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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **W.P.(C) 8994/2014 & CM 20547/2014**

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

WITH

+ **W.P.(C) 9014/2014 & CM 20601/2014**

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

WITH

+ **W.P.(C) 9015/2014 & CM 20603/2014**

SABHARWAL APARTMENTS PVT. LTD. Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh

and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+

W.P.(C) 9386/2014 & CM 21216/2014

SABHARWAL APARTMENTS PVT. LTD.

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+

W.P.(C) 9387/2014 & CM 21218/2014

SABHARWAL APARTMENTS PVT. LTD.

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+

W.P.(C) 9388/2014 & CM 21220/2014

SABHARWAL APARTMENTS PVT. LTD.

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+

W.P.(C) 9430/2014 & CM 21298/2014

SABHARWAL APARTMENTS PVT. LTD.

..... Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+ **W.P.(C) 135/2015 & CM 205/2015**

SABHARWAL APARTMENTS PVT. LTD. Petitioner

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER Respondent

Through: Mr. Zoheb Hossain, Junior Standing
Counsel for Mr. Dileep Shivpuri, Senior
Standing Counsel.

WITH

+ **W.P.(C) 823/2015 & CM 1432/2015**

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

WITH

+ **W.P.(C) 824/2015 & CM 1434/2015**

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

WITH

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W.P.(C) 825/2015 & CM 1436/2015

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

AND

+

W.P.(C) 826/2015 & CM 1438/2015

SABHARWAL PROPERTIES INDUSTRIES PVT. LTD. Petitioners

Through: Mr. Salil Kapoor, Mr. Sanat Kapoor,
Ms. Ananya Kapoor, Mr. Arun Vir Singh
and Mr. Sumit Lal Chandani, Advocates.

versus

INCOME TAX OFFICER

..... Respondent

Through: Mr. Rahul Chaudhary, Senior Standing
Counsel.

CORAM:

JUSTICE S.MURALIDHAR

JUSTICE VIBHU BAKHRU

ORDER

18.02.2016

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Dr. S. Muralidhar, J.:

1. These are two sets of writ petitions filed by Sabharwal Apartments Private Limited ('SAPL') and Sabharwal Properties Industries Private Limited ('SPIPL') challenging the notices issued to each of them under Section 148 of the Income Tax Act, 1961 ('the Act') on 28th March, 2014 in respect of Assessment Years (AYs) 2007-2008 to 2012-2013.

2. While directing issuance of notice in the writ petitions on 7th January, 2015, this court directed that no further steps shall be taken pursuant to the aforementioned notices. Further, by order dated 13th August 2015, the Court directed that W.P.(C) No.9386/2014, which pertains to the AY 2007-2008, shall be treated as the lead matter. A counter affidavit has been filed by the Respondent in the said writ petition.

3. For each of the above AYs, the returns filed by the two Assesseees were processed under Section 143(1) of the Act. Only in respect of AY 2009-2010, the return filed by SAPL on 29th September, 2009 was picked up for

scrutiny and an assessment order passed under Section 143(3) of the Act.

4. The broad grounds of challenge to the reopening of the assessments is that in respect of AY 2007-2008 and 2008-2009 pertaining to SAPL, the notices were beyond the period of four years after the end of the AY in which the return was filed; in respect of SPIPL barring the notices for AYs 2010-2011 and 2011-2012, none of the other notices were served on SPIPL; for AY 2007-2008, the notice issued to SPIPL was beyond four years. However, the main ground of challenge is that the reasons recorded for reopening the assessments under Section 148 of the Act are ambiguous and incapable of being understood. In particular it is contended that the reasons recorded by the Assessing Officer ('AO') "lacks clarity and it is practically impossible to derive meaning out of it and is incapable of being understood." It is further contended that the Additional Commissioner of Income Tax ('Additional CIT') had accorded an approval to the said reasons without application of mind.

5. The reasons for reopening the case as recorded for the AY 2007-2008 in respect of SAPL, on the basis of which notice was issued, are the reasons for reopening of the cases in respect of SPIPL as well and it is the same set of reasons for all the six AYs, i.e., 2007-2008 to 2012-2013.

6. Since the main ground of challenge is regarding the lack of clarity of the reasons recorded, it is necessary to set out the reasons as under:

"The Proposal in the prescribed format in the above mentioned cases for the issuing notices U/S 148 of the I.T. Act for reopening the cases

for the A.Y. 2007-08 to 2012-13.

