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

% **Date of decision: 31st May, 2011.**

\+ **Writ Petition (Civil) No. 7789/2010**

Sudhir Gensets Limited ....Petitioner
Through Mr. Salil Aggarwal and
Mr. Prakash Kumar, Advocates.

VERSUS

Income Tax Officer .....Respondent
Through Mr. Deepak Chopra, Advocate.

CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJIV KHANNA

1. Whether Reporters of local papers may be allowed to see the judgment?
2. To be referred to the Reporter or not ? Yes.
3. Whether the judgment should be reported in the Digest ? Yes.

SANJIV KHANNA, J.

The petitioner is engaged in the business of manufacture and sale of industrial generators and allied products. By the present writ petition, the petitioner impugns reassessment proceedings initiated under Section 147/148 of the Income Tax Act, 1961 (Act, for short), vide notice dated 31st March, 2010 for the assessment year 2003-04 and the order dated 1st November, 2010, passed by the Assessing Officer

rejecting its objections against the initiation of the reassessment proceedings.

2. The petitioner's case is predicted on two grounds (i) change of opinion; and (ii) that the petitioner had made full and true disclosure of material facts. Therefore, the reassessment proceedings that have been initiated after four years suffer from lack of 'inherent' jurisdiction.

3. The reasons recorded by the Assessing Officer for reopening, as communicated to the petitioner vide letter dated 2nd August, 2010, read as under:-

> "Reasons for reopening the case u/s 148
>
> Return of income was filed on 02.12.2003 declaring an income of Rs. 14,72,90,755/- under section 115JB of the Act. Assessment was completed u/s 143(3) on 20.03.2006 determining an income of Rs.14,72,90,756/- u/s 115JB of the Act and Rs, 2,52,08,776/- under normal provision after ollowing deduction ,of Rs. 12,57,29,939/- under section 8OIB of the Act.
>
> As per the provisions of section 80IB(13) of the Income Tax Act, 1961 read with Rule 18BBB of Income Tax Rule, in order to claim deduction under section 80IB, a separate report is to be furnished by each undertaking or, enterprise of the assessee claiming deduction under section 80IB and shall be accompanied by the Profit & Loss account and balance sheet of the undertaking or enterprise as if the undertaking or enterprise were a distinct entity.

> It has now been noticed that in the instant case the assessee had four units, out of which, two units were eligible for deduction u/s.80IB. The assessee was required to furnish separate Profit and Loss Account and Balance Sheet in respect of each unit eligible for deduction as if it were a separate entity. However the assessee had not maintained/furnished the separate accounts. The assessee worked out the eligible profit on the basis of ratio of sales and total profit of the whole business. Since the assessee had not filed separate profit and loss account in respect of each unit eligible for deduction as if it were a separate entity the correctness of the claimed and allowed deduction of Rs.12,57,29,939/- was not verifiable and hence, not allowable to the assessee."

4. In respect of the assessment year 2003-04, the petitioner had filed a return declaring income of Rs.14,72,90,755/- under Section 115JB, and Rs.1,77,92,055/- under the normal provisions. Deduction of Rs.13,19,53,499/- under Section 80-IB of the Act was claimed while computing the normal income. Deduction under Section 80-1B of the Act was in respect of two industrial units out of the four industrial units of the petitioner. These industrial units, called Units I & II, are located at Silvassa, Union Territory of Dadra & Nagar Haveli.

5. The petitioner's case was selected for scrutiny and assessment order under section 143(3) of the Act dated 20th March 2006 was passed. Deduction claimed by the petitioner under Section 80-IB of the

Act was examined and dealt with. The assessment order specifically notes that the deduction claimed under the said Section was in respect of two units and the amount claimed. It records:-

> "During the year the assessee has claimed deduction u/s 80 IB for profit earned in respect of the two units at Silvassa to the tune of Rs.13,19,53,499/-. It is seen that the profit computed from manufacturing/trading was shown at Rs.13,53,83,449/-."

6. The Assessing Officer considered whether the interest earned on FDRs was income derived from qualifying business as referred to in Section 80-IB. It was held that this interest income cannot be considered as profit derived from eligible business. Thereafter, the Assessing Officer re-computed the deduction under Section 80-IB and the same was reduced to Rs.12,57,29,939.58/-.

7. The aforesaid addition was made subject matter of the appeal before the Commissioner of Income-tax (Appeals), with substantial success and disallowance of Rs.62,23,560/- and other miscellaneous disallowances under section 80-IB were deleted. Revenue preferred an

appeal before Income Tax Appellate Tribunal which was allowed and the disallowance stands restored.

