

IN THE HIGH COURT OF JUDICATURE AT PATNA

Civil Writ Jurisdiction Case No.3942 of 2015

Samsung India Electronics Pvt. Ltd., a Company incorporated under the companies Act, 1956 having its registered office at A 25, Ground Floor, Front Tower, Mohan Co-oprative Industrial Estate, P.O. + P.S. Sarita Vihar, New Delhi-110044 and Branch office at Ground Floor, Ahluwalia Building, New Dak Bunglow Road P.O. GPO, P.S. Kotwali, District- Patna 800001 through its authorized signatory, Chandra Sekhar kar, son of Shri Krishna Chandra Kar, resident of 102, Aranya Kruna Apartment, P.O.GPO, PS. Buddha Colony, District- Patna- 800001.

.... Petitioner

Versus

- 1. The State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikash Bhawan, Bailey Road, Patna.
- 2. Dy. Commissioner of Commissioner of Commercial Taxes, Patliputra Circle, Patna.
- 3. Assistant Commissioner of Commissioner of Commercial Taxes, Patliputra Circle, Patna.
- 4. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

Civil Writ Jurisdiction Case No. 3953 of 2015

Samsung India Electronics Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at A 25, Ground Floor, Front Tower, Mohan Co-operative Industrial Estate, P.O. + P.S. Sarita Vihar, New Delhi - 110044 and Branch office at Ground Floor, Ahulwalia Building, New Dak Bunglow Road P.O. GPO, P.S. Kotwali, District Patna 800001 through its authorized Signatory, Chandra Sekhar Kar, son of Shri Krishna Chandra Kar, resident of 102, Aranya Karuna Apartment, P.O. GPO, P.S. Buddha Colony, District - Patna - 800001.

.... Petitioner

Versus

- 1. The State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
- 2. Dy. Commissioner of Commercial Taxes, Patliputra Circle, Patna.
- 3. Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
- 4. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

Civil Writ Jurisdiction Case No. 8886 of 2016

H. C. L. Infosystems Limited, a limited company registered under the Companies Act 1956 having its Branch office at Jyoti Nandan Boring Patliputra Road, Patna, P.O.+P.S. Sri Krishnapuri, District- Patna through its Regional Accounts Officer, Shobha Kant son of Shri Rajendra Prasad Singh, resident of Yashoda Bhawan Naya



Tola, Saristabad Road Gardanibag, P.O. + P.S.- Gardanibag, District- Patna

.... Petitioner

Versus

1. State of Bihar through Commissioner of Commercial Taxes having its office at Vikash Bhawan, Bailey Road, Patna
2. Commercial Taxes Officer, Patliputra Circle, Patna

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4988 of 2015

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H.C.L. Infosystems Limited, a limited company registered under the Companies Act 1956 having its branch office at Jyoti Nandan Boring Patliputra Road, Patna P.O. + P.S.- Sri Krishnapuri, District - Patna through its Regional Accounts Officer, Shobha Kant. Son of Shri Rajendra Prasad Singh. Resident of Yashoda Bhawan Naya Tola, Saristabad Road Gardanibag, P.O.+ P.S.- Gardanibag, District - Patna.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4994 of 2015

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H.C.L. Infosystems Limited, a limited company registered under the Companies Act 1956 having its branch office at Jyoti Nandan Boring Patliputra Road, Patna P.O. + P.S.- Sri Krishnapuri, District - Patna through its Regional Accounts Officer, Shobha Kant. Son of Shri Rajendra Prasad Singh. Resident of Yashoda Bhawan Naya Tola, Saristabad Road Gardanibag, P.O.+ P.S.- Gardanibag, District - Patna.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 5119 of 2015

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Sony India Private Limited, a company registered under the Indian laws having its local office at 4th Floor, Sai Corporate Park, Block B, Bailey Road, rukanpura, Patna through its Authorized Signatory Mr. Abhishek Sharma, S/o Shri Ashwini



Kumar Sharma, aged about 33 Years, Resident of Trinity Residency H No. 1-B, Ramgarh Ranchi Road, Ramgrah (Jharkhand).

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Bihar, Patna having office at Old Secretariat, PO- Saschivalya, Patna.
2. The Commissioner of Commercial Taxes, Bihar, Patna having its office at Vikash Bhawan, Bailey Road Patna.
3. The Dy Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
5. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 5227 of 2015

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Sony India Private Limited, a company registered under the Indian laws having its local office at 4thFloor, Sai Corporate Park, Block B, Bailey Road, Rukanpura, Patna through its Authorized Signatory Mr. Abhishek Shama, S/o Shri Ashwini Kumar Sharma, aged about 33 years, Resident of Trinity Residency H No.1-B, Ramgarh Ranchi Road.

.... Petitioner

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar Patna having office at Old Secretariat, PO- Saschivalya, Patna
2. The Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
3. The Dy Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
5. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4020 of 2015

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Samsung India Electronics Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registeredoffice at A 25, Ground Floor, Front Tower, Mohan Co-operative Industrial Estate, P.O+P.S. Sarita Vihar, New Delhi-110044 and Brach office at Ground Floor, Ahluwalia Building, New Dak Bunglow Road P.O. GPO, P.S. Kotwali, District- Patna 800001 through its authorized signatory, Chandra Sekhar Kar, son of Shri Krishna Chandra Kar, resident of 102, Aranya Karuna Apartment, P.O. GPO, P.S. Buddha Colony, District- Patna- 800001.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes, Patliputra Circle, Patna.
3. Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.



4. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 3968 of 2015

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Samsung India Electronics Pvt. Ltd., a Company incorporated under the Companies Act, 1956 having its registered office at A 25, Ground Floor, Front Tower, Mohan Co-operative Industrial Estate, P.O. + P.S. Sarita Vihar, New Delhi-110044 and Branch Office at Ground Floor, Ahluwalia Building, New Dak Bunglow Road P.O. G.P.O., P.S. Kotwali, District Patna 800001 through its authorized signatory, Chandra Sekhar Kar, S/o Shri Krishna Chandra kar, resident of 102, Aranya Karuna Apartment, P.O. G.P.O., P.S. Buddha Colony, District Patna-800001.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes, patliputra Circle, Patna.
3. Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 3997 of 2015

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Samsung India Electronics Pvt. Ltd. a Company incorporated under the Companies Act, 1956 having its registered office at A 25, Ground Floor, Front Tower, Mohan Co-operative Industrial Estate, P.O. + P.S. Sarita Vihar, New Delhi - 110044 and Branch Office at Ground Floor, Ahulwalia Building, New Dak Bunglow Road P.O. G.P.O. , P.S. Kotwali, District Patna - 800001 through its authorized Signatory, Chandra Sekhar Kar, son of Shri Krishna Chandra Kar, resident of 102, Aranya Karuna Apartment, P.O. GPO, P.S. Buddha Colony, District Patna - 800001.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes, Bihar having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes, Patliputra Circle, Patna.
3. Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4709 of 2015

=====

H.C.L. Infosystems Limited, a limited company registered under the Companies Act 1956 having its branch office at Jyoti Nandan Boring Patliputra Road, Patna P.O.+P.S. Sri Krishnapuri, District- Patna through its Regional Accounts Officer,



Shobha Kant son of Shri. Rajendra Prasad Singh, resident of Yashoda Bhawan Naya Tola, Saristabad Road Gardanibag, P.O. +P.S.- Gardanibag, District- Patna.

.... Petitioner

Versus

1. State of Bihar through Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
2. Dy. Commissioner of Commercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4825 of 2015

=====

Sony India Private Limited, a Company registered under the Indian laws having its local office at 4th Floor, Sai Corporate Park, Block B, Bailey Road, Rukanpura, Patna through its Authorized Signatory Mr. Abhishek Sharma, S/o Shri Ashwini Kumar Sharma, aged about 33 years, Resident of Trinity Residency H No. 1- B, Ramgarh Ranchi Road.

.... Petitioner

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having office at Old Secretariat, PO- Saschivalya, Patna
2. The Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
3. The Dy Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
5. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4826 of 2015

=====

Sony India Private Limited, a Company registered under the Indian laws having its local office at 4th Floor, Sai Corporate Park, Block B, Bailey Road, Rukanpura, Patna through its Authorized Signatory Mr. Abhishek Sharma, S/o Shri Ashwini Kumar Sharma, aged about 33 years, Resident of Trinity Residency H No. 1- B, Ramgarh Ranchi Road.

.... Petitioner

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having office at Old Secretariat, PO- Saschivalya, Patna
2. The Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
3. The Dy Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
5. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents



with

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Civil Writ Jurisdiction Case No. 4845 of 2015

=====

Sony India Private Limited, a company registered under the Indian laws having its local office at 4th Floor, Sai Corporate Park, Block B, Bailey Road, Rukanpura, Patna through its Authorized Signatory Mr. Abhishek Sharma, S/o Shri Ashwini Kumar Sharma, aged about 33 years, Resident of Trinity Residency H No. 1- B, Ramgarh Ranchi Road.

.... Petitioner

Versus

1. The State of Bihar through the Commissioner of Commercial Taxes, Bihar, Patna having office at Old Secretariat, PO- Saschivalya, Patna
2. The Commissioner of Commercial Taxes having its office at Vikas Bhawan, Bailey Road, Patna.
3. The Dy Commissioner of Commercial Taxes, Patliputra Circle, Patna.
4. The Assistant Commissioner of Commercial Taxes, Patliputra Circle, Patna.
5. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4868 of 2015

=====

H. C. L. Infosystems Ltd., a limited company registered under the Companies Act 1956 having its branch office at Jyoti Nandan Boring Patliputra Road, Patna P.O. + P.S. Sri Krishnapuri, district- Patna through its Regional Accounts Officer, Shobha Kant son of Shri Rajendra Peasad Singh, resident of Yashoda Bhawan Nay Tola, Saristabad Road Gardanibagh, P.O. + P.S. - Gardanibagh, Districty- Patna.

