

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 15.07.2015

CORAM:

THE HONOURABLE MR. JUSTICE S.VAIDYANATHAN

WRIT PETITION NO.1738 OF 2015

RESERVED ON 30.3.2015

M/s.Sword Global India Private Limited,
(Formerly known as Global Software (India) P.Ltd.)
Arihant Nitco Park, 4th Floor,
90, Dr.Radhakrishnan Salai,
Mylapore, Chennai-600 004 ... Petitioner

Vs.

1. The Assistant Commissioner of Income Tax
Company Circle VI (4)
121, Nungambakkam High Road
Chennai-34
- 2 The Deputy Commissioner of Income Tax
Company Circle VI (4)
121 Nungambakkam High Road
Chennai-34
- 3 The Income Tax Officer सत्यमेव जयते
(OSD III) Company Range VI
121 Nungambakkam High Road
Chennai-34
- 4 Commissioner of Income Tax-VI
121 Nungambakkam High Road
Chennai-34 .. Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of a writ of Certiorari, to call for the records of the 2nd respondent and quash the impugned notice under section 148 of the Act in PAN : AABCG0937C dated

26.3.2014 and the consequential impugned order of the 3rd respondent in F.NO.Co.R. VI/OSD-III/ 2007-08 dated 7.11.2014 for the Assessment year 2007-2008.

For Petitioner : Mr.Aravind P.Datar, SC for
Mr.R.Sandeep Bagmar

For Respondents : Mr.Pramod Kumar Chopda
Mr.Rajkumar Jabak

ORDER

Challenging the Notice issued under Section 148 of the Income Tax, 1961 (in short, 'the Act') issued by the second respondent, dated 26.03.2014 proposing to re-assess the income for the assessment year 2007-08 having reason to believe that the income chargeable to tax has escaped assessment; as well as the consequential order, dated 7.11.2014 passed by the third respondent, rejecting the objections filed by the petitioner for re-opening of the assessment, the petitioner has come forward with the present writ petition.

2. The Petitioner is a Private limited company incorporated under the Companies Act, 1956 in India on 23 March 1999 and is engaged in the business of development and export of software. The Petitioner is a 100% Export Oriented Undertaking ('EOU') as per the letter of approval from the Ministry of Industry, Department of Industrial Policy and Promotion (DIPP) dated 17 May 1999 and Green Card No. DOE/STPI-C/99/1242 dated 06 July 1999 and registered with Software Technology Park of India ('STPI'). Subsequently, the Petitioner renewed its registration as a 100% EOU for a further period of five years from 06 July 2004 to 05 July 2009 vide letter dated 20 July 2004 from the Director, STPI. The Petitioner has accepted the terms and conditions of the renewal vide letter dated 22.07.2004.

3. The brief case of the petitioner is that they filed its return of income for the Assessment Year ('AY') 2007-08 on 19 October 2007 declaring a total income of Rs.29,242/- after claiming an amount of Rs.4,02,37,947 as deduction under Section 10B of Act and it was selected for scrutiny and a notice dated 22 July 2008 under Section 143(2) of the Act was issued. During the course of scrutiny proceedings, the 1st Respondent called for various details from time to time. The 1st Respondent vide notice dated 27 April 2009 had specifically called for the following details:

- a. Annual accounts including directors and auditors report; and
- b. Form 56G for claim of deduction under section 10B.

3.1. In response to the above notice, filed letter dated 06 May 2009 with the Balance Sheet and auditors report, the computation for deduction under Section 10B of the Act and Certificate from the Chartered Accountant in Form 56G in support of deduction under section 10B. The 1st Respondent vide notice dated 23 June 2009 requested for numerous details in an annexure. The Petitioner vide its reply dated 3 August 2009 furnished details as required under notice dated 23 June 2009 and has specifically disclosed the details of the directors requested in serial no. 3 of the said annexure. The 1st Respondent after discussion and verification of the details furnished by the Petitioner in response to the notice dated 23 June 2009 completed the assessment under section 143(3) read with section 92CA(4) of the Act by accepting the income returned by the Petitioner.

