IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.2468 OF 2011

Bombay Stock Exchange Ltd. ...Petitioner
v/s
Deputy Director of Income Tax,
(Exemption)-1(2), Mumbai and others ...Respondents

Mr S.E. Dastoor, Sr. Counsel with Mr B.V. Jhaveri for Petitioner.
Mr Vimal Gupta, Sr. Counsel i/b Mr Suresh Kumar for Respondents.

CORAM : S.J. VAZIFDAR AND
B.P. COLABAWALLA JJ.

Reserved on : 9th May, 2014.
Pronounced on : 12th June, 2014.

ORAL JUDGMENT (PER B.P. COLABAWALLA J.) :-

1. Rule. By consent of parties, made returnable forthwith and heard finally.

2. By this petition, under Article 226 of the Constitution of India, the Petitioner seeks quashing of the notice dated 28th February 2011 (impugned notice) issued by Respondent No.1 under section 148 of the Income Tax Act 1961 (the Act) in relation to Assessment Year 2005-06.

3. There are three principal grounds of challenge. Firstly, as more than four years had elapsed from the end of the relevant Assessment Year 2005-06, Respondent No.1 could not have issued the impugned notice without coming to the conclusion that he had reason to believe that income had escaped assessment by virtue of the fact that the Petitioner had failed to disclose fully and truly all material facts necessary for its assessment. In the present case, apart from making a bald assertion that there was a failure on the part of the Petitioner to disclose fully and truly all material facts, no details thereof were furnished in the reasons for re-opening the assessment under section 147 of the Act and hence, the initiation thereof was bad-in-law. Secondly, the Petitioner had in fact disclosed fully and truly all material facts necessary for its assessment and hence the initiation of re-assessment proceedings was in the teeth of the mandate of section 147 of the Act. Thirdly, for the A.Y. 2005-2006, the Petitioner's case was selected for scrutiny, and after considering all the relevant aspects of the matter, the Assessing Officer (Respondent No.1) passed the original assessment order dated 26th November 2007 under section 143(3) of the Act determining the total income of the Petitioner at Rs.Nil after granting exemption under section 11 of the Act. Hence, the purported re-opening was based merely on a *"change of opinion"* which was impermissible in law.

4. The briefs facts are as follows:-

(a) The Petitioner was earlier known as the Stock Exchange, Mumbai and was a Company for the purposes of the Income Tax Act 1961 as per the order of the CBDT dated 3rd March 1962 passed in exercise of the powers granted under section 2(5A) of the Income Tax Act, 1922. The Stock Exchange, Mumbai was registered with the Director of Income Tax (Exemption) under section 12A(a) vide No.TR-28663 dated 30th July 1993 with effect from 1st April 1989. The income of the Petitioner was exempted from tax under section 10(23)(iv) of the Act upto Assessment Year 1989-90. Thereafter, the income of the Petitioner is exempted under section 11 of the Act as the objects of the Exchange are charitable. On 8th August, 2005 the Stock Exchange, Mumbai was incorporated as the Bombay Stock Exchange Ltd. (the Petitioner) and it took over all the assets and liabilities of the Stock Exchange, Mumbai under the scheme of Corporatisation and demutualisation as approved by SEBI on 19th August, 2005.

(b) The Petitioner filed its return of income for the Assessment Year 2005-06 on 30th October 2005 declaring its total income at Rs.Nil. The return of income was accompanied by the audited

balance-sheet, profit and loss account and schedules forming part of the audited accounts as well as a statutory Audit Report under section 44AB of the Act. In Note 4 to Schedule O of the audited profit and loss account of the Petitioner it was stated as under :-

> *"No provision for taxation for the year ended 31st March 2005 has been made in the accounts as the management is of the opinion that the appeals before the Income Tax Tribunal in respect of earlier years will be disposed off in the Exchange's favour and the Exchange will be granted exemption under sections 11 and 10(23C)(iv) of the Income Tax Act 1961. However, in the event that such exemption is not granted, there would be estimated tax liability of Rs.270.10 Million for the year (31/3/2004 – Rs.228.70 Million). The total cumulative income tax liability not provided for is estimated at Rs.774.40 Million (excluding the amounts referred to in Note 2(a) above) (31/3/2004 – Rs.504.30 Million)."*

In view of the aforesaid, out of abundant caution, the Petitioner used to get its books of accounts audited under section 44AB of the Act and this practice was being followed since more than 15 years.

