

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

Reserved on: 08.03.2017
Pronounced on: 10.08.2017

+ **W.P.(C) 9120/2015**

+ **W.P.(C) 11638/2015**

NEW DELHI TELEVISION LIMITED Petitioner
Through : Sh. S. Ganesh, Sr. Advocate with Sh.
Sachit Jolly and Sh. Gautam Swarup, Advocates.

versus

DEPUTY COMMISSIONER OF INCOME TAX CIRCLE-18(1),
NEW DELHI AND ANR. Respondents
Through : Sh. P.S. Patwalia, ASG with Sh. N.P.
Sahni, Sh. Rahul Chaudhary, Sr. Standing Counsel
and Ms. Lakshmi Gurung, Jr. Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

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Facts:

1. The present writ petitions have been filed by NDTV Ltd. (hereinafter, "NDTV") against the notice proposing reassessment proceedings initiated by the Commissioner of Income Tax (hereinafter, "Respondent" or "CIT" or "Revenue") under Section 147/148 of the Income Tax Act, 1961 (hereinafter, "Act") and the order of provisional attachment of Petitioner's assets under Section 281B of the Act. Since the two writ petitions arise out of common set of facts, the brief facts are set-out below.

2. NDTV operates news channels. In the FYs 2007-08 to 2011-12, it invested in a number of foreign subsidiaries, primarily in the UK and Netherlands. During the FY 2006-07 and FY 2008-09, NDTV received funds amounting to ₹ 1127 crore through these subsidiaries as under:

- a. US \$ 20 million (₹ 86 crores) through investment made in M/s. NDTV Networks Plc, UK (hereinafter, “NNPLC”) by M/s. Com Ventures, V.I., L.P. during FY 2006-07.
- b. US \$ 100 million (₹ 405 crores) through Step Up Coupon Bonds due 2012 issued by NNPLC during FY 2007-08.
- c. US \$150 million (₹ 642 crores) through investment made in M/s. NDTV Networks International Holding BV (hereinafter, “NNIH”) by M/s. Universal Studios International BV, Netherlands (hereinafter, “USBV”) during FY 2008-09.

3. NDTV filed its Return of Income for the AY 2008-09, which was selected for scrutiny during the original assessment proceedings under Section 139 of the Act. The Assessing Officer (hereinafter, “AO”) examined the issue of Step Up Coupon Bonds issued by NNPLC, for which NDTV stood as guarantor and revised the assessment income by adding the guarantee commission for this transaction. In addition, the AO also made certain additions relating to commission on advertisement income that was later set aside by the Commissioner of Income Tax (Appeals) (Appeal No. 50/2012-13/CIT(A)-XX). With regard to the AY 2008-09, NDTV thus, earned a right to refund of over ₹ 19.88 crores.

4. With respect to the AY 2009-10, the investment of ₹ 642 crores in NNIH by USBV was examined by the AO after a reference to the Transfer

Pricing Officer (TPO). The AO was of the view that the introduction of funds in NNIH was actually NDTV's unaccounted money and concluded that it was a sham transaction. This was further examined by the Dispute Resolution Panel (hereinafter, "DRP"), which allowed the lifting of the corporate veil. The DRP, examining the said transaction held:

"DRP has carefully considered entire gamut of transaction and is of the opinion that the structure of the holding/ subsidiary companies and the transaction as narrated above, without any commercial substance, do warrant lifting the corporate veil to identify the true nature of the transaction. Though AD in his remand report has said that the money has not been recorded in the books of assessee, after lifting the corporate veil, the DRP finds that in this case a sum of Rs.642,54,22,000/-has been found credited in the books of assessee/ its subsidiary for the previous year (FY 2008-09) under consideration. Though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/ economic rationale for such transaction has not been satisfactorily explained. Assessee's theory of having sold a "Dream" to the investor has not been substantiated by any credible evidence as no details have been filed whatsoever for the so called business projections and the basis for computation of the sale price of the share at the astronomical price of Rs.7,015/-which is 159 times of its face value of Rs.45/. Needless to mention that the subject company whose shares were sold was incurring huge losses and there was hardly any worthwhile business to justify the above sale price. Interestingly, the assessee/ subsidiaries have again repurchased the same share in the very next financial year at the price of Rs.634.17 per share totaling Rs.58 crores. Here also no details/ justification has been given by the assessee as to how the above buy back price was fixed by the assessee when the so called "Dream" went bust, as being claimed by assessee. What was the justification for the assessee to buy back the shares of nearly defunct and own subsidiary company at a value which was more than 12 times of the face value. The totality of the

transaction clearly lead to the inescapable conclusion that the entire transaction of sale & subsequent buy back of shares was a "sham" transaction entered into by the assessee with the sole motive of introducing Rs.642,54,22,000/-in its books and providing loss of Rs.584.46 crores to Universal Studios BV Netherlands.

5.16.1. In view of the facts and finding as mentioned above and taking the totality of the picture into consideration, it is held that assessee has brought an amount of Rs.642,54,22,000/- being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. It is pertinent to mention that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount."

5. Additionally, the DRP granted relief to NDTV on the issue of disallowance of commission on advertisement revenue and disallowance of transmission and up-linking charges by the AO. The final assessment order of AO was further appealed before the ITAT. With respect to the AY 2010-11, the draft Assessment Order has made additions relating to the commission on advertisement income and transmission and up-linking charges.

6. In this background of circumstances, the revenue issued a notice, dated 31.03.2015 under Section 148 of the Act (hereinafter, "impugned notice") and sought to re-open the assessment of AY 2008-09. Responding to this notice, the assessee requested the reasons for the re-opening of the re-assessment to be furnished.

7. The Respondent acceded to NDTV's request and furnished the following reasons:

“Return declaring loss of Rs.53,19,275/- was filed on 29.09.2008 and the assessment was completed u/s 143(3) on 03.08.2012 at an income of Rs.93,98,18,728/-.

2. The main additions included disallowance of ESOP expenses amounting to Rs.17.86cr, disallowance of commission u/s 40(a)(ia) amounting to Rs.45.53cr, addition of Rs.18.72cr on account of corporate guarantee expenses chargeable, disallowance of transmission and uplinking charges u/s 40(a)(ia) to the extent of Rs.7.38cr and addition of Rs.10.57cr as income from sale of shares of Astro Awani Networks Limited.

3. Perusal of the assessment record reveals that during the assessment proceedings, information was sought by the AO from the foreign tax jurisdiction through FTD, CBDT in respect of foreign transactions of the assessee with its subsidiaries abroad.

4. During the assessment proceedings for AY2009-10, in the draft assessment order, the AO had proposed an addition of Rs.642 crores on account of money raised by the assessee through its subsidiaries NDTV BV, The Netherlands, NDTV Networks BV, The Netherlands (NNBV), NDTV Networks International Holdings BV, The Netherlands (NNIH) and NDTV Networks Plc, UK (NNPLC). The assessee raised its objections before the Dispute Resolution Panel (DRP) which, after considering all facts, confirmed, through its directions, the addition and also held that the said transaction was sham. Further, the DRP also enhanced the assessee's income by another Rs.254 crores on account of unexplained unsecured loans.

5. In its directions issued u/s 144C(5) of the Act for AY 2009-10, the DRP has held that the money amounting to US \$150 million received by an NDTV subsidiary NDTV Networks International Holdings BV, Netherlands from Universal Studios International BV, Netherlands on account of issue of shares of

its indirect subsidiary NDTV BV, resulting in transfer of 26% effective indirect stake in NNPLC, represents NDTV's own unaccounted money introduced into its books through its subsidiary NDTV Networks BV through this 'sham' transaction and the same was directed to be added to the taxable income of NDTV. Further, the unsecured loan amounting to Rs.254.75 crores raised by NDTV Networks Plc, UK from NDTV-BV was also held to be the income of NDTV. Thus, within the meaning of clause 2.2.6 of the Manual on Exchange of Information, there is a reason to believe that the group companies of NDTV Limited have been non-compliant with the provisions of the income tax law in India.