3.2. While so, the 2nd Respondent without obtaining approval from the Chief Commissioner or Commissioner as required under section 151 of the Act, initiated reassessment proceedings under section 147 of the Act by issuing a notice dated 26 March 2014 under Section 148 of the Act (Impugned Notice). The said notice does not state whether the necessary sanction of the Chief Commissioner or Commissioner was obtained and also does not state the reasons for re-opening. The Petitioner, vide letter dated 8 May 2014 sought a copy of the reasons recorded on the basis of which the impugned notice has been issued. The 2nd Respondent vide his letter dated 16 June 2014 furnished four reasons for reopening the assessment. In response to the reasons furnished by the 2nd Respondent for reopening the assessment under Section 147 of the Act, the Petitioner filed its objections as regards the jurisdiction to the reopen the assessment and to the reasons for reopening the assessment vide letter dated 27 August 2014. However, the 3rd Respondent vide order dated 07 November 2014 rejected the objections raised by the Petitioner for reopening the assessment under Section 147 of the Act. Hence the writ petition.

4. A counter affidavit has been filed on behalf of the second respondent, wherein, it has been stated that after obtaining the administrative sanction under Section 151 of the Act, the second respondent has exercised his jurisdiction of reopening the assessment. The petitioner company has failed to satisfy the conditions laid down in Section 2(22-A) of the Act regarding the domestic company. Out of share capital 2,80,000 equity shares of Rs.10/- each, 2,79,999 were held by holding company Sword Global Ltd., UK and remaining 1 share was held by the ultimate holding company Sword Group, France. The declaration and payment of dividend was approved by the Board in France and hence, it cannot be

considered as a domestic company. The petitioner company being a foreign company, the dividend distribution tax is to be paid under Section 115A(1)(a)(i) and not under Section 115-O of the Act, which relates to tax on distributed profits of domestic company. It is also stated that the petitioner company had incurred expenditure in foreign currency to the extent of Rs.5,77,40,000 by way of travelling and management fees, however, it has been wrongly included in export turnover, which has to be excluded. Therefore, it is evident that there had been omission and failure on the part of the petitioner to disclose fully and truly all the materials facts stated above. The petitioner was assessed under lower rate and excess relief was granted as per Explanation 2 to Section 147, the same shall be deemed to be cases wherein income chargeable to tax has escaped assessment under the Act. Though the petitioner is a 100% EOU formed in May, 1999, necessary ratification in terms of Explanation 2(iv) of Section 10B of the Act was not obtained. Further, the petitioner seeks to place both sections 10A and 10B on the same footing by drawing analogy that what is provided as sufficient under Section 10A should automatically hold good under Section 10B also which is impermissible and not tenable in law. It is a case of income chargeable to tax having escaped from assessment in view of Explanation 2 (c) to Section 147 which provides for reassessment in cases of excess relief or excessive allowance granted erroneously under the provisions of the Act. Therefore, there has been proper and diligent exercise of the powers conferred under Section 147 and the same has been proposed and contemplated only after due ascertainment of the jurisdictional fact that provides for a reason to believe that there has been escapement to tax warranting a revision of assessment. As the petitioner was assessed at lower rate of tax, the respondent had reason to believe that income had escaped assessment. Therefore, notice for reopening was issued. It is also stated that there was no pre-existing opinion on the facts that is sought to be brought to tax under Section 147 which categorically enures as an income chargeable to tax, but has escaped assessment. Therefore, the concept of change of opinion as claimed by the petitioner does not arise so far as the facts of the present case is concerned.

5. It is also stated that the initiation of reassessment in terms of Section 147 has been carried out within the period of limitation which expires only on 31.3.2014, whereas notice for reassessment was issued on 26.3.2014 after getting necessary sanction from the concerned authority and hence, notice issued under Section 148 of the Act was not time barred as alleged by the petitioner. The impugned order dated 7.11.2014 was passed taking into consideration the objections filed by the petitioner in pursuant to the notice under Section 148 and reasons recorded for reopening the assessment and they are justified in the facts and circumstances of the case. It is also stated that the writ petition under Article 226 is not maintainable since it is wholly misconceived. With these averments, the second respondent sought for dismissal of the writ petition.

6. Heard the learned senior counsel appearing for the petitioner and the learned standing counsel for the Income Tax and perused the entire materials.

