REPORTED

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

\+ **ITA No. 740/2008**

COMMISSIONER OF INCOME TAX,
DELHI-VIII .....Appellant
Through: Ms. Prem Lata Bansal, Advocate

versus

INDIAN FARMERS FERTILIZERS
CO-OP. LTD. .....Respondent
Through: Mr. Satinder S. Gulati and
Mr. Kamaldeep Gulati, Advocates

% Date of Decision : December 24, 2010

CORAM:
HON'BLE MR. JUSTICE A.K. SIKRI
HON'BLE MS. JUSTICE REVA KHETRAPAL

1. Whether reporters of local papers may be allowed to see the judgment?

2. To be referred to the Reporter or not?

3. Whether judgment should be reported in Digest?

: REVA KHETRAPAL, J.

1. This appeal seeks to assail the order dated 31.07.2007 passed by the Income Tax Appellate Tribunal ("ITAT" in short), pertaining to the assessment year 1993-94, whereby and whereunder the ITAT quashed the order of the CIT(A) dated 23.03.2001 on the ground that initiation of action under Section 147 of the Income-Tax Act, 1961 (hereinafter referred to as the "Act") read with Section 148 thereof was without

that by way of re-assessment for the assessment year 1992-93, the carried forward losses of assessment years 1989-90 and 1990-91 had been adjusted by the Assessing Officer against profits of the assessment year 1992-93 for the purpose of deduction under Section 80-I of the Act, and the balance unabsorbed losses were carried forward to be adjusted in succeeding years. Since the re-assessment order for assessment year 1992-93 had been quashed by the ITAT in ITA No.901/D/2004, no unabsorbed losses survived to be carried forward for assessment year 1993-94 and, therefore, the re-assessment proceedings for the assessment year 1993-94 were without any foundation and jurisdiction.

2. The following question of law arises for the consideration of this Court:

> "Whether ITAT was correct in law in quashing the reassessment order passed by Assessing Officer u/s 143(3)/147 of the Act on the ground that the reassessment proceeding initiated by the Assessing Officer u/s 147 R/W Section 148 of the Act was without jurisdiction?"

3. In order to appreciate the legal and factual points at issue in the present appeal, the facts attending this matter need to be marshalled at the outset. The respondent is a cooperative society manufacturing fertilizers. During the assessment year 1989-90, the respondent had set up a new manufacturing Unit at Aonla. For the assessment year under consideration, i.e., the assessment year 1993-94, the respondent filed

₹ 1,65,33,43,991/-. The assessment was initially framed by the Assessing Officer on 20th December, 1995 under Section 143(3) of the Act at an income of ₹ 1,54,81,13,730/-, which was reduced to ₹ 97,66,99,320/-, by order dated 22.10.1997 under Section 250 of the Act. Subsequently, the assessment was revised under Section 147 of the Act to an income of ₹ 1,30,73,67,920/- by an order dated 16.03.2000, which was later modified under Section 154 by order dated 31.03.2000 reducing the income to ₹ 1,04,57,24,720/-.

4. In the aforesaid backdrop, during the course of assessment proceedings for the assessment year 1998-99, when the respondent/assessee was requested to furnish details of the profits/losses of different units over various years computed in accordance with the provisions of Chapter-IV-D, for each year, starting from the year of commercial production, it came to light that the eligible industrial undertaking at Aonla had incurred losses for the assessment years 1989-90, 1990-91 and 1991-92, which had not been set off against its income for the present year as per the mandatory provisions engrafted in sub-section (6) of Section 80-I. Thus, it was noticed by the Assessing Officer that the assessee had incurred losses of ₹ 1,64,75,67,085/- and ₹ 63,61,68,737/- in respect of the Aonla Unit for the previous years relevant to the assessment years 1989-90 and 1990-91 and had earned profit of and ₹ 11,43,31,588/- and ₹ 79,54,13,000/- for the previous

respectively. In this manner, a loss of ₹ 1,37,39,91,234/- in respect of the Aonla Unit was to be carried forward to the subsequent assessment year.

5. In his order dated 23.03.2001, the Assessing Officer, keeping in view the provisions of Section 80-I (6) of the Act, was of the view that the profits and gains of an industrial undertaking, for the purpose of computing deduction under Section 80-I for the assessment year immediately succeeding the initial assessment year or any subsequent year must be computed as if such industrial undertaking was the only source of income of the assessee during the previous years, relevant to the initial assessment year and other subsequent years upto and including the assessment year for which the determination is to be made. Thus, the carried forward loss of the earlier years of the new industrial undertaking has to be taken into account while determining the quantum of deduction permissible under Section 80-I even though they may have actually been set off against the profit of the assessee from the other units/sources. The Assessing Officer observed that since the information regarding losses incurred in Aonla Unit in the earlier years was neither disclosed in the return originally filed by the assessee nor made available during the assessment proceedings, the assessee had been allowed deduction under Section 80-I on the entire profits. The assessee in its return, which was filed in respect of the said accounting period, had made a claim for

sections (1) and (6) of Section 80-I. Subsequently, though the assessment was revised under Section 147 since the A.O. had reason to believe that the assessee's income chargeable to tax had escaped assessment, the assessee having claimed deduction under Section 80-I without excluding certain income which had not at all been derived from the eligible industrial undertaking at Aonla, even at that time information regarding losses in earlier years was neither disclosed nor made available. As a result, excess deduction of ₹ 27,47,98,246/- was again allowed to the assessee under Section 80-I. It was during the course of assessment proceedings for the assessment year 1998-99, as already stated hereinabove, when the assessee was requested to give details of profit/loss of different units for each year starting from the year of commercial production, that information regarding the losses incurred in the Unit in the previous years relevant to the assessment years 1989-90 and 1990-91 came to the knowledge of the Department. Since the income of ₹ 27,47,98,246/- had escaped assessment, a notice under Section 148 of the Act was issued to the assessee on 19.01.2001 after obtaining the approval of the Commissioner of Income-Tax, Delhi-VII, requiring the assessee to file the revised return of income. In response thereto, the return was filed by the assessee on 20th February, 2001 declaring an income of ₹ 97,61,84,320/-. The present impugned second re-assessment was thereafter framed by the Assessing Officer on

to a deduction of only ₹ 2,18,84,751/- under Section 80-I in view of the provisions of sub-section (6) of the said Section.

