the profits derived by it during the previous year relevant to any assessment year from such housing project, subject to satisfaction of certain conditions. It was therefore to the benefit of the AOP to declare as large a profit as possible, so as to avail of maximum benefit under Section 80IB(10). The case of the Revenue during the assessment of the AOP was that this method of computation constituted an inflated claim under Section 80IB(10) since the amount paid by the AOP to the SPPL was an expense in the hands of the AOP and should have been treated as such in computing the net profit of the AOP. Had this been done, the deduction under Section 80IB(10) would have been limited to approximately INR 7.4 crore for the AY 2008-09 (i.e. gross receipts of approximately INR 41.26 crore minus revenue share paid to the SPPL of approximately INR 14.44 crore minus construction expenses of approximately INR 19.38 crore).

49. The learned ASG vehemently reiterated that the primary case of the Revenue is that effect must be given to the plain language of Clause 7 of the AOP Agreement, in order to determine the nature of the receipts from the AOP in the hands of the SPPL. The plain text of the said Clause 7 makes it clear that the amount received by the SPPL from the AOP was a share of revenue/gross receipts of the AOP and not a share of the profits of the AOP. He argued that, this interpretation arrived at by the Assessing Officer, is consistent with how the parties actually understood and gave effect to the Clause. He submitted

that a contrary finding in the proceedings in the case of the AOP is not determinative of the treatment of this amount in the hands of the SPPL and at any rate cannot foreclose examination of the issue by this Court. He argued that the fact that the Bombay High Court has taken a view in favour of the AOP while during consideration of the assessment proceedings of the AOP, even if (on demurrer) was binding on a co-ordinate bench of the same court, does not foreclose examination of the issue by this Court.

50. It was further argued by the learned ASG that since the entire amount paid by the AOP to the SPPL was reduced from the taxable income of the AOP by operation of Section 80IB(10), it did not suffer any taxation at all, much less at the maximum marginal rate applicable to the AOP. Section 86 of the Act provides that where an AOP is chargeable to tax on its total income at the maximum marginal rate, the share of a member computed under Section 67A (since the shares of the constituents of the AOP are determinate and known), shall not be included in the member's total income. However, as per Clause (b) of the first *proviso* to Section 86, '*in any other case*', the share of the member shall form part of his total income. He argued that the present case of the SPPL falls squarely under the second proviso to Clause (b) of Section 86, in as much as the share of the AOP's income actually received by the SPPL had not suffered income tax at all, much less at the maximum marginal rate applicable to the AOP.

51. In light of the above, the learned ASG submitted that the SPPL must discharge its liability to pay income tax on the amounts received by it from the AOP during the AY 2008-09 and the AY 2009-10, respectively and

therefore the Civil Appeal No. 19487 of 2017 be allowed and the impugned order of the High Court set aside.

52. With respect to the issue of reopening of assessment for the AY 2007-08 and the AY 2008-09 respectively, it has been submitted by the learned ASG that the outcome of the above-mentioned Civil Appeal No. 19487 of 2017 would determine the outcome of Civil Appeal no. 744 of 2013 and Civil Appeal No. 9107 of 2012 respectively. He submitted that if the Civil Appeal no. 19487 of 2017 is dismissed on merits, the Civil Appeal No. 744 of 2013 and 9107 of 2012 respectively may be dismissed as infructuous, since the SPPL would anyway have succeeded in the final order passed in the reassessment proceedings. Conversely, if this Court were to allow the Civil Appeal no. 19487 of 2017, the *sequiter* would be that income had escaped assessment during the original proceedings on account of non-consideration by the Assessing Officer of tangible material in the form of the AOP Agreement, which in turn would mean that the reopening of the assessment for the AY 2007-08 and the AY 2008-09 respectively were legally justified and valid.

53. Moreover, with respect to the reopening of assessments, the learned ASG argued that the High Court's order dated 23.09.2011 rejecting the reopening of assessment for the AY 2007-08 does not withstand scrutiny because the reasons for reopening the assessment under Section 148 for the AY 2007-08 and the AY 2008-09 respectively were identical, and, more relevantly, were issued by way of a common notice dated 07.02.2011. The primary reason for reopening the assessment, as disclosed in the common document for both the AYs was the discovery of the AOP Agreement during the survey action under Section 133A of the Act, which showed that the SPPL was receiving a share of the gross receipts of the AOP from the sale of the residential units. Since

the very same reasons for reopening assessment were upheld by the High Court for AY 2008-09 by way of order dated 19.12.2011, it defeats reason to contend that the same material was found to be tangible and disclosing escapement of income in the AY 2008-09 were not found to be tangible material to for the AY 2007-08, more particularly when there was no material change in the factual position during each of these AYs. Thus, for the reasons specified by the High Court itself in its order dated 19.12.2011 for the AY 2008-09, the reopening of assessment for the AY 2007-08 should also be held to be valid.

54. Thus, the learned ASG respectfully prayed that Civil Appeal Nos. 19487 of 2017 and 744 of 2013 filed by the Revenue be allowed and Civil Appeal No. 9107 of 2012 filed by the Assessee be dismissed.

C. ISSUES TO BE DETERMINED

55. Having heard the learned counsel appearing for the parties and having gone through the materials on record, the following questions fall for our consideration:

(i) Whether the reopening of assessments of the SPPL for the AY 2007-08 and the AY 2008-09, respectively, were valid?

(ii) Whether the amount accrued to the SPPL from the AOP, based on Clause 7 of the AOP Agreement dated 29.04.2003, is liable to be taxed in the hands of the SPPL for the AY 2008-09 and the AY 2009-10 respectively?

D. ANALYSIS

56. We propose to first address the issue whether the reopening of assessments of the SPPL for the AY 2007-08 and the AY 2008-09 respectively were valid. Thereafter, we shall proceed to determine the question whether the amount accrued to the SPPL from the AOP, based on Clause 7 of the AOP Agreement dated 29.04.2003, is liable to be taxed in the hands of the SPPL for the AY 2008-09 and the AY 2009-10 respectively.

(i) Whether the reopening of assessments of the SPPL for the AY 2007-08 and the AY 2008-09, respectively, were valid?

(a) Statutory Framework Governing Reassessment under Section 147 and Section 148 of the IT Act, 1961 respectively:

57. Before adverting to the rival submissions canvassed on either side, we must refer to Section 147 and Section 148 of the IT Act, 1961, respectively, dealing with reopening of assessments, as applicable to the present matter.

58. Section 147 of the IT Act, 1961, prior to the amendment by Act 23 of 2012, read thus:

> **"*Section 147. Income escaping assessment.*** *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):

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:

[Provided further that the Assessing Officer may assess or reassess such income, other than the income involving matters which are the subject matters of any appeal, reference or revision, which is chargeable to tax and has escaped assessment.]

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.

Explanation 2.-For the purposes of this section, the following shall also be deemed to be cases where income chargeable to tax has escaped assessment, namely:-

(a) where return of income has been furnished by the assessee although his total income or the total income of any other person in respect of which he is assessable under this Act during the previous year exceeded the maximum amount which is not charge- able to income tax;

(b) where a return of income has been furnished by the assessee but no assessment has been made and it is noticed by the Assessing Officer that the assessee has understated the income

or has claimed excessive loss, deduction, allowance or relief in the return;

(c) where an assessment has been made, but-

(i) income chargeable to tax has been underassessed: or
(ii) such income has been assessed at too low a rate; or
(iii) such income has been made the subject of excessive relief under this Act; or
(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

Explanation 3.-For the purpose of assessment or reassessment under this section, the Assessing Officer may assess or re-assess the income in respect of any issue, which has escaped assessment, and such issue comes to his notice subsequently in the course of the proceedings under this section, notwithstanding that the reasons for such issue have not been included in the reasons recorded under sub-section (2) of Section 148."