8. It is well settled that an Assessing Officer cannot reopen or re-examine under section 147, aspects and questions that had arisen and were considered for decision in the original proceedings. The power to reopen cannot be exercised on the basis of change of opinion. It is not the power to review or reassess aspects and questions that have been considered at the time of first/original assessment (see ***Commissioner of Income Tax Vs. Kelvinator of India Limited*** (2010) 2 SCC 723*).*

9. However, the contention of the Revenue is that the Assessing Officer in the original assessment proceedings had not examined and considered sub section 13 of Section 80-IB of the Act read with Rule 18 BBB of the Income Tax Rules. It is submitted by the that as per the said provisions to claim deduction under Section 80-IB, a separate report is to be furnished in respect of each undertaking or enterprise of the assessee and should be accompanied with the profit and loss account and balance-sheet of the undertaking or enterprise as if the undertaking or enterprise is a distinct entity.

10. It is lucid from the assessment order itself that the Assessing Officer specifically examined the quantum and computation of the deduction, claimed under section 80-IB, when he went into the question whether interest earned on the FDRs has to be excluded. While doing so he has computed business income of the two units, Unit I & II separately. The said computation is indeed fairly detailed. The petitioner submitted that the computation and consideration shows and establishes the examination of all aspects including requirement of sub-section 13 to section 80-IB. Revenue contends to the contrary. It is submitted that this provision was overlooked and the requirement went unnoticed. Thus, there is no change in opinion. Even if there is some merit in the contention of the Revenue on the first issue of change of opinion, we do not think that the reassessment proceedings can be sustained in view of the second ground/contention raised by the petitioner for the reasons stated below.

11. First proviso to Section 147 applies when the reassessment proceedings are initiated after four years from the end of the relevant assessment year. The said proviso reads as under:-

> "Provided that where an assessment under sub-section (3) of section 143 or this section has been made for the relevant assessment year, no action shall be taken under this section after the expiry of four years from the end of the relevant assessment year, unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee to make a return under section 139 or in response to a notice issued under sub-section (1) of section 142 or section 148 or to disclose fully and truly all material facts necessary for his assessment, for that assessment year:"
>
> (Emphasis supplied)

12. In the present case there is an original assessment order under Section 143(3) dated March 20, 2006. The question is whether there was a failure on the part of the petitioner to disclose, fully and truly, all material facts necessary for reassessment for that year at the time of the first/original assessment. There is no such allegation or statement in the reasons recorded. This contention was specifically raised by the petitioner in their objections to the reassessment proceedings. The objection has been rejected in the order dated 1st November, 2010 recording as under:-

> "Objection No . 1 : The assessee has objected that since there is no failure on the part of the assessee to disclose full and true all necessary material faets for assessment

under section 147 of the Act, proceedings are without jurisdiction. The assessee has further stated that there is no such allegation even in the purported reasons recorded under section 147 of the Act.

It is an admitted fact that the assessee had failed to get the accounts of its undertakings audited separately and prepare balance sheet and profit and loss account separately for these undertakings which it was required as per section 80IB(13) read with section 80IA(7) of the I.T. Act and Rule 18BBB . The failure to submit these documents during assessment proceedings amounted to failure on its part to submit truly and correctly all material facts. Regarding the objection that there is no such allegation even in the purported reasons recorded under section 147 of the Act, para 4 of the reasons recorded under section 148 of the I. T. Act on 26.2.2010 is reproduced hereunder:

"Return of income was filed on 02.12.2003 declaring an income of Rs. 14,72,90,755/- under section l15JB of the Act. Assessment was completed U/S 143(3) on 20.03.2006 determining an income of Rs.14,72,90,756/- U/S 115JB of the Act and Rs. 2,52,08,776/- under normal provision after allowing deduction of Rs.12,57,29,939/- under section 80IB of the Act."

As per the provisions of section BOIB(l3) of the Income Tax Act, 1961 read with Rule 18BBB of Income Tax Rule, in order to claim deduction under section 80IB, a separate report is to be furnished by each undertaking or enterprise of the assessee claiming deduction under section 80 IB and shall be accompanied by the profit and loss account and balance sheet of the undertaking or enterprise as if the undertaking or enterprise were distinct entity.

