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

ITA No. 1270 of 2007

Reserved On: August 12, 2010
% Pronounced On: September 14, 2010

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

CORAM :-

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

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see ITA No.1274 of 2007.

(A.K.SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 14, 2010
pmc/skb

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

ITA No. 1274 of 2007
With
ITA No. 1270 of 2007, ITA No. 1273 of 2007, ITA No. 1275 of 2007, ITA No. 1285 of 2007, ITA No. 1286 of 2007, ITA No. 24 of 2008, ITA No. 26 of 2008, ITA No. 67 of 2008 and ITA No.331 of 2008.

Reserved On: August 12, 2010
% Pronounced On: September 14, 2010

1) **ITA No. 1274 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

2) **ITA No. 1270 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

3) **ITA No. 1273 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

4) **ITA No. 1275 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

5) **ITA No. 1285 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

6) **ITA No. 1286 of 2007**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

7) **ITA No. 24 of 2008**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

8) **ITA No. 26 of 2008**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

9) **ITA No. 67 of 2008**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

10) **ITA No. 331 of 2008**

COMMISSIONER OF INCOME TAX . . . Appellant

Through : Ms. Prem Lata Bansal, Advocate.

VERSUS

XEROX MODICORP LIMITED . . .Respondent

Through: Mr. Ajay Vohra with Ms. Kavita Jha and Mr. Somnath Shukla, Advocates.

CORAM :-

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

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

The Background:

1. All these appeals pertain to the same assessee, viz., M/s. Xerox Modicorp Limited. Only the assessment years are different. Otherwise, the question of law, which arises for consideration is common and relates to the permissibility of the allowance under Section 32A of the Income Tax Act (hereinafter referred to as 'the Act'). Income Tax Appellate Tribunal (hereinafter referred to as 'the Tribunal') rendered a common decision dated 8th February, 2007 whereby five appeals filed by the assessee and five appeals filed by the Revenue were disposed of together. ITA No.1274 of 2007 is filed against the decision in respect of the assessment year 1986-87 which is the first relevant assessment

year. Therefore, we shall take note of the facts appearing in t appeal before spelling out the exact formulation of the question of law that arises for consideration.

2. The assessee is engaged in manufacturing of xerographic machines, toner, developer and photoreceptor. It filed return of income for the Assessment Year 1986-87 on 30.06.1986. The returns for subsequent years up to 1990-91 were filed on different dates. During the assessment proceedings in respect of first assessment year, the assessee claimed that commercial production had not commenced at company's Modipur plant. As on the date of balance sheet, no provision of depreciation on fixed assets capitalized at Modipur was made. A note was appended to the aforesaid effect and in that note, it was also averred that the investment allowance reserve would be credited in the year of assessable profits. As per the assessee, the accounting year ended on 30.04.1985 and though trial production stated on 01.02.1985, the commercial production began only from 01.05.1985. Since no production commenced in the assessment year under consideration and there was only trial run production of 53 machines, that is why no depreciation on the plant and machinery had been claimed, but was claimed in the subsequent assessment year. It is for this reason that the assessee did not claim the investment allowance also.

3. The Assessing Officer (AO), however, found that the distinction between the commercial production and trial production made by the assessee was on artificial lines, which was not permitted. He was of the opinion that once the production had been started for the manufacturing of xerographic machines, whatever is sold after the

production in the form of xerographic machines, is definitely a trad receipt because receipt of the same was the result of selling of the goods by the assessee company in which the assessee deals. The reason for arriving at this view was that it appeared on record that 43 machines out of 53 machines had been sold to different, separate and independent customers. Once such a view was expressed by the AO, the assessee submitted his reply (during assessment proceedings) claiming the depreciation as well as investment allowance, as according to the assessee in the aforementioned facts it had become entitled to the depreciation and also the investment allowance.