7. Mr.Arvind P.Datar, learned senior counsel appearing for the petitioner would contend that after four years of the assessment year 2007-08, the second respondent issued notice dated 26.03.2014 under Section 148 of the Act, seeking to reopen the assessment, without any tangible materials and without assigning reasons that income chargeable to tax has escaped assessment by reason of failure on the part of the petitioner to disclose fully and truly all material facts necessary for the assessment which is a precondition for reopening the assessment, which is untenable and that the notice merely stated that the Assessing Officer has 'reason to believe' that the income chargeable to tax for the assessment year 2007-08 has escaped assessment and such ground is available only if the notice is within four years of the assessment year.

8. The learned senior counsel submitted that the expression used in section 147 of the Act "reason to believe" is the power of the Assessing Officer to reopen the assessment, though wide are not plenary, but it cannot be reopened merely on suspicion or for the purpose of making some enquiries. On the basis of the materials before the Assessing Officer, he has to form a belief that a particular income escaped from the assessment for the relevant assessment year by reason of any omission or failure on the part of the assessee to disclose fully or truly all material facts for the relevant assessment year. According to him, the second respondent sought for reopening the assessment on the basis of materials already available on record, which amount to mere change of opinion.

9. He would further contend that without obtaining approval from the competent authority as required under Section 151 of the Act, the second respondent had initiated reassessment proceedings under Section 147 by issuing a notice dated 26.3.2014 under Section 148 of the Act and a perusal of the notice, it is clear that there was no mention regarding sanction accorded by the competent authority, i.e. Chief Commissioner. He also contended that the second respondent erred in reopening the assessment to deny the tax holiday benefit under Section 10B of the Act without appreciating that the said claim was already accepted for preceding assessment years and having accepted the same, it is not appropriate for the respondent now denying the same on the ground that non-availability of ratification from the Board of Approval. He pointed out that though the petitioner has raised objections with sufficient materials and acceptable reasons, however, the 3rd respondent has simply rejected the same mechanically without appreciating the claim of the petitioner. With these contentions, the learned senior counsel sought for setting aside the impugned proceedings.

10. In support of his contentions, the learned senior counsel relied upon the following decisions, viz.,

i) "Fenner (India) Ltd. Versus DCIT (2000)241 ITR 672 (Mad)"

"Mere escape of income is insufficient to justify the initiation of action after the expiry of four years from the end of the assessment year. Such escapement must be by reason of the failure on the part of the assessee either to file a return referred to in the proviso or to truly and fully disclose the material facts necessary for the assessment." Unless, the condition in the proviso is satisfied, the Assessing Officer does not acquire jurisdiction to initiate any proceeding under Section 147 of the Act after the expiry of four years from the end of the assessment year. Thus, in cases where the initiation of the proceedings is beyond the period of four years from the end of the assessment year, the Assessing Officer must necessarily record not only his reasonable belief that income has escaped assessment but also the default or failure committed by the assessee. Failure to do so would vitiate the notice and the entire proceedings. If the Assessing Officer chooses to entertain the belief that the assessment has been made in the background of the assessee's failure to disclose truly and fully all material facts, it is necessary for him to record that fact, and in the absence of a record to that effect, it cannot be held that a notice issued without recording such a fact is capable of being regarded as a valid notice.

ii) "Dynacraft Air Controls v Sneha Joshi 355 ITR 102 (Bom)"

"Under section 147, for the Assessing Officer to re-open an assessment, he must have reason to believe that income chargeable to tax has escaped assessment for any assessment year. Under the proviso to section 147, where an assessment has been made under section 143(3), no action shall be taken under that 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 disclose fully and truly all material facts necessary for his assessment, for that assessment year. This is now a jurisdictional requirement which must be fulfilled where an assessment is sought to be re-opened beyond a period of four years. The existence of the jurisdictional condition must be indicated in the reasons which are furnished to the assessee. The fulfilment of the condition is a pre-requisite and if it is absent, an assessment cannot be reopened beyond

four years. The Assessing Officer cannot improve upon the reasons for re-opening the assessment or bridge the lacunae later. If the reasons disclosed do not indicate the fulfilment of the jurisdictional requirement, the re-opening is invalid."

iii) "CIT v Kelvinator of India (2010) 2 SCC 723"

