

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:-

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

FRIDAY, THE 20TH DAY OF MARCH 2015/29TH PHALGUNA, 1936

W.P.(C).No.27373 of 2011 (V)

PETITIONER(S):-

IBS SOFTWARE SERVICES PRIVATE LIMITED,
NILA, TECHNOPARK, TRIVANDRUM,
REPRESENTED BY ITS COMPANY SECRETARY MR.RAMESH BABU.M.

BY ADVS.SRI.E.K.NANDAKUMAR (SENIOR ADVOCATE)
SRI.K.JOHN MATHAI
SRI.P.BENNY THOMAS
SRI.P.GOPINATH
SRI.KURYAN THOMAS

RESPONDENT(S):-

1. THE UNION OF INDIA,
REPRESENTED BY THE SECRETARY,
MINISTRY OF FINANCE (DEPARTMENT OF REVENUE),
NORTH BLOCK, NEW DELHI-110 001.

2. THE COMMISSIONER OF INCOME TAX,
THIRUVANANTHAPURAM-695 003.

3. THE ASSISTANT COMMISSIONER OF INCOME TAX,
CIRCLE-1(1), THIRUVANANTHAPURAM-695 003.

R1 TO R3 BY SENIOR COUNSEL FOR GOVERNMENT OF INDIA (TAXES)
SRI.P.K.RAVINDRANATHA MENON &
STANDING COUNSEL FOR GOVERNMENT OF INDIA (TAXES) SRI.JOSE JOSEPH.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
13-03-2015, ALONG WITH WP(C) NOS.3786/2013-W & 7896/2013-J, THE COURT
ON 20-03-2015 DELIVERED THE FOLLOWING:-

APPENDIX

PETITIONER(S)' EXHIBITS:-

- EXHIBIT P1. TRUE COPY OF THE ASSESSMENT ORDER OF THE PETITIONER COMPANY FOR THE YEAR 2001-02 DATED 09.03.2004.
- EXHIBIT P2. TRUE COPY OF THE ASSESSMENT ORDER OF THE PETITIONER COMPANY FOR THE YEAR 2002-03 DATED 31.03.2005.
- EXHIBIT P3. TRUE COPY OF THE ASSESSMENT ORDER OF THE PETITIONER COMPANY FOR THE YEAR 2003-04 DATED 17.03.2006.
- EXHIBIT P4. TRUE COPY OF THE ASSESSMENT ORDER OF THE PETITIONER COMPANY FOR THE YEAR 2004-05 DATED 27.12.2006.
- EXHIBIT P5. TRUE COPY OF THE ASSESSMENT ORDER OF THE PETITIONER COMPANY FOR THE YEAR 2004-05 DATED 26.12.2006.
- EXHIBIT P6. TRUE COPY OF THE NOTICE ISSUED BY THE 3RD RESPONDENT UNDER SECTION 148 OF THE IT ACT, DATED 23.03.2011.
- EXHIBIT P7. TRUE COPY OF THE LETTER SENT BY THE PETITIONER TO THE 3RD RESPONDENT DATED 20.04.2011.
- EXHIBIT P8. TRUE COPY OF THE LETTER ISSUED BY THE 3RD RESPONDENT TO THE PETITIONER, DATED 11.07.2011.
- EXHIBIT P9. TRUE COPY OF THE OBJECTION DATED 16.08.2011 FILED BY THE PETITIONER, BEFORE THE 3RD RESPONDENT.
- EXHIBIT P10. TRUE COPY OF THE NOTICE ISSUED TO THE PETITIONER, DATED 26.09.2011 BY THE 3RD RESPONDENT.
- EXHIBIT P11. TRUE COPY OF THE RESPONSE FILED BY THE PETITIONER TO THE NOTICE ISSUED TO IT, DATED 30.09.2011.
- EXHIBIT P12. TRUE COPY OF THE ORDER PASSED BY THE 3RD RESPONDENT DATED 27.09.2011.
- EXHIBIT P13. TRUE COPY OF THE COVERING LETTER DATED 03.02.2006 SEND BY THE PETITIONER TO THE 3RD RESPONDENT.
- EXHIBIT P14. TRUE COPY OF THE BUSINESS CORPORATION AGREEMENT DATED 31.12.1999 ENTERED INTO BETWEEN INTERNATIONAL BUSINESS SERVICES GROUP PRIVATE LIMITED (HOLDING COMPANY) AND THE PETITIONER COMPANY.