.... Petitioner

Versus

1. State of Bihar through Commissioner of Commissioner Taxes having its office at Vikash Bhawan, Bailey Road, Patna. null null
2. Dy. Commissioner of Commiercial Taxes Patliputra Circle, Patna.
3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

with

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Civil Writ Jurisdiction Case No. 4963 of 2015

=====

H.C.L.Infosystems Limited, a limited company registered under the Companies Act, 1956 having its branch office at Jyoti Nandan Boring Patliputra Road, Patna P.O.+P.S. Sri Krishnapuri, District- Patna through its Regional Accounts Officer, Shobha Kant son of Shri Rajendra Prasad Singh , resident of Yashoda Bhawan Naya Tola , Saristabad Road Gardanibag, P.O.+ P.S.- Gardanibag, Districit- Patna.

.... Petitioner

Versus

1. The State of Bihar through Commissioner of Commercial Taxes having its office



- at Vikas Bhawan , Bailey Road, Patna. null null
 2. Dy. Commissioner of Commercial Taxes, Patliputra Circle, Patna.
 3. Commercial Taxes Officer, Patliputra Circle, Patna.

.... Respondents

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Appearance :

(In all the cases)

For the Petitioner/s : Mr. Tarun Gulati, Advocate with
 M/S Tushal Gupta
 D.V.Pathy
 Manish Rastogi
 Mrs. Manju Jha, Advocates
 For the Respondent/s : Mr. Vikash Kumar, J.C. to PAAG

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CORAM: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA

and

HONOURABLE MR. JUSTICE SUDHIR SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAMESH KUMAR DATTA)

Date: 14-12-2016

All the writ applications have been filed for quashing the different orders for different financial years passed by the assessing officer of the Commercial Taxes Department under Section 31 of the Bihar Value Added Tax Act, 2005 (in short 'the Act') as also the demand notices and the orders initiating the proceedings.

The cases, before us, fall into two categories. CWJC Nos. 5119/2015, 4845/2015, 4826/2015, 4994/2015, 4868/2015, 4709/2015, 3968/2015 and 3997/2015 are cases wherein original assessments under Section 31 or Section 33 of the Act had been framed earlier. The remaining eight writ petitions belong to the category where there was no previous assessment either under Sections 31 or Section 33 of the Act and they would be cases of deemed assessments under Section 26 thereof.

All the petitioners are registered dealers under the Act. The



petitioner Samsung India Electronics Pvt. Ltd. is engaged in the business of manufacture of consumers electronic IT and telecom products including mobile phones, electronic goods, home appliances etc. The other petitioners are dealers of, among other things, mobile phones. The petitioners had filed their returns for different assessment years.

The stand of the petitioners is that a composite pack of mobile phone along with mobile charger and other accessories is sold by them and the commodities mentioned therein are mobile phones and chargers are supplied with the mobile phones to charge the battery which are provided free of cost along with the mobile phones. No separate payment is made for the charger but only for the mobile phone. Accordingly, tax under the VAT Act is paid on the mobile phone at the rate specified for Entry 68 of Part 1 of Schedule-III read with Entry 14 of Part-II of the said Schedule which is exigible to a lower rate of tax. Where the petitioners sell the battery charger an independent tax is paid upon it for non-specified goods.

It is stated that out of 16 returns for different financial periods involved, in eight of them assessment/re-assessment has been made under Sections 31 or 33 of the Act and in the remaining also the returns having been duly filed and accepted, they would be deemed to have been assessed under Section 26 of the Act.

Recently, the Supreme Court by its judgment dated 17.12.2014



in the case of State of Punjab and others vs. Nokia India Ltd. held that the mobile/cell phone charger is an accessory to cell phone and is not a part of the cell phone and further held that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be separately sold and accordingly, set aside the impugned order of the Punjab and Haryana High Court and confirmed the order passed by the Tribunal. The respective assessing officers of the petitioners thereafter issued notices on 23.01.2015 to the petitioners, referring to the decision of the Supreme Court stating that the charger and other goods sold along with the mobile phone come in the non-specified category but the petitioners had included their price in the value of mobile hand-set and have been paying tax at the rate of 5% and, therefore, they were directed to produce details of the sales of hand-set for the last four years, i.e., for the financial year 2009-10 till date by 05.02.2015, on failure of which further action would be taken under the provisions of the Act. Thereafter the notice was issued under Section 31 of the Act. On 25.02.2015, the petitioners filed their reply to the said notice stating that they had duly discharged their tax liability under the Act on the mobile phone sold with battery. However, by the impugned orders dated 10.03.2015, 15.03.2015 and 21.03.2015, the plea of the petitioners was rejected and demand notices along with interest were issued. Aggrieved by the same, the petitioners have filed the present writ petitions.



Learned counsels for the petitioners contend that the intention of the petitioners is to sell and the customer is to buy the mobile phone which is a cell phone. The said phones are sold in a retail packaging which includes the battery, charger and other products. The package only carries big photos and model number of the mobile phone. Nothing is advertised on the cardboard box or the package that any other item, except the mobile phone is being sold to the customer.

It is further stated for the purpose of customs duty at the time of import the mobile phone package is assessed as a single unit, i.e., mobile phone under Tariff Heading of Schedule-1 of the Customs Tariff Act. It is submitted by learned counsel for the petitioners that the case of the petitioners does not come within the purview of the decision of the Supreme Court in the case of Nokia India (supra) where there was an admission of the fact that the company had made information available on the website putting the mobile charger in the category of accessories which meant that in the common parlance also the mobile battery charger is understood as an accessory. It is submitted that the petitioners neither admitted nor on their website there is any admission that the charger is an accessory. It is, thus, submitted that the decision of the Apex Court in the case of Nokia (supra) was not directly applicable to the case of the petitioners and could not be blindly applied as has been done by the assessing officer.