6. Aggrieved by the assumption of jurisdiction under Section 147 of the Act by the Assessing Officer, the respondent Society filed an appeal before the CIT(A) challenging the same. The CIT(A), however, dismissed the appeal holding that the Assessing Officer had validly invoked powers under Section 147 of the Act. Even on merits, the CIT(A) held that the Assessing Officer had correctly computed deduction under Section 80-I of the Act.

7. The respondent Society thereupon filed an appeal before the ITAT, which quashed the assessment order dated 23.03.2001 on the ground that the initiation of action under Section 147 read with Section 148 of the Act by the Assessing Officer was without jurisdiction. The relevant portion of the order of the ITAT which has led to the filing of the present appeal is being reproduced hereunder:

> "8. During hearing of this appeal it was sensed that in view of the decision of the Hon'ble ITAT given for A.Y. 1992-93, as discussed above, the reason given for re-opening of the assessment for the second time does not survive and hence the Assessing Officer lacked a valid justification to initiate action u/s 147 of the Act. The reason for re-opening given by the Assessing Officer was that the assessee did not disclose the fact that the eligible industrial undertaking at Aonla had incurred losses during the assessment years 1989-90 and 1990-91 which were required to be reduced from the profits of the present year under sub-

reassessment dated 16.03.2000. **There is no dispute about the above reason recorded by the ld. Assessing Officer for re-opening the assessment for the second time**, apart from the challenge that no requisite satisfaction of Commissioner of Income-tax was made available to the assessee in spite of repeated requests.

> *"Section 72 of the Income-tax Act, 1961 states that wherein for any A.Y. the net result of computation under head "Profit and Gains of Business or profession is a loss to the assessee, and such losses cannot be or if not wholly set-off against the income under any head of income in accordance with the provisions of section 71, so much of the loss has not been so set-off, subject to the provision of this Chapter, be carried forward to the following A.Y.:-*
>
> *(i) It shall be set-off against the profit and gains of any business or profession carried on by him and assessable for the A.Y.*
>
> *(ii) If the losses cannot be wholly so set-off shall be carried forward to the following A.Y. and so on.*
>
> *The Hon'ble High Court in the case of* ***Cambey Electric Supply Industrial Company Limited [1978-(113)-ITR-74-(SC)]*** *while analyzing the provisions of section 80E observed as under:-*
>
> > *"It is not possible to accept the view that section 72 has no bearing on or is unconnected with, the computation of total income of an assessee under the head "Profit and Gains of Business or Profession". Actually section 72(1) provides that where the net result of computation under the head "Profit and Gains of Business or Profession" is a loss and such loss cannot be or is not wholly set-off against the income under any head of income in accordance with the*

chapter, shall be carried forward to the following A.Y. and shall be set-off against the profit and gains, if any, of any business or profession for that A.Y. Therefore, section 72(1) has a direct impact upon the computation under the head "Profit and Gains of Business or Profession".

Further, as per section 80 of the Income-tax Act, 1961, which is reproduced hereunder:-

"80. Notwithstanding anything contained in this chapter, no loss which has not been determined in pursuance of the return filed shall be carried forward and set-off under sub-section (1) of section 72……."

Thus for carrying forward the loss it is mandatory that the loss should be determined by the Assessing Officer. The determination of the loss to be carried forward is the mandatory condition for setting-off the loss in succeeding years.

That the re-assessment proceedings in the case of the appellant assessee were initiated on the ground that past years unabsorbed losses of eligible Unit i.e., Aonla for the A.Ys. 1989-90 to 1990-91 were to be set-off/adjusted against the profit for the A.Y. 1992-93 for the purpose of 80-I. It is pertinent to mention that in the A.Ys. 1989-90 to 1990-91, no losses for Aonla Unit were determined by the Assessing Officer to be carried forward. In the A.Y. 1992-93, the Assessing Officer allowed the deduction of 80-I in the original assessment order dated 10.03.1995 and there is no mention of any losses of Aonla Unit. The re-assessment proceedings were initiated by the Assessing Officer for the A.Y. 1992-93 for setting-off the losses of Aonla Unit for the A.Ys.1989-90 to 1990-91 and on this basis the Assessing Officer passed the reassessment order dated 20.02.2001.

> *91 to be set-off/adjusted against the profits for the A.Y. 1992-93 for the purpose of 80-I and the balance unabsorbed losses to be adjusted in succeeding years and since this reassessment order for the A.Y. 1992-93 in ITA No.901/DEL/2004 has been quashed by Hon'ble ITAT, hence no unabsorbed losses survives to be carried forward for the A.Y. 1993-94 and the re-assessment proceedings for the A.Y. 1993-94 are without any foundation and jurisdiction."*
>
> For the above mentioned reasons, the very foundation for assumption of jurisdiction u/s 147 becomes non-extent and hence it is held that the initiation of action u/s 147 read with section 148 is without jurisdiction and is, therefore, quashed. The consequential assessment order is also quashed. In view of our above finding it is not necessary to decide any other ground of this appeal.
>
> 9. In the result, the appeal of the assessee is allowed."

8. It may be pointed out at this juncture that the ITAT in paragraph 8 of its order, reproduced hereinabove, has verbatim reproduced the written submissions of the respondent Society within quotes as the basis and foundation of its order, which is impugned in the present appeal. Significantly also, the ITAT in the aforesaid paragraph has observed:

> "There is no dispute about the above reasons recorded by the ld. Assessing Officer for re-opening the assessment for the second time ……."