RESPONDENT(S)' EXHIBITS

NIL.

Vku/

[true copy]

K. Vinod Chandran, J.

W.P(C) Nos.27373 of 2011-V,
3786 of 2013-W & 7896 of 2013-J

Dated this the 20th day of March, 2015

JUDGMENT

Whether the proceedings under Section 147 of the Income Tax Act, 1961 [for brevity “IT Act”] initiated to reassess escaped income, beyond four years, is sustainable on the ground of assessee's failure to “fully and truly disclose all material facts”, is the question arising herein. The challenge is with respect to re-opening of assessments, respectively of the years 2004-05, 2005-06 and 2006-07.

2. Section 147 of the IT Act permits assessment or re-assessment of income which has escaped assessment of any assessment year, if the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment or even recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the relevant assessment year. The first proviso to Section 147 speaks of such reopening of assessment after expiry of four years from the end of a relevant assessment year. That can be done only for reason of failure on

the part of the assessee to make a return under Section 139 or failure to respond 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 the assessment. Issue of notice to proceed under Section 147 has to be under Section 148 and Section 149 prescribes the time limit for notice. Under clause (d) of sub-section (1) of Section 149, no notice under Section 149 can be issued beyond six years from the relevant assessment year.

3. In the instant case, Section 147 of the IT Act is sought to be invoked after four years but within six years on the ground that the assessee has failed to disclose fully and truly all material facts. The exemption granted has to be withdrawn for absence of such disclosure and assessment made afresh of the income returned.

4. The petitioner is the Subsidiary Company of an International Business Services Group Private Limited, Thiruvananthapuram and had a Business Corporation Agreement [for brevity “BCA”] with the Holding Company. The business commenced in the previous year of the assessment year 2001-02 as per the BCA and the assessee was before the Assessing Officer, claiming exemption under notification SO.243(E) dated 22.03.1994

or in the alternative, under Section 10A of the IT Act. In the assessment year 2001-02 the assessee was found to be disentitled to the exemption under the notification. However, the assessee's claim for exemption under Section 10A of the IT Act was admitted by the Assessing Officer in the assessment year 2001-02, by Exhibit P1 in W.P.(C).No.27373 of 2011. This is what is essentially sought to be revoked and assessment made afresh as escaped income. The exemption continued in the years 2002-03, 2003-04 and 2004-05, as evidenced by Exhibits P2, P3 and P4 in W.P.(C).No.27373 of 2011, and even thereafter.

5. W.P.(C).27373 of 2011 is against the re-opening made for the assessment year 2004-05. The assessment was made as per Exhibit P4 on 27.12.2006. The notice issued under Section 148 is at Exhibit P6, dated 23.03.2011 and the order passed is at Exhibit P12, dated 27.09.2011.

6. W.P.(C).7896 of 2013 is concerned with the assessment year 2005-06. The assessment order is not produced. The notice issued under Section 148 is dated 30.03.2012 and produced at Exhibit P8 and the order is dated 06.03.2013, produced at Exhibit P12.

7. W.P.(C).No.3786 of 2013 is concerned with the assessment year 2006-07 and the assessment order dated 14.12.2009 is produced at Exhibit P1. The notice issued under Section 148 is dated 29.03.2012 and is produced at Exhibit P7, with the order at Exhibit P11, dated 15.01.2013.

8. Essentially the contention of the Department is that the notice issued under Section 148, though beyond four years, is within the six year period and the same is sustainable, since the notice for reopening under Section 147 has been issued. The Assessing Officer has "sufficient reason to believe" that there is escapement of assessment and that such escapement of assessment was due to the assessee's contumacious conduct of not having fully and truly disclosed all material facts is evident, goes the contention. The escapement of assessment in all the years is on the premise that the exemption granted under Section 10A is wrong.