"The concept of "change of opinion" on the part of the Assessing Officer to reopen an assessment does not stand obliterated after the substitution of section 147 of the Income Tax Act, 1961, by the Direct Tax Laws (Amendment) Acts, 1987 and 1989. After the amendment, the Assessing Officer has to have reason to believe that income has escaped assessment, but this does not imply that the Assessing Officer can reopen an assessment on mere change of opinion. The concept of "change of opinion" must be treated as an in-built test to check the abuse of power. Hence, after April 1, 1989, the Assessing Officer has power to reopen an assessment, provided there is "tangible material" to come to the conclusion that there was escapement of income from assessment. Reason must have a link with the formation of the belief. Decisions of the Delhi High Court in Cit v. Kelvinator of India Ltd. (2002) 256 ITR 1 (FB) and CIT v. Eicher Ltd. (2007) 294 ITR 310 affirmed."

iv) "United Electrical Co.(P) Ltd. Versus Commissioner of Income-tax"

"What disturbs us more is that even the Additional Commissioner has accorded his approval for action under section 147 mechanically. We feel that if the Additional Commissioner had cared to go through the statement of said V.K. Jain, perhaps he would not have granted his approval, which was mandatory in terms of proviso to sub-section (1) of section 151 of the Act as the action under section 147 was being initiated after the expiry of four years from the end of the relevant assessment year. As highlighted above, the legislature has provided certain safeguards to prevent arbitrary exercise of powers by an assessing officer, particularly after a lapse of substantial time from completion of assessment. The power vested in the Commissioner to grant or not to grant approval is coupled with a duty. The Commissioner is required to apply his mind to the proposal put up to him for approval in the light of the material relied upon by the assessing officer. The said power cannot be exercised casually and in a routine manner, we are constrained to observe that in the present case, there has been no application of mind by the Additional Commissioner before granting the approval."

11. On other hand, Mr.Pramod Kumar Chopda, learned counsel appearing for the respondents, while reiterating the averments of the counter affidavit, would submit that actually, after obtaining necessary sanction from the designated authority under Section 151, the second respondent has issued notice under Section 147 of the Act and it was not mentioned in the notice and mere non-mentioning of the same, does not vitiate the proceedings. He also contended that petitioner company has not furnished true and correct details regarding the payment of dividend and the assessee company is not a domestic company since failed to comply with the requirements under Section 2 (2D) of the Act and that it had distributed profit as per provisions of Section 115-O of the Act, which is contrary and not applicable to the petitioner company and that it had failed to furnish the Board of approval to claim deduction under Section 10B, which formed the reasons to believe for the second respondent that the income chargeable to tax for the assessment year 2007-08 has escaped assessment within the meaning of Section 147 of the Act and accordingly, the impugned proceedings were rightly initiated and the it does not fall within the purview of 'change of opinion' as contended by the petitioner. Hence, the learned counsel sought for dismissal of the writ petition.

12. The reasons for re-opening the assessment under Section 148 of the Act for the assessment year 2007-08 given by the second respondent, read as under:

- i) "Since the entire share capital is held by the Foreign Companies and accounts and declaration of dividend are approved by Board in France, it cannot be considered as a domestic company under Section 2 (22A) and only a foreign company under Section 2 (23A) of the Act. Hence any tax payable will be at the rate applicable to a foreign company."
- ii) "As per clause 2(a) notes on accounts the company had paid dividend aggregating to Rs.2,52,00,000 in foreign currency (Interim dividend of Rs.1,68,09,000 paid on 15.03.2007 and final dividend of Rs.84 Lakhs paid on 24.05.2007). Since the dividend distributed is to be considered as not covered under Section 115-O it has to be taxed as dividend received by a foreign company under Section 115A(1)(a)(i) at 20% plus Surcharge 2.5%. Since the total dividend exceeds Rs.1 crore and education cess 3%."
- iii) "The assessee is having EEFC accounts at Chennai as well as at London, UK. As per notes on accounts 2(d) the assessee had incurred expenditure in foreign currency to the extent of Rs.5,77,40,000 by way of travelling Rs.5,71,09,000/- & management fee of Rs.6,31,000/-. Under Explanation 2(iii) to

Section 10B the expenses incurred if any in foreign exchanges in providing technical services outside India shall not be included in export turnover. As per the details furnished in Annexure to Form 56G, an amount of \$20,44,100.41 has been shown foreign exchange realized in EEFC as detailed below:

HSBC A/c UK \$ 6,55,000

ABN AMRO Chennai \$13,89,100.41

However, if expenses incurred out of EEFC account has to be excluded from export turnover."

iv) "As per Circular issued by the Board in March 2009/June 2009 undertakings claiming deduction under section 10B should get the approval ratified by the Board provided under explanation 2(iv) under section 10B of the Act. As per the particulars furnished under Form 56G, the assessee got approval as 100% EOU in May 1999. Under Foreign Trade Policy issued under foreign Trade & Development Regulations Act, the license has to be renewed at the end of each of the five years. Since ratification from Board of Approval is not available, the deduction claimed under section 10B to the extent of Rs.4,02,37,947/- needs to be disallowed."