4. It was in this backdrop that in the final assessment order passed by the AO, he discussed the admissibility of investment allowance and allowed the same to the assessee in the assessment year under consideration, i.e., Assessment Year 1986-87. Needless to mention that the original assessment was completed under Section 143(3) of the Act after eliciting various information on different queries raised by the AO including qua the investment allowance. Likewise for the subsequent years, i.e., 1987-88, 1988-89, 1989-90, 1990-91, the original assessment under Section 143(3) was completed on 26.12.1990, 04.03.1991, 12.02.1992 and 29.03.1993 respectively. In all these assessment years also, claim for deduction of investment allowance was computed and was allowed to the assessee.

Circumstances leading to re-assessment

5. Subsequently, it appears that while considering the claim of the assessee for deduction under Section 80-I, the learned CIT (A) for the

assessment year 1994-95 held that the assessee company v manufacturing office machines and apparatus, falling within ambit of entry at Sl. No.22 of Schedule XI and therefore, the assessee was not entitled to deduction. The AO observed that provisions of Section 80-I of the Act were similar to Section 32A of the Act and, therefore, the assessee was also not entitled to investment allowance.

6. On the basis of this order of CIT (A) for the assessment year 1994-95, the AO initiated reassessment proceedings by issuing notice under Section 148 of the Act on 20.03.1997, for all the assessment years. The AO completed the reassessment under Section 147 read with Section 143(3) of the Act on 12.03.1999 for all the assessment years whereby investment allowance claimed by the assessee for these assessment years was withdrawn on the ground that items manufactured by the assessee fell in the prohibited category mentioned at Sl. No.22 of Schedule XI of the Act.

7. The Ld. CIT (A) considered the submission and noted that the provisions of Section 147 have been amended with effect from 1.4.1989. He considered the action of the Assessing Officer for initiating the reassessment proceedings for the assessment year 1986-97, 1987-88 and 1988-89, under the pre-amended provisions. The Ld. CIT (A) observed that assessee had furnished complete details of the items manufactured before allowing the investment allowance for the various assessment years. It was for the Assessing Officer to have drawn the proper inference from the facts that had been disclosed and were before him to draw the inference. He also observed that the assessee was expected to disclose the primary facts necessary for making the

assessment. He relied on the judgment of Kerala High Court in the ca of ***M/s Palla Marketing Cooperative Society Ltd.,*** *Vs.* ***State of Kerala & Another,*** *236, ITR 604.* He also observed that it was for the Assessing Officer to have considered whether the assessee was entitled to investment allowance or not and whether these articles were covered by the list in the XIth schedule. Thus, he concluded that by no stretch of imagination it could be said that there was any failure on the part of the assessee to disclose all material facts fully and truly. To this extent, the Ld. CIT (A) accepted the contention of the assessee.

8. The Ld. CIT (A) than proceeded to examine whether there was any material in possession of the AO which constituted information justifying for reopening the assessment. He observed that provisions of Section 80-I were analogous to provision of Section 32A. For the assessment year 1994-95, the Ld. CIT (A) held that items being manufactured by the assessee fell within the ambit of Sl. No.22 of XI schedule and, therefore, the assessee was not entitled to deduction under that section. He observed that the findings of the Ld. CIT (A) in the assessment year 1994-95 constituted information within the meaning of Section 147 (b) of the Act and such order had become available to the AO after he had completed the original assessment u/s 143 (3) for all these assessment years. The fact that the order of CIT (A) constituted information justifying the reopening of assessment u/s 147 (b) of the IT Act was supported by the judgment of the Punjab & Haryana High Court in the case of ***Kumar Engineers Vs. CIT*** 223 ITR 18. Thus, he upheld the action of the AO for initiating the reassessment proceedings for the

assessment year 1986-87, 1987-88 and 1988-89 under the p amended provisions of the Act.