9. It may also be noticed that consequent to the first re-assessment proceedings under Section 147, the Assessing Officer had, by his order dated 16.03.2000, disallowed the whole deduction of ₹ 3306.69 lakhs

December, 1995 under Section 80-I of the Act. Subsequently, the Assessing Officer passed the rectification order on 31.03.2000 under Section 154 allowing the deduction under Section 80-I to the extent of ₹ 2616.43 lakhs, thus disallowing the balance deduction of ₹ 690.25 lakhs to the assessee. On an appeal preferred to the CIT(A), the learned CIT(A) upheld the re-opening of the assessment, as also the finding that there was no nexus between interest, subsidy and miscellaneous receipts and the activities of the assessee Aonla Unit, and consequential disallowances of ₹ 33,06,68,598/- under Section 80-I of the Act. Aggrieved, the assessee preferred further appeal before the ITAT. The ITAT vide its order dated 17.02.2006 allowed the assessee full deduction under Section 80-I, as claimed by the assessee.

10. Now we advert to the second re-assessment proceedings initiated on the ground that the carried forward loss from the assessment year 1992-93 was required to be set off against the profits of the eligible Unit (Aonla Unit) before computing the deduction under Section 80-I. The Assessing Officer by his order dated 23rd March, 2001 held that there was no manner of doubt that the losses suffered in the Aonla Unit in the previous years relevant to the assessment years 1989-90 to 1991-92 are to be carried forward separately and required to be set off against the profits of the Aonla Unit for the subsequent assessment years before computing deduction under Section 80-I though the losses of Aonla Unit

On this basis, the Assessing Officer computed the deduction under Section 80-I as ₹ 2,18,84,751/-. The CIT(A) held that the learned A.O. had validly invoked his powers under Clause (c) of Explanation to Section 147 of the Act in respect of the said assessment year and had committed no error in computing the deduction under Section 80-I which was eligible to the appellant Society. By its impugned order dated 31st July, 2007, the ITAT held that the initiation of action under Section 147 read with Section 148 was without jurisdiction and quashed the same.

11. We have heard Ms. Prem Lata Bansal, the learned counsel for the Revenue and Mr. Satinder S. Gulati and Mr. Kamaldeep Gulati, the learned counsel for the respondent. Written submissions were also filed by the learned counsel for the respondent supporting the order of the ITAT and praying for the dismissal of the appeal.

12. The principal contentions of the learned counsel for the respondent were:

A. <u>No losses survived to be carried forward for the Assessment Year 1993-94, hence re-assessment proceedings are without foundation.</u>

For the assessment years 1989-90 to 1990-91, no losses for the Aonla Unit were determined by the Assessing Officer to be carried forward. In the assessment year 1992-93, the Assessing Officer allowed the deduction of Section 80-I in the original assessment order dated

assessment proceedings were initiated by the Assessing Officer for the assessment year 1992-93 for setting off the losses of Aonla Unit for the assessment years 1989-90 to 1990-91, and on that basis the Assessing Officer passed the re-assessment order dated 20.02.2001 for the assessment year 1992-93. Since this re-assessment order, for the assessment year 1992-93, was subsequently quashed by the ITAT by its order dated 05.01.2007 in ITA No.901/DEL/2004, no unabsorbed losses survived, whch could be carried forward for the assessment year 1993-94 and thus the re-assessment proceedings for the assessment year 1993-94 were without jurisdiction. It is further submitted that the aforesaid order dated 05.01.2007 passed by the ITAT was challenged by the Department in appeal before this Court and the said appeal was dismissed by order dated 17.09.2007 passed by this Court in ITA No.884/2007. Therefore, the order passed by the ITAT for the assessment year 1992-93 had attained finality.

B. <u>Unabsorbed losses must be set off during the immediate succeeding year and must enter the assessment of every following year.</u>

The next submission of the learned counsel for the respondent is that where the losses sustained are not set off against the profits of the immediately succeeding year or years, they cannot be set off against profits and gains of any business, profession or vocation at a later date. It is contended that the unabsorbed losses can be carried forward from

whereafter the respondent is not entitled to have the loss suffered by him in the preceding assessment years set off against the profits earned by him in the subsequent assessment year. In this context, the respondent heavily relied upon the following decisions:

(i) ***Hiralal Jairamdas vs. CIT, (1965) 58 ITR 1 (Bom).***

(ii) ***Tyresoles India vs. CIT, (1963) 49 ITR 515 (Mad)***.

(iii) ***B.C.S. Kartar Chit Fund and Finance Company Pvt. Ltd. vs. CIT, (1989) 179 ITR 137 (P&H)***.

C. <u>Change of opinion cannot form the basis of re-opening.</u>

It is contended by the learned counsel for the respondent that the legal position with regard to initiation of proceedings under Section 148 is well settled and was considered in detail by a Full Bench of this Court in the case of ***Commissioner of Income Tax vs. Kelvinator of India Ltd., (2002) 256 ITR 1 (Del)***, wherein this Court after discussing at length the legal position and relying upon the decision of the Supreme Court in the case of ***Calcutta Discount Company Ltd. vs. ITO, (1961) 41 ITR 191 (SC)*** and various other authorities, held that mere change of opinion would not confer jurisdiction on the Assessing Officer to re-open the assessment. It was further contended that when a regular assessment is made in terms of sub-section (3) of Section 143 of the Act, a presumption can be raised that such an order has been passed on application of mind, i.e., scrutiny of material furnished in the course of

not give the Assessing Officer jurisdiction to re-open an assessment already framed. On facts, it was submitted that it was quite clear from the records that the information regarding past losses of the Aonla Unit was available with the Assessing Officer at the time of the original assessment as well as at the time of the first re-assessment. Accordingly, the assumption of jurisdiction in the instant case was not valid. The power to re-open an assessment, it was submitted, is not conferred by the legislature with an intention to enable the Assessing Officer to re-open the final decision made in respect of questions that directly arose for decision in earlier proceedings, as has been held by this Court in the case of ***Jindal Photo Films Ltd. vs. DCIT and Anr., 234 ITR 0170 (Del).*** Reliance is also placed by the respondent on a questionnaire issued by the Assessing Officer requiring the assessee to furnish the project-wise profit and loss account along with comparative GP rate of earlier years and fixing the date of compliance to be 10.07.1995. It is the case of the respondent that in response to the aforesaid questionnaire, the respondent by its letter dated 10.07.1995 provided the information giving the plant-wise profitability for the last four years, clearly depicting the losses of the Aonla Unit.