13. It is not in dispute that the above said reasons have been duly intimated to the petitioner and after receipt of the same, it seems that the petitioner has also filed their objections dated 27.08.2014 which were duly considered and by order, dated 7.11.2014 impugned in the writ petition, the third respondent has rejected the same.

14. A notice under Section 148 of the Act, dated 26.03.2014 has been issued to the petitioner proposing to re-assess the income for the assessment year 2007-08 by the second respondent, since the second respondent has reason to believe that the income in respect of the said assessment year has escaped assessment within the meaning of Section 147 of the Act. It is relevant to extract Sections 147 to 149 of the Act, which read as under:

"147. If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of Sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or re-compute the loss of 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."

"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 no 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 chargeable 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.

"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.

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

"149. Time limit for notice.--(1) No notice under Section 148 shall be issued for the relevant assessment year,-

(a) if four years have elapsed from the end of the relevant assessment year, unless the case falls under Clause (b);

(b) if four years, but not more than six years, have elapsed from the end of the relevant assessment year unless the income chargeable to tax which has escaped assessment amounts to or is likely to amount to one lakh rupees or more for that year.

Explanation.--In determining income chargeable to tax which has escaped assessment for the purposes of this sub-section, the provisions of Explanation 2 to Section 147 shall apply as they apply for the purposes of that section.

(2) The provisions of Sub-section (1) as to the issue of notice shall be subject to the provisions of Section 151.

(3) If the person on whom a notice under Section 148 is to be served is a person treated as the agent of a non-resident under Section 163 and the assessment, reassessment or re-computation to be made in pursuance of the notice is to be made on him as the agent of such non-resident, the notice shall not be issued after the expiry of a period of two years from the end of the relevant assessment year."

15. It is no doubt true that an assessment order once made is ordinarily final. Section 154 of the Act confers a power of rectification of mistakes apparent from the record. Section 147 of the Act empowers the Assessing Officer to assess or reassess the income in the circumstances mentioned therein. The power to reopen an assessment under Section 147 is in the nature of an exception to the general principle that an assessment order once made would be final. The power to reopen an assessment is not unbridled or unrestricted and it is subject to the proviso embodied in the section itself. The proviso prescribes restrictions on the power of reopening the

assessment by limiting the time period to four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment by reason of failure on the part of the assessee (i) to submit a return under Section 139, or (ii) to respond to the notices issued under Section 142(1), or (iii) to respond to the notices issued under Section 148, or (iv) to disclose fully and truly all material facts necessary for the assessment of the income for that assessment year. Explanation 1 to Section 147 lays down that mere production of the books of account or other evidence from which the Assessing Officer could, with due diligence, have discovered certain facts would not amount to disclosure within the meaning of the provision. Explanation 2 to Section 147 enumerates cases where it would presume that income chargeable to tax has escaped assessment. If the assessment is to be reopened after the expiry of four years from the end of the relevant assessment year, under the proviso to Section 147 of the Act, following conditions must exist, viz.,

(i) The Assessing Officer must have a reason to believe that any income chargeable to tax has escaped assessment for the any assessment year. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Assessing Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the court to examine whether the reasons for the formation of the belief has a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this extent, action of an Assessing Officer in starting the proceedings under Section 147 in respect of income escaping assessment is open to challenge in a court of law.

(ii) The Assessing Officer must have a reason to believe that such income had escaped assessment by reason of failure on the part of the assessee (a) to make a return under Section 139 ; or (b) to respond to the notice issued under Section 142(1) or 148 of the Act, or (c) to disclose fully and truly all the material facts necessary for his assessment of income for that year.