59. Section 148 of the IT Act, 1961, prior to the amendment by Act 21 of 2006, read thus:

"***Section 148. Issue of notice where income has escaped assessment.*** *- (1) Before making the assessment, reassessment or recomputation under Section 147, the Assessing Officer shall serve on the assessee a notice requiring him to furnish within such period, as may be specified in the notice, a return of his income or the income of any other person in respect of which he is assessable under this Act during the previous year corresponding to the relevant assessment year, in the prescribed form and verified in the prescribed manner and setting forth such other particulars as may be prescribed; and the provisions of this Act shall, so far as may be, apply accordingly as if such return were a return required to be furnished under Section 139:*

Provided that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005 in response to a notice served under this section, and

(b) subsequently a notice has been served under sub-section (2) of Section 143 after the expiry of twelve months specified in the proviso to sub-section (2) of Section 143, as it stood immediately before the amendment of said sub-section by the Finance Act, 2002 (20 of 2002) but before the expiry of the time limit for making the assessment, reassessment or recomputation as specified in sub-section (2) of Section 153, every such notice referred to in this clause shall be deemed to be a valid notice:

Provided further that in a case-

(a) where a return has been furnished during the period commencing on the 1st day of October, 1991 and ending on the 30th day of September, 2005, in response to a notice served under this section, and

(b) subsequently a notice has been served under clause (ii) of sub-section (2) of Section 143 after the expiry of twelve months specified in the proviso to clause (ii) of sub-section (2) of Section 143, but before the expiry of the time limit for making the assessment, re- assessment or recomputation as specified in sub-section (2) of Section 153, every such notice referred to in this clause shall be deemed to be a valid notice.

Explanation.-For the removal of doubts, it is hereby declared that nothing contained in the first proviso or the second proviso shall apply to any return which has been furnished on or after the 1st day of October, 2005 in response to a notice served under this section.

(2) The Assessing Officer shall, before issuing any notice under this section, record his reasons for doing so."

60. Upon a bare reading of Section147 of the IT Act, it is seen that the provision empowers the Assessing Officer to assess income that escaped assessment in the relevant assessment year. Subject to the provisions and safeguards in the section, the Assessing Officer can reassess income for an assessment year irrespective of whether the original assessment was merely processed under Section 143(1) or assessed under Section 143(3) of the Act. The power to reopen assessment is not confined to cases where the assessee has concealed his income; it also extends to cases where though there has been no concealment by the assessee, the Assessing Officer has reason to believe, in consequence of tangible material in his possession, that income has escaped assessment. The expression "escaped assessment" is not restricted to those cases only which have not come to the notice of the Assessing Officer at all, but also applies to those cases where an assessment has been made but (i) income chargeable to tax has been under-assessed, or (ii) such income has been assessed at too low a rate, or (iii) such income has been made the subject of excessive relief under this Act, (iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

61. In the present matter before us, the Section 148 notice of reopening assessment states that certain income of the SPPL derived from the AOP, chargeable to tax had escaped assessment within the meaning of sub-clause (iv) of clause (c) of Explanation (2) to Section 147 of the IT Act. It is the Revenue's case that the income accrued to the SPPL from the AOP is not a share of the AOP's profit but is a share of revenue and hence should have

been taxed at the hands of the SPPL, rather than being exempted as a profit of the AOP under Section 80IB(10) of the IT Act.

62. The core issue before us is to test the validity of the Section 148 notice issued to the SPPL for the AY 2007-08 and the AY 2008-09, respectively, on the anvil of the requirements stated under Section 147 of the Act. The essential condition precedents to exercise jurisdiction for reopening an assessment under Section 147 read with Section 148 of the Act are:

a) The Assessing Officer must have 'reason to believe' that 'income' chargeable to tax has 'escaped assessment;' and
b) The Assessing Officer must record reasons for reopening of assessment before issuing notice under Section 148

(b) Meaning and scope of "reason to believe" under Section 147 of the IT Act, 1961:

63. The expression "reason to believe" in Section 147 of the IT Act means cause or justification and there need not be an established fact of assessment at this stage. The Assessing Officer need not have finally ascertained the facts to prove escapement of income. The Revenue's contention that the outcome of the third connected matter before us, i.e. Civil Appeal No 19487 of 2017, would determine the outcome of the matters testing the validity of the reopening of assessment, is not a legally sustainable submission. The validity of the reopening has to be ascertained by limiting the enquiry to the 'reasons recorded' under Section 148 only, and the merits of the reopening cannot be looked into to justify or discredit the reopening. In other words, there can be

a scenario where the 'reasons recorded' by the Revenue would justifiably give rise to a *prima facie* belief that income has escaped assessment, even though upon reopening of assessment, the belief turns out to be unfounded. In such a scenario, the reopening would remain valid, irrespective of the outcome arrived at. On the other hand, there can be a scenario where even though the merits indicate that income had escaped assessment, if the Revenue failed to record those reasons under Section 148, then the reopening in such a scenario would be invalid since the reopening cannot be justified by other reasons gathered subsequently at the merits stage. We must not lose sight of this Court's observation in ***Assistant Commissioner of Income Tax v. Rajesh Jhaveri Stock Brokers P. Ltd.*** **[(2008) 14 SCC 208]**, which is of great relevance in this regard, and it reads thus:

> **"***19. Section 147 authorises and permits the 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. The word "reason" in the phrase "reason to believe" would mean cause or justification. If the assessing officer has cause or justification to know or suppose that income had escaped assessment, it can be said to have reason to believe that an income had escaped assessment.* ***The expression cannot be read to mean that the assessing officer should have finally ascertained the fact by legal evidence or conclusion.*** *The function of the assessing officer is to administer the statute with solicitude for the public exchequer with an inbuilt idea of fairness to taxpayers."*
>
> **[Emphasis supplied]**

64. To decide whether the Assessing Officer has a 'reason to believe' that income chargeable to tax has escaped assessment, it is only those materials which were before the Assessing Officer at the time of initiating proceedings

that have to be taken into account, and not any further materials which subsequently came to light in the course of the proceedings under this section. The expression "reason to believe" has been interpreted by this Court to mean that the Assessing Officer must have some 'tangible material' in his possession to come to the conclusion that there is escapement of income from assessment, before assuming jurisdiction under Section 147. In other words, this tangible material must provide him with the reason to believe that the income has escaped assessment. This Court in ***Commissioner of Income Tax, Delhi v. Kelvinator of India Ltd.*** **[(2010) 320 ITR 561]** (hereinafter referred to as "***Kelvinator***"), has succinctly dealt with the difference between review and reassessment in the context of interpreting the expression "reason to believe" through the following observation:

> *"5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987, reopening could be done under the above two conditions and fulfilment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider.* ***However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of "mere change of opinion", which cannot be per se reason to reopen.***
>
> *6. We must also keep in mind* ***the conceptual difference between power to review and power to reassess. The assessing officer has no power***

to review; he has the power to reassess. But reassessment has to be based on fulfilment of certain precondition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place*.*