(c) The return of income for the Assessment Year 2005-06 was taken up for scrutiny by issuing a notice dated 17th September 2007 under section 142(1) of the Act. The Petitioner replied to the said notice vide its letters dated 4th October 2007, 17th October 2007 and 19th November 2007 answering all the

queries raised by the Assessing Officer.

(d) Thereafter, the Assessing Officer, under section 143(3) of the Act, passed his assessment order dated 26th November, 2007 determining the total income of the Petitioner at Rs.Nil after granting exemption under section 11 of the Act.

(e) On 29th January, 2009 Respondent No.1 issued a Notice under section 154 of the Act stating that the assessment order for the A.Y. 2005-2006 required to be rectified/amended as there was a mistake apparent from the record. The said Notice also enclosed the audit objections raised wherein it was stated that (i) the provision for doubtful accounts of Rs.1,50,77,995/-, being only a provision, could not be treated as "income applied" to the objects of the Petitioner under section 11 of the Act; and (ii) the Audit Report filed under section 44AB of the Act stated that expenses of Rs.1.2 crores was inadmissible under section 40(a)(ia) of the Act. Accordingly, the Senior Audit Officer had computed short levy of income tax of Rs.54,53,453/- and the Petitioner was asked to respond to the said Notice on or before 20th March, 2009.

(f) (I) In reply thereto, the Petitioner by its letter dated 13th March 2009 gave a complete reply to the said Notice setting out its reasons why the question of passing a rectification order did not arise. With reference to the expenses of Rs.1.2 crores being inadmissible under section 40(a)(ia) of the Act, the Petitioner stated as under :-

> *"Since the Stock Exchange, Mumbai is an entity established in accordance with law and its objects fall within the definition of the term "charitable purpose", its income is exempt u/s 11 of the Income Tax Act, 1961 since last several years. In case of assessees having charitable objects, provisions of sections 11, 12 and 13 of the Act are applicable and not provisions of section 28 to 44DA as they are applicable to person having business income. The provisions of section 40(a)(ia) are applicable only in respect of expenses claimed as deduction under the head "Profits and gains of business or profession" (coming within the purview of section 28 to 44DA). Thus, it is submitted that provisions of section 40(a) of the Income Tax Act, 1961 are not applicable to BSE.*
>
> *It may be noted that only as a caution, BSE used to get its books of accounts audited u/s 44AB of the Income Tax Act, 1961 and this practice is being followed since last more than 15 years. Having accepted the fact that objects are charitable in nature and income is exempt u/s 11 of the Income Tax Act, 1961, it is submitted that section 40(a) of the Act has no application and therefore no disallowance can be made of Rs.1,20,00,000/- as proposed by you."*

(II) As far as the provision for doubtful accounts amounting to Rs.1,50,77,995/- and which was treated as "income applied", the Petitioner stated as under :-

"As regards provision of doubtful accounts written off in Income and Expenditure A/c and claimed as application of income, kindly note that the same was made for the following reasons :

Particulars	*Amount*	*Annexure*
Provision for non-recovery of advances given in 1993/94 to the custodian appointed by the Government of India under the special court (Trial of Offences Relating to Transactions in Securities Act 1992) in case of notified members (Shri Ashwin Mehta, Smt Jyoti Mehta and Late Shri Harshad Mehta)	*50,86,156*	*Annexure-1*
Provision for Bad and Doubtful amount in Clearing House Account of the Exchange for balances in the general charges account and ready delivery account of the members maintained by the Clearing House not recoverable anymore	*99,91,839*	*Annexure-2*
Total	*1,50,77,995*	

Both these amounts were claimed as application of income due to non recovery of the same and hence were written off.