9. The assessee had, on receipt of the notice, replied, seeking that the return filed under Section 139(1) of the Act, be treated as the return filed pursuant to the notice and also sought for detailed reasons on the basis of the decision of the Hon'ble Supreme Court in ***GKN Driveshafts (India) Ltd. v. I.T.O.*** [(2003)

259 ITR 19 (SC)]. The said reasons were supplied by the Income Tax Officer by the various communications produced in the writ petitions, which are similar, and Exhibit P8 in W.P.(C).No.27373 of 2011 is referred to herein.

10. The reason for issuing the notice under Section 147, according to the Assessing Officer, was that the BCA No.001/99 dated 31.10.1999 between the assessee and their Holding Company indicated that the assessee's business came into existence only with the takeover of the entire infrastructure facilities, employees and all pending orders of the Holding Company, which later Company had been in existence for the last three years. The business thus having been formed, by splitting up or the reconstruction of the business already in existence and also by transfer to a new business, of machinery or plant previously used for any purpose, the conditions under Section 10A(2) of the Act was found to be not satisfied and, hence, the exemption under Section 10A was not permissible. The grant of exemption was irregular and illegal and occurred only due to the assessee's failure to disclose all material facts, truly and fully; i.e., the non-production of the BCA.

11. The final orders referred to above, produced in the

writ petitions too followed the very same reasoning. Ext.P2 finds that as a matter of fact, the Assessing Officer did not examine the eligibility of assessee's claim for deduction under Section 10A, in the light of the agreement and nothing is mentioned regarding this particular agreement anywhere in the assessment order. It was then found that the said agreement was not made available to the Assessing Officer during the course of assessment for the assessment year 2004-2005. Hence it was found that it was clear that the Assessing Officer had not discussed the matter and consequently there is an escapement of income chargeable to tax in the assessment and the Assessing Officer has reason to believe that such escapement has occurred is sufficient for a re-opening to be effected within four years. The opening portion of the order also indicates that there only two conditions are required to be satisfied as per Section 147 that is escapement of chargeable tax and reason available with the Assessing Officer to believe that chargeable income has escaped assessment. However, when the same is attempted after the period of four years, then necessarily, the question of absence of full and true disclosure by the assessee of material facts become relevant.

12. The assessee has a contention with respect to the eligibility under Section 10A, grounded on the Explanation provided under sub-section (2)(iii) and the application of Explanation 1 and 2 of Section 80-I. However, the question agitated in this petition under Article 226 of the Constitution is not with respect to the factual issue of whether the assessee is eligible or not, for such exemption, based on such Explanation, which would be an issue that could be considered in an appeal under the statute. The present petition under Article 226 could be maintained only on the ground that the proceedings initiated under Section 147 is hit by limitation, since the same is beyond four years and the Department cannot avail of the extended time till six years for reason of there being no absence of full and true disclosure of material facts.

13. Both sides have placed decisions of the Hon'ble Supreme Court and the various High Courts to substantiate their contentions. I have heard both counsel elaborately on facts and on the law disclosed from the provisions and dilated upon in the decisions.

14. The learned counsel for the assessee relied on ***Calcutta Discount Co. Ltd. v. Income Tax Officer [(1961) XLI ITR***

191] to contend that the satisfaction arrived at, that the exemption was granted only for the default of the assessee in not having truly and fully disclosed the material facts, cannot be sustained. It was also pointed out that the exemption had been granted in the year 2001-02 and had been continued on all the subsequent years. The assessee has also relied on a number of decisions to buttress their alternate plea, that the present attempt, to decline exemption under Section 10A, is a mere change of opinion, which may not be relevant, as would be noticed later; and hence not referred to.

