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IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.09.2021

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THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

W.P.No.35924 of 2016
and
W.M.P.No.30878 of 2016

M/s.SL Lumax Ltd.,
Rep.by its Managing Director,
G-15, SIPCOT Industrial Park
Sriperumbudur Taluk
Kancheepuram District,
Irrungattukottai - 602 117.

..Petitioner

vs

Deputy Commissioner of Income Tax,
Corporate Circle VI-2,
7th Floor, New Block, Room 705,
121, M.G.Road, Nungambakkam,
Chennai - 600 034.

..Respondent

Prayer: Writ Petition filed under Article 226 of the Constitution of India praying to issue a Writ of Certiorari, calling of records of the respondent herein pertaining to notice dated 10.03.2016 for AY 2009-2010 and consequential communication No.Misc/Corp.Cir 6(2)/2014-15 dated 26.9.2016, issued by the respondent and quash the same.

For Petitioner : Mr.Srinath Sridevan

For Respondent : Mr.A.P.Srinivas
Senior Standing counsel
[For Income Tax]

O R D E R

The reopening of assessment made under Section 147/148 of the Income Tax Act, 1961 [hereinafter referred to as the 'Act'] is under challenge in the present writ petition.

2. The petitioner is a company incorporated under the



Companies Act, 1956. The petitioner has been in the business of manufacturing of automobile parts and is a leading supplier to Companies such as Hyundai for over fifteen years. On 28.09.2009, the petitioner filed its return for the Assessment Year 2009-10. Notice under Section 142(1) of the Act was issued on 14.11.2011 along with the questionnaire. The petitioner furnished all the material informations and disclosed such information truly and fully. The case was referred to the Transfer Pricing Officer on 06.12.2012, which was cleared by the Transfer Pricing Officer and no adjustments were made. Finally, an order of assessment for the Assessment Year 2009-10 was passed, accepting the income declared by the petitioner and consequently, the tax assessed was also paid.

3. While so, a notice under Section 148 of the Act was issued, reopening the assessment, stating that the income chargeable to tax for Assessment Year 2009-10 has escaped assessment. The petitioner requested for reasons and reasons were furnished by the respondents. The petitioner submitted its objections in detail and the order impugned, disposing of the objections was communicated to the writ petitioner. Thus, the petitioner is constrained to move the present writ petition.

4. The learned counsel for the petitioner relied on the 12th Annual Report of the petitioner, wherein the Directors have opted for AS 11 (Accounting Standards) Amendment Rules, 2009, for accounting the difference arising on reporting of long term foreign currency monetary items effect of Exchange loss on ECB loans. As a result, there is a change in Accounting Policy, which is within in the statutory regulations. The said Annual Report further provides Profits and Loss Account as on 31.03.2009, wherein the details of unsecured loan is also stated clearly with reference to Export Import Bank of Korea and Korea Exchange Bank, Bahrain Branch. The total outstanding was stated as Rs.46,99,00,080/- and further, in the said report, the petitioner has clearly mentioned in the notes as follows:

"Note:

1.Additions to Plant & Machinery includes ECB Loans "Exchange Loss" of Rs.46,99,80,000 minus previous year's Gain of Rs.9,18,72,530 in accordance with AS 11 Amendment Rules 2009 adjustments/Deletion of Rs.4,16,36,806 shown above, includes assets discarded of value Rs.2,13,70,551."

5. Therefore, the initiation of reopening proceedings beyond the period of four years in the case of the writ petitioner is directly in violation of the proviso clause to Section 147 of the Act.



6. The 12th Annual Report dated 07.09.2009 further speaks about Foreign Exchange Translation, Foreign Currency Transactions, and also Fixed Assets Deletion. The findings in the Annual Report verbatim is the reasons furnished for reopening of assessment. Under the head of Foreign Currency Transactions, the petitioner has stated as follows:

"Foreign Currency Transactions:

The Company has opted for accounting the difference arising on reporting of long term foreign currency monetary items in line with Companies (Accounting Standards) Amendment rules, 2009 on Accounting Standard 11 (AS 11) notified by Ministry of Corporate Affairs, Government of India on 31st March, 2009. Accordingly, the effect of exchange losses aggregating Rs.4699.80 Lakhs on ECB's are added to the cost of depreciable capital assets. Consequent to the change, the depreciation for the year is higher by Rs.1.34 Lakhs and the profit for the year is higher by Rs.4,698.46 Lakhs.

Accordingly, exchange difference in the Profit & Loss Account pertaining to previous accounting year ending 31st March 2008 relating to said Long Term Liabilities in Foreign Currency have now been reversed from the Reserves & Surplus, has prescribed in the above notification. Therefore, an amount of Rs.918.73 Lakhs (gain) has been reduced from the cost of fixed assets and debited to the Reserves & Surplus to the extent of Rs.918.73 Lakhs.

As the Company had adopted an option available relating to AS-11 as notified by Government of India as per Companies (Accounting Standards) Amendment Rules, 2009 there is a change in accounting policy and it is disclosed herewith in accordance with Para 32 of AS-5, Net Profit or Loss for the Period, Prior Period items and Changes in Accounting Policies."

7. The very same report has been taken into consideration for reopening of assessment. Thus, the reopening is based on change of opinion and not based on any new materials on record.