D. <u>Section 147 of the Act does not empower the A.O. to review its own order or the orders of his predecessor.</u>

It is the contention of the respondent that in the garb of re-opening

Section 147 of the Act. Reference in this context is made to the following decisions:

(i) ***Commissioner of Income Tax vs. Indian Overseas Bank Ltd., (2001) 252 ITR 640 (Mad)***.

(ii) ***Sita World Travels India Ltd. vs. CIT, (2002) 140 Taxman 381 (Del)***.

E. <u>Issue of notice under Section 148 of the Act is time barred.</u>

The respondent contends that by virtue of the proviso to Section 147 the issuance of notice to the respondent Society is barred by time. In this context, it is submitted that all the information regarding past years' losses of Aonla Unit were available with the Assessing Officer and he has admitted the same in his letter No.JCIT/SPL.R(10)/2000-01/430 dated 20.02.2001. The relevant portion is being reproduced hereunder:

> *"……However, as per information available from records losses of ₹164,75,67,085/-, ₹63,61,68,737/- and ₹11,43,31,588/- computed in accordance with the provisions of Chapter-IV-D of the Income Tax Act, 1961 was incurred in respect of Aonla for the previous year relevant to the assessment years 1989-90, 1990-91 and 1991-92 respectively."*

According to the respondent, the last date of assessment of the assessment year 1993-94 ended on 31.03.1994, and the four year period mentioned in the proviso to Section 147 expired on 31.03.1998.

barred and the assumption of jurisdiction by the Assessing Officer on the basis of the aforesaid notice was unsustainable. The learned counsel for the respondent relied upon the case of ***Foramer vs. CIT, (2001) 247 ITR 0436 (All)***, wherein it is held that where the failure as indicated in the proviso has not been established, the four years rule would apply. The learned counsel points out that the Department's appeal against the said judgment has since been dismissed by the Supreme Court [***(2003) 129 Taxman 072 (SC)***], and, therefore, the aforesaid view taken by the Allahabad High Court has been affirmed by the Supreme Court. Reference was also made to the case of ***Commissioner of Income Tax, Coimbatore vs. ELGI Finance Ltd., Coimbatore, (2006) 155 Taxman 124 (Mad)*** that mere escape of income cannot be a valid ground for re-opening of assessment after four years.

F. <u>No satisfaction of Chief Commissioner/Commissioner of Income Tax is available under Section 151 before issuance of notice under Section 148.</u>

According to proviso to Section 151 of the Income Tax Act, 1961, no notice under Section 148 can be issued after the expiry of four years from the end of the relevant assessment year unless the Chief Commissioner/Commissioner is satisfied on the reasons recorded by the Assessing Officer that it is a fit case for issuance of notice under Section 148. The contention of the respondent is that this is an important safeguard provided in Sections 147 and 151 which could not have been

no satisfaction of the Chief Commissioner/Commissioner of Income Tax being available on the record, it is submitted that the issuance of notice under Section 148 cannot be countenanced. Reliance in this context is placed on the following judgments:

(i) ***Union of India and Ors. vs. Raisingh Debsingh Bist and Anr., (1973) 88 ITR 200 (SC)***.

(ii) ***Chhaganmal Rajpal vs. S.P. Chaillaya and Ors., (1971) 79 ITR 603 (SC)***.

G. <u>The re-assessment cannot be done to nullify the order of the appellate authority applying the principle of doctrine of merger.</u>

The contention of the respondent is that since the respondent was in appeal before the ITAT against the order of the CIT(A) dated 28.02.2001 on the issue of deduction under Section 80-I, the Assessing Officer had no authority to re-assess the deduction under Section 80-I by exercise of his powers under Section 147 as held by the Bombay High Court in the case of ***Metro Auto Corporation vs. Income Tax Officer, (2006) 286 ITR 618 (Bom)***. In the said case, the first appellate authority deleted the additions made by the Assessing Officer and the revenue took up the matter in second appeal before the appellate tribunal. Despite the pendency of the appeal before the ITAT, the Assessing Officer issued notice to the assessee company under Section 148 of the Act. On these facts, the Bombay High Court held that the assessment

could not be treated as final as the appeal was pending and quashed the notice under Section 148 in a writ petition filed by the assessee.

13. Countering the arguments of the respondent, Ms. Bansal on behalf of the Department made the following submissions:

I. The assumption of jurisdiction by the Assessing Officer under Section 147 was valid and wholly justified as is evident from a bare perusal of the notice under Section 148 issued to the respondent Society dated 17.01.2001, the relevant portion of which reads as follows:

> *"During the course of discussion on 08.12.2000 in respect of assessment proceedings for the assessment year 1998-1999, assessee was requested to give details of profit/loss of different Units, computed in accordance with the provisions of Chapter IV-D of Income-tax Act, for each year starting from the year of commercial production. As per the details submitted, the loss of ₹ 164,75,67,085/-, ₹ 63,61,68,737/- and ₹ 11,43,31,588/- was incurred in respect of Aonla Unit for the Asstt. Years 1989-1990, 1990-1991 and 1991-1992. Thus the total loss suffered during these three years is ₹ 239.80 crores. As per the provisions of Sub-section (6) of Section 80-I, the profits and gains of an industrial undertaking, for the purpose of determining quantum of deduction under sub-section (I) of section 80-I for the assessment year immediately succeeding the initial asstt. or any subsequent year, be computed as if such Industrial undertaking were the only source of income of the assessee during the previous year, relevant to the initial asstt. year and to every subsequent asstt. year upto and including the asstt. year for which the determination is to be made. This view has been affirmed by Hon'ble Supreme Court in the case of* ***Canara Workshop 161 ITR 320****.*

and required to be set-off against the profits of Aonla Unit for the subsequent assessment years before computing deduction under section 80-I. During the period relevant to the assessment year 1992-1993, Aonla Unit made profits of ₹ 79,54,13,000/-. After setting off loss against this income, a loss of ₹ 160,26,53,000/- is still left to be set off against the profits of subsequent years, i.e. assessment year 1993-1994. Since the unabsorbed losses exceeds the amount of profit for the previous years relevant to the assessment year 1993-1994 (i.e. ₹ 130,84,15,991/-), no deduction is allowable under section 80-I, which was allowed at ₹ 26,16,43,198/-.