It is further urged that the principles of res judicata and



constructive res judicata do not apply and points not taken in earlier proceedings can be raised subsequently and therefore, since the petitioners were not parties in Nokia's case (supra), they cannot be stopped from raising points of fact and law not raised and considered by the Supreme Court in Nokia's case (supra).

In support of the same, learned counsel relies upon the decision of the Apex Court in the case of Bharat Sanchar Nigam Ltd. and another vs. Union of India and others: (2006) 3 SCC 1, in paragraph No. 22 of which it has been held as follows:-

“22. A decision can be set aside in the same lis on a prayer for review or an application for recall or under Article 32 in the peculiar circumstances mentioned in Hurra v. Hurra. As we have said, overruling of a decision takes place in a subsequent lis where the precedential value of the decision is called in question. No one can dispute that in our judicial system it is open to a court of superior jurisdiction or strength before which a decision of a Bench of lower strength is cited as an authority, to overrule it. This overruling would not operate to upset the binding nature of the decision on the parties to an earlier lis in that lis, for whom the principle of res judicata would continue to operate. But in tax cases relating to a subsequent year involving the same issue as an earlier year, the court can differ from the view expressed if the case is distinguishable or per in curiam. The decision in State of U.P. v. Union of India related to the year 1988. Admittedly, the present dispute relates to a subsequent period. Hence a coordinate Bench has referred the matter to a larger Bench. This Bench being of superior strength, we can, if we so find, declare



that the earlier decision does not represent the law. None of the decisions cited by the State of U.P. are authorities for the proposition that we cannot, in the circumstances of this case, do so. This preliminary objection of the State of U.P. is therefore rejected.”

It is urged that the power of re-assessment can be exercised, if the authority is in possession of any tangible material on the basis of which it has reason to believe that any sale or purchase of goods chargeable to tax has been under-assessed or has escaped assessment. Change of opinion cannot form a “reason to believe” and the judicially evolved safeguard to exercise of powers of re-assessment under the Income Tax Act, 1961 will equally apply to initiation of proceedings under Section 31 of the Bihar Value Added Tax Act, 2005.

In support of the same, learned counsel relies upon a decision of the Apex Court in the case of Commissioner of Income-tax, Delhi vs. Kelvinator of India Limited: (2010) 2 SCC 723, in paragraph Nos. 5 to 9 of which the law has been succinctly laid down in the following terms:-

“5. On going through the changes, quoted above, made to Section 147 of the Act, we find that, prior to the Direct Tax Laws (Amendment) Act, 1987 reopening could be done under the above two conditions and fulfillment of the said conditions alone conferred jurisdiction on the assessing officer to make a back assessment, but in Section 147 of the Act (with effect from 1-4-1989), they are given a go-by and only one condition has



remained viz. that where the assessing officer has reason to believe that income has escaped assessment, confers jurisdiction to reopen the assessment. Therefore, post-1-4-1989, power to reopen is much wider. However, one needs to give a schematic interpretation to the words “reason to believe” failing which, we are afraid, Section 147 would give arbitrary powers to the assessing officer to reopen assessments on the basis of “mere change of opinion”, which cannot be per se reason to reopen.

6. We must also keep in mind the conceptual difference between power to review and power to reassess. The assessing officer has no power to review; he has the power to reassess. But reassessment has to be based on fulfillment of certain precondition and if the concept of “change of opinion” is removed, as contended on behalf of the Department, then, in the garb of reopening the assessment, review would take place.

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



Parliament reintroduced the said expression and deleted the word “opinion” on the ground that it would vest arbitrary powers in the assessing officer.

8. We quote hereinbelow the relevant portion of Circular No.549 dated 31.10.1989, which reads as follows:

“7.2 Amendment made by the Amending Act, 1989, to reintroduce the expression ‘reason to believe’ in Section 147- A number of representations were received against the omission of the words ‘reason to believe’ from Section 147 and their substitution by the ‘opinion’ of the Assessing Officer. It was pointed out that the meaning of the expression, ‘reason to believe’ had been explained in a number of court rulings in the past and was well settled and its omission from Section 147 would give arbitrary powers to the Assessing Officer to reopen past assessments on mere change of opinion. To allay these fears, the Amending Act, 1989, has again amended Section 147 to reintroduce the expression ‘has reason to believe’ in the place of the words ‘for reasons to be recorded by him in writing, is of the opinion’. Other provisions of the new Section 147, however, remain the same.

9. For the aforesaid reasons, we see no merit in these civil appeals filed by the Department, hence, dismissed with no order as to costs.”

Reference is also made to three decisions of the Apex Court and a decision of the Rajasthan High Court to the same effect, i.e., in the case of Mepco Industries Limited, Madurai vs. Commissioner of Income Tax and



another: (2009) 319 ITR 208 (SC), Mukesh Modi vs. Deputy Commissioner of Income-Tax, Central-1, Jodhpur: (2014) 45 Tax Man 468 (Rajasthan) and Binani Industries Limited, Kerala vs. Assistant Commissioner of Commercial Taxes, VI Circle, Bangalore and others: (2007) 15 SCC 435.