6. Raising funds by issuing US\$ 100m coupon convertible bonds

6.1 Perusal of the assessment record for AY 2008-09 reveals that during the financial year -2007-08 relevant to AY 2008-09, NNPLC, NDW's indirect subsidiary incorporated in UK, raised funds by issuing \$ 100m coupon convertible bonds due in 2012 (redeemable at premium of 7.5%). In this regard, NDTV gave an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required.

6.2 Subsequently, during the financial year 2010-11 relevant to AY 2011-12, NNPLC repurchased the US \$100 million Step up Coupon Bonds, which were due in 2012. The Bonds were repurchased for US \$ 72.4 million. The transaction resulted in a gain on buy back amounting to Rs.128.28 crores (US\$ 27.60 million) for NNPLC.

6.3 The above transactions of issue of coupons and the subsequent repurchase resulted in introduction of Rs.405.09 crores in the account books of NNPLC, out of which Rs.128.28 crores finally stayed with NNPLC.

6.4 NNPLC had only a small capital of Rs.40 lacs and did not have any business activities, any fixed assets, any place of business except a postal address in UK, was a new entrant

without any performance record, was a loss making company having incurred loss of about Rs.8.34 crores during the year, had invested in loss making companies and had its share's face value of Rs.40-45 per share and book value in the negative. Under these circumstances, it appears unnatural and out of place to imagine that the investors will make such a huge investment in a little known company named NNPLC. Further, it is still more unnatural and out of place to imagine that instead of earning any profit, the investors will absolve NNPLC by accepting a value equal to just 72% of their original investment. The natural inference could be that it was NDTV's own funds introduced in NNPLC in the garb of the impugned bonds.

6.5 Regarding the investors in these Bonds, the information furnished by NDTV during the proceedings before DRP for AY 2009-10 revealed that the following entities had invested in these Bonds :-

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6.6 There are complaints received in the case of NDTV from a minority shareholder alleging that the money introduced in NNPLC was shifted to NDTV's another subsidiary in Mauritius, from where it was taken to NDTV's subsidiaries in Mumbai, which finally merged In NDTV. NNPLC was placed under liquidation on 28.03.2011. The period relating to the shifting of funds from NNPLC is covered by the later assessment years, wherein the assessment proceedings in the case of NDTV are pending.

7. In view of the above facts and circumstances of the case and considering the findings of the DRP holding the funds received by NNPLC as the funds of the assessee New Delhi Television Limited under sham transactions, there is reason to believe that the funds amounting to Rs. 405.09 crores introduced into the books of NNPLC during the FY 2007-08 in the form of Step Up Coupon Bonds pertain to the assessee New Delhi Television

Limited only. I have therefore reason to believe that the income of the assessee New Delhi Television Limited for AY 2008-09 amounting to at least Rs.405.09 crores has escaped assessment. It is also recorded that the escapement is due to failure on the part of the assessee to disclose fully and truly all facts material for assessment.”

8. NDTV preferred its objections to the proposal for reassessment, on 27.08.2015. These objections elaborated why re-opening was not feasible or permissible in law and that the issues on which the revenue was proposing to issue notice, had been examined during regular assessment proceedings. According to NDTV, therefore, reassessment in effect amounted to review or a second look at the same material, which was not permissible in law. The objections were however, rejected by the AO in his letter dated 23.11.2015. Dissatisfied with the order of the AO, NDTV has preferred the present proceedings under Article 226 of the Constitution of India.

9. The AO, keeping in mind the estimated position of demands that would likely to arise from the re-assessment proceedings for the AY 2008-09 and the assessment proceedings for the AY 2010-11, 2011-12, 2012-13 and 2013-14 as well as the declining net worth of NDTV, passed an order dated 14.09.2015 under Section 281B of the Act provisionally attaching the immovable properties, non-current investments and refund of ₹19.88 crores due to NDTV for the AY 2008-09.

10. Aggrieved by that order, NDTV has filed the second Writ Petition – W.P.(C) 9120/2015.

Issues involved

11. The following questions arise for decision, in the two petitions:

- i. *Whether the impugned notice for re-opening of assessment for the AY 2008-09 is valid as per Section 147 of the Act?*
- ii. *Whether the impugned order of provisional attachment of NDTV's assets is valid and permissible under Section 281B of the Act?*

Issue 1:

12. The learned counsel for NDTV has argued that the complete details regarding the issuance of the Step Up Coupon Bonds by NNPLC and guaranteed by NDTV were submitted during the original assessment proceedings under Section 143 of the Act. On the basis of this information, the AO had made enquiries to FT &TR, Central Board of Direct Taxes(CBDT) in respect of the bonds issued and made a transfer pricing adjustment of the guarantee fee earned by NDTV in the original assessment order. NDTV stressed that there had been no suppression or withholding of any material fact by it and the impugned notice under Section 147 of the Act was issued on a “mere change of opinion”. For this, the learned counsel for NDTV relied on *Madhya Pradesh Industries Ltd. v. ITO*, 57 ITR 637 (SC) and *Ranbaxy Laboratories Ltd. v. CIT*, 336 ITR 136 (Del.)

13. It was submitted by Mr. S. Ganesh, learned senior counsel, for NDTV that the “reasons to believe” supplied by the AO did not substantiate on how it had failed to disclose all material facts and instead merely repeated the statutory language. Additionally, it was submitted that the AO’s allegation that it were the funds that belonged to NDTV that were introduced in NNPLC under the pretext of the issued bonds is baseless and merely a reason to suspect. It was urged on behalf of NDTV that the re-assessment

has been opened not on the basis of any tangible material, but only on a mere change of opinion and therefore the notice has been issued without jurisdiction. NDTV placed reliance on *CIT v, Kelvinator of India Ltd.* [2010] 228 CTR 488.

14. Mr. Ganesh argued that during the course of proceedings in the regular, scrutiny assessment, for the relevant assessment year, the AO had made inquiries with respect to the investment in the Step Up coupons. In reply to these queries, it had written a letter:

"During the course of assessment proceedings, the assessee was asked to state whether any corporate guarantee has been given by the assessee for NNPLC and justification thereof. The assessee was further asked to specify the fee charged for the same and computation thereof.

In this regard, it is respectfully submitted that during the financial year relevant to the subject assessment year, NDTV Networks Plc, (NNPLC), had raised funds by issuing US \$100 million convertible bonds. As per the terms of the bonds, NDTV had given an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required.

However, the requirement for giving the corporate guarantee never arose and therefore no corporate guarantee was given. Accordingly, no fee was charged as there was no requirement to charge the same and neither any corporate guarantee was given. The assessee had duly submitted these details vide submission dated 19th December'2011 and 26th December'2011 along with a Copy of the extracts of the resolution dated 22nd May'2007. The above understanding was contained in Terms and Conditions of the Bonds which form a part of the Subscription Agreement. A copy Subscription Agreement alongwith the relevant Terms and Conditions of the Bonds is attached as Annexure."

15. Reliance was placed on NDTV's letter of 28.05.2011, to the revenue, the relevant part of which is extracted below:

“Further, in respect of corporate guarantee extended with respect to NNPLC, you have asked to give a note on benefit accruing to NDTV from the same and also specify when the coupon bonds were received and profits arising to NNPLC/NOTV from the same.