In view of the reasons mentioned above, I am satisfied that income to the extent of ₹ 26,16,43,198/- has escaped assessment. In his return of income, for the above mentioned assessment year the assessee has failed to disclose fully and truly all material facts necessary for his assessment, i.e. information regarding loss suffered in Aonla Unit during the previous years relevant to assessment year 1989-1990 to 1991-1992, respectively. Accordingly, it is proposed to issue notice under section 148 requiring the assessee to file a revised return of income to withdraw the deduction allowed under section 80-I.

However, since a period of more than 4 years has elapsed from the end of asstt. year 1993-1994, the notice under section 148 cannot be issued unless the Chief Commissioner of Income Tax or Commissioner of Income Tax is satisfied, on reasons recorded by the assessing officer that is fit case for the issue of such notice.

In view of the reasons recorded above, the kind approval of Commissioner of Income Tax, Delhi-VIII, New Delhi is solicited to issue notice under section 148."

Referring to the provisions of Section 147 of the Act, Ms. Bansal

Assessing Officer under Section 147 read with Section 148 was not valid.

II. Ms. Bansal pointed out that the ITAT had arrived at an erroneous finding that on quashing of the re-assessment order for the assessment year 1992-93 by the ITAT, which order was confirmed in appeal by this Court, no losses survived to be carried forward for the assessment year 1993-94 to be set off for allowing the deduction under Section 80-I of the Act. Ms. Bansal pointed out that the order of this Court passed in ITA No.884/2007 dated 17.09.2007, pertaining to the assessment year 1992-93 (impugning the order of the ITAT dated 5th January, 2007 in ITA No.901/DEL/2004) clearly shows that there was no allegation whatsoever contained in the reasons for re-opening the assessment for the said year that the assessee had failed to disclose fully or truly all the material facts necessary for the assessment for the said year. The Tribunal accordingly came to the conclusion that the action initiated by the Revenue under Section 147/148 was barred by limitation. Likewise, Ms. Bansal contended, that for the assessment year 1994-95 the Tribunal had, on similar facts, held that the action initiated by the Revenue under Section 147/148 was liable to be quashed and had passed a quashing order. Adverting to the present assessment, i.e., the assessment pertaining to the assessment year 1993-94, however, it is clear from a perusal of the notice dated 17.01.2001 issued under Section 148 of the

failed to disclose fully and truly all material facts necessary for his assessment, i.e., information regarding loss suffered in the Aonla Unit during the previous years relevant to assessment years 1989-90 to 1991-92 respectively. Thereafter, it was clearly set out that since the period of four years had elapsed from the end of the assessment year 1993-94, the notice under Section 148 could not be issued unless the Chief Commissioner or Commissioner of Income Tax was satisfied on the reasons recorded by the Assessing Officer that it was a fit case for the issuance of such notice. In view thereof, the approval of the Commissioner of Income Tax was solicited for the issuance of notice under Section 148. The Revenue had placed on record the proposal sent for such permission as well as the Noting regarding the grant of permission by the Commissioner of Income Tax, which read as under:

> *""**Commissioner of Income Tax, Delhi-VIII***
>
> *Received proposal for reopening the assessment for A.Y. 1993-1994 from JCIT, SR-10 alongwith the case records Ld. CIT may kindly peruse for necessary approval or otherwise.*
>
> *Sd/- 19.01.2001*
> *DC(HQ.-VII),*
> *NEW DELHI*
>
> ***CIT-VIII***
>
> *Perused the case records and other relevant records. I am satisfied that it is a fit case for re-opening the assessment for the year 93-94 u/s 147 in view of wrong claim for deduction u/s 80-I and allowance of the same.* ***There has been failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment for***

G.B. PARIDA
IRS
Commissioner of Income Tax,
Delhi-VIII, New Delhi"

III. Ms. Bansal further contended that the submission of the respondent, that the re-opening of the assessment was based upon change of opinion, was specious. According to Ms. Bansal, the records clearly indicate that it was only during the course of assessment proceedings for the assessment year 1998-99, when the assessee was requested to give details of the profit/loss of different units, computed in accordance with the provisions of Chapter-IV-D of the Act for each year, starting from the year of commercial production and the assessee submitted such details showing that the Aonla Unit had suffered the loss of ₹ 1,64,75,67,085/-, ₹ 63,61,68,737/- and ₹ 11,43,31,588/- for the assessment years 1989-90, 1990-91 and 1991-92, that the Assessing Officer came to the conclusion that the said Unit had suffered a total loss of ₹ 239.80 crores during these three years and that income to the extent of ₹ 26,16,43,198/- had, therefore, escaped assessment on account of the failure of the assessee to disclose fully and truly all material facts necessary for its assessment.

IV. Ms. Bansal also contended that the reliance placed by the respondent on letter dated 20th February, 2001 was misplaced, as the said letter was issued after the respondent had been called upon to furnish

relevant to the assessment years 1989-90, 1990-91 and 1991-92 respectively, in the course of the discussion on 08.12.2000, and the assessee had in fact furnished such details on the record.

V. Dealing next with the respondent's submission that in response to the specific query of the Assessing Officer the respondent by its letter dated 10.07.1995 had provided the plant-wise profitability for the last four years of the Aonla Unit, clearly depicting the losses of the said Unit, Ms. Bansal submitted that this was wholly incorrect as is evident from the record. The record shows that the documents furnished by the assessee vide its letter dated 10.07.1995, far from depicting the losses of the Aonla Unit, were altogether misleading. The said documents which form part of the record were the profit and loss accounts, which merely depicted the profit for the relevant years and nowhere in the said documents is there any mention of the losses incurred by the Unit in the relevant preceding years. Had the said documents indicated the losses incurred by the Unit, there would have been no need for the Assessing Officer to call upon the respondent as late as on 8th December, 2000 to furnish the details of the losses incurred in respect of the Aonla Unit for previous years. There would also have been no occasion for the respondent to furnish the said details if the same had already been furnished, and the respondent would have merely indicated that the said details had already been furnished and were on the record.