In view of the above it is submitted that there is no mistake apparent from records and hence the question of passing a rectification order does not arise."

(g) Thereafter, Respondent No.1 issued the impugned notice dated 28th February, 2011 under section 148 of the Act and asked the Petitioner to file a return of income in the prescribed form.

(h) In response thereto, the Petitioner, on 29th March, 2011 filed its return of income for the Assessment Year 2005-06, once again declaring it's total income at Rs.Nil.

(i) Prior thereto, the Petitioner by its letter dated 15th March 2011, requested Respondent No.1 to furnish a copy of the reasons recorded by him for re-opening the assessment under section 147 of the Act for Assessment Year 2005-06. Respondent No.1, on 24th November 2011, served a copy of the said reasons which principally set out four reasons/grounds on which he proposed to initiate re-assessment proceedings. On the basis of the said four reasons/grounds Respondent No.1 stated that he had reason to believe that the income of the Petitioner had escaped assessment for A.Y. 2005-06 and that the cause of escapement of income was due to the failure on the part of the Petitioner to make a full and true disclosure of the material facts.

5. It is pertinent to note that Respondent No.1 has not set out in the reasons which fact or other material was not disclosed by the Petitioner that led to income escaping assessment. In fact, on going through the reasons, we find that Respondent No.1 has come to the conclusion/belief that income had escaped assessment on the basis of the material already before him and no new tangible material has been relied upon by Respondent No.1 to come the said conclusion/belief. This is clear from the use of the words *"on perusal of the records it is noticed....."*, *"further perusal of statement 2 enclosed with the computation of income shows....."* and *"it is further*

noticed....." in the impugned notice.

6. Be that as it may, the Petitioner filed its detailed objections to the purported re-opening vide its letter dated 25th November 2011. By his order dated 30th November 2011, Respondent No.1 rejected the objections of the Petitioner against re-opening of the assessment for the Assessment Year 2005-06.

7. Section 147 of the Act empowers the Assessing Officer to re-open a concluded assessment subject to certain restrictions as set out therein. It provides that 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 other income chargeable to tax which had escaped assessment and which comes to his notice subsequently in the course of the proceedings. The first proviso to section 147 reads as under:-

> *"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;"*
>
> (emphasis supplied)

A perusal of the said proviso makes it clear that where an assessment

under sections 143(3) or 147 has been carried out for the relevant assessment year, no action under section 147 can be taken after the expiry of four years from the end of the relevant assessment year unless income chargeable to tax had escaped assessment 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 section 142(1) or section 148, or to disclose fully and truly all material facts necessary for its assessment for that assessment year.

8. The present case relates to Assessment Year 2005-06. The return of income for Assessment Year 2005-06 was taken up for scrutiny which culminated in an Assessment Order dated 26th November, 2007 under section 143(3) of the Act. Thereafter, Respondent No.1 issued the impugned notice dated 28th February, 2011 under section 148 of the Act which was after the expiry of four years from the end of the relevant assessment year. In such a scenario, the first proviso to section 147 of the Act was attracted and no action for initiation of re-assessment proceedings could be initiated unless the income chargeable to tax had escaped assessment by reason of the failure on the part of the Petitioner to disclose fully and truly all material facts. Mr Dastoor, the learned senior counsel appearing on behalf of the Petitioner, submitted that apart from making a bald assertion that there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment, no details

whatsoever were given with reference to the same. He therefore submitted that the initiation of re-assessment proceedings for the Assessment Year 2005-06 were bad-in-law and accordingly prayed for quashing the impugned notice.

On the other hand, Mr Gupta, the learned senior counsel appearing on behalf of the Respondents, submitted that the reasons for initiating re-assessment proceedings under section 147 of the Act clearly stated that there had been a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment and therefore, Respondent No.1 was fully justified in initiating the re-assessment proceedings.