15. Learned Senior Counsel for Government of India (Taxes) Sri.P.K.R. Menon supported the order of the Assessing Officer on the strength of the decisions reported in ***Malegaon Electricity Co. P.Ltd. v. C.I.T.*** [(1970) 78 ITR 466 (SC)], ***C.I.T. v. Central India Industries Ltd.*** [(1971) 82 ITR 555 (SC)], ***Asst.CIT v. Rajesh Jhaveri Stock Brokers P. Ltd.*** [(2007) 291 ITR 500 (SC)], ***Bengal Luxmi Cotton Mills Ltd. v. I.T.O.*** [(1973) 87 ITR 618 (Cal.)], ***M.Varadarajulu v. I.T.O.*** [(1974) 97 ITR 476 (Mad.)], ***Iqbal Singh Atwal v. C.I.T.*** [(1984) 147 ITR 599 (Cal.)], ***Tiwari Kanhaiya Lal v. C.I.T.*** [(1985) 154 ITR 109 (Raj.)], ***CIT v. Kerala State***

Cashew Development Corpn. [(2006) 286 ITR 553 (Ker.)] and ***CIT v. Popular Vehicles & Service Ltd. [(2010) 191 Taxman 333 (Ker.)]***. The decisions on the point of 'change of opinion', cited are not referred for reasons to be noticed later.

16. The learned Senior Counsel, on the basis of the aforesaid decisions, would assert that the Assessing Officer had never looked at the BCA, which the assessee had failed to produce before the Assessing Officer. Explanation 1 to Section 147 is specifically referred, to contend that mere production 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 proviso.

17. This Court does not find that Explanation 1 to Section 147 is applicable, since the specific contention taken is that BCA was never produced before the Assessing Officer. If it were produced, from the terms, it could be discerned whether the assessee Company was formed by takeover of the infrastructure facilities and existing orders of the holding Company, which alone could have disentitled the assessee from claiming such exemption.

The alternate contention as to the benefit of the Explanation under sub-section (2)(iii) of Section 10A also could have been considered. It is not the factum of admissibility of exemption that arises here, but whether the re-assessment is permissible on the ground of non-production of the BCA.

18. The assessee's contention that mere change of opinion could not result in an exemption already granted being taken away also would not be relevant, since every assessment year is a separate unit of assessment and the exemption claimed could be looked into with reference to the concerned assessment year and the factum of disentitlement would not and could not be dismissed '*prima facie*' as a mere change of opinion.

19. What is relevant for consideration of the aforesaid case is the issue whether there was a contumacious conduct on the part of the assessee; who could be deemed to have not fully and truly disclosed the material facts. A reference to Explanation 1 to Section 147, though not applicable, would be apposite. Explanation 1 takes in situations where the assessee, for example, does not disclose a chargeable income in his return, though the same could be discerned from a detailed and scrupulous examination of the

books of accounts which have been produced before the Assessing Officer. Such a suppression made could definitely be considered as escaped assessment merely for reason of there being no full and true disclosure of facts.

20. Here, it would be worthwhile to notice the decision in ***Calcutta Discount Co. Ltd. v. Income Tax Officer [(1961) XLI ITR 191]***. Therein, the original assessments of the Company for three years was sought to be revised on the ground that the profits realised by the Company, by sale of shares were not assessed to tax. The reassessment was proposed on the ground that at the time of assessment, the assessee had stated that the sale of shares were casual transactions, in the nature of mere change of investments. However, it was later revealed that there were systematic transactions in shares carried on by the assessee and the true intention was not disclosed at the time of assessment. The Hon'ble Supreme Court, by majority, found that the assessee had in fact disclosed the fact of sale of shares and whether the same was with an intention to make a business profit or with an intention to change the form of investment was an inference to be drawn by the assessing authority from the material facts taken in conjunction with

the surrounding circumstances. The conclusion being of the Assessing Officer, it was not for the assessee to contend either way and the factum of selling of shares having been disclosed, there can be no inference of deliberate omission to state the true intention behind the sale of the shares, was the finding. Such an omission could not be considered as a failure or omission to disclose any material fact within the meaning of section 34.