VI. In the above circumstances, Ms. Bansal contended that the contention of the learned counsel for the respondent, that Section 147 of the Act did not empower the A.O. to review his own order or the orders of his predecessor, was devoid of merit, as the very concept of review denotes the formation of an earlier opinion by the Assessing Officer. In the instant case, the assessee not having furnished the details of the losses incurred, quite obviously with a view to obtain the maximum deduction under Section 80-I of the Act, the contention of the assessee that the assessment was re-opened merely because the Assessing Officer had changed his opinion and decided to review his order, was without merits.

VII. Adverting to the contention of the respondent's counsel that the notice under Section 148 of the Act was barred by time, Ms. Bansal relied upon the proviso to Section 148 of the Act to contend that though ordinarily the law mandates that no action shall be taken under Section 147 after the expiry of four years from the end of the relevant assessment year, an exception has been culled out by the proviso to Section 147 which clearly lays down that such action may be taken where any income chargeable to tax had escaped assessment for such assessment year by the reason of failure on the part of the assessee:

(i) to make a return under Section 139, or

(ii) in response to a notice under sub-section (1) of Section 142 or Section 148 to disclose fully and truly all material facts necessary for his assessment for that assessment year.

In terms of the proviso, Ms. Bansal contended, the Assessing Officer had recorded in his "reasons to believe" that the respondent had failed to disclose fully and truly all material facts necessary for his assessment and hence there was occasion for re-opening the assessment. Since however the period of more than four years had elapsed, the necessary approval of the Commissioner for the issuance of notice under Section 148 of the Act was sought, which, it is not in dispute, was granted after the Commissioner had satisfied himself of the wrong claim for deduction under Section 80-I made by the assessee and allowed by the Department.

VIII. Ms. Bansal accordingly concluded her submissions by making a prayer for setting aside of the order of the ITAT and restoration of the order of the Assessing Officer and the CIT(A), which, according to her, had been passed on proper appreciation of the facts.

14. Having considered the rival submissions of the respondent-assessee and the Revenue, we are of the opinion that the ITAT did not correctly appreciate the provisions of Section 80-I of the Act in holding that the earlier years unabsorbed losses of the eligible Unit could not be set off in computing the deduction under the said section of a succeeding

carried forward in the assessment orders in the preceding years. Clearly, in our view, as per the provisions of sub-section (6) of Section 80-I, for the purpose of determining quantum of deduction under sub-section (1) of Section 80-I, the profits and gains of an industrial undertaking must be computed as if such industrial undertaking was the only source of income of the assessee during the year for which the determination is to be made. The information regarding the losses incurred in the Unit in the earlier year not having been disclosed by the respondent in the return of income filed by it nor made available during the assessment proceedings right uptill 8th December, 2000, the assessee was allowed deduction under Section 80-I on the entire profits. Later on, though the assessment was revised under Section 147 and deduction under Section 80-I was re-computed after excluding certain other income not derived from the industrial undertaking from the profits of the Unit, even at that time (i.e. at the time of first re-assessment), no information regarding the losses incurred in the Unit in the earlier years was disclosed or was made available by the assessee to the Department. As a result, excess deduction of ₹ 27,47,98,246/- was again allowed to the assessee under Section 80-I.

15. It bears repetition that it was only during the course of assessment proceedings for the assessment year 1998-99, when the assessee was requested to furnish details of profit/loss of different units for each year

notice of the Assessing Officer that income to the extent of ₹ 27,47,98,246/- had escaped assessment and a notice under Section 148 of the Act was issued after obtaining the approval of the Commissioner of Income-Tax, Delhi, requiring the assessee to file the revised return of income. In response thereto, a revised return was filed by the respondent on 20th February, 2001 declaring an income of ₹ 97,61,84,320/-. Pertinently, in a letter filed with the revised return of income, the assessee protested against the issuance of notice under Section 148 on the sole ground that since there was no failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment year, no action could be taken under Section 147 after the expiry of four years from the end of the assessment year, i.e., 1993-94. The judgment of the Delhi High Court in the case of ***Jindal Photo Films Ltd. (supra)*** was cited in support. It deserves to be mentioned at this juncture that no submission was made by the assessee regarding the merits of the claim of deduction under Section 80-I as noted by the Assessing Officer. Accordingly, the Assessing Officer concluded:

> *"It has been alleged by the assessee that there was no failure on its part to disclose fully and truly all material facts necessary for the assessment for the Assessment Year 1993-94 and notice u/s 148 has been issued merely on the basis of change of opinion by the Assessing Officer regarding the admissibility of the claim u/s 80-I. The allegations made by the assessee are not correct. I have also gone through the assessment records for the*

Assessing Officer. Here, the attention is drawn to the Explanation to the Section 147 which reads as under:

> *"Production before the Assessing Officer of accounts 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, in view of the explanation above it cannot be said that the assessee had disclosed fully and truly all material facts necessary for the assessment of income of the assessment year 1993-94. Further, under section 147 the Assessing Officer has to show a reasonable belief that income chargeable to tax has escaped assessment. Explanation 2 of Section 147 says that if:-

iii) *income chargeable to tax has been under assessed, 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 the Act or (emphasis added)***

iv) *excessive loss or depreciation allowance or any other allowance under this*

then it will be deemed to be a case where income chargeable to tax has escaped assessment.

The present case will fall under this explanation."