In regard to above query, it is submitted that no corporate guarantee was issued by the NDTV in respect of the above transaction for or on behalf of NDTV Networks Plc. The above fact had duly been reported in the Audited Accounts of the assessee Company wherein it has been stated that the Company has merely give n an undertaking to provide a corporate guarantee for and on behalf of NNPLC, as and when required . However, it is again reiterated that no such corporate guarantee was issued by the assessee Company in favour of any person in relation to raising USO 100m from the issue of step-up coupon convertible bonds by NNPLC. Accordingly, it is respectfully submitted that the question of accruing any benefit in the h ands of NOTV does not arise. It is further submitted that NOTV had not received any income for giving an undertaking to provide a corporate guarantee for and on behalf of NOTV Networks in relation to raising USO 100m Step Up Coupon Convertible bonds.

With respect to the query when the coupons were received, it is submitted that, NNPLC has raised funds by issuing \$ 100m coupon convertible bonds on 30 May 2007 by entering into Subscription Agreement with the Jefferies International Ltd ('Jefferies'), a leading global securities and investment banking group having it s registered office at Bracken House, 4th Floor, One Friday Street, London EC4M9J A, UK. Jefferies were also appointed, as an underwriter and the placing agent for offer and issuance of bonds..”

16. Mr. Ganesh also stated that NNPLC’s identity is as a non-resident, and accordingly is liable to tax in UK and that any gain/(loss) on the redemption of bonds was duly considered in accordance with UK Tax Laws and disclosed in the Tax Returns filed by the NNPLC in UK. He relied on the

letter written to the revenue, for AY 2008-09, on 31.05.2012. A letter dated 20.07.2012, reiterating the same facts, was shown to the court.

17. It was submitted that all the documents placed on record in the regular assessments, demonstrated that the AO sought and obtained every possible piece of information regarding the Step Up Coupon Bonds. The Subscription Agreement, names of bondholders, Trust Deed were all referred to and relied upon in the said letters filed by the Petitioner and NNPLC. If the AO wanted any further details/information, he could have asked for the same from NDTV. After examination of all the aforesaid data, the AO vide Order dated 03.08.2012 passed under 143(3) of the Act holds that since NDTV stood as a guarantor for issuance of the Step up Coupon Bonds and "*exposed itself to risks pertaining to the transaction*", it should have received arm's length consideration for such service/guarantee. Accordingly, a transfer pricing adjustment of ₹18.72 crores was made in the hands of the NDTV. AO was of the view that the issuance of Step Up Coupon Bonds by NNPLC was a *bonafide* and genuine commercial transaction and without the provision of the guarantee by NDTV, NNPLC would not have been able to raise the money through the said bonds. The case made out in the reasons recorded by revenue that the money introduced in NNPLC is the NDTV's own money is, therefore, inconsistent and diametrically opposite, to the case made out by AO in the original assessment proceedings.

18. Mr. Ganesh argued that in the assessment proceedings for the AY 2009-10, the same transfer pricing adjustment in respect of the Step up Coupon Bonds was proposed by the AO against which the Petitioner filed objections before the Dispute Resolution Panel ("DRP"). Before the DRP, though the AO doubted the legality of other transactions, however, in respect

of the issuance of Bonds, the revenue contended that unless NDTV stood guarantor for the issuance of Step up Coupon Bonds, NNPLC would not have been able to raise the funds from the Bondholders. The DRP by directions dated 31.12.2013, upheld the submissions of the AO and confirmed the transfer pricing addition proposed in the draft order, albeit after reducing the quantum of adjustment. The CIT(A), for AY 2008-09, by Order dated 29.4.2014 followed the order of the DRP for AY 2009-10 and confirmed the addition in principle, but reduced the quantum of adjustment. Therefore, the consistent case of the Respondents has been that the issuance of Step up Coupon Bonds by NNPLC was a legitimate and genuine commercial transaction and without the NDTV's provision of the guarantee, NNPLC would not have been able to raise the money through the said bonds. Lastly, NDTV also contended that second proviso of Section 147 cannot be invoked by the revenue as no mention of this ground is found in the reasons recorded by the AO. This amounts to supplementing the reasons recorded, which is not permitted by the law.

19. It is submitted that a mere allegation in the reasons recorded that there is failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment is insufficient for initiating proceedings under Section 147 of the Act. The mere repetition of the expression in the "reasons to believe" about failure to disclose fully and truly all material facts will not empower the AO to assume jurisdiction under section 147 of the Act and he is required to state in the reasons recorded which material facts have not been disclosed in the reasons recorded. Learned senior counsel emphasized that there is no whisper or even an allegation that the facts disclosed by the Petitioner were false and that there has been any denial by the investors i.e.

bond holders that they did not make any such investment or that investment made by them was the investment made from NDTV's funds. Counsel also argues that in the reasons recorded the AO's inference that it could be NDTV's own funds introduced in NNPLC in the garb of impugned bonds is without any material and only on account of suspicion and conjectures and the assessment has been reopened to make roving and fishing enquiries. Counsel submitted that all particulars relating to the transactions were fully disclosed; further the UK revenue authorities furnished the documents.

20. Learned counsel relied on *JSRS Udyog Limited and Another v. Income Tax Officer* [2009] 313 ITR 321 (Del) where this court held that

"Apart from merely saying that the receipts of the share application money were bogus and sham transactions, there is nothing indicated either in the reasons or in the impugned order dated November 28, 2008, to enable us to arrive at such a conclusion.."

"20. In the reasons supplied to the petitioner, there is no whisper, what to speak of any allegation, that the petitioner had failed to disclose fully and truly all material facts necessary for assessment and that because of this failure there has been an escapement of income chargeable to tax. Merely having a reason to believe that income had escaped assessment, is not sufficient to reopen assessments beyond the four year period indicated above. The escapement of income from assessment must also be occasioned by the failure on the part of the assessee to disclose material facts, fully and truly. This is a necessary condition for overcoming the bar set up by the proviso to section 147. If this condition is not satisfied, the bar would operate and no action under section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation."

21. It was argued that the tangibility of materials should be the basis for valid "reasons"; they cannot be merely based on "reasons to suspect". In

other words, there should be a trigger by an external matter, outside the record, leading to a genuine “reasons to believe”. Learned counsel relied on *Union of India v Rai Singh Deb Bisht* 77 ITR 802 in this regard. It is submitted that in the “reasons” recorded there is reference to some complaints. However, the revenue acknowledges that the complaint relates to a later year. Therefore it has no nexus with the matter of issuance of bonds by NNPLC in the year under consideration. Furthermore, the revenue in the impugned letter/order dated 23.01.2015 has sought to supplement the reasons recorded and has referred to second Proviso to Section 147 of the Act as an afterthought. It is submitted that it is well settled that the AO cannot supplement the reasons recorded and it is the reasons, alone which are to be looked into to justify the reopening of proceedings under Section 147 of the Act. Mr. Ganesh relied on *Atma Ram Properties Pvt. Ltd. v. Deputy Commissioner of Income Tax* 343 ITR 141 (Del) and *Bombay Stock Exchange Ltd. v Deputy Director Income Tax* (2014) 365 ITR 160. Counsel also relied on *Pardesi Developers and infrastructure (P) Ltd v. CIT* (2013) 351 ITR 8 (Del) and *Rasalika Trading & Investment Co. (P) Ltd v Deputy Commissioner of Income Tax & Anr* (2014) 365 ITR 447.

22. Mr. P.S. Patwalia, learned Additional Solicitor General appearing for the revenue argued that despite repeated notices, NDTV had not submitted the financial statements of its subsidiaries including the Balance Sheet, Profit & Loss Accounts, report of Board of Directors, Report of auditors etc., during the original assessment. It was further contended that the AO. had “reason to believe” that there had been escapement of income. This was on the basis of the DRP proceedings for the AY 2009-10 wherein the DRP held that the transaction routed through NDTV’s subsidiary NNBV was sham and

required lifting of the corporate veil. The DRP also noted that given the financial strength of NNPLC, it was doubtful that investors purchased the Step Up Coupon bonds only to resell them at a loss in AY 2011-12. In addition to this, the AO also relied on the tax evasion petitions filed by the shareholders of NDTV alleging that the investment introduced in NDTV's subsidiaries was NDTV's own unaccounted money that was later transferred to NDTV through merger and liquidation of the said subsidiaries. On the basis of this information, the AO formed an opinion that the investment made through Step Up Coupon Bonds is a sham transaction and NDTV's own unaccounted money, similar to the investment made in NNBV of US \$150 million. Thus, there was tangible material to reopen the assessment for AY 2008-09 and the impugned notice must not be quashed.