9. Thereafter he considered the action of the AO for reinitiating the assessment proceedings for the assessment year 1989-90 and 1990-91 under the post amended provisions of Section 147. He accepted the contention of the assessee for the assessment year 1989-90 and 1990-91 like assessment year 1986-87 to 1988-89 that there was no failure or commission on the part of the assessee to disclose fully and truly all material facts necessary for the assessment in respect if subsequent assessment years. However, Ld. CIT (A) observed that the decision of the Ld. CIT(A) for the assessment year 1994-95, had become available after completion of the original assessments u/s 143 (3) and therefore, the reopening of the assessment even for the subsequent assessment years was valid. Thus he upheld the action of the AO for initiating the reassessment proceedings in respect of all the assessment years.

10. As regards the merits of the claim of the assessee under Section 32A the Ld. CIT (A) held that provisions of Section 32A were similar to section 80-I. The issue for deduction u/s 80-I came up before the ITAT, Delhi Bench in the case of assessee in ITA No. 3034 (Del)/1996 and ITA No. 3290(Del.)/1997 for the assessment year 1991-92 and 1992-93 reported in 67ITD 252 where it was held that the Xerographic machine was the article which came within the ambit of item 22 of XI schedule. Whereas, toner, developer and photoreceptors were not the items included in XI schedule. Thus, the Tribunal held that the assessee was entitled to deduction u/s 80-I of the IT act in respect of profits derived from the manufacture and sale of toners, developers and photo

receptors and the assessee were not entitled to deduction u/s 80-E in respect of profit derived from manufacture of xerographic machines. Relying on the order of the Tribunal, the Ld. CIT (A) held that the assessee was not entitled to investment allowance in respect of additions to plant & machinery of the unit engaged in the manufacture of xerographic machines whereas it was eligible to investment allowance in respect of plant & machinery of the unit engaged in the manufacture of toner, developer and photo receptors.

11. The assessee felt aggrieved by the orders of CIT (A) on the issue of upholding the action of the AO for initiating the reassessment proceedings and also not allowing the investment allowance in respect of profit from unit engaged in the manufacture of xerographic machines. On the other hand, the revenue was aggrieved with the order of the Ld. CIT (A) for allowing investment allowance in respect of profits derived from manufacture of toner, developer and photo receptors for all the assessment years.

12. It was in these circumstances, both the assessee as well as Revenue filed five appeals each in respect of all these assessment years.

Order of the Tribunal

13. The Tribunal primarily went into two questions, viz:

(i) Whether notice under Section 148 of the Act was warranted, beyond four years from the date when the assessments were made, and the related aspect which was examined was as to whether there was complete and full disclosure of particulars/information by the assessee?

(ii) Whether the AO had considered the issue of allowing investment allowance in his original assessments under Section 143(3) in detail and it was a case of mere change of opinion, not warranting reopening of the assessments?

14. On both these counts, the Tribunal has held in favour of the assessee. Commenting on the first aspect, the Tribunal held that even the order of the CIT (A) while upholding initiation of reassessment proceedings had given a clear finding that there was no failure on the part of the assessee to disclose all the material facts fully and truly, necessitating the reassessment for the relevant assessment year. CIT (A) had also recorded the finding that all the relevant facts were fully discussed and considered by the AO at the time of completing the original assessment under Section 143(3) of the Act. However, the CIT (A) upheld the initiation of the reassessment proceedings only on the ground that the AO had rightly entertained a plea that income chargeable to tax had escaped assessment for the reason that the assessee was not entitled to investment allowance. This, according to the Tribunal, was not permissible in view of proviso to Section 147 of the Act, which provided limitation of four years for issuing notice under Section 147 of the Act and since beyond four years it could be reopened only if there was non-disclosure of full and complete material facts. The Tribunal further observed that even in the reassessment order passed by the AO, there was no allegation made in the reasons recorded that the escaped assessment was by reason of the failure of the assessee to disclose fully and truly all material facts necessary for the assessment for these assessment years. That apart, observed the Tribunal, necessary material was placed on record and referred to by the AO in

the original assessment proceedings clearly demonstrating that assessee had disclosed all material facts relating to its claim for investment allowance for all the assessment years. Relevant portion of the order of the Tribunal, in this behalf, is as under:

> "A perusal of the same shows that there is no allegation made by the AO in the reasons recorded that escapement of income was due to failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessments for the relevant assessment years. Even otherwise, we find that the material placed on record and referred to above clearly show that the assessee had disclosed all material facts relating to its claim for investment allowance for all the assessment years. In fact, the claim was examined by the AO in detail after referring to the items being manufactured by the assessee and thereafter, the same was allowed. The Ld. CIT (A) has himself accepted that there was no failure on the part of the assessee to disclose material facts necessary for the assessments and the revenue has not challenged such findings in the cross appeals. Therefore, such findings of CIT(A) have attained finality. Thus, we hold that AO has initiated such re-assessment proceedings without establishing that income had escaped assessment by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessments. The mandatory requirement of law has not been satisfied before assuming jurisdiction to initiate reassessment proceedings by the AO and, therefore, the action of AO for initiating the reassessment proceedings was illegal and without jurisdiction.
>
> In the light of these facts and circumstances and the legal position, the reassessment completed by AO for all the assessment years are liable to be quashed on this point itself."

15. Insofar as merits of allowing assessment proceedings are concerned, the Tribunal held the view that in the original assessment, issue of investment allowance was discussed by the AO in detail. Therefore, it was only a case of change of opinion, which could not be valid basis for initiating reassessment proceedings. We would like to

reproduce the relevant discussion in the Tribunal's order on this asp as well, which is as under:

> "8.2 We have already held that the AO had considered this issue in detail at the time of completing the original assessments u/s 143(3) for all the assessment years. Therefore, the action of the AO for initiating reassessment proceedings was only on the basis of mere change of opinion. Such course of action is not permission under law. Reliance in this regard, is placed on the judgment of the Hon'ble Delhi High Court in the case of Jindal Photo Films Ltd., Vs. CIT 234 ITR 170, where it was held that re-assessment proceedings could not be initiated merely on the basis of change of opinion. The High Court further observed that from the date of order of assessment sought to be reopened and the date of forming of opinion by Income-tax Officer nothing new had happened. There was no change of law and no material had come or record. Thus, the action of the AO for initiating the reassessment proceedings was held to be bad in law. The full Bench of the Hon'ble Delhi High Court in the case of CIT Vs. Kelvinator of India Ltd., 256 ITR 1; again considered this issue. It was held that if an order had been passed without application of mind, the same could not confer jurisdiction upon the AO to reopen the proceeding without anything further, as the same could amount to giving premium to an authority exercising quasi judicial function to take benefit of its own wrong. Hence, section 147 of the Act does not postulate conferment upon the AO to initiate reassessment proceedings upon a mere change of opinion. In the case of CIT Vs. Foramer France reported in 264 ITR 566 the Hon'ble Supreme Court has approved the judgment of the Hon'ble Allahabad High Court and has held that the assessment cannot be reopened on the basis of mere change of opinion and the amendment of section 147 introduced with effect from 1.4.89 has not altered the position. In as much as that even under the amended provisions the issue cannot be re-opened on mere change of opinion. This view is further supported by the judgment of Hon'ble Punjab & Haryana High Court in the cases of M/s. Mahavir Spinning Mills Vs. CIT, 270 ITR 290, CIT Vs. Smt. Binda Devi (2006) 150 Taxman 95, Duli Chand Singhania, 269 ITR 192. Now in the present case, there is no doubt in our mind that assessment proceedings have been initiated on the basis of mere change of opinion. On same facts, ITAT, Delhi Bench in the case of Modi Xerox Ltd., Vs. DCIT, 67 ITD 252, for the assessment years 1991-92

and 1992-93, where the CIT revised the order u/s 263 had held that the CIT assumed the jurisdiction on the basis of change of opinion. Further, on same facts, ITAT Delhi Bench in the case of the assessee considered this issue for the A.Y. 1991-92 (supra) where the order of CIT(A) was upheld on the ground that the AO initiated proceedings merely on the basis of change of opinion. Thus, we hold that the reassessments completed by the AO are also liable to be quashed on the point that these were initiated merely on the basis of change of opinion."