16. Therefore, it is clear that both the aforementioned conditions imposed must co-exist to confer jurisdiction on the Assessing Officer to reopen the assessment under Section 147. Sub-section (2) of Section 148 of the Act makes it imperative for the Assessing Officer to record his reasons before initiating proceedings. Where a notice under Section 147 of the Act is to be issued after the expiry of four years from the end of the relevant assessment year, the Commissioner or the Joint Commissioner, as the case may be, should be satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issue of such notice.

17. The power of reassessment conferred under Section 147 of the Act can be exercised within a period of four years from the end of

the relevant assessment year without restrictions imposed by the proviso to that section. However, after the expiry of four years from the end of the relevant assessment year, power of the Assessing Officer is restricted by the limitations imposed under the proviso, as stated earlier.

18. Section 147 of the Act is the source of power of the Assessing Officer for reopening of the assessment. Section 148 contains procedural restrictions for issuance of a notice for exercise of the power of reopening of an assessment conferred under Section 147. Section 149 prescribes the time limit for issuance of a notice under Section 148. Therefore, the conditions laid down under Section 147 of the Act for the purposes of reopening the assessment must be satisfied before the notice can be issued. The conditions laid down in Section 147 are the jurisdictional facts necessary for the purpose of exercise of the power under Section 147. The jurisdictional facts prescribed under Section 147 must exist before a notice under Section 148 can be issued. The time limit prescribed under Section 149 of the Act for issuance of a notice under Section 148 is in addition to and not in derogation with the necessary conditions required to be satisfied under Section 147 of the Act. In other words, if the basic jurisdictional facts required for reopening of an assessment under Section 147 of the Act do not exist it would not be competent for the Assessing Officer to issue a notice under Section 148. Even where the jurisdictional facts prescribed under Section 147 exist and all conditions laid down under Section 147 and the proviso thereto are satisfied, the notice under Section 148 can be issued only after the Assessing Officer has recorded his reasons for doing so under Sub-section (2) of Section 148 and has further obtained the necessary sanction for issuance of the notice as required under Section 151 of the Act. Such notice is also required to be issued within the time limit prescribed under Section 149 of the Act. In fact, Section 149 of the Act, does not relax the restriction of four years prescribed in the proviso to Section 147 of the Act for issuance of a notice under the proviso to Section 147. The restriction of four years would be applicable unless the income chargeable to tax has escaped assessment by reason of failure of the assessee to make a return under Section 139 or in response to a notice under Section 142 or 148 of the Act or the failure of the assessee to disclose fully and truly all material facts. If the reassessment is required to be made on account of the failure of the assessee to disclose fully and truly all material facts necessary for his assessment, obviously, the restriction of four years put under the proviso to Section 147 would not be applicable and notice can be issued after the expiry of a period of four years, but within the time limit of 7 or 10 years, as the case may be, prescribed under Section 149 of the Act. The object of Section 149 in imposing the restriction of seven years or ten years where the income likely to have escaped assessment is less than Rs.50,000 or Rs.1,00,000, as the case may be, is not to permit reopening of the assessment where the

tax liability would not be significant as compared with the efforts that would be required for reopening of an assessment after a passage of seven or ten years, as the case may be. To repeat, the time-limit imposed under Section 149 of the Act for issuance of the notice is not in derogation of and is not for enlarging the time restriction imposed under the proviso to Section 147 of the Act but to put an additional time restriction even where there is no restriction of time for reopening of the assessment on account of failure of the assessee to disclose fully and truly all material facts.

19. Reverting to the case on hand, it is not in dispute that the scrutiny assessment under Section 143(3) was completed on 16.12.2010 and the time limit of four years to invoke Section 147 of the Act is till 31.03.2014. It is not in dispute that the impugned notice under Section 148 has been issued on 26.3.2014 by the second respondent proposing to reassess the income for the assessment year 2007-08 since he had reason to believe that the income chargeable to tax for the said assessment year has escaped assessment within the meaning of Section 147 of the Act. Therefore, when it is clear that the reassessment resorted to by the second respondent is within the period of four years, now this Court is required to examine whether there any tangible material is exist on record for the assessing officer to form the requisite belief that that the income chargeable to tax, has escaped assessment.