Reliance has also been placed on the decision of a Division Bench of this Court in the case of Bhimraj Madan Lal vs. The State of Bihar and another: (1985) 58 STC 119 (Pat), in paragraph No.18 of which with reference to similar provisions of the Bihar Finance Act, 1981 under Section 18 of the Act, it has been held as follows:-

“18. The condition precedent for reopening a case under Section 18 (1) of the Act are these:

“(1) That there must be an information either from external source or from the record which has come into possession of the sales tax authority subsequent to the assessment order; and

(2) That the sales tax authority is satisfied that reasonable grounds exist to believe that any turnover of a registered dealer has escaped assessment.”

In furtherance of the above, learned counsel further submits that the assessment proceedings on the basis of subsequent decision/ruling would amount to change of opinion and cannot be a ground for reopening the proceedings.

Reliance in this regard is placed on a decision of the Supreme Court in the case of Deputy Commissioner of Income-tax vs. Simplex Concrete Piles (India) Ltd.: (2012) 25 taxman 283(S.C.), in paragraph No.3 of which it has been held as follows:-



“3. We see no error in the observation made by the Division Bench of the High Court in the impugned judgment that once limitation period of four years provided under Section 147/149 (IA) of the Income Tax Act, 1961, (for short ‘the Act’) expires then the question of re-opening by the Department does not arise. In any event, at the relevant time, when the assessment order got completed, the law as declared by the jurisdictional High Court, was that the civil construction work carried out by the assessee would be entitled to the benefit of Section 80HH of the Act, which view was squarely reversed in the case of CIT.v. N.C. Budharaja & Co. [1993] 204 ITR 412/70 Taxman 312 (SC). The subsequent reversal of the legal position by the judgment of the Supreme Court does not authorize the Department to re-open the assessment, which stood closed on the basis of the law, as it stood at the relevant time.”

Reliance has also been placed upon a decision of the Punjab and Haryana High Court in the case of Mitsubishi Electric Automotive India (P) Ltd. v. Union of India: (2015) 57 taxman 240 (Punjab & Haryana), in paragraph Nos. 3, 4, 12 and 13 of which it has been observed as follows:-

“3. At the petitioner’s request the reasons for initiating the proceedings under Section 147 were furnished. The relevant reasons read as under:

“The case was finalized under section 143 (3) of the Income Tax Act, 1961 vide order dated 20.11.2009 at an income of Rs.172794009/-. It is noticed from the P & L Account that the assessee is making payment of royalty at Rs.8741302/- for technology transfer and patent licence. The assessee has claimed the entire payment as revenue expenditure. In view of the judgment of



the Hon'ble Supreme Court in the case of M/s. Southern Switch Gears (232 ITR 359) either the full amount or a part of the royalty amount is to be treated as capital expenditure. This has resulted in under assessment of the income to the extent of Rs.8741302/- which will be treated as capital expenditure. The assessee has submitted details of sundry creditors as on 31.03.2006. One of the items of the sundry creditors is 'accrued exchange profit' which has been shown as a negative amount at Rs. 1145902/-. No explanation of the assessee is available on record with regard to the nature of this credit amount. Prima facie it appears to be under assessment of income as the assessee company itself is mentioning it as exchange profit."

4. This is clear case of the notice having been issued only on a change of opinion or rather a difference of opinion. The entire facts pertaining to the issue had been disclosed on each and every stage of the proceedings. Indeed the material in this regard was sought by the Transfer Pricing Officer (TPO) as well as by the Assessing Officer (A.O.). The relevant material was furnished by the petitioner. The assessment order was clearly passed after taking the same into consideration. The following facts establish the same.

12. It is established, therefore, that the Assessing Officer and Transfer Pricing Officer were not only aware of the payment of Royalty but had taken the same into consideration at every stage. The Assessing Officer in fact expressly called for the said information. It cannot be held, therefore, that the Assessing Officer was not aware of the "Royalty" and had not taken the same into consideration



before passing the assessment order under Section 143 of the Act. It is also important to note that proceedings had been initiated under Section 154 of the Act by the issuance of a notice dated 24.3.2011. However, the same were dropped holding that it was a debatable issue which would be apparent from the affidavit filed by D.C.I.T. Dated 20.11.2014 in the present case.

13. The impugned notice under Sections 147 and 148, therefore, are clearly based only on change of opinion which is not permissible.”

Learned counsel also relies upon similar proposition as laid down by different High Courts in the case of Sesa Goa Ltd. vs. Joint Commissioner of Income-tax : (2007) 294 ITR 101 (Bombay), Commissioner of Income-Tax v. Baer Shoes (India) Pvt. Ltd.: (2011) 331 ITR 435 (Mad), Austin Engineering Co. Ltd. vs. Joint Commissioner of Income-Tax: (2009) 312 ITR 70 (Guj), Commissioner of Income-Tax vs. Nedungadi Bank Ltd.: (2003) 264 ITR 545 (Kerala), Geo Miller & Co. Ltd. vs. Deputy Commissioner of Income-tax: (2003) 134 Taxman 552 (Calcutta).