7. One must treat the concept of "change of opinion" as an in-built test to check abuse of power by the assessing officer. ***Hence, after 1-4-1989, the assessing officer has power to reopen, provided there is "tangible material" to come to the conclusion that there is escapement of income from assessment. Reasons must have a live link with the formation of the belief.*** *Our view gets support from the changes made to Section 147 of the Act, as quoted hereinabove. Under the Direct Tax Laws (Amendment) Act, 1987, Parliament not only deleted the words "reason to believe" but also inserted the word "opinion" in Section 147 of the Act. However, on receipt of representations from the companies against omission of the words "reason to believe", Parliament reintroduced the said expression and deleted the word "opinion" on the ground that it would vest arbitrary powers in the assessing officer.*

8. We quote hereinbelow the relevant portion of Circular No. 549 dated 31-10-1989, which reads as follows:

> *"7.2. Amendment made by the Amending Act, 1989, to reintroduce the expression 'reason to believe' in Section 147.—A number of representations were received against the omission of the words 'reason to believe' from Section 147 and their substitution by the 'opinion' of the Assessing Officer. It was pointed out that the meaning of the expression, 'reason to believe' had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to*

reintroduce the expression 'has reason to believe' in the place of the words 'for reasons to be recorded by him in writing, is of the opinion'. Other provisions of the new Section 147, however, remain the same."

[Emphasis supplied]

(c) Whether the Assessing Officer had any tangible material or were the reopening of assessments on mere change of opinion?

65. In the present matter, the Revenue has sought to reopen assessment on the basis of books of account and six documents impounded during the survey dated 23.12.2010, carried out at the premises of the SPPL. Alongside impounding the above-mentioned documents, the statement of one Shri Ashok V. Suratwala, Director of the SPPL, was recorded on oath under Section 131 of the Act. The relevant portion of the reasons recorded under Section 148, (as found identical for both the AY 2007-08 and the AY 2008-09), reads as follows:

"*4. Survey under section 133A of theAct was carried out in business premises of the assessee on 23.12.2010. The books of account and documents were found and impounded during the course of survey. The impugned materials included the following documents:*

- *Original copy of the AOP agreement dated 28.04.2003.*
- *Copy of the audited financial statements of M/s Fortaleza Developers for F.Y. 2007-08.*
- *Books of account of assessee company showing the treatment of land in its accounts since inception.*
- *Copy of the development agreement between Assessee Company and M/s Yerawada Stud Farm and Agriculture.*

- *Letter written by Auditor Shri Suresh C. Shah to Assessee Company dated 19.06.2008 indicating the working of the amount that has to be received by assessee from M/s Fortaleza Developers.*
- *Standard agreements in respect of sale of residential units in Fortaleza Complex*

.

The statement of Shri Ashok V. Suratwala, Director of Assessee Company was recorded on oath under section 131 of the Act.

5. The evidences indicate that the assessee has received a share at 35% from the gross receipts on sale of residential units in Fortaleza Complex. The audited financial statements of AOP M/s Fortaleza Developers show that assessee was given 35% of the gross receipts from sale of residential units in the said complex. It did not indicate that assessee has received its share out of the profits of AOP, M/s Fortaleza Developers. This finding was confronted to Shri Ashok V Suratwala, Director of Assessee Company. In reply he has stated thus:

> *The development rights over the land belonged to us which are precious. Because of many other factors affecting the output of construction business, the returns that we should have received from those rights could not be exposed to the inherent risks of business. In pursuit of this and in order to safeguard the value of those rights we have devised a formula by which we are entitled to 35% of the gross receipts out of sales of flats in Fortaleza. Amount of the sales do not include other incidental charges charged to the customers like MSEB charges, maintenance charges, legal charges and administrative charges, etc.*

5.1 Thus it is clear that assessee has received its share from the gross sale proceeds and not the share of profit. Further, following facts came to notice.

- *The assessee is not having any employee on its muster.*

- *It does not have any stake in the construction of the said Fortaleza Complex except the land it has given to the AOP against which it receives 35% of the sale proceeds of flats.*
- *It has been stated that the assessee is the owner of the land and when the land is to be finally transferred to the society/community that will be formed after all the residential unit are sold, the assessee company will sign the conveyance as transferor and AOP as a confirming party.*
- *The AOP, M/s Fortaleza Developers has claimed deduction under Section 80IB(10) of the Act on the profits and gains of business derived by it from sale of flats in Fortaleza Complex.*

6. Thus, it is found that the assessee is not receiving the share of the profit from the AOP but is receiving the consideration in the form of 35% share in proceeds of sale, against the development rights in a land surrendered by it to other member of AOP and finally to the purchaser of the flat/residential units.

7. In view of this, the income received by Assessee from AOP M/s Fortaleza Developers is not a share of profit, but consideration received against the development rights sold/surrendered. Hence the income of [Rs. 3,49,18,587/- for AY 2007-08 & Rs. 14,18,52,156 for AY 2008-09] is not an exempt income but taxable in the hands of assessee. Therefore, income of [Rs. 3,49,18,587/- for AY 2007-08 & Rs. 14,18,52,156 for AY 2008-09] chargeable to tax has escaped assessment within the meaning of sub-clause (iv) of clause (c) of Explanation 2 to Section 147 of the Act. In order to bring the income escaped assessment, assessment is reopened under section 148 of the Act.

Issue notice under section 148 of the Act."

66. It has been contended by the SPPL that out of the six impounded documents, four were already with the Revenue at the time of scrutiny assessment under Section 143(3) and that the remaining two documents did not carry the matter

any further. The SPPL also contended that disclosures regarding the AOP and the income derived from it had been made by the SPPL in its returns for the AY 2007-08 and the AY 2008-09 respectively, and that the Revenue had even considered the same in the Assessment Order. Hence, placing reliance on this Court's observation in ***Kelvinator*** (*supra*), the SPPL contends that the notice of reopening is bad in law as the reasons recorded are nothing but a mere change of opinion since the relevant facts and record had already been duly considered, appreciated and accepted by the Revenue at the time of original assessment.

67. On the other hand, the Revenue contends that the books of accounts and the appropriation account of the AOP were not produced during the relevant assessment proceedings. These documents came to light after the completion of the original assessment, and hence, it was contended that the said information was 'tangible material' that led the Assessing Officer to have 'reason to believe' that there was income escaping assessment. Moreover, it was contended that the statement of Shri Suratwala, Director of the SPPL, was "information" which was not available with the Assessing Officer at the time of original assessment. Furthermore, it was argued that details available to an Assessing Officer in the papers already filed before does not become an item of information by its mere availability, but is transformed into an item of information when its existence is realized and implications are recognised, and that the awareness of the Assessing Officer subsequent to the completion of the original assessment would constitute "information".

68. In light of the above rival contentions, it is crucial for us to ascertain whether the 'tangible material' that the Revenue sought to rely upon had already been considered, appreciated and accepted by the Revenue in the original

assessment orders. If such 'tangible material' had already been relied upon by the Assessing Officer to form an opinion in the original assessment orders, then relying upon the same for the purpose of reopening assessment would amount to review instead of reassessment, and that would not be permissible in law, as noted by this Court in ***Kelvinator*** (*supra*). However, if the 'tangible material' is extraneous to the original assessment records, or was present but not considered or acted upon by the Assessing Officer during the initial proceedings, such information provides a valid jurisdictional basis for the Revenue to reopen the assessment.