In this case a survey operation U/S 133A has been conducted by the Investigation Wing, New Delhi on 12.12.2013. During the course of survey conducted at the premises of the assessee company M/s Sabharwal Apartment Pvt. Ltd (SAPL) & Sabharwal Properties Ind. Pvt. Ltd. (SPIPL) were alleged to have shown unsecured loans of Rs.9.65 crore during F.Y. 2010-11 (A.Y. 2011-12) M/s Mahima Distributors Pvt. Ltd. (MDPL) Kolkata which was acquired by purchase of shares by four company was more than Rs.9 crores but purchased for Rs. 37 lacs while other companies who acquired shares in the same company had paid huge premium over and above the par value of Rs.10/- per share of (MDPL) in F.Y. 2006-07(A.Y. 2007-08). The issue is being investigated by Investigation Wing, Kolkata for verifying the receipt of share premium by MDPL and report awaited.

Further computation of long term capital gain by persons/owner of properties developed by Sabharwal group through SAPL & SPIPL & investigation are in progress conducted by the Investigation Wing. The unsecured loans obtained by MDPL & other share holders sold their shares at par value of Rs, 10 taken over by Sabharwal Apartment Pvt. Ltd. (SAPL) & Sabharwal Properties Industries Pvt. Ltd. (SPIPL) remain unexplained credits u/s 68 of I.T. Act.

During A.Y. 2011-11 share premium & share applicable money received in A.Y. 2008-09 by SPIPL is Rs.50 lac & in A. Y. 2009-10 75 lac. SAPL Rs. 50 lac in A.Y. 2009-10 for verification of transaction and existence of companies or merely providing book entries and commission issued to DDIT Kolkata & report awaited.

The loans received by M/s. SAPL and M/s. SPIPL in AY 11-12 before the takeover of company M/s. MDPL remains unexplained as under. –

M/s Sabharwal Properties Industries Pvt. Ltd. (SPIPL)	Rs.5244306/-
M/s Sabharwal Apartment Pvt. Ltd. (SAPL)	Rs.5345082/-

The source and genuineness of share application money and share premium received for the A.Y. 2010-11 has to be examined.

M/s Sabharwal Properties Industries
Pvt. Ltd. (SPIPL)

Rs.12500000/-

M/s Sabharwal Apartments Industries
Pvt. Ltd. (SAPL)

Rs. 5000000/-”

7. In respect of the above reasons, objections were filed by both the Assesseees for each of the AYs on 20th October, 2014 and the objections were rejected by the orders dated 24th October 2014 passed by the Income Tax Officer Ward-7(1), New Delhi. These orders have also been challenged in the present writ petitions.

8. With the help of the learned counsel for the Revenue, the Court has tried to decipher the reasons recorded for reopening since a plain reading of it reveals that the reasons are totally incoherent. In fact, a plain reading of it gives rise to doubts whether some lines have gone missing or some punctuation marks have been left out. Grammatically also the reasons recorded make little sense. However, this is the least of the problems. Essentially, the reasons recorded do not indicate what the basis for the reopening of the assessments is.

9. Under Section 147 (1) of the Act, the reasons recorded for reopening an assessment should state that the Assessee had failed to disclose fully and truly all the material facts necessary for his assessment in the returns as originally filed and the reasons recorded should provide a live link to the formation of the belief that income has escaped assessment. To recapitulate