23. The learned ASG also submitted that in cases of sham transactions, it was not necessary to record how NDTV had failed to disclose material facts. The counsel further argued that second proviso to Section 147 can be invoked in the present case. The respondent contended that the law does not bar applicability of the second proviso as the reasons recorded by the AO can be supplemented through the counter-affidavit. Accordingly, on both grounds, the impugned notice issued by the AO is valid.

24. It was submitted that during FY 2005-06, the NDTV had only two subsidiaries, i.e. 'M/s NDTV News Limited' and 'M/s NDTV Media Limited', both Indian companies. During FY 2006-07, it incorporated two subsidiaries –M/s Emerging Markets 24X7 and M/s. NDTV Networks BV ("NNBV") in Netherlands and one subsidiary - M/s. NDTV Networks Plc ("NNPLC") in UK apart from four subsidiaries in India, namely M/s. NDTV Imagine Limited, M/s. NDTV Labs Limited, M/s. NDTV Convergence Limited and

M/s. NDTV Lifestyle Limited. During the FYs 2007-08 to 2011-12, NDTV created a complex web of Indian and foreign subsidiaries and the number of NDTV's subsidiaries and associates drastically increased to 33, with 21 subsidiaries, one Joint Venture (JV) and 11 associates. Of these 33 entities, 11 subsidiaries were incorporated abroad - 4 each in Mauritius and Netherland and 1 each in UK, Sweden and UAE. The key subsidiaries were situated in UK and Netherlands and these were all liquidated by FY 2011-12. During FY 2006-07 to FY 2008-09, NDTV received funds amounting to ₹1127 crore through these subsidiaries situated in Netherlands and UK, as per following details:

- (i) US \$ 20 million (₹86 crores) through investment made in M/s. NDTV Networks Plc, UK ("NNPLC") by M/s. Com Ventures, V.I.,L.P. during FY 2006-07
- (ii) US \$ 100 million (₹405 crores) through Step Up Coupon Bonds due 2012 issued by NNPLC during FY 2007-08;
- (iii) US \$ 150 million (₹ 642 crores) through investment made in M/s. NDTV Networks International Holding BV ("NNIH") by M/s. Universal Studios International BV, Netherlands ("USBV") during FY 2008-09.

25. The introduction of funds in these main subsidiaries, followed by immediate routing of these funds to other supporting entities, which finally merged into the ultimate parent company NDTV, i.e. destination of these funds was the petitioner. It was argued that, the entities investing funds in NDTV's subsidiaries incurred huge losses within short period of time; for example, the investors in bonds were allegedly returned ₹ 290 crores out of investment of ₹ 405 Crores, while USBV was returned only ₹ 58 crores out of investment of ₹642 Crores. The balance funds of ₹699 Crores [i.e. ₹115

Crores (₹ 405 Crore - ₹ 290 Crores) + ₹ 584 Crore (₹ 642 Crore - ₹ 58 Crore) = ₹ 699 Crores] were retained by the foreign subsidiaries of the petitioner, which were ultimately transferred to petitioner itself. The real source of these funds was and is unexplained and all the key subsidiaries in Netherlands and UK were liquidated by FY 2011-12, which created considerable problems for the revenue in gathering of information from tax officials of foreign countries, particularly about their bank accounts. It was argued that during the original assessment proceedings, by notice issued under Sections 143(2)/142(1) dated 05.11.2009, the AO specifically required NDTV to furnish all statutory reports as per the Income Tax Act, copies of which could not be filed with return of income. However, in response to this notice, it furnished only “standalone” financial statements of NDTV and did not furnish copies of financial statements including Balance Sheet, Profit and Loss account, Report of Board of Directors, report of its auditors of each subsidiary. Such information was in fact not furnished throughout the assessment proceedings.

26. The learned ASG relies on the judgment in *Phoochand Bajrangi Lal v Income Tax Officer* 1993 (203) ITR 456 (SC) where the Supreme Court held as follows:

“Acquiring fresh information, specific in nature and reliable in character, relating to the concluded assessment which goes to expose the falsity of the statement made by the assessee at the time of original assessment is different from drawing a fresh inference from the some facts and material which was available which the I.T.O. at the time of original assessment proceedings. The two situations are distinct and different. Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere disclosure of that transaction at the time of original assessment proceedings,

cannot be said to be disclosure of the "true" and "full" facts in the case and the I.T.O. would have the jurisdiction to reopen the concluded assessment in such a case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under Section 147 of the Act, on receipt of the information subsequently. The subsequent information on the basis of which the I.T.O. acquired reasons to believe that income chargeable to tax had escaped assessment on account of the omission of the assessee to make a full and true disclosure of the primary facts was relevant, reliable and specific. It was not at all vague or nonspecific."

27. The revenue also relies upon the decision reported as *ALA Firm v Commissioner of Income Tax* 1991 (189) ITR 289 (SC) which held that:

"This proposition clearly envisages a formation of opinion by the Income-tax Officer on the basis of material already on record provided the formation of such opinion is consequent on "information" in the shape of some light thrown on aspects of facts or law which the I.T.O. had not earlier been conscious of. To give a couple of illustrations, suppose an I.T.O., in the original assessment, which is a voluminous one involving several contentions, accepts a plea of the assessee in regard to one of the items that the profits realised on the sale of a house is a capital realisation not chargeable to tax. Subsequently he finds, in the forest of papers filed in connection with the assessment, several instances of earlier sales of house property by the assessee. That would be a case where the I.T.O. derives information from the record on an investigation or enquiry into facts not originally undertaken. Again, suppose if I.T.O. accepts the plea of an assessee that a particular receipt is not income liable to tax. But, on further research into law he finds that there was a direct decision holding that category of receipt to be an income receipt. He would be entitled to reopen the

assessment under S.147(b) by virtue of proposition (4) of Kalyanji Mavji. The fact that the details of sales of house properties were already in the file or that the decision subsequently come across by him was already there would not affect the position because the information that such facts or decision existed comes to him only much later.”

28. It was argued that tax assessments are completed on the assumption that the transactions disclosed are genuine; no doubt, the AO has the authority to verify the accounts and is expected to do so. In the exercise of such powers, the AO- in his wisdom chose only to consider the transfer pricing aspect of the overseas investments and transactions and the potential income that might have accrued to the assessee/NDTV in this case. Therefore, when other facts came to light that these investments were not genuine but rather bogus and the monies were circulated in sham transactions, the revenue correctly sought recourse to Sections 147/148.