It is contended that the judgment is an authority only for what it decides and not what can be deduced therefrom and, therefore, the judgment in Nokia India's case (supra) cannot be applied to the facts of the present case.

Learned counsel further submits that the petitioner had filed its return and paid tax on battery chargers as per the correct



understanding of law as it existed on that date and Section 31 of the Act cannot be invoked in absence of concealment, omission or failure to disclose full and correct particulars of any sale made with an intent to evade payment of tax.

It is also contended by learned counsel that best judgment can only be resorted to in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of sale and in absence of such allegation, arbitrary values could not have been assigned to the battery chargers for which no separate consideration is being charged by the petitioner.

Learned counsel for the State, on the other hand, submits that the present matters are squarely covered by the decision of the Apex Court in the case of State of Punjab & Ors. vs. Nokia India Pvt. Ltd.: Civil Appeal Nos. 11486-11487 of 2014, in which the law has been succinctly laid down in paragraph No.19 in the following terms:-

“19. In view of the aforesaid facts, we find that the Assessing Authority, Appellate Authority and the Tribunal rightly held that the mobile/cell phone charger is an accessory to cell phone and is not a part of the cell phone. We further hold that the battery charger cannot be held to be a composite part of the cell phone but is an independent product which can be sold separately, without selling the cell phone. The High Court failed to appreciate the aforesaid fact and wrongly held that the battery charger is a part of the cell phone.”



It is further submitted that the case of the present petitioners is identical to that of Nokia (supra), and thus the same result would follow.

With regard to the submission of change of opinion, it is urged by learned counsel that in the light of the judgment of the Supreme Court in the case of Nokia (supra) a detailed perusal of the returns of the petitioners both quarterly/annual were made and the same revealed that VAT on the entire sales had been paid at the rate of 4% and accordingly a notice was issued to the dealer to provide sale details of mobile for the said five years 2009-10 to 2014-15 and on the basis of the sale details submitted by the dealer it was evident that the goods had been assessed/deemed to be assessed to tax at a lower rate and accordingly after examination, proceedings of assessment/re-assessment under Section 31 of the Act were initiated.

It is further submitted that the law declared by the Supreme Court under Article 141 of the Constitution shall be binding on all courts within the territory of India and therefore, the submission of the petitioner in this regard has no substance with regard to the question of repeated re-assessment. It is submitted that on the basis of Section 31 (1) of the Act, reassessment can be initiated if reasonable grounds exist to believe that the petitioners have been assessed to tax at a lower rate and they did exist as per the reasons recorded in Nokia's case (supra) and it cannot be said that Section 31 of the Act or any



other Section of the Act prohibits re-assessment of the dealer on the ground that it was subjected to re-assessment on earlier occasion. It is also submitted by learned counsel for the State that even the review petition filed by learned counsel for the Nokia has been dismissed by the Apex Court on 27.08.2015.

Learned counsel further submits that the petitioners have statutory alternative remedy available to them under the provisions of the Act and in the said circumstances the writ applications ought not to be entertained.

In support of his different propositions, learned counsel relies upon a decision of the Rajasthan High Court in the case of Chandi Ram vs. Income Officer and another dated 22.12.1995, in paragraph Nos. 16 and 17 of which it has been held as follows:-

“16. The Income-tax Officer would be free to take the proceedings in accordance with law. It may also be observed that the initial assessment in this case was made under Section 143 (1) and not under Section 143 (3) of the Income-tax Act, and, therefore, the contention of learned counsel for the petitioner that the proceedings of reassessment are based on change of opinion has no force.

17. The jurisdiction under Article 226 of the Constitution while examining the validity of the notice issued under Section 148 is very limited. The court has to see as to whether the notice issued by the taxing authorities is on the basis of the reasons which have been recorded by them. If the reasons are in existence then sufficiency thereof even could not be examined. The assessee was informed



vide letter dated June, 14, 1991, that the investment allowance is admissible only on machinery and plant used in the business of manufacture, production or construction of any article or thing which could not have been claimed in the return submitted by the assessee. Even if it is considered that at the time when the notice under Section 148 was issued, the judgment of the apex court was not pronounced, it will not make any difference because the Apex court only interprets the law as stated above and, therefore, the legal position as explained by the apex court has to be considered as always in existence. Besides this, it was also informed to the assessee that the investment allowance reserve made in the assessment year 1987-88 has been transferred to the capital account of the assessee in the assessment year 1988-89 and in accordance with the provisions of Section 155 (4) of the Income-tax Act and the same has to be added because the reserve could have been utilized for the specified purpose after the expiry of 10 years. The basis which was taken by the Income-tax Officer for assuming the jurisdiction under Section 148, therefore, is well founded. The initiation of proceedings cannot be termed without jurisdiction. The assessee has always a remedy of filing an appeal and the Act has provided efficacious machinery. The existence of reasons, a copy of which has already been provided to the petitioner are sufficient for invoking the jurisdiction for reassessment.”