9. It is true that the reasons for initiating re-assessment proceedings do in fact state that there was a failure on the part of the Petitioner to disclose fully and truly all material facts necessary for its assessment. However, as correctly submitted by Mr Dastoor, merely making this bald assertion was not enough. In this regard, the reliance placed by Mr. Dastoor on a Division Bench judgment of this Court in the case of *Hindustan Lever Ltd. v/s R.B. Wadkar, Assistant Commissioner of Income Tax and others, reported in [2004] 268 ITR 332* is well founded. The relevant portion of the said judgment reads as under:-

> *"The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are*

required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court on the strength of the affidavit or oral submissions advanced."

(emphasis supplied)

10. In the present case, admittedly there are no details given by the Assessing Officer (Respondent No.1) as to which fact or material was not disclosed by the Petitioner that led to it's income escaping assessment. There is merely a bald assertion in the reasons that there was a failure on the part of the Petitioner to disclose fully and truly all material facts without giving any details thereof. This being the case, the impugned notice is bad in law and on this ground alone the Petitioner is entitled to succeed in this

Writ Petition.

11. Even otherwise, in the facts of the present case, we find that there was no justification on the part of Respondent No.1 for issuing the impugned notice dated 28th February 2011 under section 148 of the Act. The four reasons/grounds for re-opening the assessment for the Assessment Year 2005-06 were as follows:-

(I) On a perusal of the records it was noticed that the amount of Rs.11,821.31 lacs applied for carrying out the objects of the trust included a provision of Rs.150.78 lacs representing a provision made for doubtful accounts. As this amount represented only a provision, it could not to be treated as income applied to the objects of the trust and was required to be reduced from the income applied to the objects of the trust.

(II) A perusal of statement 2 enclosed with the computation of income showed that the Petitioner had claimed application of income under the head 'Settlement of Defaulters Clients Claims' of Rs.341,67,330/-. Further perusal of Schedule K to the Income and Expenditure Account revealed that the Petitioner had reduced Rs.25,44,889/- being the amount transferred to defaulter's account from the income from investments and deposits. Thus the Petitioner had reduced the income to the extent of Rs.25,44,889/-. Since this amount of Rs.25,44,889/- had already been claimed as application of income as per Statement 2, the same tantamounted to double deduction.

(III) A sum of Rs.120 lacs had been treated as an inadmissible expense under section 40(a) of the Act as stated in clause 17(f) of the Audit Report under section 44AB filed alongwith the Petitioner's return of income and accordingly, the sum of Rs.120 lacs was also required to be reduced from the income applied to the objects of the trust.

(IV) The Petitioner had claimed depreciation on fixed assets amounting to Rs.15,99,78,749/- in addition to allowance of capital expenditure to the tune of Rs.10,64,26,980/-. The Petitioner, having adopted the policy of claiming the capital expenditure as application of income as well as depreciation on these capital assets as application of income, the same contravened the judgment of the Hon'ble Supreme Court in the case of Escorts Ltd. vs. CIT 199 ITR 43 wherein the Supreme Court had clearly held that a double deduction could not be allowed unless and until specifically provided by the Act. Thus income of the Petitioner had escaped the assessment in view of clause (c)(iv) of Explanation 2 to the proviso to section 147 of the Act.

12. (A). Ground (I) set out above is with reference to a provision made for the sum of Rs.150.78 lacs in relation to doubtful accounts. As rightly submitted by Mr. Dastoor, this issue is covered by a Division Bench judgment of this Court dated 27th March, 2012 passed in *Writ Petition No.2467 of 2011 in the case of Bombay Stock Exchange Ltd. v/s Deputy Director of Income Tax (Exemption)-1(2) and others*. With reference to this very Peti-

tioner, the Respondents therein had sought to re-open the assessment under section 148 of the Act for the Assessment Year 2004-05. The facts before the Division Bench in Writ Petition No.2467 of 2011 were almost identical to the facts in the present case, save and except the difference in the figures claimed. Paragraph 3 of the said judgment sets out the facts which reads as under:-