29. It was urged that the assessment regarding introduction of funds amounting to ₹ 642 crores during FY 2008-09 (relevant to AY 2009-10) has already been completed on 21.02.2014 and addition of this amount was made to NDTV's taxable income of the petitioner, after lifting the corporate veil and holding the impugned transaction as a sham one. The revenue highlights that the AO's findings in the assessment order were confirmed by the DRP, after detailed enquiries under Section 144C(7) of the Income Tax Act, 1961 (the "Act"). The introduction of funds amounting to ₹ 405 Crores through Bonds issued by NNPLC are the subject matter of the reassessment proceedings for AY 2008-09, which were initiated by way of issue of notice to NDTV under Section 148 of the Act on 31.03.2015. The reassessment proceedings were initiated on the basis of new information received from

following two sources after completion of original assessment proceedings on 03.08.2012. The first source was the findings of the DRP, recorded in the assessment order for AY 2009-10 (finalized on 21.02.2014, i.e. after a gap of approximately seventeen months from the date of finalization of assessment in question) in order to initiate proceedings under Section 147 of the Act. These were :

- Transactions routed through subsidiaries of the petitioner company, namely NDTV BV, Netherlands, NDTV Networks BV, Netherlands (NNBV) and NDTV Networks Plc, UK (NNPLC) were sham. The revenue relies on paragraph 4 of reasons recorded and paragraph 5.16 of the DRP's order.
- Transactions routed through NDTV's foreign subsidiaries reflected introduction of unaccounted money in the books of accounts of the petitioner through its subsidiary companies. The revenue relies on paragraph 5 of reasons recorded in paragraph 5.16.1 of the DRP's order.
- It is stated that NNPLC had only a small capital of ₹ 40 lakh and did not have any business activities, any fixed assets, any place of business except a postal address in UK. NNPLC was a new entrant without any performance record, was a loss making company having incurred loss of about ₹ 8.34 crore during the year and book value of its share (having face value of ₹ 40-50 per share) was in the negative. The revenue relies on Para 6.4 of the reasons recorded and para 5.14 (2.3.11.1) of the DRP's order.
- Considering financial conditions of the NNPLC, it was quite unlikely that any prudent investor will make investment of US\$ 100mn (₹405.09 crore) in coupon convertible bonds during the year under consideration which were repurchased later in subsequent AY 2011-12 at loss. Para 2.1.18 of the DRP's order is relied on.

- Most of investors were located in known tax heavens namely British Virgin Islands, Cayman Islands and Switzerland. Even the bifurcation of the amounts of investment by each of eight investors was not disclosed by the petitioner company during assessment proceedings for AY 2008-09 and not even during of subsequent assessment year, i.e. AY 2009-10.

30. In addition to credible information from above referred to Source 1, the AO has also taken into account several specific tax evasion petitions received from a shareholder of the petitioner company that money introduced in the NNPLC through money laundering activities was actually transferred to the petitioner company through liquidations and mergers. The Director of the complainant company was part of the team of the petitioner at some point of time, which designed the complex corporate structure to route and reroute funds and layering of funds. Copies of these tax evasion petitions received from 11.03.14 onwards, i.e. 18 months after the date of finalization of original assessment order now form part of the official record.

31. It is stated that after receipt of initial complaint on 11.03.2014, further complaints against the petitioner were received from the shareholder on various dates, i.e. on 25.07.2014, 13.10.2014 and 11.03.2015, wherein further details regarding the raising and routing of funds through round tripping were given. The AO took note of information contained in these tax evasion petitions, because the complaints of tax evasion were received from NDTV's shareholders, who were aware of its internal affairs and aim and object of floating complex corporate structure by the petitioner; therefore, the AO had reason to believe that information was credible. The tax evasion petition contained detailed information regarding the complex corporate structure created by petitioner to route funds and evade taxes and most of this

information was corroborated with the findings of the DRP for AY 2009-10. The revenue also refers to WP(C)984/2015, which is pending before this court and in which the complainant/petitioner has alleged that no action was being taken by the Enforcement Directorate and the Investigation Wing of the Income Tax Department on the complaints filed by it. The revenue had also subsequently been impleaded as a party in this writ petition. All these complaints are treated as confidential. On the basis of such information from two different sources and after having considered material on assessment record for the year under consideration, the AO formed a belief that investment of US\$ 100million, the source of which was not explained in the books of accounts of the NNPLC as evident from the findings of DRP relied upon by the AO while recording the reasons that the petitioner introduced its own money.

32. It is pointed out that NDTV is one of the signatories of the Underwriting Agreement in order to raise US \$ 100 million from alleged investors. NNPLC is a subsidiary company 100% owned and managed by NDTV. According to the revenue, the money raised through bonds was ultimately transferred to NDTV after liquidation of the NNPLC in the year 2011 and merger of NDTV Mauritius Media Ltd. (subsidiary of the petitioner) with NDTV One Holdings Limited (subsidiary of the petitioner) on 30.09.2011 and finally, the merger of NDTV One Holdings Limited with the petitioner company and thus becomes NDTV's income, which is liable to be taxed. These facts lead to a reasonable belief that undisclosed income of ₹ 405.09 crores (equal to US\$ 100 Million) chargeable to tax for the year under consideration has escaped assessment. It is evident from the above that reason to belief of the AO was based on credible information and material,

which came to the knowledge of the AO after a gap of more than one year from the date of finalization of the original assessment order under Section 143(3) for the year under consideration.

31. The present issue concerns the application of Section 147 of the Act. Section 147 provides:

“Section 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 recomputed the loss 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.

Provided further that nothing contained in the first proviso shall apply in a case where any income in relation to any asset (including financial interest in any entity) located outside India, chargeable to tax, has escaped assessment for any assessment year.”

33. The first question requires firstly an analysis of the proposition as to whether the AO can supplement the reasons for re-opening the assessment under Section 147/148 by way of a counter-affidavit. At the outset, what must be noted is that the requirement for providing reasons for re-assessment was recognized by the Supreme Court in *GKN Driveshafts (India) Limited v. Income Tax Officer and Others* [(2003) 259 ITR 19 (SC)], wherein the Court held:

“However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The assessing officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the assessing officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the assessing officer has to dispose of the objections, if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years.”

34. Thus, an assessee can object to the re-opening of the assessment under Section 147 only when the correct reasons are provided by the AO.

35. Having said that, the issue of whether reasons can be supplemented by a counter-affidavit was considered by this Court in *Haryana Acrylic Manufacturing Company v. The Commissioner of Income Tax and Anr.* [2009] 308 ITR 38 (Delhi). In that case, the Respondents alleged that the reasons provided in the notice under Section 148 were not the actual reasons for re-opening of the assessment. The actual reasons had been filed by way of a counter-affidavit. The Court frowned upon the supplementing of reasons. A similar approach was adopted by the Bombay High Court in

Hindustan Lever Ltd. v. Assistant Commissioner of Income Tax and Others [2004] 268 ITR 339 (Bom). Furthermore, there can be no question that the reasons for an executive or statutory order are to be reflected in the concerned file or public document, and not improved through pleadings in court (See *Mohinder Singh Gill and Anr. v. The Chief Election Commissioner and Ors* [1978]2SCR272). This Court is of the view that the revenue, therefore, cannot be allowed to supplement the reasons recorded for re-opening of the assessment by way of a counter-affidavit.

36. However, the above analysis does not dispose of the petition relating to re-opening of assessment. The real issue before the Court is whether there were “reasons to believe” under Section 147 of the Act to justify the re-opening of the assessment. The scope of the phrase “reason to believe” was examined by the Supreme Court in *M/s. Phool Chand Bajrang Lal & Anr* (supra) where the Court held that:

“The court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief.”