8. The return of income for the Assessment Year 2009-10 filed by the petitioner would reveal that the petitioner has furnished depreciation of plant and machinery. Additions for a period of less than 180 days in the previous year was also furnished. Citing the said depreciation column stated by the petitioner in its return, the learned counsel for the petitioner



reiterated that the final assessment order was passed, considering all these facts and particulars provided by the writ petitioner and therefore, the reopening of assessment beyond the period of four years is untenable as it is reopened based on change of opinion.

9. The learned counsel for the petitioner drew the attention of this Court with reference to the reasons furnished for reopening. The reasons are taken out from the 12th Annual Report for the Year 2008-09 furnished by the petitioner. Admittedly, the petitioner has opted for AS 11 (Accounting Standards) Amendment Rules 2009. When all these facts are very much available even during the original assessment and the Assessing Officer also considered these facts and passed an assessment order, there is no reason whatsoever for reopening of assessment beyond the period of four years in the absence of any tangible materials as required under Section 147 of the Act.

10. The learned counsel for the petitioner criticized the disposal of objections by the respondents on the ground that there is no application of mind on the part of the authorities, while disposing of the objections. They have miserably failed to consider the fact that there is no new material available on record to reopen the assessment. Contrarily, the respondent passed an order, stating that the Assessment officer has been passed without considering certain facts at the time of passing original assessment order and therefore, the reopening of assessment is justified. Such a finding is insufficient to meet out the principles laid down by the Hon'ble Supreme Court of India in the case of GKN Driveshafts (India) Ltd., Vs. ITO, reported in 259 ITR 19. Therefore, the reopening proceedings are liable to be set aside.

11. The learned counsel for the petitioner relying on the conditions stipulated in the Proviso Clause to Section 147 of the Income Tax Act, contended that the reasons furnished as well as the disposal of objections did not satisfy the requirements as contemplated under the provisions and therefore, the impugned orders are liable to be set aside. In support of the said contentions, the judgment in the case of the Income Tax Officer, I Ward, District VI, Calcutta and others, Vs. Lakhmani Mewal Das, reported in 1976 3 SCC 757, the Hon'ble Supreme Court of India made the following observations:

"7. It would appear from the perusal of the provisions reproduced above that two conditions have to be satisfied before an Income Tax Officer acquires jurisdiction to issue notice under Section 148 in respect of an assessment beyond the period of four years but within a period of eight years from the end



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of the relevant year viz. (1) the Income Tax Officer must have reason to believe that income chargeable to tax has escaped assessment, and (2) he must have reason to believe that such income has escaped assessment by reason of the omission or failure on the part of the assessee (a) to make a return under Section 139 for the assessment year to the Income Tax Officer, or (b) to disclose fully and truly material facts necessary for his assessment for that year. Both these conditions must coexist in order to confer jurisdiction on the Income Tax Officer. It is also imperative for the Income Tax Officer to record his reasons before initiating proceedings as required by Section 148(2). Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income Tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income Tax Officer of the account books or other evidence from which material evidence could with due diligence have been discovered by the Income Tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income Tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income Tax Officer with regard to the inference which he should draw from the primary facts. If an Income Tax Officer draws an inference which appears subsequently to be erroneous, mere change of opinion with regard to that inference would not justify initiation of action for reopening assessment.

12. The powers of the Income Tax Officer to reopen assessment though wide are not plenary. The words of the statute are "reason to believe" and not "reason to suspect" The reopening of the assessment after the lapse of many years is a serious matter. The Act, no doubt, contemplates the reopening of the assessment if grounds exist for believing that income of the assessee has escaped assessment. The underlying reason for that is that instances of concealed income or other income escaping assessment in a large number of cases come to the notice of the Income Tax Authorities after the assessment has been completed. The provisions of the



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Act in this respect depart from the normal rule that there should be, subject to right of appeal and revision, finality about orders made in judicial and quasi-judicial proceedings. It is, therefore, essential that before such action is taken the requirements of the law should be satisfied. The live link or close nexus which should be there between the material before the Income Tax Officer in the present case and the belief which he was to form regarding the escapement of the income of the assessee from assessment because of the latter's failure or omission to disclose fully and truly all material facts was missing in the case. In any event, the link was too tenuous to provide a legally sound basis for reopening the assessment. The majority of the learned Judges in the High Court, in our opinion, were not in error in holding that the said material could not have led to the formation of the belief that the income of the assessee respondent had escaped assessment because of his failure or omission to disclose fully and truly all material facts. We would, therefore, uphold the view of the majority and dismiss the appeal with costs."

12. The learned counsel for the petitioner has emphasized that the reopening of assessment is not in consonance with the conditions stipulated in proviso clause cannot be sustained. The Apex Court of India, in unequivocal terms, held that the duty of the assessee in any case does not extend beyond making true and full disclosure of primary facts. Once, he has done that his duty ends. It is for the Income Tax Officer to draw the correct inference from the primary facts. It is not the responsibility of the assessee to advise the Income Tax Officer with regard to the inference, which he should draw for the primary facts. If an Income Tax officer draw an inference, which appears subsequently to be erroneous, mere change of opinion with regard to that inference does not justified for reopening of assessment. It is contended that applying the above principles laid down in the case of the petitioner also, the assessment officer has considered all these aspects and passed the final assessment order. The very same 12th Annual Report has been taken into consideration and the very same facts furnished are repeated for the purpose of reopening of assessment and therefore, the inference drawn in the reasonings furnished is nothing but change of opinion and cannot be construed as new material, conferring jurisdiction on the respondent to reopen the assessment.