> *"3. The Petitioner filed its return of income for Assessment Year 2004-05 on 30th October 2004. An order of assessment was passed on 28th November 2006 under section 143(3). The reopening of the assessment under section 148 is by a notice dated 11th March 2011 which admittedly has been issued beyond a period of four years of the end of the relevant Assessment Year. The reasons which have been disclosed to the Petitioner for reopening the assessment furnished two grounds for the reopening of the assessment. Firstly, it has been stated that as against a total income of Rs.162,41 crores, the assessee had applied an amount of Rs.113.94 crores towards the object of the trust under section 11(1)(a). This amount includes the provision for doubtful accounts amounting to Rs.1.60 crores. The Assessing Officer has stated that the provision made in the accounts cannot be treated as income applied to the objects of the trust and consequently this amount has to be deducted while calculating the total amount applied to the objects under section 11(1)(a). Since the provision for doubtful accounts was allowed as application of income, the Assessing Officer has stated that there is reason to believe that income chargeable to tax has escaped assessment. The second ground for reopening is that the assessee has claimed depreciation on fixed assets amounting to Rs.21.72 crores in addition to an allowance of capital expenditure to the tune of Rs.19.91 crores. According to the Assessing Officer the assessee was not entitled to claim both capital expenditure as application of income and also a depreciation on capital assets which would tantamount to a double deduction."*

(B) As far as the issue of doubtful accounts is concerned, the Division Bench in Writ Petition No.2467 of 2011 held as under:-

"6. In so far as the first ground is concerned, it will be necessary to note that in the statement of income filed by the assessee, the income of the assessee was disclosed to be Rs.162.41 crores. The income applied for carrying out the objects of the trust under section 11(1)(a), as per Statement – 2 was reflected at Rs.113.94 crores. Statement – 2 in turn showed that the total expenditure as per the income and expenditure account was Rs.100.27 crores. The income and expenditure account clearly reflects a provision for doubtful accounts in the sum of Rs.1.60 crores. Therefore, ex facie, it is evident that there was no suppression of material facts by the assessee. The reasons for reopening in fact indicate that according to the Assessing Officer, the details of the amount applied for carrying out objects under section 11(1)(a) shows that this amount includes a provision for doubtful accounts amounting to Rs.1.60 crores. That being the position, it is impossible to even postulate that there was a failure on the part of the assessee to fully and truly disclose material facts necessary for the assessment for that Assessment Year. In the reply which was filed by the assessee before the Assessing Officer on 3rd November 2011 objecting to the reopening of the assessment, it was stated that during the course of the discussions before the Assessing Officer, the assessee had explained that the provision for doubtful accounts consisted of three items viz. (i) general charges which could not be recovered from various members; (ii) amounts relating to Valan account and (iii) general charges and Valan account balance of members prior to 1996-97 which could not be recovered. This statement has not been controverted while disposing of the objections when the Assessing Officer passed an order thereon on 30th November 2011."

(C) The facts in the present case are identical except as far as the figures are concerned. In the present case also, in the return of income filed by the Petitioner, the income of the Petitioner was disclosed as Rs.138,02,71,860/-. The income applied for carrying out the objects of the Trust under section 11(1)(a) as per statement - 2 was reflected at Rs.118,21,30,867/-. Statement - 2 in turn showed that the total expenditure as per the income and expenditure account was Rs.93,53,81,865/-. The income and expenditure account clearly reflects a provision for doubtful ac-

counts in the sum of Rs.1,50,77,995/-. Therefore, ex facie, it is evident that there was no suppression of material facts by the Petitioner. In fact, the reasons for re-opening indicate that *on a perusal of the records, it was noticed* by the Assessing Officer that the details of the amount applied for carrying out the objects of the Trust under section 11(1)(a) included a provision for doubtful accounts amounting to Rs.150.78 lacs. This being the position, it is impossible to even postulate that there was any failure on the part of the Petitioner to fully and truly disclose any material fact necessary for the assessment for that Assessment Year. In fact, this would clearly go to show that the initiation of re-assessment proceedings was based merely on a *"change of opinion"* as Respondent No.1 has not relied on any new material, tangible or otherwise, to come to the conclusion that income had escaped assessment as contemplated under section 147 of the Act. It is further pertinent to note that in the reply filed by the Petitioner before the Assessing Officer dated 25th November 2011 objecting to the re-opening of the assessment, it was stated that after discussions, and having considered a similar issue of application of income in the past, the Assessing Officer had allowed the provision for doubtful accounts as an application of income for the A.Y. 2005-2006. It was further stated that the provision for doubtful accounts consisted of three items viz. (i) general charges which could not be recovered from various members due to various reasons; (ii) amounts relating to valan account and (iii) general charges and valan account balance of members prior