69. It is settled law that mere intimation by an assessee of a transaction does not preclude the Assessing Officer from reopening assessment if there is tangible material to prima facie indicate that primary facts regarding the true nature of the transaction had not been brought to the notice of the Assessing Officer by the assessee. The observations made by this Court in ***Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District I Calcutta and Anr.*** **[(1961)41 ITR 191]** (hereinafter referred to as "***Calcutta Discount***"), and in ***M/s Phool Chand Bajrang Lal and Another v. Income Tax Officer and Another*** **[(1993) 4 SCC 77]** (hereinafter referred to as "***Phool Chand***") are of crucial significance in this regard.

70. The majority in the Constitution Bench decision of this Court in ***Calcutta Discount*** (*supra*) had observed that the duty to disclose all the primary facts relevant to a question before the assessing authority lies on the assessee and mere production of books of account and documents does not fulfil that obligation, unless the assessing authority's attention is brought to particular items in the account books, or particular portions of the documents which are

relevant. The observation made by this Court in ***Calcutta Discount*** (*supra*) reads thus:

> *" **9.** There can be no doubt that the duty of disclosing all the primary facts relevant to the decision of the question before the assessing authority lies on the assessee. To meet a possible contention that when some account books or other evidence has been produced, there is no duty on the assessee to disclose further facts, which on due diligence, the Income Tax Officer might have discovered, the legislature has put in the Explanation, which has been set out above. In view of the Explanation, it will not be open to the assessee to say, for example — "I have produced the account books and the documents : You, the assessing officer examine them, and find out the facts necessary for your purpose : My duty is done with disclosing these account-books and the documents". His omission to bring to the assessing authority's attention these particular items in the account books, or the particular portions of the documents, which are relevant, amount to "omission to disclose fully and truly all material facts necessary for his assessment". Nor will he be able to contend successfully that by disclosing certain evidence, he should be deemed to have disclosed other evidence, which might have been discovered by the assessing authority if he had pursued investigation on the basis of what has been disclosed. The Explanation to the section, gives a quietus to all such contentions; and the position remains that **so far as primary facts are concerned, it is the assessee's duty to disclose all of them — including particular entries in account books, particular portions of documents and documents, and other evidence, which could have been discovered by the assessing authority, from the documents and other evidence disclosed**.*
>
> ***10.** Does the duty however extend beyond the full and truthful disclosure of all primary facts? In our opinion, the answer to this question must be in the negative. Once all the primary facts are before the assessing authority, he requires no further assistance by way of disclosure. It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be*

drawn. It is not for somebody else — far less the assessee — to tell the assessing authority what inferences whether of facts or — law should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose what inferences — whether of facts or law he would draw from the primary facts.

11. *If from primary facts more inferences than one could be drawn, it would not be possible to say that the assessee should have drawn any particular inference and communicated it to the assessing authority. How could an assessee be charged with failure to communicate an inference, which he might or might not have drawn?*

***

15. *Clearly it is the duty of the assessee who wants the court to hold that jurisdiction was lacking, to establish that the Income Tax Officer had no material at all before him for believing that there had been such non disclosure.[…]"*

[Emphasis supplied]

71. Moreover, as pithily put by this Court in ***Phool Chand*** *(supra)*, one must understand that acquiring fresh information relating to a concluded assessment which goes to expose the falsity of a statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the Assessing Officer at the time of original assessment proceedings. Where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case, and the ITO would have the jurisdiction to reopen

the concluded assessment in such a case. The relevant observation of this Court in ***Phool Chand*** *(supra)* reads thus:

> *"19. […]* ***Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the same facts and material which was available with the ITO at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the ITO would have the jurisdiction to reopen the concluded assessment in such a case.*** *It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under Section 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the ITO acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or non-specific.*
>
> ***
>
> *25. From a combined review of the judgments of this Court, it follows that an Income Tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax Act, 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his*

assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. ***He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information.*** *Since, the belief is that of the Income Tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income Tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income Tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted Burlop Dealer case as laying down law to the contrary fell in error and did not appreciate the import of that judgment correctly.*

26. We are not persuaded to accept the argument of Mr Sharma that the question regarding truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the

plain phraseology Sections 147(a) and 148 of the Act and is against the settled law by this Court. ***We have to look to the purpose and intent of the provisions. One of the purposes of Section 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude****."*

[Emphasis supplied]

72. Before proceeding further, it is pertinent to clarify at this stage that in the matter before us, since the notice for reopening assessment under Section 148 was served upon the SPPL within four years from the end of the relevant assessment years, the first *proviso* to Section 147 is not attracted. Consequently, the Revenue is not required to establish a failure on the part of the assessee to disclose fully and truly all material facts. However, the Explanation 1 to Section 147 remains highly relevant to the present matter for the interpretative guidance it provides to what amounts to disclosure and the relevance of the information that remains buried in the books of account or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer. The Explanation 1 to Section 147 clarifies the statutory objective that the mere production of account books or other evidence before the Assessing Officer does not necessarily amount to 'disclosure' within the meaning of the Act. Thus, even in the absence of the higher threshold of 'failure to disclose', the interpretative standards of what constitutes a 'true and full disclosure' remains applicable. In other words, the meaning attributable to what amounts to such disclosure remains equally relevant to the contention raised by the assessee that the 'tangible material' based on which the reassessment is stated to be done had

already been provided to the Revenue. As a result, it is important to analyse in detail the manner in which such information was furnished by the assessee and the extent to which the Revenue had engaged with the information in the assessment order in order to reflect whether an opinion has been formed on this issue.

73. In the present matter, the learned counsel for the SPPL drew our attention to the following statement made by the SPPL in its return of income for the relevant AYs to impress upon the fact that the Assessing Officer was aware of the income accrued to the SPPL from the AOP:

> "1. *The Assessee is a member in the Association of Persons doing business under the name and style of "Fortaleza Developers". The tax on the income of AOP being payable in the case of the AOP itself under section 167B(2) of the Act, no tax is payable by the Assessee in respect of its share of income from the AOP.*
>
> *2. For computation of book profit u/s. 115JB of the Income-tax, 1961 share of profit from AOP has been considered as a 'non-income' category as spelt out in Mumbai Tribunal decision in the case of Income-tax officer v. Suraj Jewellery India Ltd. As such this income is deducted from book profit to arrive at profit chargeable under that section."*

74. On a perusal of the materials on record, we also find that a copy of the AOP Agreement was indeed submitted by the SPPL to the Assessing Officer at the time of scrutiny assessment for both, i.e. the AY 2007-08 and the AY 2008-09 respectively. The SPPL had submitted a copy of the AOP Agreement, alongside other documents with its letter dated 06.11.2009, in the course of scrutiny assessment for the year. On another occasion, the SPPL had submitted a copy of the AOP Agreement attached with its letter dated

01.07.2010, during the course of correspondence with respect to the AY 2008-09.

75. However, it is crucial to note that the materials on record indicate that the SPPL had not shed light on the primary fact that the income which it declared as a share of the 'profit' of the AOP, was a 35% share of the gross sale receipts of the residential units sold by the AOP. When the information gathered in the form of the impounded documents and the SPPL's director's statement came to the Revenue's knowledge, the true purport of the transaction between the SPPL and the AOP was revealed.