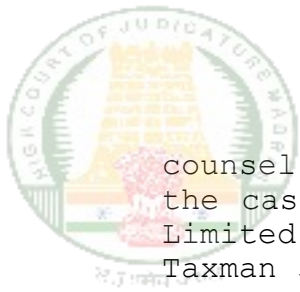
13. The learned Senior Standing counsel appearing on behalf of the respondents disputed the contentions raised on behalf of the petitioner in entirety. It is contended that the order of assessment originally passed is cryptic in nature. The Assessing



Officer has not considered the inferences drawn by the respondents for reopening of assessment by invoking Section 147/148 of the Act. The judgment of the Hon'ble Supreme Court of India is not applicable, if the Assessing Officer has 'reason to believe' in respect of the issues raised for reopening of assessment. In the present case, the respondents have reopened the assessment based on a tangible material for arriving a conclusion as there is an escapement of income from assessment. Thus, the case of the petitioner do not fall under the principles relied on by them in the case of Lakmani Mewal Das (Cited supra). In the present case, the conditions stipulated in the Proviso Clause to Section 147 are complied with and reopening is done based on tangible material. Mere production of books of accounts, informations not necessarily be the factor for the purpose of reopening of assessment under Explanation 1 to Section 147 of the Act. Explanation 2(c) provides various circumstances for reopening of assessment and the case of the petitioner is falling under Section 147, Explanation 2(c) of the Act and therefore, the Assessing authority shall be allowed to continue the reopening proceedings to pass the reassessment order.

14. The learned Senior Standing counsel contended that the notice was issued, after necessary approval from the Principal Commissioner of Income Tax-6, Chennai. The reasons were recorded based on tangible material and the Assessing Officer also has 'reason to believe' for reopening. There was a failure on the part of the assessee to disclose fully and truly the material facts necessary for assessment for that Assessment Year. In the case of M/s.Kelvinator & Co., Ltd., regarding the reopening of assessment under Section 147, the Hon'ble Supreme Court of India had discussed the effects of amendment to Section 147 of the Act, wherein the Apex Court has distinguished between the expressions "reasons to believe" and "opinion. The Apex Court had stated, "Assessing Officer has power to re-open, provided there is "tangible material" to come to the conclusion that there is an escapement of income from assessment. Reasons must have a live link with the formation of the belief. This being the principles laid down, in the present case, the petitioner assessee did not furnish fully and truly material facts necessary for the assessment for the Assessment Year. The learned Senior Standing Counsel reiterated that it is a reopening proceedings and therefore, the scope for the assessee to assail the reopening is limited. Once, the respondents are able to establish that the conditions stipulated under Section 147 are complied with, then they are empowered to continue the reopening proceedings and the assessee will be getting an opportunity for the purpose of defending their case and therefore, the writ petition is devoid of merits.

14a. In support of the contentions, the learned Standing



counsel relied on the judgment of the Hon'ble Supreme Court in the case of Indi-Aden Salt Manufacturing Trading Company Private Limited Vs. Commissioner of Income Tax reported in [1986] 25 Taxman 356 (SC), wherein the Apex Court held as follows:

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"7.....In respect of the material failure, the omission to disclose may be deliberate or inadvertent. That was immaterial. But if there is omission to disclose material facts, then, subject to the other conditions, jurisdiction to reopen is attracted. It is sufficient to refer to the decision of this Court in Calcutta Discount Co. Ltd.'s case (supra) where it had been held that if there are some primary facts from which reasonable belief could be formed that there was some non-disclosure or failure to disclose fully and truly all material facts, the ITO has jurisdiction to reopen the assessment. This position was again reiterated by this Court in Malegaon Electricity Co. (P.) Ltd. Vs. CIT [1970] 78 ITR 466.

8. Furthermore, bearing these principles in mind in this particular case whether there has been such non-disclosure of primary facts which has caused escapement of income in the assessment was basically a question of fact.

(b) In the case of Girilal and Company Vs. Income-Tax Officer, Mumbai, reported in [2016] 75 Taxmann.com 172 (SC), the Court held as follows:

"4. It is clear from the above that this information was supplied as there was some query about the value of the land. Obviously, while going to this document the Assessing Officer would examine the value of the land. However, the reason for issuing notice under Section 148 of the Income Tax Act was that the appellant had not correctly disclosed the actual assets of the plot and hence, it was not entitled for deduction under Section 80(1B) (10) of the Act. The Income Tax Authority itself has mentioned in the notice under Section 148 of the Act that such information was available only in the valuation report. Giving the information in this manner shall be of no help to the appellant as the Assessing Officer was not expected to go through the said information available in the valuation report for the purpose of ascertaining the actual construction of the plot."