It has now been noticed that 'in the Instant case the assessee had four units, out of which two units were eligible for deduction u/s 80lB. The assessee was required to furnish separate Profit and Loss Account and Balance Sheet in respect of each unit eligible for deduction as if it were a separate entity. However the assessee had not

> maintained/furnished the separate accounts. The assessee worked out the eligible profit on the basis of ratio of sales and total profit of the whole business. Since the assessee had not filed separate profit and loss account in respect of each unit eligible for deduction as if it were a separate entity the correctness of the claimed and allowed deduction of Rs.12,57,29,939/- was not verifiable and hence, not allowable to the assessee.
>
> The escapement of income has been on account of failure on the pa1t of the assessee to truly disclose all the material facts necessary for assessment. In view of the above, I have reason to believe [hat an amount of Rs. 12,57,29,939/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961."
>
> From above, it is clear that the objection of the assessee on this ground is not valid."

(emphasis supplied)

13. The aforesaid reasoning of the Assessing Officer refers to the failure of the assessee to submit separate profit and loss accounts of two units and it is stated that the assessee had worked out eligible profits on the basis of ratio of sale and profit of the whole business. It records that the assessee had not maintained or furnished separate books of accounts in respect of each unit. Therefore, correctness of the claim and deduction allowed was not verifiable.

14. It is not possible to accept the contention that the aforesaid reasoning discloses or shows that the petitioner had failed to disclose fully and truly all material facts. It is incorrectly recorded and stated

that it was "now" noticed that the petitioner had 4 units and the deduction under section 80-IB was claimed in respect of two units. The fact that two units out of four were eligible for deduction under section 80-IB is recorded in the first/original assessment order. This is not a new revelation or a fact discovered or known after the first/original order. It may be noted here that it has been stated and accepted that in respect of the units I & II, the petitioner assessee has been claiming deduction for the last 6 and 4 years respectively. The sentence "however the assessee had not maintained/furnished the separate account" shows a lack of clarity and considerable ambiguity with which the Assessing Officer has proceeded. What was furnished by the petitioner was on record and not unknown. It was ex facie apparent. The petitioner had filed the documents/ accounts in support of the claim before the Assessing Officer along with the return and had furnished further details during the course of the assessment proceedings. Accounts and details related to computation and the method of computing of deduction under section 80-IB of the Act. The petitioner assessee did not conceal any fact. It had made full and true

disclosure of all material facts. It was for the Assessing Officer thereafter to examine and consider whether the claim for deduction was allowable in law. It is not the case of the Revenue that they have come across any new material or evidence on the basis of which reassessment has been initiated. At best, the case of the Revenue as made out in the aforesaid reasoning is that the Assessing Officer, on the basis of the material disclosed, should not have allowed the deduction under Section 80-IB of the Act as the legal requirements/preconditions of subsection 13 to section 80- IB and Rule 18BBB were not satisfied. The material facts were truly and correctly disclosed to the Assessing Officer but as per the reasons, he failed to apply "law" to the said facts.

15. The method of computation and whether or not the assessee had maintained/furnished separate accounts, was known to the Assessing Officer at the time of first assessment. He did not proceed under any doubt or his apprehension on the said subject. This is clear, if we examine the computation made by the Assessing Officer made in the original assessment order dated 20th March, 2006. The computation begins with the net profit as shown in the profit and loss appropriation

account from which inadmissible expenses were subtracted. Expenses disallowed under Section 43B, 36(1)(va) etc. are also subtracted. Thereafter, the income credited to the profit and loss account but not considered as a part of business income, was computed and not included for consideration for the purpose of deduction under Section 80-IB. The Assessing Officer then has computed income of the two units for deduction under section 80-IB, recording as under:-

"Sales of Silvassa Unit-:I		26,287,287.00
Sales of Silvassa Unit-II,	1,919,621,444.00	
Add: Installation charge~ received	596,867.00	
Sales of DG Set transferred from Silvassa Unit-II but included in sales of Delhi unit	4,950.674.00	1,925,168,985.00
Sales of Delhi Unit .	11,785,378.05	
DG Set sales (Inc. installation & erection)	97,283,825.00	
	109,069,203.05	
Less: Sales of D.G. Set transferred from Silvassa Unit-II'	4,950,674,00	104,118,529.05
Sales of 100% EOU Unit		81,577,256.00
Total Sales of the company ,is computed as under		2,137,152,057.05