37. Similarly, in *Kelvinator (supra)*, the Supreme Court held that the AO has power to re-open the assessment if there is tangible material to come to the conclusion that there has been escapement of income. As to whether something disclosed during the regular assessment proceeding, upon scrutiny is *per se* excluded, because there was some inquiry into the matter, was explained in *Commissioner of Income Tax v. Velocient Technologies Ltd.*

(2015) 376 ITR 131. The Division Bench of this court, observed in that judgment as follows:

“19. Phool Chand Bajrang Lal (supra) is an authority for the proposition that acquisition of "fresh information, specific in nature and reliable in character, relating to the concluded assessment" which exposes "falsity" of the assessee's statement during the original statement is a legitimate basis for re-opening (the assessment). The court significantly noted that "the mere disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the "true" and "full" facts in the case and the I.T.O. would have the jurisdiction to reopen the concluded assessment in such a case." That decision had taken note of Lakhmani Mewal Dass and Calcutta Discount (supra). This court also notes that the subsequent ruling of a three judge bench of the Supreme Court in Commissioner of Income Tax v Kelvinator India Ltd (2010) 320 ITR 561 (SC) crystallizes the acceptable standard for upholding a reassessment notice (under Section 147/148) as something beyond the existing record, in the form of "tangible material" available to the AO which provides a "live link" to the formation of a legitimate belief that reassessment is called for. In the present case, the formation of opinion is recorded in the note (i.e "reasons to believe") dated 30-03-2001 which noted that for AY 1996-97, the forfeiture of the loan was treated as cessation of trading liability and that even in its submissions before CIT (A) the assessee "failed to establish the truthfulness of its claim of the receipt of loan of Rs. 10.65 crores despite being afforded specific opportunities. The CIT (A) also in his order has not commented on the veracity of the evidence furnished by the assessee in this regard...the assessee was not able to accurately and specifically establish the fact that this money indeed belonged to the Russian Company nor the reason for the unilateral forfeiture as discussed in the earlier paras." Now, these facts facially were sufficient, in the light of the ruling in Phool Chand and Kelvinator (supra) for the AO to form a valid opinion that reassessment was necessary. The judgment in Honda Siel Power Products v Dy. CIT 340 ITR 53

(Del) of this court is authority to say that the term failure" on the part of the assessee is not restricted to the income-tax return and the columns of the income-tax return or the tax audit report. The court held that the expression "failure to fully and truly disclose material facts" also relates to the stage of the assessment proceedings and that there can be omission and failure on the part of the assessee to disclose material facts fully and truly during the course of the assessment proceedings."

38. In the present case, the Revenue relies on the assessment proceedings for the AY 2009-10, the DRP directions as well as the tax evasion petition received by the AO to form the belief that the transaction of raising of funds through the Step Up Coupon Bonds by NNPLC was a bogus transaction. The investment of US\$ 150 million made in NNBV by USBV, that was the subject of AY 2009-10, was held to be a sham transaction, to hide the unaccounted income of NDTV. In that transaction the shares of NNBV were issued at a price much greater than its share value and later bought back at a cheaper rate, thus resulting in losses for the investors. Similarly, the Step Up Coupon Bonds were issued at a higher price, and yet were prematurely redeemed leading to a loss for the investors. In this regard, the AO has provided specific details regarding the new or tangible information that was received subsequent to the assessment proceedings for the year 2008-09. The DRP's observations, in its order dated 31-12-2013 (for AY 2009-10) are extracted below:

"Though AO in his remand report has said that the money has not been recorded in the books of assessee, after lifting the corporate veil, the DRP finds that in this case a sum of Rs. 642,54,22,000/- has been found credited in the books of assessee/ its subsidiary for the previous year (FY 2008-09)

under consideration. Though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/ economic rationale for such transaction has not been satisfactorily explained. Assessee's theory of having sold a "Dream" to the investor has not been substantiated by any credible evidence as no details have been filed whatsoever for the so called business projections and the basis for computation of the sale price of the share at the astronomical price of Rs. 7,015/- which is 159 times of its face value of Rs. 45/- .Needless to mention that the subject company whose shares were sold was incurring huge losses and there was hardly any worthwhile business to justify the above sale price. Interestingly, the assessee/ subsidiaries have again repurchased the same share in the very next financial year at the price of Rs. 634.17 per share totalling Rs. 58 crores. Here also no details/ justification has been given by the assessee as to how the above buy back price was fixed by the assessee when the so called "Dream" went bust, as being claimed by assessee. What was the justification for the assessee to buy back the shares of nearly defunct and own subsidiary company at a value which was more than 12 times of the face value. The totality of the transaction clearly lead to the inescapable conclusion that the entire transaction of sale & subsequent buy back of shares was a "sham" transaction entered into by the assessee with the sole motive of introducing Rs. 642,54,22,000/- in its books and providing loss of Rs. 584.46 crores to Universal Studios BV Netherlands.

5.16.1. In view of the facts and finding as mentioned above and taking the totality of the picture into consideration, it is held that assessee has brought an amount of Rs.642,54,22,000/- being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. It is pertinent to mention that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount."

5.16 DRP has carefully considered entire gamut of transaction

and is of the opinion that the structure of holding/subsidiary companies and the transaction as narrated above, without any commercial substance, do warrant Ming the corporate veil to identify the true nature of the transaction. Though AO in his remand report has said that the money has not been recorded in the books of assessee, after lifting the corporate veil, the DRP finds that in this case a sum of Rs. 642,54,22,000/- has been found credited in the books of assessee/its subsidiary for the previous year (FY 2008-09) under consideration. Though the assessee has sought to explain the above amount through the lengthy and circuitous transactions, the commercial substance/economic rationale for such transaction has not been satisfactorily explained. Assessee's theory of having sold a "Dream" to the investor has not been substantiated by any credible evidence as no details have been Wed whatsoever for the so called business projections and the basis for computation of the sale price of the share at the astronomical price of Rs. 7,015/- which is 159 times of its face value of Rs. 45/-. Needless to mention that the subject company whose shares were sold was incurring huge losses and there was hardly any worthwhile business to justify the above sale price. Interestingly, the assessee/subsidiaries have again repurchased the same share in the very next financial year at the price of Rs. 634.17 per share totaling Rs. 58 crores. Here also no details/justification has been given by the assessee as to how the above buy back price was fixed by the assessee when the so called 'Dream' went bust, as being claimed by assesseees. What was the justification for the assesseees to buy back the shares of nearly defunct and own subsidiary company at a value which was more than 12 times of the face value. The totality of the transaction clearly lead to the inescapable conclusion that the entire transaction of sale & subsequent buy back of shares was a "sham" transaction entered into by the assessee with the sole motive of introducing Rs. 642,54,22,000/- in its books and providing loss of Rs. 584.46 crores to. Universal Studios BV Netherlands.

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that assessee has brought an amount of Rs. 642,54,22,000/- being unexplained money in to its books through its subsidiary NDTV Networks BV Netherlands. It is pertinent to mention that, as per the admission of the assessee the above subsidiary has been subsequently liquidated, which shows that the same was floated only to create a front for introducing the above amount.

5.16.2 The DRP has considered the addition proposed by the AO and finds the addition is fully justified in view of facts mentioned above. The DRP is of the considered opinion that the facts of the case fits for making addition u/s. 68 of the IT Act as unexplained cash credit. Even addition u/s. 69A as proposed by the AO is also justified, as after lifting the corporate veil, the assessee is found owner/controller of the money under reference.

5.17 AO has brought to the notice of the DRP through his letter dated 20.08.2013 forwarded by the Addl. CIT Range-13, New Delhi that an amount of Rs. 365.25 crores was raised by the assessee company which needed further examination. The relevant part of the letter of the AO is as under:

"10. Another issue involved in the case is that during the year, the assessee company, through its guarantees, raised an amount of Rs. 365,25,00,000/- as unsecured loans through its subsidiary NNPLC. As the information was stated to be furnished by the assessee on 30.3.2013 i.e. just one day before the expiry of limitation, therefore, this aspect also could not be probed by the AO as to the identity of the payers, the creditworthiness of the payers and the genuineness of the transactions."

5.18 Accordingly, the AO was directed to examine this issue and send a remand report. The remand report was given to the assessee who strongly objected to the proposed addition made by the AO in the remand report. The remand report dated 11.12.2013 and the summary of the oral argument of the AO dated 26.12.2013 are reproduced below:...."