(c) In the case of Shri Krishna Pvt. Ltd. Vs. Income Tax Officer 1996 87Taxman 315 (SC), the Hon'ble Supreme Court of



India, considered the principles as under:

"8. The first and foremost is the decision of the Constitution Bench *Calcutta Discount Co. Ltd. v. Income Tax Officer, Companies District-I, Calcutta & Anr.* [(1961) 41 I.T.R. 191(SC)]. The case arose under Section 34 of the Income Tax Act [as amended in 1951]. In material particulars, the provisions in Section 34 were similar to those in Section 147. Having regard to the fact that it is the only Constitution Bench decision on the point, it is necessary to examine it in some detail. The Constitution Bench explained the purport of Section 34 in the following words:

"To confer jurisdiction under this section to issue notice in respect of assessments beyond the period of four years, but within a period of eight years, from the end of the relevant year two conditions have therefore to be satisfied. The first is that the Income-tax Officer must have reason to believe that income, profits or gains chargeable to income-tax have been under-assessed. The second is that he must have also reason to believe that such 'under-assessment' has occurred by reason of either (i) omission or failure on the part of an assessee to make a return of his income under section 22, or (ii) omission or failure on the part of an assessee to disclose fully and truly all material facts necessary for his assessment for that year. Both these conditions are conditions precedent to be satisfied before the Income-tax Officer could have jurisdiction to issue a notice for the assessment or reassessment beyond the period of four years, but within the period eight year, from the end of the year in question..... The words used are 'omission or failure to disclose fully and truly all material facts necessary for his assessment for that year. It postulates a duty on every assessee to disclose fully and truly all material facts necessary for his assessment. what facts are material and necessary for assessment will differ from case to case. In every assessment proceeding, the assessing authority will, for the purpose of computing or or determining the proper tax due from an assessee, require to know all the facts which help him in coming to the correct conclusion. From the primary facts in his possession, whether on disclosure by the assessee, or discovered by him on the basis of the facts disclosed, or otherwise, the assessing authority has to draw inferences as regards certain other facts; and ultimately, from the primary facts and the further facts inferred from them,



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the authority has to draw the proper legal inferences, and ascertain on a correct interpretation of the taxing enactment, the proper tax leviable. Thus, when a question arises whether certain income received by an assessee is capital receipt, of revenue receipt, the assessing authority has to find out what primary facts have been proved, to decide what the legal inference should be..... We have, therefore, come to the conclusion that while the duty of the assessee is to disclose fully and truly all primary relevant facts, it does not extend beyond this." (Emphasis added)

9. In that case, the alleged not-disclosure of material facts fully and truly- to put it in the words of the court - was the failure of the assessee to disclose "the true intention behind the sale of the shares". The assessee had stated during the assessment proceedings that the sale of shares during relevant assessment years was a casual transaction in the nature of mere change of investment. The Income Tax Officer found later that those sale were really in the nature of trading transactions. The case of the Revenue was that the assessee ought to have stated that they were material, on the basis of which, he has reasons to believe that the assessee had put forward certain bogus and false unsecured hundi loans said to have been taken by him from non-existent persons of his dummies, as the case may be, and that on that account income chargeable to tax has escaped assessment. According to him, this was false assertion to the knowledge of the assessee. The Income Tax Officer says that during the assessment relating to subsequent assessment year, similar loans [from some of these very persons] were found to be bogus. On that basis, he seeks to re-open the assessment. It is necessary to remember that we are at the state of re-opening only. The question is whether, in the above circumstances, the assessee can say, with any justification, that he had fully and truly disclosed the material facts necessary for his assessment for that year. Having created and recorded bogus entries or loans with what face can the assessee say that he had truly and fully disclosed all material facts necessary for his assessment for that year. True it is that Income Tax Officer could have investigated the truth of the said assertion which he actually did in the subsequent assessment year - but that does not relieve the assessee of his obligation, placed upon him by the statute, to disclose fully and truly all material facts. Indubitably, whether a loan alleged to have been taken by the assessee, is true or false, is a



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material facts and not an inference, factual or legal, to be drawn from given facts. In this case, it is shown to use that ten persons [who are alleged to have advanced loans to the assessee in a total sum of Rs.3,80,000/- out of the total hundi loans of Rs.8,53,298/-] were established to be bogus persons or mere name lenders in the assessment proceedings relating to the subsequent year. Does it not furnish a reasonable ground for the Income Tax Officer to believe that on account of the failure- indeed not a mere failure but a positive design to mislead - of the assessee to disclose all material facts, fully and truly, necessary for his assessment for that year, income has escaped assessment? We are of the firm opinion that it does. It is necessary to reiterate that we are now at the stage of the validity of the notice under Section 148/147. The enquiry at this stage is only to see whether there are reasonable grounds for the Income Tax Officer to believe and not whether the omission/failure and the escapement of income is established. It is necessary to keep this distinction in mind.

10. A recent decision of this Court in Phoolchand Bajranglal v. Income Tax officer [(1993) 203 I.T.R.456], we are gratified to note, adopts an identical view of law and we are in respectful agreement with it. The decision rightly emphasises the obligation of the assessee to disclose all material facts necessary for making his assessment fully and truly. A false disclosure, it is held, does not satisfy the said requirement. We are also in respectful agreement with the following holding in the said decision:

"Since the belief is that of the Income tax Officer, the Sufficiency of reasons for forming the belief is not for the court of judge but it is not for the court of judge but it is open to an assessee to establish that there in fact not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, 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."