76. In light of the position of law as explained in ***Calcutta Discount*** *(supra)* and ***Phool Chand*** *(supra)*, the mere disclosure of the existence of the AOP and the quantum of income derived by the SPPL from the AOP at the time of original assessment, does not preclude the Assessing Officer from reopening assessment where fresh information emerges which *prima facie* indicates that certain income has escaped assessment. The statements made by the SPPL regarding the AOP in its return of income or in the course of the original assessment do not amount to discharging its duty to provide the assessing officer with the primary facts relevant to determining the issue in dispute. A perusal of the materials on record would indicate that SPPL had merely informed the Revenue that certain income is accrued to it from the profit of the AOP. Even when a copy of the AOP Agreement was submitted to the Assessing Officer, the particular item in the document, i.e. Paragraph 7 of the AOP Agreement which is at the core of the dispute, was not brought to the fore.

77. Upon a detailed reading of the assessment orders for the AY 2007-08 and the AY 2008-09, respectively it is evident that the Revenue had accepted the SPPL's declaration regarding the income derived from the AOP at face value, without delving into the fundamental nature of the income itself, i.e. the Revenue had proceeded with the assessment without questioning whether the subject income is indeed a share of the profit of the AOP. While the Assessment Orders are not entirely silent on this income, the existing discussion pertained to entirely different issues. Therefore, it is crucial that we deal with the discussion on the income accrued to SPPL from the AOP in the Assessment Orders for the AY 2007-08 and the AY 2008-09 respectively in greater detail.

78. In the Assessment Order of the SPPL dated 21.12.2009, for the AY 2007-08, the income accrued to the SPPL from the AOP has been mentioned only fleetingly in paragraph no. 4. Before analysing further, it is necessary to reproduce the relevant portion of that paragraph from the Assessment Order of the AY 2007-08 as follows:

> "*4. As per the agreement the assessee company received 333.56 lacs, i.e. 35% of the sales proceeds from Raviraj Kothari & Associates.* ***Assessee has also earned Income of Rs. 349.19 lacs in the form of share of profit from AOP i.e.M/s Fortaleza Developers.***"
>
> [**Emphasis supplied**]

79. Crucially, the '*agreement*' referred to in the above-mentioned paragraph no. 4 is the Joint Venture Agreement dated 26.08.2002 (hereinafter referred to as "the JV Agreement"), between SPPL and RKA respectively and not the AOP Agreement dated 29.04.2003 between the SPPL and RKC respectively.

While the Assessment Order examined the JV Agreement in great detail, it offers no discussion on the AOP agreement beyond the lone sentence in the above-mentioned paragraph no. 4. This peripheral reference to the income derived from the AOP clearly demonstrates that the Assessing Officer never formed an opinion on whether such income was a share of the AOP's profit or its revenue. The High Court, however, erroneously conflated the references to the 35:65 gross receipt sharing arrangement found in Clause 11 of the JV Agreement with Clause 7 of the AOP Agreement. We must clarify that despite the superficial resemblance between these two clauses regarding the 35:65 ratio of dividing sale proceeds between the respective parties, the Assessing Officer's analysis of the JV Agreement cannot be construed as an opinion on Clause 7 of the AOP Agreement or the nature of the income accrued from the AOP. The Joint Venture (JV) Agreement between RKA and the SPPL was specifically directed towards the development of commercial units for the project "Victoria Complex." On the other hand, the AOP Agreement between RKC and the SPPL, which is central to the matter before us, pertained to the development of a wholly different project for residential units. These are two legally distinct agreements involving different contracting parties and separate subject matters. The Joint Venture (JV) Agreement between RKA and the SPPL was specifically directed toward the development of commercial units. On the other hand, the AOP Agreement between RKC and the SPPL pertained to the development of a wholly different project for residential units. These are two legally distinct agreements involving different contracting parties and separate subject matters. The mere fact that the Assessment Order contains a reference to a 35:65 sale-proceeds sharing arrangement, derived from two wholly different agreements involving different parties, it cannot be

construed as a finding on the income derived from the AOP. To constitute a "change of opinion," there must first be a conscious application of mind and a formation of an opinion during the original assessment proceedings.

80. In the present case, the Assessing Officer's discussion in the Assessment Order for the AY 2007-08 was confined to the JV Agreement. There is perceptible lack of any inquiry or adjudication regarding the specific terms of the AOP Agreement, particularly the nature of income under Clause 7. In the absence of such an initial inquiry, the plea of "change of opinion" is legally untenable. A change of opinion presupposes the existence of a previously formed opinion. Where no such opinion was formed in the first instance, the Revenue is not precluded from reopening the assessment upon the discovery of facts suggesting that income has escaped assessment. Thus, it can be concluded that since the Revenue had not formed any opinion on the fundamental nature of the income accrued to the SPPL from the AOP as to whether it is a share of profit or revenue, the Revenue retains the authority to reassess the income upon coming across information which *prima facie* indicates that the income is tax-liable revenue and not tax-exempt profit.

81. Coming to the assessment order for the AY 2008-09, we find that there was some discussion on the income accrued to the SPPL from the AOP, but on an issue wholly different from the reasons for reopening assessment. The issue which was discussed pertained to whether the income, despite being a share of profit of the AOP, would nevertheless be excluded from its net profit to arrive at its book profit under Section 115JB of the Act. The Assessment Order indicated that the assessment had proceeded on the

assumption that the subject income was profit, without verifying whether it was indeed so or not.

82. Thus, we find that in the assessment orders for both, i.e. the AY 2007-08 and the AY 2008-09, the Assessing Officer had not formed any opinion on what the fundamental nature of the income was, which accrued to the SPPL from the AOP. Hence, when 'tangible material' in the form of the impounded documents and the director's statement shed light on the manner in which the SPPL received its income from the AOP, it gave rise to 'reasons to believe' that income liable to tax has escaped assessment. As observed by this Court in ***Phool Chand*** *(supra)*, it would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer has reasons to believe that income chargeable to tax had escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Applying the principle as laid down by this Court in ***Phool Chand (supra)***, when fresh information was acquired in the course of the survey dated 23.12.2010 which *prima facie* led the Assessing Officer to believe that the true nature of the income was not profit but revenue which had escaped assessment, such reasons cannot be discarded as mere change of opinion.

83. Thus, we find that the notices for reopening of the SPPL's assessment for both, i.e. the AY 2007-08 and the AY 2008-09 respectively were a result of the Revenue acting on fresh information and not merely change of opinion.

84. Therefore, the impugned judgment of the High Court in Civil Appeal No. 744 of 2013 is set aside and the notice of reopening assessment for the AY 2007-08 is held to be valid. However, we would like to clarify that the validity of the reopening of assessment does not have a bearing on the merits of the assessment order that would be the outcome upon completion of the reopening proceedings.

85. With regards to Civil Appeal no. 9107 of 2012, while we uphold the ultimate conclusion reached by the High Court regarding the validity of the reopening of assessment for the AY 2008-09, we find the reasoning employed by the High Court to be flawed. To ascertain the validity of the reassessment proceedings, the High Court had erroneously traversed beyond the reasons recorded under Section 148, by relying on the Assessment Order of the AOP for the AY 2008-09 and the AY 2007-08 respectively. In our opinion, such an approach taken by the High Court, defeats the principles of natural justice and the statutory objective of recording reasons, and is impermissible in law. The High Court relied on the fact that a copy of the AOP's Assessment Orders for the AY 2007-08 and the AY 2008-09 respectively had been placed before the Court. In doing so, the High Court lost sight of the fact that the reasons recorded under Section 148 serve a crucial purpose of informing the assessee of the grounds for reopening assessment so that they may file meaningful objections accordingly.