Learned counsel further relies upon Full Bench judgment of this Court in the case of Bhimraj Madanlal v. The State of Bihar and another (1984) 56 STC 273 Patna, in paragraph No.19 of which it has been held as follows:-



“19. To finally conclude-

(i) The answer to the question posted at the very outset is rendered in the negative and it is held that “information” envisaged by Section 18 (1) of the Act for purposes of reassessment need not necessarily spring from a source external or extraneous to the original record.

(ii) That having second thoughts or a mere change of opinion by the prescribed authority on the same set of facts and materials on the record would not constitute “information” under Section 18 (1) of the Act for the purposes of reassessment.

(iii) That with deference *Satya Narainji Mills v. State of Bihar* (CWJC No.1400 of 1973 decided on 13th August, 1976-Patna High Court) does not lay down the law correctly and is hereby overruled.”

On the strength of the aforesaid decision, it is submitted by learned counsel that the law declared by the Supreme Court must be treated as an external source of information and it is not a mere change of opinion on the same.

Learned counsel also relies upon the decision of the Apex Court in the case of *Bharat Sanchar Nigam Ltd.* (supra) relying upon paragraph Nos. 12 and 15 of the said judgment, which are as follows:-

“12. After considering various earlier authorities on the issue, it was held that : (SCR p.188)

“If, for instance, the validity of a taxing statute is impeached by an assessee who is called upon to pay a tax for a particular year and the matter is



taken to the High Court or brought before this Court and it is held that the taxing statute is valid, it may not be easy to hold that the decision on this basic and material issue would not operate as res judicata against the assessee for a subsequent year. That, however, is a matter on which it is unnecessary for us to pronounce a definite opinion in the present case. In this connection, it would be relevant to add that even if a direct decision of this Court on a point of law does not operate as res judicata in a dispute for a subsequent year, such a decision would, under Article 141, have a binding effect not only on the parties to it, but also on all courts in India as a precedent in which the law is declared by this Court. The question about the applicability of res judicata to such a decision would thus be a matter of merely academic significance.”

15. The question in *Radhasoami Satsang v CIT* (also cited by the State of U.P.) was whether the Tribunal was bound by an earlier decision in respect of an earlier assessment year that the income derived by the *Radhasoami Satsang*, a religious institution, was entitled to exemption under Section 11 and 12 of the Income-tax Act, 1961. The Court said: (SCC p.666, paras 16-17).

“We are aware of the fact that strictly speaking res judicata does not apply to income-tax proceedings. Again, each assessment year being a unit, what is decided in one year may not apply in the following year but where a fundamental aspect permeating through the different assessment years has been found as a fact one way or the other and parties have allowed that position to be sustained by not challenging the order, it would not be at all appropriate to allow the position to be changed in a subsequent year, unless there was any material change justifying



the Revenue to take a different view of the matter.”

We have considered the submissions of learned counsels for the parties.

It would be useful to quote Section 31 of the Bihar VAT Act which is in the following terms:-

“31. Assessment or re-assessment of tax of escaped turnover- (1) If the prescribed authority is satisfied, either on the basis of audit conducted under sub-section (3) of Section 26 or otherwise, that reasonable ground exist to believe that, in respect of any assessment under this Act or under the Bihar Finance Act, 1981, (Bihar 5 of 1981) as it stood before its repeal by section 94, during any period, any sale or purchases of goods liable to tax under this Act or the said Act, for any reason, has been under-assessed or has escaped assessment, or has been assessed to tax at a lower rate, or any deduction therefrom has been wrongly made, or an input tax credit has incorrectly been claimed, the prescribed authority shall, in such manner as may be prescribed and after serving on the dealer a notice in the form and in the manner prescribed, proceed to assess or re-assess, as the case may be, the tax payable by such dealer within four years from the expiry of the year during which the original order of assessment or re-assessment was passed, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase of input tax credit, and the provisions of this Act shall, so far as may be, apply accordingly as if the notice under this sub-section was a notice under Section 27.

Provided that the amount of tax shall



be assessed or re-assessed after allowing such deductions as were allowable during the said period and at the rates at which it would have been assessed had the turnover not escaped assessment.

(2) (a) The prescribed authority shall, in a case where the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, direct that the dealer shall, besides the amount of interest payable under sub-section (10) of Section 24, pay by way of penalty, sum equal to three times the amount of tax which is or may be assessed on the turnover of sale or purchase which escaped assessment.

(b) The penalty imposed under clause (a) shall be in addition to the amount of tax, which is or may be assessed on the turnover of sale or purchase which escaped assessment.

(c) No order shall be passed under this sub-section without giving the dealer a reasonable opportunity of being heard.

(3) Any assessment or re-assessment made and any penalty imposed under this section shall be without prejudice to any action, which is or may be taken under section 81.”