The Arguments : Revenue

16. Ms. Prem Lata Bansal, learned counsel for the Revenue, has submitted that the Tribunal has erred on both the counts. In the first place, her contention is that concededly the assessee had not claimed investment allowance in the return filed by it. In fact, according to the assessee, in that year only trial production was done and no commercial production had started. Rather, the assessee had appended note to the effect that it would claim investment allowance in the year of profits. Thus, when during the assessment proceedings the assessee claimed the investment allowance, the AO examined the matter only from a limited angle, viz., whether there was commercial production in that year as well and, therefore, the assessee could be given investment allowance. Otherwise, contended the learned counsel, the issue about the permissibility of the allowance under Section 32A of the Act was not examined on merit at all. She submitted that the AO did not go into the question as to whether the goods manufactured by the assessee would fall in any of the entries mentioned in Schedule-XI and therefore, the investment allowance would be impermissible, except in the case of small scale industries. She further submitted that there was not full disclosure of the facts, as the assessee never informed that it was not a

small scale industry. Thus, there was no evidence before the AO on basis of which the deduction of investment allowance could be given. It was, therefore, not a case of full disclosure of all material facts by the assessee, contended the learned counsel.

17. Proceeding further on the basis of the above, she also argued that when the issue regarding applicability of Schedule XI and whether the assessee-company is small scale industry or not was not even in the contemplation of the AO and was not discussed, the question of change of opinion does not arise. This becomes clear when the CIT(A) made observations in his order in the appeal decided by him in respect of Assessment Year 1994-95. This constituted information on the basis of which it was permissible for the AO to act upon and reopen the assessment proceedings, as was done in the case of ***A.L.A. Firm*** vs. ***Commissioner of Income Tax*** [189 ITR 285 (SC)].

18. In support of the plea as to what constitute full and material particulars, she relied upon the following judgments:

(i) ***Calcutta Discount Co.*** vs. ***ITO*** [41 ITR 191]

(ii) ***Rakesh Agarwal (Legal Heir of Late R.S. Agarwal)*** v. ***Assistant Commissioner of Income-tax*** [221 ITR 492 (Del.)]

(iii) ***Indo-Aden Salt Mfg. & Trading Co. Pvt. Ltd.*** v. ***Commissioner of Income Tax, Bombay*** [159 ITR 624 (SC)].

The Arguments: Assessee

19. Mr. Ajay Vohra, learned counsel appearing for the assessee, contested these appeals and made a fervent plea in support of the conclusion drawn by the Tribunal in the impugned order. Regarding full

and complete disclosure of the facts, his submission was that the d cast upon by the assessee was to give primary facts and not to disclose what can be inferred therefrom. In the present case, complete facts were given as is clear from the original assessment order passed by the AO himself, in the form of complete list of machinery and plant. According to him, whether the manufacturing of particular type of machinery and plant falls within all the items specified in Schedule XI or not was for the AO to decide. That did not amount to any information, which the assessee had not given. He referred to the following decisions in his support:

(i) ***Calcutta Discount Co.*** vs. ***ITO*** [41 ITR 191 (SC)]

(ii) ***Commissioner of Income Tax*** vs. ***Kelvinator of India Ltd.*** [256 ITR 1 (Del.)]

20. In continuation, his further submission was that if it was a case of failure on the part of the assessee to disclose full particulars, then in the 'reasons to believe' furnished by the AO in his notice under Section 148 of the Act, there should have been specific averment to this effect, which was missing in the instant case. It was for this reason that the Tribunal rightly held that even as per CIT (A), it was not a case made out that there was failure on the part of the assessee to give complete particulars. He referred to the following judgments in his support this plea:

(i) ***JSRS Udyog Ltd.*** vs. ***ITO*** [313 ITR 321 (Del.)]