to 1996-97 which could not be recovered. This statement has not been controverted while disposing of the objections when the Assessing Officer passed his order on 30th November 2011. We therefore find that the initiation of reassessment proceedings on this ground is unsustainable.

13. Ground (II) set out above is with reference to an alleged double deduction for the sum of Rs.25,44,889/-. It is an admitted fact that statement - 2 enclosed with the computation of income filed on 30th October, 2005 showed that the Petitioner had claimed application of income under the head 'Settlement of Defaulters Clients Claims' of Rs.341,67,330/-. It is further admitted that Schedule K to the Income and Expenditure Account revealed that the Petitioner had reduced the sum of Rs.25,44,889/-, being the amount transferred to defaulter's account from the income from investments and deposits. Thus the Petitioner had reduced the income to the extent of Rs.25,44,889/-. All this was already disclosed in the return of income filed on 30th October, 2005. It does not stop there. With reference to this very item, the Assessing Officer sought an explanation during the scrutiny assessment proceedings vide his letter dated 17th September 2007, of copy of which was tendered by Mr. Dastoor before us. The same was replied to by the Petitioner vide it's letter dated 4th October 2007. The Assessing Officer, after being satisfied with the explanation and the details given by the Petitioner, passed his assessment order dated 26th November, 2007 under section

143(3) of the Act computing the income of the Petitioner at Rs.Nil. This clearly goes to show that not only were all the details disclosed by the Petitioner in its original assessment, but queries with reference to the same were called for by the Assessing Officer under his notice dated 17th September 2007 which was replied to by the Petitioner by its letter dated 4th October 2007. Considering the explanation given by the Petitioner, the assessment order came to be passed. This clearly establishes that the petitioner had fully and truly disclosed all material facts regarding the reduction of Rs.25,44,889/- from the income from investments and deposits as set out in Schedule K to the Income and Expenditure Account read with Statement - 2 enclosed with the computation of income. In fact, on reading the reasons, we find that the initiation of re-assessment proceedings on this ground also was based merely on a *"change of opinion"*, as it is not the case of Respondent No.1 that it came across any new tangible material that gave him reason to believe that any income had escaped assessment. This is clear from the reasons itself which state that *"Further perusal of Statement 2 enclosed with the computation of income ..... Further perusal of Schedule K to Income and Expenditure Account reveals that the assessee has reduced Rs.25,44,889/- being amount transferred to defaulters account from the income from investments and deposits."* This, to our mind clearly establishes that the Assessing Officer had come to the conclusion that after perusal of the computation of income as well as the income and expenditure account

that was originally filed on 30th October 2005, he had reason to believe that the Petitioner claimed a double deduction for the amount of Rs.25,44,889/-. This being the position, his belief was based merely on a *"change of opinion"* which was impermissible in law. We therefore find that the initiation of re-assessment proceedings on this ground also is unsustainable.

14. (A). Ground (III) set out above is with reference to the sum of Rs.120 lacs that was treated as an inadmissible expense under section 40(a) of the Act vide clause 17(f) of the Audit Report filed u/s 44AB. In FORM NO. 3CD being the statement of particulars required to be furnished under section 44AB of the Act it was stated as follows:-

"17. Amounts debited to the profit and loss account, being:-

(a) ……..

(b)……..

(c) ……..

(d) ……..

(e) ……..