86. As established by this Court in ***GKN Driveshafts (India) Ltd. v. ITO*** **[(2003) 1 SCC 72]** (hereinafter referred to as "***GKN Driveshafts***"), the Assessing Officer is bound to furnish reasons, and the assessee is entitled to a speaking order disposing of their objections before the assessment is validly reopened. This Court in ***GKN Driveshafts (supra)*** noted thus:

> *"5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that* ***when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order.*** *In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."*
>
> **[Emphasis supplied]**

87. Thus, it is settled law that the validity of a reopening must be tested solely on the basis of the reasons recorded at the time of issuing the notice under Section 148. A document not referred to in those reasons recorded under Section 148 cannot be used to justify the validity of the reopening, as the assessee must not be deprived of a fair opportunity to dispute such grounds. In the present matter, while we exclude the extraneous documents relied upon by the High Court, our inquiry into the reassessment's validity, when tested strictly against the reasons recorded, reveals existence of 'tangible material'

to form a bona fide belief that income has escaped assessment. Accordingly, Civil Appeal No. 9107 of 2012 stands dismissed.

(ii) Whether the amount accrued to the SPPL from the AOP, based on Clause 7 of the AOP Agreement dated 29.04.2003, is liable to be taxed in the hands of the SPPL for the AY 2008-09 and the AY 2009-10, respectively?

88. We shall now proceed to consider Civil Appeal No. 19487 of 2017. When the assessment orders of the SPPL for the AY 2008-09 and the AY 2009-10 respectively were challenged by the assessee and the challenge reached the ITAT, the ITAT framed the following point for determination, as noted in its order dated 21.03.2014:

> "*7. […] Therefore, the point for determination in the present case is as to whether the amount received by the assessee from the AOP representing 35% of gross sale proceeds was a profit-sharing arrangement as claimed by the assessee or it is a mere consideration in lieu of surrender of development rights in the land to RKC as observed by the Assessing Officer.*"

89. To address the above issue, the ITAT in its order dated 21.03.2014, relied on its own order dated 12.10.2012 in ITA no. 2648/2012 between the AOP and the respective ITO, and held that:

> "*Since the Mumbai Bench of the Tribunal in the case of the AOP has categorically held that 35% share received by SPPL was not in the nature of overriding title to the revenue but is only share of profit of SPPL, therefore, respectfully following the above and in absence of any contrary material brought to notice against the order of the Tribunal the grounds raised by the assessee have to be allowed. We accordingly set-aside the order of the CIT(A) and allow the grounds raised by the assessee.*"

90. When the issue reached the Bombay High Court, the High Court in its impugned order dated 24.03.2017 upheld the ITAT's order dated 21.03.2014 and observed that:

> *"8. […] Following the finding of fact arrived at by the Tribunal in the case of M/s Fortaleza Developers (AOP) for the subject assessment years that there was no surrender of development rights by the respondent assessee to it and that respondent assessee herein received only its share of profits would hold good even in the present appeal. This is so as the finding of fact and the interpretation of clause 7 of the Agreement dated 29th April, 2003 will not change depending upon the assessee concerned. In fact, the High Court in its order dated 3rd October, 2016 placed reliance upon its earlier order dated 9th April, 2015 in appeal filed by the Revenue from the order of the order of the Tribunal for Assessment Year 2007-08 in respect of M/s Fortaleza Developers (AOP), which was dismissed by this Court on 9th April, 2015.*
>
> *9. Thus, in the above facts, the question as proposed being already decided in case of M/s Fortaleza Developers (AOP) by this Court, does not give rise to any substantial question of law. Thus, not entertained.*
>
> *10. Accordingly, both the appeals are dismissed. No order as to costs."*

91. Aggrieved by the impugned order of the High Court dated 24.03.2017, the Revenue has preferred this present Civil Appeal no. 19487 of 2017, by raising the following two questions of law:

a. Whether on the facts and in circumstances of the case, the ITAT was correct in holding that 35% share received by the SPPL was not in the nature of overriding title to the revenue generated by the AOP but only a share of profit of the SPPL in the AOP?

b. Whether on the facts and in the circumstances of the case and in law, the High Court erred in upholding the order of the ITAT relying on its own decision in the case of the AOP for the AY 2007-08 and holding that no substantial question of law arises in the case of assessee?

92. In light of the two questions referred to above, the core issue before us is whether the amount accrued to the SPPL from the AOP, based on Clause 7 of the AOP Agreement dated 29.04.2003, is liable to be taxed in the hands of the SPPL for the AY 2008-09 and the AY 2009-10, respectively?

93. It is settled law that interpretation of a particular clause of an agreement is a question of law and not a question of fact. In order words, construction of a document constitutes a question of law. This Court in ***Sir Chunilal V. Mehta and Sons Ltd. v. Century Spinning. & Manufacturing Co. Ltd.*** **[AIR 1962 SC 1314]** (hereinafter referred to as "***Chunilal Mehta"***) had observed that:

> *" 2. It is not disputed before us that the question raised by the appellant in the appeal is one of law because what the appellant is challenging is the interpretation placed upon certain clauses of the managing agency agreement which are the foundation of the claim in suit.* ***Indeed, it is well settled that the construction of a document of title or of a document which is the foundation of the rights of parties necessarily raises a question of law.*** *"*
>
> **[Emphasis supplied]**

94. Thus, the interpretation of Clause 7 of the AOP agreement being a question of law, we find merit in the Revenue's argument that the interpretation adopted by the High Court based on a finding of its Coordinate Bench, would

not act as a bar against this Court deciding on the correct interpretation of the Clause.

95. It is not the case of the SPPL that the actual manner of deducting expenses from the gross sale receipts was any different from how Clause 7 indicated. It has been the case of the SPPL all throughout that the income accrued to the SPPL from the AOP was strictly in accordance with Clause 7 of the AOP agreement. Therefore, a correct interpretation of the said clause is crucial in order to determine whether the income accrued to the SPPL from the AOP is a share of its profit or revenue.

96. In order to decide this issue, it is essential that we reproduce the subject Clause 7 of the AOP Agreement which is in contention:

> ***"7. Sharing of revenue and Income****: All Agreement for sale of residential units in the housing project undertaking by the AOP shall be entered into only between the authorized signatories of the AOP and the respective purchasers of the housing units. The members of the AOP hereby agree that neither of them, will during the validity of this Agreement execute any independent or separate Agreement on their own with any prospective Purchaser. All payments receivable from the Purchasers towards the above shall be received only in the name of the AOP, i.e. Fortaleza Developers and the said amounts received from purchasers of the housing units as aforesaid shall be deposited only in the bank account in the name of the AOP, i.e. Fortaleza Developers.*
>
> *Out of the aforesaid amounts received from the Purchasers of the housing units (representing the gross sale proceeds of the Units inclusive of the value of land)* ***SPPL, shall be entitled to as its share of revenue/income an amount comprising of 35% of such Receipts.*** *It is hereby agreed and understood between the parties hereto, that SPPL*

may actually withdraw such share of revenue/income to which it is entitled as per the understanding between the parties, from time to time.

