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

\+ **ITA Nos.1391/2009, 1362/2009 & 1130/2009**

% **Date of Decision: 09.03.2011**

**Commissioner of Income Tax** .... **APPELLANT**
*Through*: MS.Prem Lata Bansal, Sr. Advocate with
Mr.Deepak Anand, Advocates

Versus

**The Simbhaoli Sugar Mills Limited** .... **RESPONDENT**
*Through*: Mr.Ajay Vohra, Advocate

**CORAM:**
**HON'BLE MR. JUSTICE A.K. SIKRI**
**HON'BLE MR. JUSTICE M.L. MEHTA**

1. Whether reporters of Local papers 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?

**M.L. MEHTA, J. (ORAL)**
*

1. The aforesaid three appeals are being disposed of by this common order as these relate to same assessee, for the same assessment year and have common questions of law.

2. The facts leading to filing of these appeals in brief the assessment year 1997-98, assessee filed retur loss of about Rs.17.20 crores. This return was proc Section 143(1)(a) of the Income Tax Act (hereinafte as "the Act"). Subsequently, the case was selected and assessment was completed under Section 143( on 26th November, 1999 at a total loss of about Rs after making certain additions and unabsorbed depreciation. The assessee preferred appeal Commissioner, Income Tax (Appellate) [hereinafter r "CIT(A)], who allowed certain reliefs to the assess giving effect to the appellate order, the assessment year under consideration was revised on a net l Rs.5.33 crores. Subsequently, after expiry of four y basis of information available with the Departm based on the audit report, it surfaced that ce chargeable to tax has escaped assessment for the year under consideration and based on this, th Officer issued a notice dated 31.03.2004 under Se the Act followed by another notice under Section with section 148 of the Act dated 20.10.2004. Ac assessment proceedings were completed on a tot Rs.56,23,890/-. Simultaneously, penalty proceedin

initiated against the assessee under Section 271(1)(c) of the Act allegedly for furnishing inappropriate particulars of income and a penalty of Rs.2.54 crore was imposed by the Assessing Officer. The assessee preferred an appeal before the CIT(A), Ghaziabad, who vide his order dated 19.10.2005 dismissed the appeal and confirmed the additions made by the Assessing Officer. The two main additions were – (i) excise duty payable on stock of finished goods amounting to Rs.3,89,33,833/-, (ii) interest incurred on the term loan to the tune of Rs.1,99,96,463/-. It was observed by CIT(A) that as per note (V) and (9) of the Audit Report, the duty which has already been paid on unsold stock forms part of the closing stock and, therefore, amount of Rs.3,89,33,833/- should have formed part of closing stock as liability to pay the same has already arisen during the course of year though the same was paid by the assessee before the filing of the return of the assessment year under consideration. Based on this opinion, the said amount was added to the income of the assessee. Likewise, with regard to the deduction of Rs.1,99,96,463/- claimed by the assessee as interest on term loan, the CIT(A) upheld the view of the Assessing Officer that the assessee had incurred the said expenditure for the acquisition of fixed assets, which is directly attributable to the cost of the plant/fixed asset and, hence, any interest payable thereof is of the nature of the

capital expenditure and not revenue expenditur
this was also added to the income of the assess
filed appeal against this order before the Inco
Tribunal (hereinafter referred to as "the
allowed the appeals holding as under:

> "4. We have carefully considered the riv
> gone through the records. In our vie
> for re-assessment u/s 148 cannot be
> than one reason. First of all, the or
> were completed u/s 143(3) of the Act
> return filed and the re-assessment
> initiated beyond the expiry of 4 years
> AY in question. In respect of each of t
> subject matter of re-assessment
> assessee has made full and complete
> AO framed opinion of those issues. E
> objection, there appears to be no mate
> issuance of the notice u/s 147 of the
> circumstances, we accept the contenti
> that re-assessment proceedings are
> change of opinion and not on any vali
> now sell settled that an opinion of an
> of the I.T. Deptt. on a point of law can
> an information within the meaning u
> Having regard to these discussions,
> assessment proceedings framed u/s 14
> have cancelled the reassessment
> jurisdiction, we do not find it necess
> merits of the case. Accordingly, appea

3. Against this order, the Revenue has come
No.1391/2009.

4. In the appellate penalty proceedings, CIT(A) vi
15.12.2006 following the order of quant

cancelled the penalty with reference to the first a
Rs.3,89,33,833/- in respect of excise duty but s
penalty with reference to the second addit
Rs.1,99,96,463/- in respect of interest on capital
acquiring assets for business purpose. The
disposing of the two appeals, recorded as under:

> "..... After considering all the facts and cir
> the case, as discussed above, in this ca
> element of mensrea pertaining to either c
> furnishing of inaccurate. It is only the cor
> the Department pertaining to treatment
> payable, it has been looked at diffe
> assessment order. As such, penalty levied
> made of Rs.3,89,33,833/- on account of
> excise duty payable is cancelled."