21. Considering Section 34 of the Income Tax Act, 1922, as amended in 1948, it was held that, to confer jurisdiction under the Section to issue notice in respect of assessments beyond the period of four years but within a period of eight years from the end of the relevant year, two conditions are to be satisfied. The first is that, the Income Tax Officer should have reason to believe that income, profits or gains chargeable to income tax have been under-assessed. The second is that, he must have also reason to believe that such under-assessment has occurred by reason of either omission or failure on the part of the assessee to make a return of his income under Section 22, or omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment.

22. It was also held that what facts are material and necessary for assessment will differ from case to case. An Assessing Officer, from the primary facts in his possession, whether on disclosure by the assessee or discovered by him on the basis of the facts disclosed or otherwise, has to draw inferences as regards certain other facts; and...**“ultimately, from the primary facts and the further facts inferred from them, the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable”**(*sic.*) [at page 200]. In the said case, the sale of shares having been disclosed, whether it be a business profit as distinguished from change in the form of investment, was held to be an inference which had to be drawn by the Assessing Officer from the material facts taken in conjunction with the surrounding circumstances.

23. The Revenue, in that case on a specific query made by the Court; as to which was the fact that was not disclosed, raised two contentions, one that the sale had not been disclosed and the other the Memorandum of Articles of Association of the Company had not been shown. The first contention was repelled on the claim

made by the Income Tax Officer itself that the disclosure of sale of shares was made; but on the professed intention of change in form of investment. As to the aspect of non-production of Memorandum of Articles of Association, it was held that the Income Tax Officers could not have concluded the proceedings without reference to such documents. The Company had claimed to be an investment Company and the question whether the sales were in the nature of trade or in the nature of change of investment could not have been considered without examining the said documents and the nature of the sale which were disclosed by the Company. The said observations squarely apply in the aforesaid case where it is the contention of the Revenue that the exemption was granted without looking at the constitution of the assessee; the BCA

24. The decisions relied on by the Revenue are the following:

a. **(1970) 78 ITR 466 (SC)** was a case in which the reopening of assessment was effected on the ground that the sale of assets of the assessee Company, being more than the written down value, was not disclosed. Neither was the said fact reflected in the profit and loss account nor was it disclosed in the returns. The

assessee merely informed the Income Tax Officer about the sale, the price and the agreement between the seller and the purchasers, reflected in their respective meetings. After setting off the unabsorbed depreciation, the Income Tax Officer determined the income as nil, which was sought to be reopened for reason of the assessee having not fully and truly disclosed the material facts. The Tribunal was directed to adjudicate on the fact whether actually the sale price received amounted to profit; without merely drawing an inference that the Income Tax Officer had considered the relevant facts, on the mere disclosure of sale,

(b). **(2007) 291 ITR 500 (SC)** deals with the concept of 'reason to believe' as contemplated in Section 147, which was held to be only a reasonable belief based on relevant material and not the established fact of escaped income. **(1973) 87 ITR 618 (Cal.)** and **(1974) 97 ITR 476 (Mad.)** are again on the aspect of the reasons to believe and the non-disclosure leading to under-assessment being only primary facts, the adequacy of which need not be gone into at the stage of notice. The Calcutta High Court dealt with an issue where depreciation claimed on written down value of machineries was allowed and the Assessing Officer,

later had reason to believe that such machineries did not at all exist. Loans said to have been taken, as hundi transaction, were found to be bogus transaction, on the creditor disclaiming such loans, in the Madras decision. The prior disclosure was found to be a reasonable ground to reopen, the adequacy of which would not be gone into by the High Court, was the finding. Herein the question is quite different for reason of the reopening having been attempted after four years.

(c). **(1984) 147 ITR 599 (Cal.)** and **(1985) 154 ITR 109 (Raj.)** were on the issue of no return having been filed. In the former, on notice being issued under Section 148, the assessee contended that a duplicate return filed, should be treated as return filed under Section 148 and in the latter a delayed return was sought to be treated as one properly filed. These do not at all apply to the instant case.