(f) Amounts inadmissible under section 40(a);	*Rs.12,000,000/- (being payment to a Contractors under section 194C.)"*

(B). In view of the aforesaid statement, Respondent No.1 was of the view that the sum of Rs.120 lacs was required to be reduced from the income applied to the objects of the Trust. At the outset, it must be stated that it is not the case of Respondent No.1 that any income had escaped assess-

ment by virtue of the fact that any new tangible material was brought to his notice that was not available at the time when either the return of income was filed, or when the scrutiny assessment proceedings were carried out. Admittedly, the Audit Report was filed along with the Petitioner's return of income on 30th October, 2005. It is not even the case of the Respondents that Audit Report was not disclosed.

(C). Mr Gupta submitted that the Tax Audit Report filed under section 44AB was not brought to the specific attention of the Assessing Officer and in the light thereof, placed reliance on Explanation 1 to section 147. Explanation 1 to section 147 reads as under:-

> *"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."*

(D). We find that the reliance placed by Mr. Gupta on the said Explanation is wholly misconceived. As rightly submitted by Mr. Dastoor, the said Explanation would not apply to a Statutory Audit Report under section 44AB filed along with the return of income. In this regard, the reliance placed by Mr Dastoor on a judgement of a Division Bench of this Court in the case of *3i Infotech Ltd. v/s Assistant Commissioner of Income Tax, reported in [2010] 192 Taxman 137 (Bom.)* is well founded. Paragraphs 14 and 15 of the said judgment read as under:-

"14. The third ground on which the assessment has been sought to be re-opened is that from Annexure 2, clauses 20 and 22(b), of Form 3CD an amount of Rs.31.32 lakhs is found to be debited to the profit and loss account on account of prior period expenses. This according to the Assessing Officer is not allowable under the Act and should be added back. To this extent, the Assessing Officer has found that there was an escapement of income. During the course of the submissions, the attention of the Court has been drawn by the learned Counsel appearing on behalf of the assessee to the particulars of income and expenditure of the prior period, credited or debited to the profit and loss account. Appended to the statement are the following notes :

> *(1) Based on the recommendations of the Institute of Chartered Accountants of India in its publication 'Guidance note on Tax Audit under section 44AB of Income-tax Act, 1961' at para 44.2 of edition September 1999, expenditure of earlier years means expenditure which arose or accrued in any earlier year and which excludes any expenditure of any earlier year for which the liability to pay has crystallized during the year.*
>
> *(2) Excess/short provision of earlier year and income and expenditure crystallized during the year though shown above has not been considered as prior period item.*

15. These notes, according to the assessee are consistent with the Guidance Note issued by the Institute of Chartered Accountants on Tax Audit under section 44AB of the Act. By its note, the assessee has recorded that the expenditure of the earlier years means expenditure which arose or which accrued in any earlier year and excludes any expenditure of an earlier year for which the liability to pay has crystallized during the year. Similarly, the assessee has clarified that excess/short of provision of an earlier year and income and expenditure crystallized during the year, though shown in the statement, have not been considered as prior period items. The assessee, as the material on record would show, therefore brought to bear the attention of the Assessing officer to this facet while submitting the Tax Audit Report as a part of its return of income. This is not a case where the assessee can be regarded as having merely produced its books of account or other evidence during the course of the assessment proceedings on the basis of which material evidence could have been deduced by the Assessing Officer with the exercise of due diligence. Under section 139 the assessee was under a mandatory obligation to furnish with its return of income the report of audit under section 44AB. The assessee fulfilled the obligation. The disclosures which are made as part of the report under section 44AB cannot fall within the interdict of Explanation (1) to section 147."

(emphasis supplied)

In this view of the matter, the submission of Mr Gupta will have to be rejected.

(E). We also find force in the submission of Mr Dastoor that section 40(a) will not apply to the Petitioner at all as it is not carrying on any business. It is a charitable institution whose income is exempt under section 11 of the Act. Section 11 falls under Chapter III with the heading *"INCOMES WHICH DO NOT FORM PART OF TOTAL INCOME"*. On the other hand, Section 40(a) falls under Chapter IV with the heading *"COMPUTATION OF TOTAL INCOME"*. The relevant portion of section 40 of the Act reads as under:-