> "..... The facts on record establish that the
> furnished in accurate particulars to t
> Rs.1,99,96,463/- by claiming the same
> expenditure. As such it is held that the A
> in levying penalty u/s 271(1)(c) on th
> Rs.1,99,96,463/- by holding that the
> furnished in accurate particulars thereof
> levied u/s 271(1)(c) on this account is confi

5. Both Revenue and the assessee filed cross-appea
Tribunal against the aforesaid order dated 15.1
CIT(A). Both the cross-appeals were disposed o
impugned order also dated 07.11.2008 by the Tr
this impugned order, the appeal of the assessee

i.e., the penalty in relation to
cancelled. The appeal of the Reven
relating to cancellation of penalty v
Rs. 3,89,33,833/- in respect of excis
Tribunal held as under:-

> "3. The issue with regard to t
> borrowed for acquiring t
> purposes, although, the C
> respect of the addition, t
> contest before the ITAT. T
> the copy of the order of th
> allowability of the interes
> the AY 2001-02 has be
> assessee. This clearly sho
> respect of which a pena
> 271(1)(c) of the Act, or
> Therefore, in our conside
> levied even in respect
> 271(1)(c). We, therefore,
> the CIT(A)."

6. From the above chronological narra
recorded by the authorities below,
issue of notice under Section 148
assessment year under considera
internal audit report. In the Reasc
the AO, he had mentioned about th
audit report. Based on this audit re
be made by the AO under the nar
escape of income in the assessme

regard to the aforesaid two entries, available before the AO. The ass disclosure of the particulars before t assessment under Section 143(3).

7. Reopening of assessment after fou permissible. There is a catena of ju proposition of law that assessment Section 147 of the Act merely on th beyond the period of four years wh part of the assessee to disclose, material particulars. Reference in some of the judgments of our ow Supreme Court. In ***Commissioner (India) Ltd.***, (2010) 229 CTR 167, judgment of ***CIT v. Kelvinator of*** (Del) 174, a judgment of our H specifically observed that when a re passed in terms of Section 143(3) a that such an order has been passe was also pointed out that a presum the same effect in terms of Claus Indian Evidence Act indicating that been regularly performed. The Full B

to be held that an order that has been passed purportedly without application of mind, would itself confer jurisdiction upon the AO to re-open the proceedings without anything further, the same would amount to giving premium to an authority exercising a quasi-judicial function to take benefit of its own wrong. The Full Bench decision also makes it clear that Section 147 of the Act does not postulate conferment of power upon the AO to initiate reassessment proceedings upon a mere change of opinion. It is obvious that the Full Bench Decision holds the field.

8. It may also be noted that appeal arising out of the aforesaid Full Bench decision of this Court has also been dismissed by the Supreme Court in the case of ***Commissioner of Income Tax V. Kelvinator of India Ltd.***, (2010) 228 CTR (SC) 488. The Supreme Court, after observing the changes and amendments brought about in Section 147, from time to time, held as under:

> "However, one needs to give a schematic interpretation to the words "reason to believe" failing which, we are afraid, Section 147 would give arbitrary powers to the AO to re-open assessments on the basis of "mere change of opinion", which cannot be per se reason to re-open. We must also keep in mind the conceptual difference between power to review and power to re-assess. The AO has no power to review; he has the power to re-assess. But re-assessment has to be based on fulfillment of certain pre-condition and if the concept of "change of opinion" is removed, as contended on behalf of the Department, then, in the garb of re-opening the assessment, review would take place. One must treat the

concept of "change of opinion" as an
abuse of power by the AO.

9. In another case of our High Court entitled
***Income Tax v. Eicher Ltd.,*** (2007) 294 ITR
making reference to different judgments of va
it was observed that if the entire material ha
the assessee before the Assessing Officer at
original assessment was made and the Assess
his mind to that material and accepted the
the assessee, then merely because he did not
assessment order, that by itself would not giv
conclude that income has escaped assessme
the assessment needed to be reopened. On th
Assessing Officer did not apply his mind and
there is no reason why the assessee should
the consequences of that lapse.

10. In the case of ***Commissioner of Income***
***Batra Bhatta Company,*** (2008) 174 Tax
another Division Bench of our High Court held

"7. We feel that the observations of the S
aforesaid decision clearly apply to
Merely because the Assessing Office
required 'much deeper scrutiny, is no
invoking Section 147. It is not belief

condition for invoking Section 147 of the said
belief founded on reasons. The expression used
147 is – "If the Assessing Officer has reason
and not – "If the Assessing Officer believes". T
be some basis upon which the belief can be bu
not matter whether the belief is ultimately prov
wrong, but, there must be some material upon
a belief can be founded. In the present
Commissioner Income-tax (Appeals) as we
Tribunal have found as a fact that there was
upon which the Assessing Officer could have
belief that income had escaped assessment."

11. There is also catena of judgments to the effect that in reassessment proceedings on the basis of audit report is bad in law. A reference in this regard can be judgment of our High Court titled ***Transworld Inte Inc. v. Joint Commissioner of Income Tax***, (2005 242 and also judgments of Supreme Court in ***In Eastern Newspaper Society v. Commissioner o Tax, New Delhi***, (1979) 119 ITR 996 and ***Commis Income Tax v. Lucas T.V.S. Ltd.***, (2001) 249 ITR 306

12. The sum and substance of discussion is that rea proceedings under Section 147 read with 148 of the be initiated merely based on the audit report . A principally intended for the purpose of satisfying the a regard to sufficiency of rules and procedures prescrib purpose of securing an effective check on the a

collection and proper allocation of revenue. As per para (3) of the circular issued by the Board on July 28, 1960, also an audit department should not in any way substitute itself for the revenue authorities in the performance of their statutory duties.

13. In view of our foregoing discussion, we are in complete agreement with the conclusion arrived at by the Tribunal in the impugned orders.

14. As we do not find any infirmity in the aforesaid impugned orders, no substantial question of law arises. Consequently, all the appeals are dismissed.

**M.L.MEHTA**
**(JUDGE)**

**A.K. SIKRI**
**(JUDGE)**

**MARCH 09, 2011**
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