39. After extracting the remand report dated 11-12-2013 and the assessee/NDTV's contentions, the DRP held:

“5.19 The copy of the remand report was given to the assessee on 16.12.2013 to submit its rejoinder and on the day of hearing i.e. on 17.12.2013 they were asked to treat the forwarding letter of the DRP enclosing the remand report as enhancement notice by DRP to cut short the time as matter is getting time barred on 31.12.2013. The same was recorded in the order sheet vide entry dated 17.12.2013.

5.20 In response to the above, the assessee vide its letter dated 23.12.2013 has filed a document which is purported to be a loan agreement concluded between NBCU, NDTV limited, NDTV PLC and NDTV Networks BV and requested to admit the same. The assessee has further submitted as below:

- The appellant was not able to produce the above documents since the issue came up for the first time before the DRP and the assessee as unable to submit the same due to paucity of time.*
- The loan agreement was not specifically asked for by the Ld. AO.*
- The evidence submitted in this submission is correct and very much relevant for deciding the appeal of the appellant.*
- It is requested to your good self that the evidences be admitted and be considered for deciding the matter.*

Your goodself may exercise the powers conferred on yourself by the law, which are very much required to be exercised in the light of facts and circumstances of the case.

5.21. The additional evidence in the form of copy of the

purported loan agreement (supri) has been admitted in the interest of natural justice and was handed over to the AO for his response. The response is received, the extract of which is reproduced below:

Extract of response of the AO dated 26.12.2013

5.22 DRP has carefully considered this issue. Out of Rs. 365.25 crores representing unsecured loan, under reference, an amount of Rs. 110.5 crores is due to the restatement of the original amount pertaining to a transaction happened in the FY 2007-08 which was the subject matter of assessment for the A.Y. 2008-09. It appears from the report that there was no disallowance made on the amount in the first place in the AY 2008-09. Therefore, to disallow Rs. 110.5 crores on account of reinstatement of the amount is not called for as rightly mentioned by the AO in his remand report dated 11.12.2013. (quoted in the earlier paragraph No. 5.18 on Page No. 22 onwards)

5.23 The AO has examined the said agreement and in his response dated 26.12.2013 has clearly brought out that even after the production of the copy of the agreement assessee has not discharged its onus of explaining the genuineness of the transaction. From a bare reading of the so-called agreement copy by the DRP, it is found that the above loan is advanced without any interest, the reason for which has not been explained. The amount involved is quite a large sum of money. Further, as per this document, the interest-free credit facility was to be granted on the basis of a duly completed utilization request, where as no such utilization request or basis for seeking the above credit facility, has been produced by the assessee before the AO or before the DRP. We are therefore in agreement with the AO's finding that the onus of proving the genuineness of the loan transaction has not been discharged by the assessee. The AO is, therefore, directed to make addition of

Rs. 254.75 crores."

40. At this juncture, it is to be noted that re-opening of the assessment proceedings on the basis of fresh information received is permissible under the law as held by *Clagett Brachi Co. Ltd. v. CIT* (1989) 177 ITR 409 (SC) and *Phool Chand* (supra). In *Clagett Brachi* (supra) it was observed as follows:

"It is contended that the Income Tax Officer has no jurisdiction to take proceedings under Sections 147 and 148 of the Income-tax Act because the conditions pre-requisite for making the re-assessments were not satisfied. The re-assessments were made with reference to Clause (b) 30 of Section 147 of the Act, and apparently the Income Tax Officer proceeded on the basis that in consequence of information in his possession he had reason to believe that income chargeable to tax had escaped assessment for the two assessments years. From the material before us it appears that the Income Tax Officer came to realise that income 35 had escaped assessment for the two assessment years when he was in the process of making assessment for a subsequent assessment year. While making that assessment he came to know from the documents pertaining to that assessment that the overhead expenses related to the entire business including the business as commission agents and 40 were not confined to the business of purchase and sale. It is true, as the High Court has observed, that this information could have been acquired by the Income Tax Officer if he had exercised the due diligence at the time of the original assessment itself. It does not appear, however, the attention of the Income Tax Officer was directed by any- 45 thing before him to the fact that the overhead expenses related to the entire business. The information derived by the Income Tax Officer evidently came into his possession when taking assessment proceedings for the subsequent year. In the circumstances, it cannot be doubted that the case falls within the terms of cl. (b) of Section 147 of the Act, and that, therefore, the High Court is right in holding against the assessee."

41. In the background of these circumstances, this court is of opinion that the complex and circuitous structure of subsidiaries and the transactions entered therein are closely connected and provide a live link for the formation of the belief of the AO that there has been escapement of income in AY 2009-10 and for the previous assessment year, AY 2008-09 as well because the investments continued that year.

42. The next question deals with the issue of true and full disclosure of the transaction at the time of assessment proceedings. Proceedings under Section 147 of the Act, beyond a period of 4 years can only be initiated if the AO has reason to believe that there has been escapement of income and this escapement is owing to the lack of true and fair disclosure by the assessee. In this regard, it is essential to understand the meaning of the phrase “*true and fair disclosure*”. This Court in has considered the meaning of this phrase in *Honda Siel Power Products Ltd. v. Deputy Commissioner Income Tax* (2012) 340 ITR 53 (Delhi) where the Court held that that the term “failure” on the part of the assessee is not restricted to the Income-tax return and the columns of the Income-tax return or the tax audit report. The Court held that there can be omission and failure on the part of the assessee to disclose material facts fairly and truly during the course of the assessment proceedings.

43. More specifically, the Supreme Court in *Phool Chand* (supra) was dealing with the issue of disclosure related to bogus and sham transactions. The Court there held:

“Thus, where the transaction itself on the basis of subsequent information, is found to be a bogus transaction, the mere

disclosure of that transaction at the time of original assessment proceedings, cannot be said to be disclosure of the “true” and “full” facts in the case and the I.T.O. would have the jurisdiction to reopen the concluded assessment in such a case. It is correct that the assessing authority could have deferred the completion of the original assessment proceedings for further enquiry and investigation into the genuineness to the loan transaction but in our opinion his failure to do so and complete the original assessment proceedings would not take away his jurisdiction to act under Section 147 of the Act, on receipt of the information subsequently”.

44. This has also been reiterated by the Patna High Court in *Kapoor Brothers v. Union of India* (2001) 247 ITR 324 (Pat) and by the Bombay High Court in *Nickunj Exim Enterprises (P) Ltd. v. Assistant Commissioner of Income Tax*(2014) 270 CTR (Bom) 494 where the Court held:

“In case there is a prima facie doubt about the truthfulness and/or completeness of the disclosure at the time of original assessment in view of information obtained later the provisions cannot aid the petitioner at the stage of notice under s. 148 of the Act. It is likely that during the assessment proceedings the assessee may be able to satisfy the AO that there was a true and full disclosure. Once the AO has received information that invoices issued by M/s. Rahul Industries are bogus then the same is necessarily to be the subject matter of enquiry during the reassessment proceedings.”

45. It is clear from the above judicial pronouncements that the mere disclosure of a transaction at the time of the original assessment proceedings does not protect the assessee from a re-assessment under Section 147 if the AO has information that indicates that the transaction is sham or bogus. In the present case, NDTV has alleged that the details of the corporate guarantee issued by NDTV to NNPLC regarding the Step Up Coupon Bonds

was intimated to the Revenue during the original assessment proceeding. This argument of NDTV falls flat in light of the judicial decisions mentioned above considering that the AO has reason to believe that this transaction is bogus. For these reasons, this Court is of the view that the impugned reassessment notice is valid in law and can be sustained. The Writ Petition No. 11638/2015 is hereby dismissed.