(ii) ***Hindustan Lever Ltd.*** vs. ***R.B. Wadkar*** [268 ITR 332 (Bom.)]

21. On the aspect of change of opinion, Mr. Vohra's forceful submission was that complete details of the items manufactured by the

assessee were given. Whether they fall in Schedule XI or not was hc debated and discussed. Even certificate under Section 80CC (3) was given. Two views were possible on this aspect. According to him, when the matter was discussed in detail by the AO in the original assessment and the deduction for investment allowance was granted, as admissible, thereafter holding a different view that too by the CIT (A) in the assessment proceedings relating to the Assessment Year 1994-95 would amount to change of opinion.

22. Mr. Vohra further pointed out that even this view held by the CIT(A) has been reversed by the Tribunal in the appeal filed by the assessee vide its decision dated 22.03.2004.

23. Mr. Vohra, also referred to the following judgments in support of his submissions that where two views were possible mere change of opinion would not provide sufficient ground for a reopening of the assessment:-

(i) ***CIT Vs. Kelvinator of India Ltd***. 256 ITR 1 (Del)

(ii) ***KLM Royal Dutch Airlines Vs. ADIT***, 292 ITR 49 (Del.)

Analysis of the issue involved:

24. After having considered the submissions of both the counsel, we proceed to discuss and decide the following question which arises for consideration in the following manner:-

> "(i) Whether notice under Section 148 of the Act was warranted, beyond four years from the date when the assessments were made, and the related aspect which was examined as to whether there was complete and

full disclosure of particulars/information by the assessee?

25. It is not in dispute that notice under section 148 of the Act was issued beyond four years from the date when the assessments were made. Such a notice could be issued only if it is established that there was no complete and full disclosure of particulars/information given by the assessee at the time when original assessment was made. In the 'reasons to believe' furnished by the Assessing Officer while issuing notice under Section 148 of the Act, we find that there is no specific averment made by the Assessing Officer that full and complete particulars were not disclosed. CIT (Appeal) has recorded a categorical finding to this effect namely that there was no failure on the part of the assessee to disclose the full and complete particulars/information necessary for assessment, which finding is accepted by the ITAT also.

26. In ***JSRS Udyog Ltd***. (supra), this Court dealt precisely with such an issue at great length and quoted the following observations from earlier judgment of this Court in Haryana Acrylic Manufacturing Company Vs. CIT {2009} 308 ITR 38 (Delhi):-

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

under Section 147 could be taken. We have already mentioned above that the reasons supplied to the petitioner does not contain any such allegation. Consequently, one of the conditions precedent for removing the bar against taking action after the said four year period remains unfulfilled. In our recent decision in Wel Intertrade Private Ltd. V. ITO (2009) 308 ITR 22 (Delhi) we had agreed with the view taken by the Punjab and Haryana High Court in the case of Duli Chand Singhania V. Asst. CIT (2003) 269 ITR 192 that, in the absence of an allegation in the reasons recorded that the escapement of income had occurred by reason of failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment, any action taken by the Assessing Officer under Section 147 beyond the four year period would be wholly without jurisdiction. Reiterating our view-point, we hold that the notice dated March 29, 2004, under section 148 based on the recorded reasons as supplied to the petitioner as well as the consequent order dated March 2, 2005 are without jurisdiction as no action under section 147 could be taken beyond the four year period in the circumstances narrated above"

27. Similar view is taken by the Bombay High Court in ***Hindustan Lever Limited*** (supra). It would be apt to quote the following extract there from:-