(d). **(2006) 286 ITR 553 (Ker.)** dealt with a deduction claimed of penal interest, which liability had accrued in the earlier years, and not in the previous year relevant to the assessment year. The Assessing Officer was aware that the assessee was following the mercantile system of accounting and that the liability of earlier years would not be entitled for deduction in a subsequent year. But

the fact remained that, the liability of penal interest for non-payment of sales tax being of the previous year, was not disclosed by the assessee, though discernible from the books of account.

(e). **(1971) 82 ITR 555 (SC)** is placed to refute the contention of the assessee that the exemption granted in the earlier years would stand against the reopening. No benefit can be claimed based on an erroneous order; but the specific period provided for reopening, that too on the aspect of absence of full and true disclosure would disable the Revenue from opening even an erroneous assessment, after the limitation prescribed.

None of these decisions apply herein.

25. In the present case what is alleged is, an escapement of income, on the ground that the assessee was granted an exemption, which they were not entitled to. The assessment orders of the earlier years are produced in all the writ petitions and a reference is made to Exhibit P1 in W.P.(C).No.27373 of 2011. Assessment year 2001-02, was the first year in which the exemption was claimed. Exhibit P1, being the assessment completed under Section 143(3) of the Act, indicates that the assessee had claimed exemption under a notification as also under

Section 10A. The assessee having submitted an application for registration as 100% export oriented undertaking and the same having been accepted by the Government of India, the benefit of tax holiday under the STP Scheme [Notification No.SO.243(E) dated 22.4.94] was found to be not entitled. The assessee's claim under Section 10A was, however, allowed. True, there is no reference to the BCA in the assessment order.

26. The exemption available under Section 10A is a special provision with respect to newly established undertakings in free trade zone. The assessee having been established in the previous year of the assessment year 2000-01, it is difficult to comprehend how the exemption was allowed without looking at the BCA, which is the essential document with respect to its constitution. It is also not clear as to what are the documents which the Assessing Officer had looked into, as produced by the assessee, to grant such exemption. Unlike an income chargeable to tax available in the books of accounts, which was not disclosed by the assessee, herein there is an affirmative action on the part of the Assessing Officer to grant exemption. It was the alternative claim made by the assessee that was allowed. The said exemption

continued in the subsequent years, as is revealed in Exhibit P2 (2002-03) and Exhibit P3 (2003-04) and thereafter. Exhibits P1 to P3 remained untouched, since the limitation of six years was over.

27. **(2010) 191 Taxman 333 (Ker.)** would be apposite for reference, in the context of the assessment order having not disclosed any consideration on the aspect of exemption under Section 10A. In the said case, the assessee was granted the entire deduction claimed towards interest paid, without noticing that there was diversion of interest-free loans to sister concerns. Hence, the reopening was proposed to disallow proportionate interest attributable to interest-free loans granted to sister concerns. The appeal filed by the assessee before the C.I.T. (Appeals) was allowed and the challenge made to it by the Revenue before the Tribunal was rejected. The Division Bench specifically noticed that there was no discussion in the assessment order, by the Assessing Officer, as to the allowance of the claim. Deduction was merely allowed in terms of the claim and it was held that, hence, there could be no ground urged of change of opinion being the basis of such reopening. The Full Bench of the Delhi High Court in ***CIT v. Kelvinator of India Ltd.*** [(2002) 256 ITR 1] was specifically noticed

to hold that the said decision is no longer good law in view of the decision of the Hon'ble Supreme Court in ***Asst. CIT v. Rajesh Jhaveri Stock Brokers (P.) Ltd.*** [(2007) 291 ITR 500]. The Hon'ble Supreme Court had held that the amendment introduced with effect from 01.04.1989 to Section 147 has brought out substantial difference in the meaning and content of the Section and, hence, the finding of the Delhi High Court that the amendment was inconsequential was overruled. On the facts of the aforesaid case, it was found that the Tribunal had wrongly assumed that re-assessment was completed beyond four years from the end of the relevant assessment year. Hence, it was also held that there was no requirement for finding an absence of full and true disclosure of any relevant facts. The assessment therein was initiated within the four year period and amended provisions of Section 147, effective from 01.04.1989, was held to authorise reopening, if the Assessing Officer has reason to believe that income chargeable to tax has escaped assessment for any assessment year. Hence, only two conditions were required, being (i) escapement of assessment and (ii) the belief, of the Assessing Officer, grounded on reasons. This was a fact on which the

contention of the assessee that there was mere change of opinion was refused to be accepted. That would be a valid contention to be urged when the reopening is attempted within four years. Herein, admittedly the reopening was made belatedly. Hence, the said decision would not apply to the facts of the present case.