It is evident from the aforesaid provisions that sub-section (1) of Section 31 although not very happily worded, but is on the same lines as the earlier provisions of the Income-tax Act, 1961 prior to its amendment in 1987. Taking into account the said Section as a whole including sub-section (2), it is evident that two types of cases are envisaged therein; in both type of cases the prescribed authority must be satisfied that reasonable grounds exist to believe that there has



been under assessment or escaped assessment or assessment to tax at a lower rate or any deduction has been wrongly made therein or an input tax credit has been wrongly claimed, in which cases within the statutory period of four years it can make an assessment or reassessment of the tax payable by such dealer. In the first category, such reassessment can be made irrespective of whether the dealer has concealed, omitted or failed to disclose full and correct particulars of such sale or purchase or input tax credit, whereas in the second category there has been such a failure to disclose on the part of the dealer. The same would flow from the harmonious reading of the provisions of sub-section (1) with sub-section (2) of Section 31 of the Act, which obliges the prescribed authority in the second category of cases to impose by way of penalty the sum equal to three times of the amount of tax which is or may be assessed on the turnover of sale or purchase which escaped assessment, whereas in the first category there would be a mere reassessment of the under-assessed or escaped tax, etc.

In the present matter, it is not in dispute at all that there has been no concealment, omission or failure to disclose full and correct particulars by the petitioners. Thus, the only issue is as to whether the assessing officer was justified in making reassessment under Section 31 of the Act with regard to the periods in issue. As stated earlier, the provisions of the Act are on similar lines as the unamended provisions



of Section 147 of the Income Tax Act and that they provide for two categories of cases; but even the provisions of Section 147 of the Income-tax Act amended in the year 1989 make it clear that there must be reason to believe that there has been under-assessment or escaped assessment, etc. and as has been held in the case of *Kelvinator* (supra) by the Apex Court, it should not be a mere change of opinion, otherwise it would amount to arbitrary exercise of power by the assessing officer to reopen the assessment. The said law emphatically laid down by the Supreme Court in *Kelvinator's* case (supra) is squarely applicable in the present matter also and it has to be held that reassessment cannot be made on a mere change of opinion.

The next question is whether the decision of the Supreme Court subsequent to the assessments can be considered a mere change of opinion. The law on this point is also very much clear, as held in the several decisions cited including that of *Simplex Concrete* case (supra), a subsequent reversal of legal position by the judgment of the Supreme Court does not authorize the Department to reopen the assessment which stood closed on the basis of law at the relevant time.

It is evident that in the first category of 8 writ petitions assessment/reassessment had been made earlier under the provisions of Section 31 and/or Section 33 of the Act. It is also evident from the



notice issued under Section 31 of the Act that the sole reason for initiation of proceedings under Section 31 of the Act is the decision of the Supreme Court in the case of Nokia India (supra). There was no other material which has come into the possession of the Department which was already not known to it. The fact that there had been earlier assessment/reassessment under Section 31 or Section 33 of the Act goes to show that any further issuance of notice under Section 31 of the Act in such matters without anything more, except the decision of the Supreme Court in Nokia's case (supra) would, on the same materials, amount to a mere change of opinion by the prescribed authority in the matter. Thus, any action on the said basis would clearly be without jurisdiction and therefore without authority of law.

That being the position, the plea of alternative statutory remedy would also not come to the rescue of the respondents as in such matters, the Writ Court normally interferes by exercising its power under its extraordinary writ jurisdiction. The law on this point is well settled in the case of Whirlpool Corporation vs. Registrar of Trade Marks, Mumbai and others : (1998) 8 SCC1 and several other decisions.

So far as the remaining eight matters are concerned, admittedly they are cases of deemed assessments on the basis of the provisions of Section 26 of the Act or assessment under Section 27. No doubt under Section 25 of the Act, the prescribed authority is required to look into



and scrutinize the return filed under Section 24 (1) and (3) of the Act but that is not the same thing as making a proper assessment. If the assessing authority had no occasion to form an opinion during the course of such deemed assessment of the returns filed by the petitioner, and subsequently a notice was issued under Section 31 (1) of the Act, or assessment made under Section 27, albeit on the ground of decision rendered by the Supreme Court, it could not be said that there has been any change of opinion. For the said reason, I am of the view that so far as the remaining eight cases are concerned, the plea of the petitioners regarding change of opinion is not applicable.

That being the position, considering the fact that various issues of facts, etc. will have to be dealt with before the question of liability can be decided, the writ jurisdiction does not appear to be a proper one to deal with such issues of fact which must be thrashed before the statutory authorities up to the Tribunal.

For the aforesaid reasons, no interference is called for in such cases where that has been no previous assessment/reassessment under Section 31 or Section 33 of the Act.

In the light of the aforesaid observations, C.W.J.C. Nos. 3968/2015, 3997/2015, 4994/2015, 4868/2015, 4709/2015, 5119/2015, 4845/2015 and 4826/2015 are allowed and the impugned orders and demand notices as also the proceedings initiated under Section 31/33 of the Act are quashed.



C.W.J.C. No.3942/2015, 3953/2015, 8886/2016, 4988/2015, 5227/2015, 4020/2015, 4825/2015 and 4963/2015 are dismissed on the ground of availability of alternative statutory remedy to the petitioners.

However, it is made clear that upon the petitioners filing statutory appeal before the competent authority within a period of four weeks from today along with applications for condonation of delay, including stay petition then the appellate authority shall consider the same keeping in view the fact that the petitioners have been pursuing their remedies before this Court. It is further directed that until the disposal of the stay petitions, if filed, no coercive action shall be taken against the petitioners in the said cases.

(Ramesh Kumar Datta, J)

Sudhir Singh, J. I agree.

(Sudhir Singh, J)

V.P.Sinha/-

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