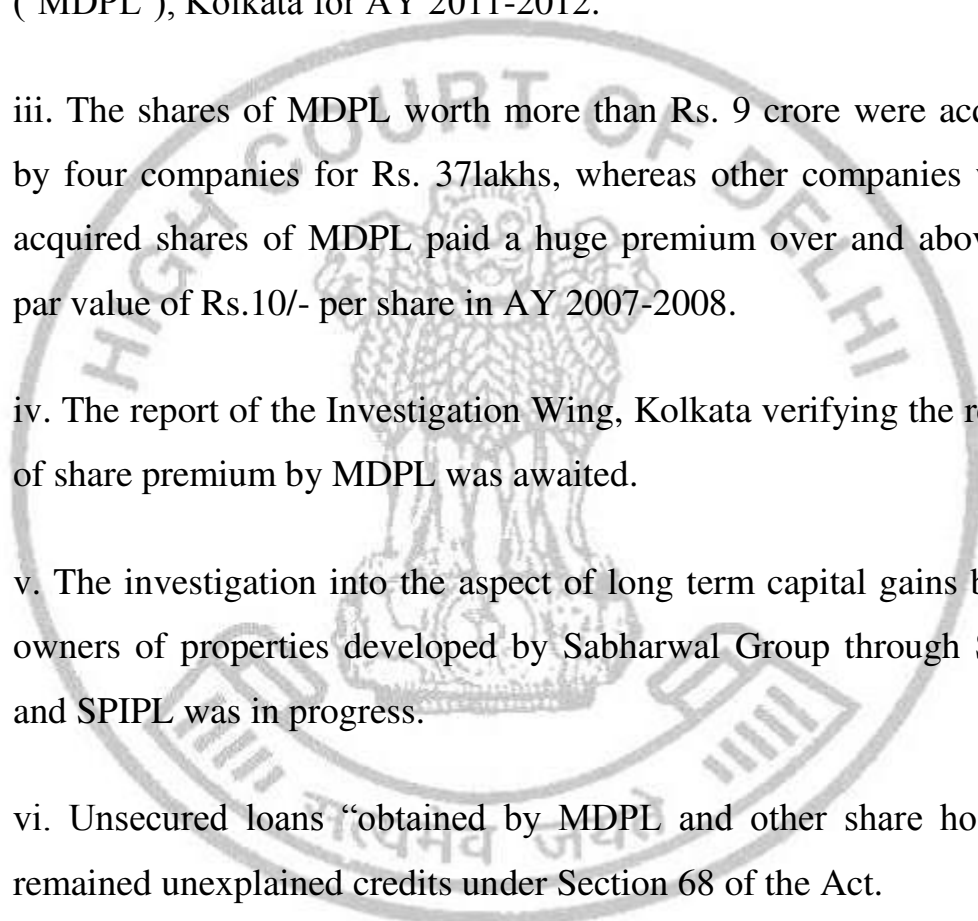
the law on this aspect as explained in ***Madhukar Khosla v. Assistant Commissioner of Income Tax (2014) 367 ITR 165 (Del)***:

“the foundation of the AO’s jurisdiction and the *raison d’etre* of a reassessment notice are the “reasons to believe”. Now this should have a relation or a link with an objective fact, in the form of information or facts external to the materials on the record. Such external facts or material constitute the driver, or the key which enables the authority to legitimately re-open the completed assessment. In absence of this objective ‘trigger’, the AO does not possess jurisdiction to reopen the assessment.” There has to be a definite recording in the reasons that there was an escapement of income as a result of failure on the part of the Assessee to disclose fully and truly all the material facts necessary.”

10. In ***CIT v. Kelvinator of India Ltd. (2010) 320 ITR 561 (SC)***, the Supreme Court reiterated that, under Section 147 of the Act, the AO does not have the power to reopen an assessment on the basis of ‘mere change of opinion’. It observed:

“....the Assessing Officer has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfilment of certain pre-condition and if the concept of ‘change of opinion’ is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. 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 1st April, 1989, Assessing Officer has power to re-open, 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.”

11. Turning to the case on hand, the Court has been able to decipher, with the assistance of the learned counsel for the Revenue, the reasons as stated for reopening the assessments to be as under:

- 
- i. A survey operation under Section 133A was conducted by the Investigation Wing, New Delhi on 12th December, 2013 in the premises of SAPL and SPIPL.
 - ii. Both SAPL and SPIPL showed unsecured loans of Rs. 9.65 crore having been borrowed from Mahima Distributors Private Limited ('MDPL'), Kolkata for AY 2011-2012.
 - iii. The shares of MDPL worth more than Rs. 9 crore were acquired by four companies for Rs. 37lakhs, whereas other companies which acquired shares of MDPL paid a huge premium over and above the par value of Rs.10/- per share in AY 2007-2008.
 - iv. The report of the Investigation Wing, Kolkata verifying the receipt of share premium by MDPL was awaited.
 - v. The investigation into the aspect of long term capital gains by the owners of properties developed by Sabharwal Group through SAPL and SPIPL was in progress.
 - vi. Unsecured loans "obtained by MDPL and other share holders" remained unexplained credits under Section 68 of the Act.
 - vii. The loans received by SAPL and SPIPL in 2011-2012 before takeover of MDPL remained unexplained.

12. The facts relating to all the six AYs appear to be jumbled up. That apart, the unnumbered paras 3 and 4 of the reasons extracted hereinbefore do not

make any grammatical sense whatsoever.

13. In an attempt to salvage the situation, learned counsel for the Revenue drew attention to paras 2 to 4 and 8 of the order dated 24th October 2014 rejecting the Petitioners' objections which read thus:

“2. The transactions pertaining to the loans and share application money revealed during the course of survey proceedings are interlinked and cannot be separated, hence, all the assessment proceedings pertaining to six assessment years permitted to be re-opened under the provisions of the Act, has been re-opened. The action is very much permitted under the provisions of the Act.