16. On merits, the Assessing Officer, after discussing the scope and ambit of the provisions of Section 80-I, sub-section (1) and sub-section (6) and considering the legal precedents in this regard, held that there was no scope for doubt that the losses suffered in the Aonla Unit in the previous years relevant to the assessment years 1989-90 to 1991-92 were

the profits of the said Unit for the subsequent assessment years before computing deduction under Section 80-I though the losses of the Aonla Unit had already been set off against the profits of other units in earlier years. Significantly before the Commissioner of Income Tax also, the only grievance made by the respondent was that no notice under Section 148 could be said to have been legally issued justifying the assumption of jurisdiction by the Assessing Officer after the expiry of four years from the end of the relevant assessment year 1993-94, and hence, the re-opening of the assessment under Section 147 was totally illegal. As a matter of fact, the Commissioner of Income Tax recorded that the authorized representative of the assessee had nothing much to say insofar as the merits of the matter were concerned "except to urge *albeit somewhat baldly*, that the words "source of income" employed in sub-section (6) of Section 80-I only mean that the income from other units should not be attributed to the income of the eligible Unit while computing the deduction". It was for the first time before the ITAT that the respondent in its written submissions urged that for carrying forward the loss it was mandatory that the loss should be determined by the Assessing Officer to be carried forward, and since the re-assessment order for the assessment year 1992-93 in ITA No.901/DEL/2004 had been quashed by the ITAT, hence no unabsorbed loss survived to be carried forward for the assessment year 1993-94, and the re-assessment

proceedings for the assessment year 1993-94 were without any foundation and jurisdiction.

17. From the aforesaid, the following facts indubitably emerge unscathed:

(i) In the reasons to believe recorded by the A.O. on 17.01.2001 under Section 148(2) of the Act, it has been clearly recorded by the A.O. that the assessee had failed to disclose fully and truly all material facts necessary for its assessment, i.e., information regarding loss suffered in the Aonla Unit during the previous years relevant to the assessment year in question.

(ii) In terms of the proviso to Section 147 of the Act, the Commissioner of Income Tax expressly recorded his satisfaction that it was a fit case for re-opening the assessment for the year 1993-94 under Section 147 in view of the wrong claim for deduction under Section 80-I made by the respondent and allowance of the same by the Revenue.

(iii) The Commissioner of Income Tax, in his "Note", while granting approval for issuance of notice under Section 148 affirmed the fact that there had been "failure on the part of the assessee to fully and truly disclose all material facts necessary for the assessment for which wrong deduction under Section 80-I stood allowed as claimed".

(iv) There is nothing on record to justify the plea taken for the first time before the ITAT that all material facts had been fully disclosed by the respondent much prior to the issuance of notice under Section 148 by the Assessing Officer, and as a matter of fact, the record shows that it was after 8th December, 2000 and during the assessment proceedings for the assessment year 1998-99 that the assessee for the first time disclosed the losses incurred by it in the Aonla Unit, thereby bringing it to the notice of the concerned A.O. that deduction under Section 80-I of the Act had been claimed by the assessee by suppressing its real income.

18. As regards the reliance placed by the respondent on the judgment of the Allahabad High Court rendered in the ***Foramer*** case ***(supra)***, the Allahabad High Court has held, and we think rightly so, that where the failure as indicated in the proviso to Section 147 of the Act has not been established, the four years rule would apply. In the present case, the failure as indicated in the proviso has been clearly established, and the necessary corollary to our mind is that the four year rule of limitation would stand relaxed on the Commissioner of Income Tax granting his approval to the issuance of notice under Section 148 of the Act. The said approval, as noted by us, has been granted by the Commissioner of Income Tax in clear terms.

19. The reliance placed by the respondent on the decision of the

Coimbatore vs. ELGI Finance Ltd., Coimbatore, (2006) 155 Taxman 124 (Mad) that the mere escapement of income cannot be a valid ground for re-opening of assessment after four years is also of no avail to the respondent. There cannot, in our opinion, be any quarrel with the aforesaid proposition of law as it is well settled that to escape the rigors of the time period prescribed for re-opening the assessment, it is incumbent upon the revenue to establish failure on the part of the respondent to disclose fully and truly all the material facts.

20. As regards the reliance placed by the respondent on the judgments in the cases of ***Hiralal Jairamdas (supra), Tyresoles India (supra)*** and ***B.C.S. Kartar Chit Fund and Finance Company Pvt. Ltd. (supra)***, rendered by the Bombay, Madras and the Punjab High Courts respectively, to contend that unabsorbed losses must be set off against the profit of the immediate succeeding year and if the losses are not so set off against the profit of the immediate succeeding year, then the unabsorbed losses cannot be allowed to be carried forward for set off in succeeding subsequent years, the said decisions, in our view, have no application to the facts of the present case, as none of the aforesaid cases deal with the absorption of losses for the purpose of Section 80-I of the Act. Thus, for instance, in the case of ***Hiralal Jairamdas***, it was held that the assessee was not entitled to have the loss suffered by him in assessment years 1952-53 and 1953-54 set off against the profits earned

it was held that the assessee having failed to claim set off at the relevant time was clearly disentitled to have the losses set off against the income of a subsequent assessment year. Similarly, in the case of ***B.C.S. Kartar Chit Fund and Finance Company Pvt. Ltd.***, it was opined by the Court that where losses sustained are not set off against the profits of the immediately succeeding year or years, they cannot be set off against profits at a later date. All these cases thus pertain to the assessee's claim of set off, which not having been exercised for the relevant assessment year was sought to be exercised at a subsequent stage. This is not the controversy in the present case which relates to Section 80-I of the Act, whereunder the assessee is entitled to claim deduction on the profits derived from its business. The ascertainment of the said profits requires the absorption and set off of the losses suffered by the assessee.

21. What needs to be borne in mind is that it is not the assessee who is claiming set off. It is the Department, which, for the purpose of computing the deduction to which the assessee is entitled under Section 80-I of the Act, is required to arrive at the real income of the assessee derived from its business, after taking into account the past losses of the assessee's industrial undertaking, in this case the Aonla Unit. It also cannot be lost sight of that Section 80-I of the Act is a beneficial provision and like every beneficial provision is susceptible to misuse. The benefit under the aforesaid Section, though must enure to the benefit

cannot be used to obtain deduction which is not legally permissible under the provisions thereof by camouflaging the real income of the assessee.