> *"40. Notwithstanding anything to the contrary in sections 30 to 38, the following amounts shall not be deducted in computing the income chargeable under the head "Profit and gains of business or profession" -*
>
> *(a) in the case of any assessee -*
>
> *(i) ……..*
>
> *(ia) any interest, commission or brokerage, (rent, royalty) fees for professional services or fees for technical services payable to a resident, or amounts payable to a contractor or sub-contractor, being resident, for carrying out any work (including supply of labour for carrying out any work), on which tax is deductible at source under Chapter XVII-B and such tax has not been deducted or, after deduction, has not been paid on or before the due date specified in sub-section (1) of section 139:"*

(emphasis supplied)

It is clear that section 40 applies to deductions claimed in computing the income chargeable under the head *"profit and gains of business and*

profession". In the present case, admittedly, the income of the Petitioner is exempted under section 11 of the Act. The Petitioner is not carrying on any business as held by the ITAT, Mumbai Bench in its order dated 22nd August 2006 in relation to Assessment Years 1991-92 to 1996-97. This order has not been challenged. In this view of the matter, we have no hesitation in holding that section 40(a)(ia) has no application to the facts of the present case and the impugned notice issued on the basis thereof was wholly misconceived. It is pertinent to note that in the reply dated 13th March 2009 filed by the Petitioner to the notice dated 29th January 2009 under section 154 of the Act, the Petitioner had clearly stated that it was only out of abundant caution that the Petitioner used to get its books of accounts audited under section 44AB of the Act and that this practice was being followed since the last 15 years. The same explanation was also given by the Petitioner in its letter dated 25th November, 2011 objecting to the re-opening of assessment for the A.Y. 2005-2006.

15. (A). Ground (IV) set out above is with reference to claiming depreciation on fixed assets amounting to Rs.15,99,78,749/- in addition to allowance of capital expenditure to the tune of Rs.10,64,26,980/-. As rightly submitted by Mr. Dastoor, this issue is also covered by the Division Bench judgment of this Court passed in *Writ Petition No.2467 of 2011 (supra)*. The Division Bench in Writ Petition No.2467 of 2011 held as follows:-

"4. As regards the second ground for reopening, the attention of the Court has been drawn to the fact that the assessment of the assessee for Assessment Year 2003-04 was sought to be reopened under section 148 by a notice dated 24th March 2010. The same ground for reopening the assessment for Assessment Year 2003-04 was set out. A Division Bench of this Court, by its judgment dated 19th April 2011 allowed the writ petition filed by the assessee (Bombay Stock Exchange Ltd. v/s Deputy Director of Income Tax (Writ Petition No.2394 of 2010). While allowing the petition the division Bench observed as follows:-

> *"It is not in dispute that the additions sought to be made by reopening the assessment have been held on merits by this Court in the case of CIT v/s Institute of Banking (264) ITR 110 (Bombay) that such additions are not permissible in law. Moreover in the present case, the assessment is sought to be reopened beyond four years. There is nothing on record to suggest that there was any failure on the part of the assessee to disclose fully and truly material facts necessary for the purpose of assessment. In this view of the matter, in our opinion, the notice issued under section 148 of the Income Tax Act 1961 cannot be sustained."*

5. The order of the Division Bench has attained finality and has not been challenged by the Revenue. Consequently, the second ground on the basis of which the assessment for Assessment Year 2004-05 is sought to be reopened, cannot be sustained."

(B). In view of the aforesaid judgment, which is binding on us, we have no hesitation in holding that the re-opening of assessment for the Assessment Year 2005-06 on this ground also is unsustainable.

16. As we have noted, grounds (I) and (IV) are covered against the Respondents by the judgement of this court in the case of *Bombay Stock Exchange Ltd. v/s Deputy Director of Income Tax (Exemption)-1(2) and others (supra)*. Mr. Gupta submitted that this judgement is incorrect. It is not open

for us in any event to question the correctness of the judgement. It is binding on us.

17. For all the aforesaid reasons, rule is made absolute and the Petition is granted in terms of prayer clauses (a) and (c). However, there shall be no order as to costs.

(B. P. COLABAWALLA J.) **(S. J. VAZIFDAR J.)**