28. The learned Senior Counsel for the Revenue would also rely on the judgment of the learned Single Judge in **W.P.(C). No.7863 of 2013** dated 12.04.2013 [***Suntec Business Solutions Private Limited v. Union of India***]. Therein also, a similar reopening was under challenge and the same was proceeded with after the four year period; but within the six year period. Therein, the impugned orders specifically found that there was no revised return of income filed by the assessee and there was no contention taken that there was full and true disclosure of material facts or rather the assessee did not refute seriously the absence of full and true disclosure. Hence, this Court does not find the denial of exercise of discretion, to be a binding precedent, looking at the distinguishable facts.

29. The first notice issued is dated 23.03.2011, just prior to the expiry of six years from the relevant assessment year, being

2004-05. Till the issuance of such notice, the exemption was granted. In all the aforesaid assessment years, one Ms. R.Dolly, Deputy Commissioner of Income-tax, Circle-1(1) had carried out the assessment and granted the exemption. The notices under Section 148 were issued by one Mr.Abdul Hakeemn.M., Assistant Commissioner of Income-tax, Circle-1(1) in the previous year of the assessment year 2011-12.

30. It is pertinent that in the first of the assessment years where Section 147 proceedings were initiated; i.e., 2004-05, the very same Assessing Officer (Ms.Dolly) passed an assessment order with respect to the Holding Company, just a day previous to that of the assessment carried out in the case of the assessee Company. Exhibit P4 is the assessment order of the assessee Company for the year 2004-05 dated 27.12.2006 and Exhibit P5 is the assessment order of the Holding Company for the very same assessment year dated 26.12.2006. The assessment of both the assessee and the Holding Company were carried out by the very same Assessing Officer, Ms.R.Dolly. True a wrong assessment made with respect to the Holding Company cannot be relied on by the Subsidiary Company, so as to perpetrate that wrong in the

latter's assessment too. But here, the assessee has also, by I.A.No.2445 of 2015, produced a document as Exhibit P13, which discloses that at least in the previous assessment year the BCA was forwarded to the Assessing Officer on 03.02.2006 and the same was available in the files of the Assessing Officer before the completion of assessment of the assessment year 2003-04.

31. There is no dispute on that count raised by the Revenue. However, the learned Senior Counsel for the Revenue would assert that it is not the non-disclosure of a particular year which is relevant; but the fact remains that there is nothing to show that the assessee had produced the BCA in the first assessment year, to support the claim of exemption, i.e., in 2001-02. This Court is not convinced that the same is a sustainable argument. If the true and full disclosure had not been made for the year 2001-02, then the proceedings under Section 147 for that year had to be initiated within six years. Admittedly such proceeding was not initiated and the same was barred by limitation by the time the new incumbent officer woke up to the alleged mistake. Limitation stands against the Revenue in the two subsequent years also; i.e., 2002-03 and 2003-04. We are concerned with the assessment years

commencing from 2004-05. Before completion of assessment of the said years, evidently the BCA was available in the records of the Assessing Officer. At least before completion of the assessment for the previous assessment year, i.e., 2003-04, the BCA was perused and exemption granted. There is no discussion in the assessment order of the terms in BCA. But when it was available in the records, that too produced in the midst of hearing, there could be no absence of full and true disclosure alleged.