11. Learned counsel for the assessee, Sri Gupta



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placed strong reliance upon the decisions of this Court in Chhugamal Rajpal v. S.P. Chaliha & Ors [(1971) 79 I.T.R.603], Income Tax Officer, I Word, Dist. VI, Calcutta v. Lakhmani Mewal Das [(1976) 103 I.T.R.437] and Commissioner of Income Tax, Calcutta v. Burlop Dealers Limited [(1971) 79 I.T.R.609] as laying down propositions contrary to those laid down in Phool Chand Bajranglal. We cannot agree. The principle is well-settled by Calcutta Discount and it is not reasonable to suggest that any different proposition was sought to be enunciated in the said decisions. Calcutta Discount emphasises repeatedly the assessee's obligation to disclose all material facts necessary for his assessment fully and truly in the context of the two requirements - called conditions precedent which must be satisfied before the Income Tax Officer gets the jurisdiction to re-open the assessment under Section 147/148. This obligation can neither be ignored nor watered down. Nor can anyone suggest that a false disclosure satisfies the requirement of full and true disclosure. All the requirement stipulated by Section 147 must be given due and equal weight. Finality of proceedings is certainly a consideration but that avails one who has fully and truly disclosed all material facts necessary for his assessment for that year - and not to others. All the decisions relied upon by Sri Gupta have been elaborately discussed and distinguished in Phool Chand Bajranglal and we fully agree with the same. We think it unnecessary to repeat those reasons. In particular, we agree with the reasons given in Phool Chand Bajranglal for holding that the decision of this Court in Burlop dealers must be confined to the particular fact-situation of that case and that it cannot be construed to be of universal application irrespective of the facts and circumstances of the case before the Court."

(d) Lastly, in the case of Helios and Metheson Information Technology Ltd. Vs. Assistant Commissioner o Income-Tax [2011] 15 Taxmann.com 324 (Madras), the Hon. Division Bench of Madras High Court held as follows.

"11. Having heard the learned counsel for the respective parties and having perused the materials placed before us, we find that the Tribunal has analysed various factors before it to arrive at the conclusion that there was no true and full disclosure of material facts necessary for making the assessment at the original stage. The proviso to section 147 of the Act, among other things, empowers the assessing



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authority to invoke section 148 of the Act to issue notice for reopening the assessment beyond the prescribed period of four years, from the end of the relevant assessment year, if the assessee failed to disclose fully and truly all material facts necessary for the assessment for that year. It is true that in the case on hand, the last date for the four year period expired on March 31, 2002 and the notice under section 148 of the Act came to be issued only on December 20, 2003. Assessment under section 143(3) came to be made on March 29, 2000. In the return filed by the appellant, there was no specific reference to the receipt of a sum of Rs. 542 lakhs. However, in the profit and loss account, in the schedule, after ascertaining the profit, an extraordinary item was shown with the additional expression to the effect "from transfer of division". The sum was indicated as Rs. 542 lakhs. That apart, the appellant is stated to have submitted a note on the extraordinary item on February 8, 2000 stating that the said sum of Rs. 542 lakhs represents consideration as a restrictive trade covenant for not engaging in forex business. Reliance was placed upon a decision of this court in support of the said claim. In the letter written by the chartered accountant dated March 15, 2000 the appellant, however, admitted that the date of commencement of forex business was only on January 3, 1995 with the details of RBI license. Significantly, neither the copy of the agreement, nor the date of the agreement was disclosed at any time before the issuance of notice under section 148 of the Act, viz., December 20, 2003. In fact, even after the issuance of the notice under section 148 of the Act, copy of the agreement was not furnished before the Assessing Officer. By making a reference to the clarificatory letter dated February 8, 2000, the appellant wanted to contend that the assessment completed under section 143(3) ought not to have been reopened after the expiry of the period of four years."

15. As far as the cases cited above are concerned, in such cases, where there is a failure on the part of the assessee or disclose the materials facts fully and truly, then jurisdiction to reopen is attracted. Even in Calcutta Discount Company Limited case, the Hon'ble Supreme Court of India held that reasonable belief could be formed that there was some non-disclosure or failure to disclose fully and truly all material facts, the ITO has jurisdiction to reopen the assessment. The said position was reiterated by the Apex Court even in Malegaon Electricity Company (P.) Ltd. Vs. CIT [1970] 78 ITR 466.



16. The other cases cited are also on the similar line, wherein non-disclosure of material facts fully and truly were established or there was a failure on the part of the assessee. Thus, the principles laid down in the above judgments are to be followed with reference to the facts and circumstances established in a particular case.

17. Let us examine the Proviso Clause to Section 147 of the Income Tax Act and also the Explanations 1 & 2.

18. Section 147 commences by enumerating that "If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year". Therefore, the Assessing Officer must have 'reason to believe'. What is 'reason to believe' has been elaborately considered by the Hon'ble Supreme Court of India in the case of M/s.Kelvinator & Co., Ltd., Accordingly, the 'reasons to believe' should have tangible material to arrive a conclusion that income chargeable to tax escaped assessment and reasons must have live link with the formation of the belief. Thus, mere opinion cannot be a belief. Such opinion formed must be supported with tangible material and the conclusion arrived must have live link with the formation of the belief. Thus, the 'reason to believe' must be to the subjective satisfaction of the Assessing Officer for the purpose of reopening of assessment.

19. Section 149 contemplates "Time Limit for Notice". Three circumstances are provided. The first case is within four years, Second case is beyond four years, but within six years subject to conditions and Third case is Financial interest outside India. Thus, Section 149 contemplates time limit for issuing notice under Section 148 and 147 provides income escaping assessment. Once income escaping assessment is satisfied, then notice must follow under Section 148 in consonance with the time limit prescribed under Section 149 of the Act.

20. Proviso to Section 147 imposes certain restrictions for reopening of assessment beyond the period of four years, but within the period of six years. If the period of four years expired, then any one of the following three conditions must be satisfied:-

(i) 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

(ii) in response to a notice issued under sub-section (1) of section 142 or section 148, or,

(iii) to disclose fully and truly all material facts necessary for his assessment, for that assessment year.