"The reasons recorded by the Assessing Officer nowhere state that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for the assessment of that assessment year. It is needless to mention that the reasons are required to be read as they were recorded by the Assessing Officer. No substitution or deletion is permissible. No additions can be made to those reasons. No inference can be allowed to be drawn based on reasons not recorded. It is for the Assessing Officer to disclose and open his mind through reasons recorded by him. He has to speak through his reasons. It is for the Assessing Officer to reach the conclusion as to whether there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for the concerned assessment year. It is for the Assessing Officer to form his opinion. It is for him to put his opinion on record in black and white. The reasons recorded should be clear and unambiguous

and should not suffer from any vagueness. The reasons recorded must disclose his mind. The reasons are the manifestation of the mind of the Assessing Officer. The reasons recorded should be self-explanatory and should not keep the assessee guessing for the reasons. Reasons provide the link between conclusion and evidence. The reasons recorded must be based on evidence. The Assessing Officer, in the event of challenge to the reasons, must be able to justify the same based on material available on record. He must disclose in the reasons as to which fact or material was not disclosed by the assessee fully and truly necessary for assessment of that assessment year, so as to establish the vital link between the reasons and evidence. That vital link is the safeguard against arbitrary reopening of the concluded assessment. The reasons recorded by the Assessing Officer cannot be supplemented by filing an affidavit or making an oral submission, otherwise, the reasons which were lacking in the material particulars would get supplemented, by the time the matter reaches the court, on the strength of the affidavit or oral submissions advanced."

28. In the absence of any such observation in "reasons to believe' to the effect that the assessee had not disclosed true, full and complete particulars/information , the notice under Section 148 was rightly quashed by the Tribunal on this ground itself.

29. In ***Calcutta Discount Co. Ltd's*** case (1961) 41 ITR 191, the Apex Court clearly held that once the primary facts are before the assessing authority he requires no further assistance by way of disclosure. It was observed by the apex court that:-

"It is for him to decide what inferences of facts can be reasonably drawn and what legal inferences have ultimately to be drawn. It is not for somebody else - far less the assessee - to tell the assessing authority what inferences, whether of facts or law, should be drawn. Indeed, when it is remembered that people often differ as regards what inferences should be drawn from given facts, it will be meaningless to demand that the assessee must disclose

what inferences - whether of facts or law - he would draw from the primary facts."

As regards the scheme of the Act, the Apex Court held:-

> "The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an under assessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for re-assessment within a period of 8 years; and where he has reason to believe that an under assessment has resulted from other causes he shall have jurisdiction to start proceedings for reassessment within 4 years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been under assessment and (ii) his having reason to believe that such under assessment has resulted from non-disclosure of material facts, must co-exist before the Income-tax Officer has jurisdiction to start proceedings after the expiry of 4 years. The argument that the Court ought not to investigate the existence of one of these conditions, viz., that the Income-tax Officer has reason to believe that under assessment has resulted from non-disclosure of material facts cannot therefore be accepted."

We also cannot accept the submission of Mr. Jolly to the effect that only because in the assessment order, detailed reasons have not been recorded an analysis of the materials on the record by itself may justify the Assessing Officer to initiate a proceeding under section 147 of the Act. The said submission is fallacious. An order of assessment can be passed either in terms of sub-section (1) of section 143 or sub-section (3) of section 143. When a regular order of assessment is passed in terms of the said sub-section (3) of section 143 a presumption can be raised that such an order has been passed on application of mind. It is well known that a presumption can also be raised to the effect that in terms of clause (e) of section 114 of the Indian Evidence Act judicial and official acts have been regularly performed. If it be held that an order which has been passed purportedly without application of mind would itself confer jurisdiction upon the Assessing Officer to

> reopen the proceeding without anything further, the same would amount to giving a premium to an authority exercising quasi-judicial function to take benefit of its own wrong."

30. We would also like to observe that as pointed above, the assessment was reopened because of the view taken by the CIT (Appeal) in respect of assessment year 1994-95. The very fact that this view is reversed by the Tribunal, is in itself sufficient to demonstrate that two views were possible and, therefore, it would be a case of change of opinion only. We, therefore, are of the view that the order of the Tribunal does not call for any interference. As a result, all these appeals are dismissed.

(A.K.SIKRI)
JUDGE

(REVA KHETRAPAL)
JUDGE

SEPTEMBER 14, 2010
pmc/skb