32. The document produced by the assessee, in fact, refutes the specific contention of the Revenue in the statement filed on 25.07.2013, where it is contended that the BCA between the assessee and the Holding Company was not made available to the Assessing Officer during the assessment proceedings. The defence now raised, on the production of Exhibit P13, can only be seen as a last ditch effort by the Revenue to somehow uphold Section 147 proceedings. The specific contention in the aforesaid statement that the Assessing Officer had not examined the eligibility for the assessee's claim for deduction under Section 10A with reference to the said agreement for the assessment year 2004-05 can only be a default of the Assessing Officer and there could be no allegation of

lack of full and true disclosure of material facts. The Department also admits in its statement that the assessment years from 2001-02 to 2003-04 were not reopened for reason of it being beyond the six year period provided under Section 153.

33. We are not concerned with the earlier assessment years, in which the exemption was claimed and allowed. Nor is it permissible for the Department to reopen the said assessments; for reason only of such proceedings being hit by limitation. We are specifically concerned with the exemption granted from the year 2004-05 onwards. The proceedings initiated under Section 147 is on the ground that there is reason to believe that there is escapement of income for reason of an ineligible deduction being granted and the grant of such deduction is alleged to be on the assessee not fully and truly disclosing material facts before the Assessing Officer. The adequacy of the reasons or the eligibility to deduction cannot be gone into by this Court. But the ground of absence of full and true disclosure of material facts stands demolished.

34. Even with respect to the grant of exemption for the earlier years, this Court is unable to find any absence of full and true disclosure as is contemplated under the provision, since an

exemption claimed cannot be granted for the mere asking. It was the duty of the Assessing Officer to examine whether the exemption claimed under Section 10A was applicable to the Company. The assessee having claimed such exemption on the first assessment year after incorporation and commencement of business, necessarily the constitution of the assessee Company is the most relevant factor in deciding the claim of exemption. The BCA between the holding Company and the assessee Company is the essential document which discloses the factum of commencement of business. It would be surprising if the Assessing Officer had granted such exemption merely for the asking and without looking at the constitution of the Company; the formation of which in the previous year of the assessment year 2001-02 is the basic factor that had to be examined for granting the exemption which, as is stated before, was an affirmative action on the part of the Assessing Officer.

35. *De hors* that, for the assessment year 2003-04, it has been unequivocally established that the BCA was before the Assessing Officer even before completion of the assessment. The production of the said document, as is evident from Exhibit P13, is pursuant to a hearing held on 19.12.2005. The Revenue does not

dispute the factum of the BCA being available in the files before the assessment was completed for the assessment year 2003-04 and the subsequent years beginning from assessment year 2004-05. Hence, there could be no contention raised as to there being no full and true disclosure of material facts.

36. If essential and basic documents which are to be necessarily examined before grant of exemption, if not gone into, then it is the default of the officer and not the assessee as held in ***Calcutta Discount Co. Ltd.*** (*supra*). Further, as held by the Hon'ble Supreme Court, here too the grant of exemption, is an inferential conclusion of the Assessing Officer and it cannot be said that the assessee while claiming exemption under Section 10A should have, in the same breath, pointed out that they are not entitled to it.

37. This Court would not look into the question of whether there is a change of opinion or not, since the assessment of a subsequent year, which was challenged on the ground of exemption being disallowed, assailed as a mere change of opinion, has been declined consideration under Article 226 and the assessee relegated to the statutory remedy. This Court, hence, would not refer to the decisions on that aspect too. Any observation made on that

count in this judgment is in the nature of a *prima facie* one; not binding on the statutory authorities who are to first consider that aspect. Going by the binding precedents with respect to full and true disclosure of material facts, this Court is of the opinion that no proceedings could be initiated under Section 147 of the IT Act. The impugned orders in the respective writ petitions would stand set aside, for the proceedings are hit by limitation; - having been initiated beyond four years - as provided under Section 153 of the Act. There is no warrant to extend the period by two years, again as provided under Section 153, since on facts it cannot be said that the grant of exemption, at least from the assessment year 2003-04, was in the absence of full and true disclosure by the assessee.

The writ petitions would stand allowed. Parties are left to suffer their respective costs.

Sd/-
K. Vinod Chandran,
Judge

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