21. Therefore, it is sufficient if any one of the ground is satisfied. It is not necessary that all the three conditions stipulated must be satisfied. If the Assessing Officer is satisfied with any one of the conditions under the Proviso Clause to Section 147 and has 'reason to believe' that the income chargeable to tax has escaped assessment, then jurisdiction is conferred on him for reopening of assessment.

22. The dispute arises, whether the assessee disclosed the material facts fully and truly necessary for the assessment. In this context, it is necessary to look into the Explanations 1 & 2 to Section 147 of the Act. Explanation 1 clarifies that "Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso." Therefore, the Explanation is provided to remove the doubts with reference to the conditions stipulated in the Proviso Clause.

23. A doubt naturally arises regarding disclosure of all material facts fully and truly necessary for assessment. There is a possibility that every assessee may come and say that he has submitted all relevant account books containing all the material facts, which all are relevant for the particular assessment year and further, may contend that it is the duty of the Assessing Officer to verify all the account books and draw inference, if he has any other doubt. In certain circumstances, it may be an impossible act, which cannot be accepted by the Courts. A pragmatic approach in such circumstances are certainly warranted by adopting purposive and contextual interpretation. The purpose and object of the provision is of paramount importance. Thus, the explanation would be more relevant to understand the conditions stipulated in the proviso clause to Section 147 to the extent that, mere production of account books or other evidences will not necessarily amount to disclosure. Thus, even in cases, where account books or other evidences are produced by the assessee and assessment order is passed, based on the return of income, then also, the Assessing Officer is conferred with the jurisdiction to reopen the assessment, if he has 'reason to believe' that the income chargeable to tax has escaped assessment and such reasons must have live link with the materials discovered.

24. Explanation 2 to Section 147 of the Act stipulates "deemed cases", where income chargeable to tax has escaped assessment. Explanation 2 commences by stating that "For the purpose of Section 147, the following shall also be deemed to be cases". Undoubtedly, the deemed cases are the cases, where reopening of assessment is permissible under Section 147 of the Act.



(i) income chargeable to tax has been underassessed; or
(ii) such income has been assessed at too low a rate; or
(iii) such income has been made the subject of excessive relief under this Act ; or
(iv) excessive loss or depreciation allowance or any other allowance under this Act has been computed.

27. To make it more clear, in cases, where the Assessing authority found income chargeable to tax has been under-assessed, then such under assessment is falling under the deemed cases, where income chargeable to tax has escaped assessment. In such cases, where under-assessment is identified, then the Assessing Officer has 'reason to believe' for reopening of assessment. Therefore, Sub Clause (c) of Explanation 2 to Section 147 of the Act is satisfied. In other words, the 'reason to believe' will follow, once the Assessing Officer traced out an under-assessment after passing of the assessment order, which would confer jurisdiction on him to reopen the assessment. For the purpose of Explanation 2 Sub Clause (c), if any one of the deemed case is traced out by the Assessing Officer, then it is to be construed that the requirement of 'reason to believe' under Section 147 is implied as the under-assessment is also a deemed case, which provides 'reason to believe' for the Assessing authority to reopen the assessment.

"In the 12th Annual Report for the year 2008-09, at page 5, it is mentioned that the Company has opted for AS 11 (accounting Standards) Amendment Rules 2009, for accounting the difference arising on reporting of long term foreign currency monetary items effect of



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exchanges loss on ECB loans. As a result, there is a change in accounting policy. Accordingly, the effect of exchange losses aggregating to Rs.4699.80 lakhs on ECB's are added to the cost of depreciable capital assets. Consequent to the change, the depreciation for the year is higher as claimed in the depreciation schedule. Similarly, the exchange difference pertaining to previous accounting years of Rs.918.73 lakhs (gain) has been reduced from the cost of fixed assets. Therefore, there is a net increase in the cost of assets of Rs.3781.07 lakhs in the current year and the depreciation at rate of 10.34% works out to Rs.390.96 lakhs which has been claimed during this year in addition to the normal depreciation.

As per the provisions of section 43A of the Income Tax Act, the revaluation of any asset purchased in foreign currency can be revalued on account of fluctuation on the date of exchange and only at the time of actual repayment of the loan. It is clear from the notes to accounts that there has been no actual repayment during the current year made by the assessee and therefore the claim of Rs.390.96 lakhs on account of depreciation in the current year is higher. This should have been added back to the book profits as per the clause iia of explanation 1 of section 115 JB. Thus, there is a shortfall in assessment of income U/S 115 JB by 390.96 lakhs. The tax effect thereon is Rs.59 lakhs.

2. As per schedule 18 of the profit and loss account the following expenses have been debited.

(i) Assets discarded Rs.31,18,028/-

(ii) Exchange loss of capital Rs.28,54,362/-

Goods purchased

Total

Rs.59,72,380/-

As per clause I & J of Explanation of section 115JB both the above items are to be added back to the book profits. Thus, there is escapement of Rs.59,72,380/- to be taxed U/s.115JB. The tax effect thereon is Rs.8.96 lakhs.

3. As already stated there is revaluation of assets in the depreciation schedule which goes to increase the claims for depreciation under normal provisions by 25% i.e., Rs.945.27 lakhs (Rs.4699.80-Rs.918.73=Rs.3781.1 25%=Rs.945.27). This should have been added back in the normal computation of income as per provisions section 43A of the IT Act. There tax effect thereon is Rs.321.39 lakhs."