Out of the balance 65% of the aforesaid Receipts representing the gross sale proceeds), all required and relevant expenditure for the purpose of the business of the AOP shall be met with and whatever net balance remains thereafter, shall be determined as the share of revenue/income of RKC. *RKC will be liberty to actually withdraw its share of revenue/income as worked out hereinabove, from time to time.*

The above ***arrangement of sharing of revenue and income*** *is restricted to the present housing Project developed by A.O.P. on land admeasuring 31026.90 sq. Mtrs. (approx 7.76 acres) on final plot no. 72, Yerawada TPS and hearing S.No.210 (part) situated at village Yerawards, Taluka Haveli, Dist. Pune. However, for any other project to be developed by this AOP in future the sharing of revenue and income shall be decided mutually by the parties hereto from time to time."*

[Emphasis supplied]

97. Upon a plain reading of Clause 7 of the AOP Agreement, it is clear that the SPPL was entitled to withdraw a share of 35% of the gross sale proceeds rightaway, even before the expenses were deducted from the gross sale proceeds. It is from the remaining 65% that "***all*** *required and relevant expenditure for the purpose of the business of the AOP"* was to be met with and the net balance that remained, were to be the share of revenue/income of RKC. This, in our opinion, clearly indicates that the 35% received by SPPL was an income in the hands of the SPPL and a diversion for the AOP due to overriding title on the said 35%, created by Clause 7 of the AOP Agreement.

98. In the aforesaid context we may refer to and rely upon the decision of this Court in ***Commissioner of Income Tax, Bombay City II, Bombay v. Shri***

Sitaldas Tirathdas, Bombay **[(1961) 41 ITR 367]** (hereinafter referred to as "***Sitaldas Tirathdas***"), wherein this Court succinctly explained the distinction between an obligation to pay a portion of one's own income and a case where an amount is merely collected and diverted to the person on whose behalf it is received. The relevant portion of Court's observation in ***Sitaldas Tirathdas*** *(supra)* reads thus:

> "*[…] In our opinion,* ***the true test is whether the amount sought to be deducted, in truth, never reached the assessee as his income.*** *Obligations, no doubt, there are in every case, but it is the nature of the obligation which is the decisive fact. There is a difference between an amount which a person is obliged to apply out of his income and an amount which by the nature of the obligation cannot be said to be a part of the income of the assessee.* ***Whereby the obligation income is diverted before it reaches the assessee, it is deductible; but where the income is required to be applied to discharge an obligation after such income reaches the assessee, the same consequence, in law, does not follow.*** *It is the first kind of payment which can truly be excused and not the second.* ***The second payment is merely an obligation to pay another a portion of one's own income, which has been received and is since applied. The first is a case in which the income never reaches the assessee, who even if he were to collect it, does so, not as part of his income, but for and on behalf of the person to whom it is payable****.[…]"*
>
> **[Emphasis supplied]**

99. Upon analysing Clause 7 of the AOP Agreement in light of the above-mentioned observation of this Court in ***Sitaldas Tirathdas*** *(supra)*, we are certain that accrual of the SPPL's share, i.e. 35% of gross sale receipts of the AOP, was not contingent on the AOP's profit and the SPPL could withdraw

such amount immediately. The entitlement of the SPPL is embedded in the very framework of the arrangement of Clause 7 of the AOP Agreement and attaches to the gross receipts at the point of their accrual, leaving no discretion with the AOP in the matter. To that extent, the AOP neither acquires nor retains any control over such portion of the receipts but merely holds and disburses the same on behalf of the SPPL. This is not a case of the AOP applying its income in discharge of an obligation; rather, it is a case where, by reason of a pre-existing and enforceable right created by the overriding title under Clause 7 of the AOP Agreement, the gross sale receipts to the extent of 35% is intercepted and diverted towards the SPPL before it could have even assumed the character of income in the hands of the AOP. Consequently, within the meaning of the principle enunciated in ***Sitaldas Tirathdas*** *(supra)*, the subject 35% share attributable to SPPL has to be taxed at the hands of the SPPL itself, and not the AOP, since it is an income in the hands of the SPPL and a diversion for the AOP.

100. The statement given by the SPPL's director under Section 131, is also pertinent in this regard. He clearly stated therein that as there are multiple inherent risks involved in the business of construction and with a view to safeguard the SPPL's precious 'development rights' over the land, a particular formula was devised whereby 35% of the gross receipts out of the sale of the flats would straightaway go to the SPPL.

101. Therefore, it is clear that no expenses were to be deducted from the share of income accrued to the SPPL from the AOP. Since all expenses were to be paid out of RKC's share, the SPPL's share, i.e. 35% of gross sale receipts of the AOP, remains unaltered.

102. When no expense is being deducted from the SPPL's share and the expenses are being wholly borne out of RKC's share, it is clear that the income accrued to the SPPL from the AOP is merely revenue and not profit. Moreover, even the words used in the clause itself are "share of revenue/income", and not "share of profit". Hence, it would defy logic to say that the SPPL's income from the AOP is a share of its profit and not merely a share of its revenue.

103. It is a well-settled principle of accounting and law that profit is the surplus that remains after all the expenses have been deducted from the gross receipts. Since the SPPL's share remained insulated from the expenses of the AOP, the amount received by it lacks the essential characteristics of "profit" and is, in pith and substance, a business receipt arising from the surrender of development rights or a share of gross revenue.

104. Therefore, since the amount received by the SPPL from the AOP is not a share of its profit but a share of revenue, the impugned order of the High Court and the ITAT which incorrectly held otherwise, are liable to be set aside.

105. Thus, we hereby allow the Civil Appeal no. 19487 of 2017 and hold that since the amount received by the SPPL from the AOP is not a share of its profit, the amount accrued to the SPPL from the AOP would be liable to be taxed in the hands of the assessee as a business receipt, in accordance with the respective Assessment Orders of the SPPL for the AY 2008-09 and the AY 2009-10 respectively.

E. CONCLUSION

(i) Civil Appeal No. 744 of 2013 and Civil Appeal No. 9107 of 2012:

106. It is settled law that mere intimation by an assessee of a transaction does not preclude the Assessing Officer from reopening assessment if there is tangible material to prima facie indicate that primary facts regarding the true nature of the transaction had not been brought to the notice of the Assessing Officer by the assessee.

107. The majority in the Constitution Bench decision of this Court in ***Calcutta Discount*** (*supra*) had observed that the duty of disclosing all the primary facts relevant to a question before the assessing authority lies with the assessee and merely producing account books and documents does not fulfil that obligation, unless the assessing authority's attention is brought to particular items in the account books, or particular portions of the documents which are relevant.

108. The statements made by the SPPL regarding the AOP in its return of income or in the course of the original assessment do not amount to discharging its duty to provide the assessing officer with the primary facts relevant to determining the issue in dispute. A perusal of the materials on record would indicate that the SPPL had merely informed the Revenue that certain income is accrued to it from the AOP out of its share of profit. Even when a copy of the AOP Agreement was submitted to the Assessing Officer, the particular item in the document, i.e. Clause 7 of the AOP Agreement which is at the core of the dispute, was not brought to the fore.

109. Upon a close reading of the assessment orders for the AY 2007-08 and the AY 2008-09, respectively, it is evident that the Revenue had accepted the SPPL's declaration regarding the income derived from the AOP at face value, without delving into the fundamental nature of the income itself, i.e. the Revenue had proceeded with the assessment without questioning whether the subject income is indeed a share of the profit of the AOP.