3. It is not true to state that there is no alleged escapement of income for the year under consideration. The assessee purchased a company M/s Mahima Distributors Pvt. Ltd., Kolkata for Rs.37 lac though the investment of this company was 9 crore. Not so much, the other companies purchased the shares of this company during F.Y. 2006-07 relevant to A.Y. 2007-08 after payment of huge premium. This company was found bogus and was only operation on paper and no actual transactions were going on as per the statement of the Director of M/s. MDPL recorded by the Investigation Wing, Kolkata.

4. There is a clear mentioned in the reasons that the escapement of income is more than Rs.1 lac and therefore, the permission has been sought from Addl. CIT Range 7 u/s 151(2) which was granted.

.....

8. As already stated that the transactions of all the years re-opened are inter-linked and sufficient material is available on record to show that the income escaped in every year is more than. DIT (Investigation) Kolkata has recorded the statement of various persons who has made transactions with MDPL and all are found on enquiry as bogus. Their statements are available on record."

14. The following reasons which find place in the above orders dated 24th October 2014, do not find any mention in the original reasons recorded for

reopening the assessment:

- i. The **Assessee**s purchased a company, MDPL, for Rs. 37 lakh though the investment of the company was Rs. 9 crore.
- ii. MDPL was found to be bogus and there was no actual transaction involving it.
- iii. There was a statement of the Director of MDPL to the above effect recorded by the Investigation Wing, Kolkata.
- iv. The escapement of income was more than Rs. 1 lakh.
- v. The 'various persons' who had transactions with MDPL were also bogus.

15. Further, in the counter affidavit filed by the Respondent, the above reasons adduced for the first time in the order rejecting the objections have been sought to be reiterated.

16. It is well settled that the reasons recorded for reopening the assessment have to speak for themselves. They have to spell out that (i) there was a failure of the Assessee to disclose fully and truly all the material facts necessary for the assessment and (ii) the reasons must provide a live link to the formation of the belief that income had escaped assessment. These reasons cannot be supplied subsequent to the recording of such reasons either in the form of an order rejecting the objections or an affidavit filed by

the Revenue. In this context, the decision of this Court in *Northern Exim (P) Ltd. v. DCIT [2013] 357 ITR 586 (Del)* is instructive. Para 14 of the said decision reads as under:

“14. The learned Standing Counsel for the Income Tax Department drew our attention to the entry made on 22.01.2001 in the proceedings sheet recorded in the course of the re-assessment proceedings. We have already seen that the said entry records that the authorised representative of the petitioner was asked to show cause why the difference in the amount of profit before tax and the amount declared under the VDIS cannot be treated as its income for the assessment year 1997-98 as no return of income had been filed. The entry made in the proceeding sheet is perhaps more elaborate and informative than the reasons recorded under Section 148(2) in the sense that it also states one more reason for initiating re- assessment proceedings, namely, that there is a difference between the profit before tax (Rs.42,79,340/-) and the amount declared in the VDIS (Rs.7,23,490/). The reasons recorded however are not so explicit and do not refer to this fact. We are to be guided only by the reasons recorded for re-assessment and not by the reasons or explanation given by the Assessing Officer at a later stage in respect of the notice of re-assessment.

The ratio laid down in all these cases is that, having regard to the entire scheme and purpose of the Act, the validity of the assumption of jurisdiction under Section 147 can be tested only by reference to the reasons recorded under Section 148(2) of the Act and the Assessing Officer is not authorised to refer to any other reason even if it can be otherwise inferred and/ or gathered from the records. He is confined to the recorded reasons to support the assumption of jurisdiction. He cannot record only some of the reasons and keep the others up his sleeves to be disclosed before the Court if his action is ever challenged in a Court of law.”

17. Even otherwise even the above reasons given subsequently do not satisfy the jurisdictional requirements of Section 147 (1) of the Act inasmuch as

they do not indicate that there was a failure by the Assessee to disclose fully and truly all the material facts necessary for the assessment. The reasons also do not provide a live link to the formation of the belief that income had escaped assessment.

18. Consequently, for the aforementioned reasons, the Court is satisfied that in the present case the essential requirements of Section 147 of the Act have not been satisfied by the Revenue. The impugned notices dated 28th March, 2014 and the orders dated 24th October 2014 rejecting the objections of the two Petitioners are accordingly quashed.

19. The writ petitions are allowed and the applications are disposed of in the above terms but in the circumstances with no orders as to costs.

S.MURALIDHAR, J

VIBHU BAKHRU, J

FEBRUARY 18, 2016

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