Therefore, I have the reason to believe that in the instant case income more than 1 lakh has escaped assessment. Hence this is a fit case to reopen U/s.148 of the IT Act, 1961."

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29. The assessee has submitted its objections elaborately and the said objections were disposed of by the respondents in the impugned proceedings dated 26.09.2016 as the disposal of objections must be on objective satisfaction of the authorities competent. The disposal of objections at the initial stage of reopening need not be on the subjective assessment as the complete adjudication must follow for passing reassessment order. Therefore, it is sufficient if the objections are considered and an objective satisfaction is arrived with reference to the reasons furnished, enabling the authorities to continue the reopening proceedings for its completion as during the course of such reopening proceedings, the assessee will get further opportunity to furnish materials and defend their cases. Keeping in mind, the above principles, in the present case, the objections filed by the petitioner were disposed of by the respondents. As rightly pointed out by the learned counsel for the petitioner, they have recorded the reasons in the disposal order and 12th Annual Report for the Year 2008-09 is also the material for the purpose of reopening of assessment. However, the respondents arrived a conclusion that there has been recording of reasons for reopening, based on tangible material, to come to the conclusion that there is escapement of income from assessment. The reopening is based on a new finding of fact, totally different from the issues dealt in the original assessment. Since, the assessing officer had not applied his mind and formed any opinion on the issues for which the case has been re-opened, it cannot be argued that reassessment is based on change of opinion and hence for the same reason, the assessee is wrong in stating that the issues for which the case was reopened at present have already been disclosed by the assessee and dealt by the Assessing Officer in the original assessment.

30. The respondents relied on Explanation 2(c) to Section 147 deemed cases, where income chargeable to tax has escaped assessment. In the case of the petitioner, the respondents have stated that where an assessment has been made but income chargeable to tax has been under-assessed or such income has been made the subject of excess relief under this Act or excessive allowance under the Act has been computed.

31. The respondents arrived a conclusion that the case of the petitioner is falling within the ambit of Explanation 2(c) to Section 147 of the Act.



32. No doubt, the petitioner would have produced the materials. However, Explanation 1 to Section 147 enumerates that submission of materials, account books not necessarily be a ground for exoneration from reopening proceedings. Even in cases, where such books of accounts or materials are produced and if the conditions stipulated in the Proviso clause deemed or the cases are established, then the jurisdiction is conferred on the Assessing Officer to reopen the assessment.

33. The first reason furnished relating to Section 43A of the Income Tax Act. Section 43A contemplates special provisions consequential to changes in rate of exchange of currency. With reference to the said section, the reasons are furnished by stating that the revaluation of any asset purchased in foreign currency can be revalued on account of fluctuation on the date of exchange and only at the time of actual repayment of the loan. It is clear from the notes to accounts that there has been no actual repayment during the current year made by the assessee and therefore the claim of Rs.390.96 lakhs on account of depreciation in the current year is higher. This should have been added back to the book profits as per the clause (iia) of explanation 1 of section 115 JB. Thus, there is a shortfall in assessment of income U/S 155 JB by 390.96 lakhs. The tax effect thereon is Rs.59 lakhs.

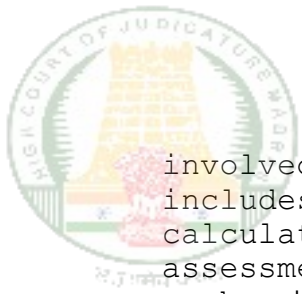
34. Importantly, in the reasons furnished, the respondents have stated that there has been no actual repayment during the current year made by the assessee. Perusal of the assessment order would reveal that absolutely there is no details with regard to the inference drawn by the Assessing Officer for the purpose of reopening of assessment. The assessment order originally passed dated 08.02.2013, such consideration is absolutely absent and the assessment order itself is cryptic in nature and the details elaborately has not been provided. The petitioner / assessee is a company, adopting mercantile method of accounting. Thus, the findings in these aspects are of paramount importance for the purpose of making the assessment in a clear manner. In view of the fact that the assessment order did not speak anything regarding the actual payments and other details elaborately, then it paves way for reopening of assessment. In the present case, the first reason would show that there is a shortfall in assessment of income under Section 115JB by 390.96 lakhs. Thus, the Assessing Officer has 'reason to believe' that there was an under-assessment. When such an under assessment is identified and falling under the deemed cases, where income chargeable to tax has escaped assessment, then the conditions stipulated in the proviso clause that disclosure of material facts fully and truly became absent. Thus, the Assessing Officer has 'reason to believe' for reopening of assessment.



35. As discussed above, it is sufficient if any one of the conditions stipulated in Proviso clause to Section 147 of the Income Tax Act is satisfied for reopening of assessment. However, let us now consider the second reason furnished for reopening, wherein the respondent considered as per schedule 18 of the profit and loss account, expenses have been debited. With reference to the said expenses, it is stated that as per clause I & J of Explanation of section 115JB both the above items are to be added back to the book profits. Thus, there is escapement of Rs.59,72,380/- to be taxed U/s.115JB. The tax effect thereon is Rs.8.96 lakhs. The third reason stated is that there is revaluation of assets in the depreciation schedule which goes to increase the claims for depreciation under normal provisions by 25% i.e., Rs.945.27 lakhs ($\text{Rs.4699.80} - \text{Rs.918.73} = \text{Rs.3781.1}$ 25 % = Rs.945.27). This should have been added back in the normal computation of income as per provisions section 43A of the IT Act. There tax effect thereon is Rs.321.39 lakhs.