22. Another significant aspect of the matter is that sub-section (6) of Section 80-I of the Act starts with a non-obstante clause. It then lays down that the profits and gains of an industrial undertaking, to which the provisions of sub-section (1) apply, shall for the purposes of determining quantum of deduction be computed **"as if such industrial undertaking is the only source of income of the assessee"**. This being so, in our view, the ITAT failed to appreciate that the Assessing Officer was under an obligation to adjust unabsorbed loss of the earlier years of the eligible Unit against the profit of the subsequent years, whether declared by the assessee or not, or whether determined by the Assessing Officer in the earlier years or not. Thus, the reliance placed by the ITAT on the provisions of Sections 72 and 80 of the Act is misplaced as the said provisions have no application whatsoever to the issue involved in the present case where the assessee has derived a huge benefit to the tune of ₹ 26.16 crores by claiming excessive deduction under Section 80-I of the Act through the devious means of suppressing its losses.

23. Adverting next to the contention of the respondent that mere change of opinion cannot form the basis of re-opening the assessment once the said assessment has attained finality, we find no merit in this

contention as well. In this context, it would be apposite to quote the relevant portion of the judgment of the CIT(A):

> *"6. Proceeding further there can be no quarrel with the ld. AR's submissions that even under the amended provisions, mere change of opinion does not confer valid jurisdiction upon the A.O. u/s 147 of the Act. I am also aware of the Supreme Courts decision in* ***Parashuram Pottery Works Co. Ltd. v. ITO (1977) 106 ITR 1*** *in which the Apex Court following the principles laid down in its earlier decision in* ***Calcutta Discount Co. Ltd. v. ITO (1961) 41 ITR 191*** *observed that any remissness on the part of the assessing authority can only be at the cost of the national exchequer and that there must be a point of finality in all legal proceedings, so that stale issues are not reactivated beyond a particular stage and the controversies are set at rest.*
>
> *It is well known that reopening of assessment under section 147 is not permissible simply on the ground that a new view may be entertained on the same facts. The consistent judicial view is that even after amendment of section 147 with effect from 1/4/89, mere change of opinion does not confer jurisdiction on AO to initiate proceedings for reassessment under section 147 and various authorities on this point had been considered by the Hon'ble Gujarat High Court in* ***Garden Silk Mills (P) Ltd. vs. DCIT (1999) 151 CTR (Guj) 533****. A full bench of the Delhi High Court in* ***CIT, Delhi-II vs. Kelvinator of India Ltd. (2002) 256 ITR 1 (Del) (FB)*** *has succinctly exposited the law in following eloquent words:-*
>
> > *"In the event it is held that by reason of section 147 if ITO exercises its jurisdiction for initiating a proceeding for reassessment only upon mere change of opinion the same may be held to be unconstitutional. We are therefore of the opinion that section 147 does not postulate conferment of power*

We however may hasten to add that if "reason to believe" of the Assessing officer is founded on an information which might have been received by the Assessing Officer after the completion of assessment, it may be a sound foundation for exercising the power under section 147 read with section 148 of the Act."

7. But be that as it may the background of the present matter as detailed above speaks for itself. It cannot be said that the notice which was issued by the ld. AO u/s 148 reflected a mere change of opinion. The appellant society cannot seriously dispute that its claim for deduction u/s 80-I was grossly in violation of the law laid down in both Section 80-I(1) and section 80-I(6). To my mind it is clear that the A.O. had invoked his powers when he discerned the aforesaid reality from the records which had been proffered before him by the assessee and which were of the type as are covered by Explanation 1 to section 147……."

To similar effect is the decision of the Supreme Court in ***Hindustan Lever Ltd. vs. CIT (1991) 239 ITR 297 (SC)*** *where the Hon'ble Court was dealing with section 2(5)(i) of the Finance (No.2) Act, 1962 which was attracted only when assessee's total income included any profits or gains "derived" from exports of any goods or merchandise out of India. It was held by the Hon'ble Apex Court that the word 'derived' was not a term of art and the inquiry should stop as soon as the effective source was discovered.*

x x x x

The aforesaid view had also recommended itself to the Apex Court in the context of section 80-E in ***Cambay Electric Supply Industrial Co. Ltd. (1978) 113 ITR 84 (SC)*** *wherein the principle was exposited thus:-*

"It is not possible to accept the view that section 72 has no bearing on or is unconnected with, the computation of the total income of an assessee under the head

computation under the head "profits and gain of business or profession" is a loss and such loss cannot be or is not wholly set off against the income under any head of income in accordance with the provision of section 71 so much of the loss as has not been so set off, subject to the other provisions for the chapter shall be carried forward to the following assessment year and shall be set off against the profit and gains, if any of any business or profession for that assessment year. Therefore section 72(1) has a direct impact upon the computation under the head 'profits and gains of business or profession'. In other words the correct figure of total income, which is otherwise taxable under other provisions of the Act, cannot be arrived at without working out the net result of computation under the head profits and gains of business or profession'. Further the question whether special benefit under section 80-E as well as the normal or usual benefit of carry forward of losses of previous years should both be available to an assessee without one impinging on the other must depend upon the intention of the legislature and such intention has to be gathered from the language employed. In this view of the matter it is extremely doubtful whether in spite of the legislative mandate contained in the three steps provided for by sub-section (1) of section 80-E the carried forward losses would not be deductible before working out the 8% deduction contemplated by section 80E and therefore the contention that by parity of reasoning or on a priori reasoning unabsorbed development rebate and unabsorbed depreciation should be held to be non-deductible before working out the 8% deduction under section 80E(1) cannot be accepted. As observed earlier on a

unabsorbed development rebate will have to be deducted in arriving at the figure which would be eligible to deduction of 8% under section 80E(1).”

24. In view of the aforesaid, we unhesitatingly conclude that the Tribunal has failed to consider the case from its proper perspective and has set aside the orders of the Assessing Officer, unstintingly approved by the Commissioner of Income Tax after detailed consideration, in a perfunctory manner, and without taking into account the fact that the assessee had by suppression of material facts (in this case the losses incurred by it) availed of an undue deduction of ₹ 27,47,98,246/- which had escaped assessment. We accordingly set aside the order of the Tribunal and restore the order of the Assessing Officer as affirmed by the CIT(A).

23. The appeal stands disposed of accordingly.

REVA KHETRAPAL
(JUDGE)

A.K. SIKRI
(JUDGE)

December 24, 2010
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