Issue 2:

46. It is urged and argued by the learned counsel for NDTV that the order for provisional attachment of NDTV's assets is *mala fide*, patently illegal and in violation of the provisions of Section 281B of the Act. It is submitted that the Respondent has failed to demonstrate that NDTV was likely to thwart the attempt of the Revenue to recover legitimate taxes. In this regard, NDTV stressed that it had regularly assessed to tax for the past two decades. Further, NDTV argued that the extraordinary power under Section 281B cannot be invoked merely on grounds of difficulty in recovering taxes and the Respondent has failed to indicate any overt activities of NDTV in alienating its assets to the detriment of the Respondent. NDTV argued that there were no enforceable tax demands at present and the estimated tax demand of ₹ 328.96 crores, if arises, can be enforced against the assets of NDTV which are valued at ₹675.35 crores.

47. On behalf of the Revenue, it was submitted that the order of provisional attachment was legal and valid and had been passed with the due approval of the Commissioner. The Respondent contended that it is not essential to prove that NDTV will thwart the recovery of future demand. For passing an order of attachment under Section 281B of the Act, the AO must

be of the opinion that such an order is necessary to protect the interests of the Revenue.

48. The revenue placed reliance on the tax evasion petitions filed by the shareholders of NDTV raising issues of tax evasion by NDTV by raising funds amounting to ₹1100 crore through its foreign subsidiary, NNPLC. The Revenue took into consideration the findings of the DRP for the AY 2009-10, wherein the DRP had noted that the investment in NNPLC were sham transactions and required lifting of the corporate veil. Even for the AY 2008-09, the investigation in raising of ₹405 crores through Step Up Coupon Bonds issued by NNPLC and guaranteed by NDTV were in progress. In addition to this, the revenue argued that the declining net worth of NDTV as against the estimated tax liability will make it difficult to recover the tax demand. It was further contended that NDTV had also pledged its assets to the tune of ₹3.5 crore and ₹5 crore to issue an irrevocable and unconditional guarantee to secure a term loan for its subsidiary, NDTV Convergence Limited. This, the revenue argues, is in clear violation of the CBDT Circular No. 4 of 2011, dated 19.07.2011, wherein prior permission of the AO is required for the assessee to create a charge on its assets.

49. This issue involves the application of Section 281B of the Act. For convenience, the relevant provision of the Act is reproduced below:

“Section 281B-

- (1) Where, during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or*

Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.....”

50. The question that arises for consideration is whether the AO was of the opinion that for the purposes of protecting the interests of the Revenue, it was necessary to attach the assets of NDTV. The scope of judicial review over the powers of the AO under Section 281B was considered by this Court in *VLS Finance Ltd. v. Commissioner of Income Tax*[2000] 246 ITR 707 (Delhi). The Court stated that the review over the powers of the executive was limited and held:

“The Court must while adjudicating validity of an executive decision grant a certain measure of freedom of play in the joints to the executive.....It is only palpably arbitrary exercise which can be declared void. Only when the action of the administrative authority is so unfair or unreasonable that no reasonable person would have taken that action, can the court intervene.”

51. In *VLS Finance* (supra), the Court relied upon the *prima facie* investigations conducted by the investigation wing that indicated the manipulation of the Profit & Loss A/c by the assessee to indicate losses despite profits earned in that year. Holding in favour of the Revenue, the Court did not interfere with the orders under Section 281B. In this context, while interpreting this provision in *Society for Integrated Development in Urban and Rural Areas v. Commissioner of Income Tax and Anr.* [2001] 252 ITR 642 (AP), the Court noted that there must be “*reasonable apprehension that the assessee may default the ultimate collection of demand, i.e., likely to be raised on completion of the assessment*”. The power under Section 281B

must not be invoked unless there is sufficient and relevant material on record to prove that the assessee is about to dispose of the property to thwart the collection of tax liability. [*Raghuram Grah P. Ltd. and Another v. ITO* [2006] 281 ITR 147 (All)]. Mr. Ganesh, senior counsel for the assessee had argued that ordinarily the principles applicable to Order XXXVIII, Rule 5 Civil Procedure Code (CPC) which empowers a court to attach property before judgment, would be applicable to AOs who exercise powers under Section 281 of the Act. In this context, it is asserted that unless the authority or court (in this case the AO) concludes on the basis of materials on record, that there is a real danger or likelihood of the assessee fleeing his jurisdiction or squandering or frittering away its assets, the order under Section 281B should not be invoked, because it would place severe and impossible restraints on the commercial functioning of the assessee.

52. In this case, the reasons provided are to be viewed in the background of the tax evasion allegedly conducted by NDTV by floating paper companies to raise approximately ₹1100 crore and later dissolving them. Owing to these transactions, the investors in these companies have suffered significant losses within a short span of time. The AO also specifically points out to the declining net worth of NDTV and records:

“12. The Balance Sheet of the assessee company as on 31.03.2015 reflects reserves & surplus amounting to Rs.313.63 crore. At the same time, the assessee company has current liabilities of Rs.335.93 crore in the form of trade payables, short term & long term borrowings and the other current short term provisions and liabilities. Apart from this, the assessee company had issued bank guarantee to its subsidiary amounting to Rs.40 crore. After excluding the figures of cumulative outgo on account of trade payables, short term & long term borrowings and the other current short term

provisions and liabilities of the assessee company, the assessee company would be left with assets of nearly Rs.339.42 crore. As the figures mentioned above pertain to the previous financial year, the possibility of the availability of assets being even lower as on date cannot be ruled out. As against this, the anticipated demand as mentioned above comes to Rs.328.96 crore apart from an existing demand of Rs.449.47 crore. It is apprehended that existing outstanding demand as well as the tax liability which would arise on completion of pending assessments/reassessments will be difficult to recover.”

53. In addition to this, NDTV has also issued guarantees to obtain a term loan for its subsidiary NDTV Convergence.

54. The AO relies on the CBDT Circular No. 4 of 2011 dated 19 July, 2011, which *inter alia*, states as follows:

"3. The circumstances under which prior permission u/s 281 should be granted by the Assessing Officers are as follows:

(iv) If demand is likely to arise in the next six months, then the AO should explore the possibility of action prescribed u/s 281B."

55. The revenue states that the annual reports and financial statements of the assessee show that its net worth has constantly declined over the years and has in fact declined to ₹ 339.42 crore, as on 31.03.2015 from ₹ 421.06 crore as on 31.03.2012. In addition, it also urges that NDTV has created further charge on its assets without taking previous permission from the AO. In terms of Para 10 of the provisional attachment order dated 14.09.2015, NDTV issued unconditional and irrevocable guarantee to the extent of ₹ 3.5 crore and ₹ 5 crore for obtaining a term loan from Yes Bank by its subsidiary NDTV Convergence Limited. However, while pledging these assets, NDTV failed to seek permission from the Department as per the provisions of

section 281 of the Act read with CBDT's Circular No. 4 of 2011 dated 19.07.2011. It is submitted that NDTV is aware of the Circular, because the AO had issued an advisory to the petitioner by letter no. 529 dated 01.08.2014.

56. This Court is of the view that a reasonable apprehension that NDTV may liquidate the assets thwarting the recovery of tax liability is not unwarranted. This court further notes the AO's decision not to attach the bank accounts and other trade receivables of NDTV so as to ensure unhampered operation of its business. This decision is in line with the judgment of the Bombay High Court in *Gandhi Trading v. Assistant Commissioner of Income Tax and Others* [1999] 239 ITR 337 (Bom) wherein the Court held that the action taken under Section 281B must not hamper the business activities of the assessee and accordingly, attachment of bank accounts must be the last resort.

57. For these reasons, this Court is of the opinion that the impugned order under Section 281B does not suffer from any infirmities and is valid under the Act. The Writ Petition No. 9120/2015 has to therefore, fail.

58. In view of the foregoing analysis, both petitions WP Nos. No. 9120/2015 and 11638/2015 have to be and are dismissed, without any order as to costs.

S. RAVINDRA BHAT
(JUDGE)

NAJMI WAZIRI
(JUDGE)

AUGUST 10, 2017

HIGH COURT OF DELHI



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