36. This Court is of the considered opinion that High Court is not an expert body, so as to go into the details of the accounting system and find out the arithmetic errors, if any. What is to be considered in a writ petition mainly with reference to the cases of reopening of assessment is the 'reason to believe' for reopening of assessment. The reasons furnished should have live link with the materials and the conditions stipulated are to be complied with. If these aspects are satisfied, such an objective satisfaction would be sufficient for the purpose of allowing the assessing authority to proceed with the reassessment proceedings and conclude the same by providing opportunity to the assessee. The sufficiency of the reasons need not be gone into by the High Court in a writ proceedings. Thus, if there is a prima facie case for the purpose of reopening of assessment, and the objective satisfaction is sufficient for the purpose of reopening of assessment.

37. Let us consider the possible definition of the condition contemplated in the proviso clause to Section 147 of the Act. "To disclose fully and truly all material facts necessary for assessment" does not mean that mere production of books of accounts or other evidences. What is important in this aspect is that the manner in which the return of income is filed. No one can dispute mercantile accounting system has got many intricacies, technicalities and companies may adopt such mercantile accounting system in a calculated manner. All these intricacies and technical aspects would also fall under the condition that an assessee has not furnished truly and fully all material facts. The material facts includes the technicalities



involved in the accounting system. The material facts further includes the intricacies and the maintenance of account in a calculated manner. Thus, any information, which is necessary for assessment is not truly and fully produced by the assessee, then such circumstances would fall under the conditions stipulated under Proviso clause to Section 147 and in such cases, the jurisdiction is conferred on the Assessing Officer to reopen the assessment.

38. The manner in which the assessee has dealt with such materials and evidences for the purpose of filing of return of income is of paramount importance to form an opinion, whether the assessee has satisfied the condition of disclosing fully and truly all material facts necessary for the assessment. Any narrow interpretation in this regard undoubtedly will defeat the very purpose and object of the reopening proceedings contemplated under Section 147 of the Act. Fully and truly cannot be seen with naked eyes, but it is to be seen through tax lens. Thus, "truly and fully" would not fall under the literal Dictionary meaning and the word 'fully and truly' connotes the technical and contextual meaning, so as to inject life to the purpose and object of the reopening proceedings under Section 147 of the Act.

39. The Courts are expected to be cautious in such circumstances, where the assessee may broadly establish before the Court of law that he has furnished all the materials truly and fully and it is the Assessing officer, who has committed fault in not considering certain aspects and they cannot reopen on the basis of change of opinion. No doubt, change of opinion is a ground to set aside the reopening proceedings. But what amount to change of opinion must be carefully dealt with as the conditions stipulated under Section 147 and the deemed cases under Explanation 2 are to be looked into for the purpose of examining the case of reopening of assessment.

40. In this context, this Court is of an opinion that the petitioner has produced all the material facts and evidences. However, the Assessing Officer in the original assessment order dated 08.02.2013, not considered many such details and passed an assessment order in a cryptic manner. From and out of such an assessment order, the respondent could able to trace out certain under assessment and such income has been made the subject of excessive relief under the Income Tax Act or excessive allowance under the Act has been computed. In view of the fact that the case of the petitioner is falling under the deemed cases, where income chargeable to tax has escaped assessment and such



intricacy of under assessment and the excess relief or excess allowance or otherwise would be falling under the condition that the petitioner has failed to disclose fully and truly. Thus, it is necessary that the reassessment proceedings must go on. The petitioner / assessee has to avail the opportunity to be provided to defend their case with regard to the allegations of under assessment or excessive relief or otherwise and co-operate for the early completion of the reassessment proceedings. What is necessary for arriving at a conclusion is that where there has been such non-disclosure of primary facts, which has escaped assessment of income in the assessment would be sufficient for conferring jurisdiction on the Assessing Officer to reopen the assessment. As held repeatedly, escapement of assessment is the primary factor to be considered and such escaped assessment occurred due to any one of the reasons enumerated under Section 147 of the Income Tax Act.

41. In view of the facts and circumstances, this Court could able to arrive a conclusion that the case of the petitioner is falling under Sub-Clause (c) to Explanation 2 of Section 147 of the Act as it is a deemed case, where income chargeable to tax has escaped assessment and if such deemed cases are traced out, then necessarily the Assessing authority has to draw an inference on certain factual aspects for forming such an opinion and such 'reason to believe' would be certainly falling under the condition that the assessee has not disclosed fully and truly material facts necessary for assessment. Thus, the Assessing Officer had 'reason to believe' that income chargeable to tax has escaped assessment. However, whether it is escaped assessment or not is the subjective adjudication, which is to be done by following the procedures as contemplated under the Act.

42. With these observations, the writ petition stands dismissed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar (CS-III)

//True Copy//

Sub Assistant Registrar

Kak



To

Deputy Commissioner of Income Tax,
Corporate Circle VI-2,
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+1cc to Mr.A.P.Srinivas, Advocate, S.R.No.44517

+1cc to M/s.Srinath Sridevan, Advocate, S.R.No.44685

W.P.No.35924 of 2016

RLD(CO)
SU(20/09/2021)