110. Thus, we find that in the assessment orders for both the AY 2007-08 and the AY 2008-09, respectively, the Assessing Officer had not formed any opinion on what was the fundamental nature of the income which accrued to the SPPL from the AOP. Therefore, when 'tangible material' in the form of the impounded documents and the director's statement shed light on the manner in which the SPPL received its income from the AOP, it gave rise to 'reasons to believe' that income liable to tax has escaped assessment.

111. As observed by this Court in ***Phool Chand*** *(supra)*, it would be immaterial whether the Income Tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if on the basis of subsequent information, the Income Tax Officer has reasons to believe that income chargeable to tax had escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which were not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information.

112. Applying the principle as laid down by this Court in ***Phool Chand*** *(supra)*, when fresh information was acquired in the course of the survey dated 23.12.2010 which *prima facie* led the Assessing Officer to believe that the true nature of the income was not profit but revenue which had escaped assessment, such reasons cannot be discarded as mere change of opinion.

113. Thus, we find that the notices for reopening of the SPPL's assessment for both the AY 2007-08 and the AY 2008-09 were a result of the Revenue acting on fresh information and not merely change of opinion.

114. Therefore, for the foregoing reasons, **Civil Appeal no. 744 of 2013 is hereby allowed.** The impugned judgment of the High Court is set aside, and the notice for reopening of assessment for the AY 2007-08 is held to be valid.

115. Similarly, for the reasons recorded hereinabove, **Civil Appeal no. 9107 of 2012 is hereby dismissed.** While we uphold the ultimate conclusion reached by the High Court regarding the validity of the reopening of assessment for the AY 2008-09, we find the reasoning employed by the High Court to be flawed.

116. To ascertain the validity of the reassessment proceedings, the High Court had erroneously traversed beyond the reasons recorded under Section 148, to look at the AOP's Assessment Orders for the AY 2008-09 and the AY 2007-08. In light of this Court's observation in ***GKN Driveshafts*** *(supra)*, the Assessing Officer is bound to furnish reasons, and the assessee is entitled to a speaking order disposing of their objections before the assessment is validly reopened.

117. It is settled law that the validity of a reopening must be tested solely on the basis of the reasons recorded at the time of issuing the notice under Section 148. A document not referred to in those reasons recorded under Section 148 cannot be used to justify the validity of the reopening, as the assessee must not be deprived of a fair opportunity to dispute such grounds. Thus, the High Court's approach, in our opinion is bad in law.

118. However, in the present matter, even when we excluded the extraneous documents relied upon by the High Court, and confined our enquiry strictly to the reasons recorded, the notice of reopening assessment for the AY 2008-09 is found to be valid. Accordingly, **Civil Appeal No. 9107 of 2012 stands dismissed.**

(ii) Civil Appeal No. 19487 of 2017

119. In the foregoing analysis, we find that the High Court and the ITAT erred in treating the ITAT's interpretation of Clause 7 of the AOP Agreement in a set of parallel proceedings between the ITO and the AOP as a final finding of fact. In light of this Court's observation in ***Chunilal Mehta*** *(supra)* it is settled law that the interpretation of a contractual clause, which forms the foundation of a party's rights, constitutes a question of law and hence, this Court is not bound by the interpretation of Clause 7 of the AOP Agreement which has been adopted by the adjudicatory forums below.

120. It is not the SPPL's case that the actual manner of the subtracting expenses from the gross sale receipts was any different from how Clause 7 indicated. It has been the case of the SPPL all throughout that the income accrued to

the SPPL from the AOP was in strict accordance with Clause 7 of the AOP agreement. Therefore, a correct interpretation of the said clause is crucial in order to determine whether the income accrued to the SPPL from the AOP is a share of its profit or revenue, which in turn forms the basis of whether such income is to be taxed in the hands of the SPPL or not.

121. A plain and literal reading of Clause 7, supported by the statement of the SPPL's Director under Section 131, leads to the inescapable conclusion that the parties to the AOP Agreement intended to share revenue, not profits. As per the mandate of Clause 7 of the AOP Agreement, the SPPL was entitled to 35% of the gross sale proceeds upfront, while the entirety of the project's expenses was burdened upon the remaining 65% share of RKC.

122. Upon a plain reading of Clause 7 of the AOP Agreement, it is clear that the SPPL was entitled to withdraw a share of 35% of the gross sale proceeds rightaway, even before the expenses were deducted from the gross sale proceeds. It is from the remaining 65% that "***all*** *required and relevant expenditure for the purpose of the business of the AOP"* was to be met with and the net balance that remained, were to be the share of revenue/income of RKC. This, in our opinion, clearly indicates that the 35% received by SPPL was an income in the hands of the SPPL and a diversion for the AOP due to overriding title on the said 35%, created by Clause 7 of the AOP Agreement.

123. In ***Sitaldas Tirathdas*** *(supra)*, this Court succinctly explained the distinction between an obligation to pay a portion of one's own income and a case where an amount is merely collected and diverted to the person on whose behalf it is received.

124. Upon analysing Clause 7 of the AOP Agreement in light of this Court's observation in ***Sitaldas Tirathdas*** *(supra)*, we are certain that accrual of the SPPL's share, i.e. 35% of gross sale receipts of the AOP, was not contingent on the AOP's profit and the SPPL could withdraw such amount immediately. The entitlement of the SPPL is embedded in the very framework of the arrangement of Clause 7 of the AOP Agreement and attaches to the gross receipts at the point of their accrual, leaving no discretion with the AOP in the matter. To that extent, the AOP neither acquires nor retains any control over such portion of the receipts but merely holds and disburses the same on behalf of the SPPL. This is not a case of the AOP applying its income in discharge of an obligation; rather, it is a case where, by reason of a pre-existing and enforceable right created by the overriding title under Clause 7 of the AOP Agreement, the gross sale receipts to the extent of 35% is intercepted and diverted towards the SPPL before it could have even assumed the character of income in the hands of the AOP. Consequently, within the meaning of the principle enunciated in ***Sitaldas Tirathdas*** *(supra)*, the subject 35% share attributable to SPPL has to be taxed at the hands of the SPPL itself, and not the AOP, since it is an income in the hands of the SPPL and a diversion for the AOP.

125. Moreover, it is a well-settled principle of accounting and law that profit is the surplus remaining after all expenses have been deducted from gross receipts. Since the SPPL's share remained insulated from the expenses of the AOP, the amount received by it lacks the essential characteristics of "profit" and is, in pith and substance, a business receipt arising from the surrender of development rights or a share of gross revenue.

126. Therefore, since the amount received by the SPPL from the AOP is not a share of its profit but a share of its revenue, the impugned order of the High Court and the ITAT which incorrectly held otherwise, are hereby set aside.

127. For all the foregoing reasons, we hold that the 35% share received by the SPPL from the AOP for Assessment Years 2008-09 and 2009-10 is taxable in the hands of the assessee as a business receipt. Thus, **Civil Appeal No. 19487 of 2017 filed by the Revenue is hereby allowed.**

128. Pending application(s), if any, shall stand disposed of.

…….J.
(J.B. PARDIWALA)

…….J.
(K.V. VISWANATHAN)

NEW DELHI;
MAY 12, 2026.