20. According to the third respondent, the petitioner/assessee had not furnished the true information regarding its status and the details regarding payment of dividend and not disclosed full and true material facts on the claim of deduction under Section 10B of the Act. It is the case of the Revenue that the petitioner company is not a domestic company, but it worked out the tax on its distributed profit as per provisions of Section 115-O of the Act, which, in fact, applicable only to a domestic company and that it has made expenses in foreign country to the extent of Rs.5,77,41,000, which is liable to be excluded from the export turnover for the purpose of calculating exemption under Section 10B of the Act and further, the petitioner company has not furnished the approval from the competent authorities for continuance of 100%. These factors, according to the department, were not considered at the time of original assessment proceedings since the petitioner has not disclosed full and true material facts, which prompted the respondents to reopen the assessment. Therefore, having regard to the facts and circumstances, I am of the considered view that the second respondent has rightly initiated the reassessment proceedings after getting necessary sanction as required under Section 151 from the designated authority. I am also of the view that mere non-mentioning of sanction accorded by the authority in the impugned notice, would not in any way fatal to the process of reopening. In fact, a perusal of the above said factors, would prima facie establish that the income chargeable to tax for the assessment year 2007-08 has escaped assessment within the

meaning of Section 147 of the Act which had formed a reason for the Assessing Officer to believe that the income has escaped assessment.

21. However, the learned senior counsel appearing for the petitioner would vehemently contend that in order to exercise the jurisdiction under section 147 of the Act, the Assessing Officer must have a reason to believe that the income has escaped assessment and there must be a rational connection between that belief and tangible material on the basis of which the belief is formed and in the present case, absolutely there was no tangible or fresh material available with the Assessing Officer and in fact, the second respondent during the regular assessment proceedings under Section 143(3) had examined all the details disclosed by the petitioner and concluded the proceedings and now it is not open to him to reopen the concluded assessment on the same material and if he resorted to the same, it would be nothing but amount to change of opinion and it is settled law that no assessment can be reopened merely because the Assessing Officer has changed his mind.

22. Of-course, it is true that no fresh material was available with the second respondent to proceed with the reassessment proceedings. However, it is to be noted that the second respondent had categorically mentioned the reasons as stated supra, by which, he had a reason to believe that the income chargeable to tax has escaped assessment inasmuch as the specific case of the Revenue is that the petitioner has not disclosed fully, truly all necessary material to enable the department to assess the income correctly regarding the particulars, viz., the petitioner company is not a domestic company, tax rate applicability on dividend distributor, expenses incurred out of EEFC Fund and Board of approval to claim deduction under Section 10B. Therefore, there is a failure on the part of the petitioner to disclose the above material facts and in such circumstances, the Assessing Officer has rightly initiated the reassessment proceedings on the basis of available material on record, which was specific, relevant and considerable, and after recording the reasons for his own belief that in the original assessment proceedings, the petitioner/assessee had not disclosed the material facts truly and fully and therefore income chargeable to tax had escaped assessment. In my opinion, he, therefore, correctly invoked the provisions of Sections 147 and 148 of the Act. In this regard it is worthwhile to refer the decision of the Hon'ble Supreme Court reported in "Phool Chand Bajrang Lal v. ITO, (1993) 4 SCC 77, at page 96, wherein, it has been held as under in para 26:

"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 added)

23. In the present case, what exactly the petitioner wants to demonstrate that already all the details regarding the income were disclosed and after considering the same, the Assessing Officer has concluded in favour of the petitioner and again on the same material, it is not appropriate for the Assessing Officer to proceed with the reassessment proceedings which would amount to 'change of opinion'. In such circumstances, the concept highlighted in the above decision would squarely apply to the version of the petitioner, that having wilfully made false or untrue statements at the time of original assessment and when that falsity comes to notice, it is not fair on the part of the petitioner to turn around and say "you accepted my lie, now your hands are tied and you can do nothing".

24. In "Ganga Saran & Sons (P.) Ltd., versus Income Tax Officer" reported in 1981 AIR 1363, the Hon'ble Supreme Court has held as under:

"It is well settled as a result of several decisions of this Court that two distinct conditions must be satisfied before the Income Tax Officer can assume jurisdiction to issue notice under section 147 (a). First, he must have reason to believe that the income of the assessee has escaped assessment and secondly, he must have reason to believe that such escapement is by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If either of these conditions is not fulfilled, the notice issued by the Income Tax Officer would be without jurisdiction. The important words under section 147 (a) are "has reason to believe" and these words are stronger than the words "is satisfied". The belief entertained by the Income Tax Officer must not be arbitrary or irrational. It must be reasonable or in other words it must be based on reasons which are relevant and material. The Court, of course, cannot investigate into the adequacy or sufficiency of the reasons which have weighed with the Income Tax Officer in coming to the

belief, but the Court can certainly examine whether the reasons are relevant and have a bearing on the matters in regard to which he is required to entertain the belief before he can issue notice under section 147 (a). It there is no rational and intelligible nexus between the reasons and the belief, so that, on such reasons, no one properly instructed on facts and law could reasonably entertain the belief, the conclusion would be inescapable that the Income Tax Officer could not have reason to believe that any part of the income of the assessee had escaped assessment and such escapement was by reason of the omission or failure on the part of the assessee to disclose fully and truly all material facts and the notice issued by him would be liable to be struck down as invalid.

25. Having carefully examined the reasons given by the Assessing Officer for re-opening the assessment in the present case, this Court is of the view that the said reasons are relevant and material and have a bearing on the matters in regard to which, the Assessing Officer has formed a reason to believe that the income chargeable to tax has escaped assessment and there is, absolutely rational and intelligible nexus between the reasons and the belief entertained by the Assessing Officer.

26. In the present case, though the petitioner has given explanation elaborately in regard to the reasons relied on by the Assessing Officer for reopening the assessment and demonstrated the circumstances under which, there was no income chargeable to tax has escaped assessment, this Court is not supposed to decide the same since the issue involved in this Writ Petition is whether the Assessing Officer was right in reopening the assessment. To this extent, this Court has answered accordingly.

For the foregoing discussion, I do not find any scope to interfere with the impugned proceedings. Accordingly, the Writ Petition fails and it is dismissed. No costs.

Sd/-

Asst.Registrar (CO)

/true copy/

Sub Asst. Registrar

To

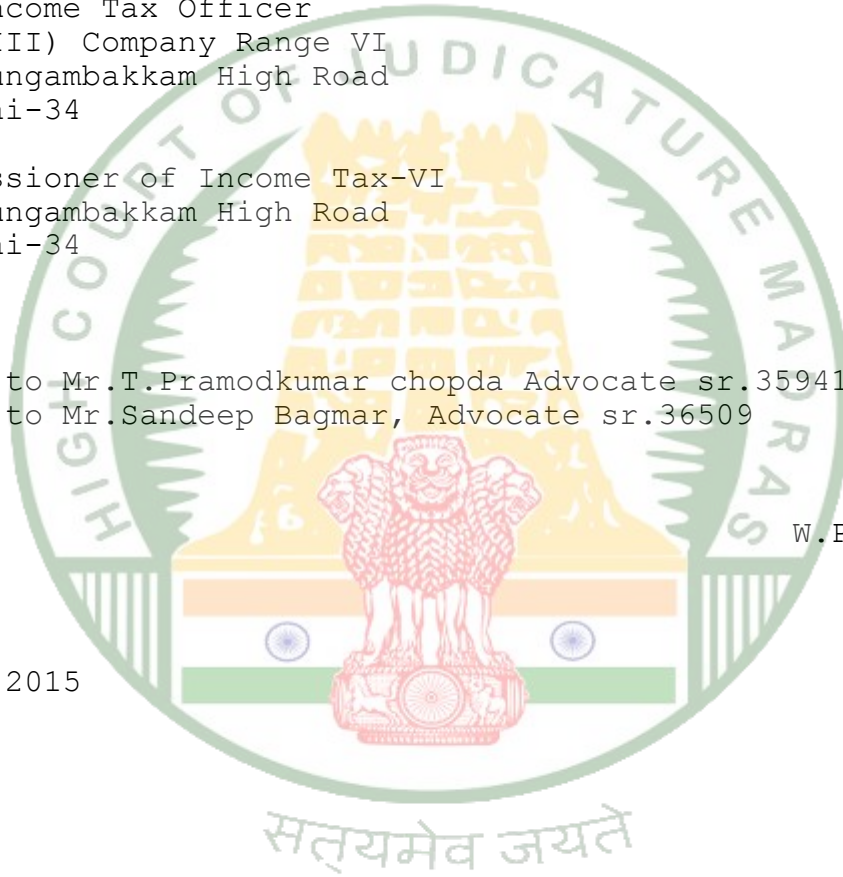
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W.P.NO.1738 OF 2015

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srg 07.08.2015



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