Business income attributable to Silvassa Unit In the ratio of sales Is worked out as under:

$$139,099,406.12 \times \frac{26,287,287.00}{2,137,152,057.05} = 17,10,943.30$$

Deduction u/s 80IB in respect of Silvasia unit-II
@25%OfRs.17,10,943.30 = 4,27,735.83

Business income attributable to Silvassa Unit-II in the ratio of sales is worked out as under:

$$139,099,406.12 \times \frac{1,925.168,985.00}{2,137,152,057.05} = 12,53,02,203.75$$

Deduction u/s.80lB in respect of Silvassa Unit-II @ 100% of Rs.12,53,02,203.75 = 12,53,02.203.75
Total Deduction u/s.80IB 12.57.29.939.58 "

16. It is clear from all the doubt that the petitioner assessee had made full and true disclosure of all material facts necessary for the assessment and there was no concealment. The fact that the petitioner had not submitted a separate profit & loss account or furnished/maintained separate accounts was known as without knowing these facts, the computation or quantification under Section 80-IB was not possible. Inspite of knowing the full and true material facts, the Assessing Officer computed the said deduction in the original assessment proceedings. Thus, it cannot be said that the assessee had not disclosed fully and truly all the material facts necessary for the assessment. This is a case where the material facts were truly and fully disclosed by the assessee but as per the case of the Revenue, the Assessing Officer had made the assessment without considering the requirements of subsection 13 to section 80-IB of the Act.

17. Learned counsel for the revenue has relied upon explanation 1 to the proviso to Section 147 which reads as under:-

> *"Explanation 1.*—Production before the Assessing Officer of account books or other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not necessarily amount to disclosure within the meaning of the foregoing proviso."

18. Explanation 1 to the proviso stipulates that mere production of books of accounts and other material from which the Assessing Officer could with due diligence, have discovered escaped income, does not bar reassessment proceedings. This does not amount to disclosure. The aforesaid explanation does not help the Revenue in the present case. As noticed above, the material facts were fully and truly disclosed. Further inference, or new discovery of facts by exercise of due diligence, is not the error or ground made out by the Revenue. The alleged error or mistake pointed out by the Revenue is the failure to apply the law, i.e. provision of subsection 13 to section 80-IB, to the known and accepted facts. The Assessing Officer, as per the Revenue, did not examine and consider whether there was compliance or violation of section 80-IB(13) and Rule 18BBB of the Rules, inspite of known and accepted facts recorded in the first/original assessment order. The petitioner was not required to "disclose" the law. The

proviso and explanation draws out a distinction between law and disclosure of facts and this is not obliterated. As noticed above, Revenue has pleaded and stated that the Assessing Officer had overlooked and disregarded the said provisions and therefore it is not a case for change of opinion as no opinion was formed at the first instance. This plea of the Revenue has been accepted. Thus, the petitioner had disclosed true and full material facts and these were within the knowledge of the Assessing Officer. The failure alleged by the Revenue is an alleged error in applying the law to the facts on record. This is not covered by Explanation 1.

19. Reliance placed by the Revenue on our decision dated February 14, 2011 in W.P. (C) No. 9036/2007, ***Honda Siel Powers Ltd. v. Deputy Commissioner of Income Tax and Anr.***, is inappropriate and misconceived. In the said case, the contention of the assessee was that they were required to disclose facts as when they had filed the return. This contention of the assessee was rejected as disclosure is not only restricted to the Income Tax return but also relates to the assessment proceedings.

20. Way back in 1961, the Supreme court in the case of ***Cal***[illegible] ***Discount Co. Ltd. Vs. CIT*** (1961) 41 ITR 191 had observed as under:-

> "……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."
>
> ……..
>
> ……The scheme of the law clearly is that where the Income-tax Officer has reason to believe that an underassessment has resulted from non-disclosure he shall have jurisdiction to start proceedings for reassessment within a period of eight 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 four years. Both the conditions, (i) the Income-tax Officer having reason to believe that there has been underassess-ment 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 four 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 underassessment has resulted from non-disclosure of material facts, cannot therefore be accepted."

21. Following this judgment in ***Income Tax Officer, Calcutta and Ors. Vs. Lakhmani Mewal Das*** (1976) 103 ITR 437 (SC), it was observed as follows:-

"7. ……Another requirement is that before notice is issued after the expiry of four years from the end of the relevant assessment years, the Commissioner should be satisfied on the reasons recorded by the Income-tax Officer that it is a fit case for the issue of such notice. We may add that the duty which is cast upon the assessee is to make a true and full disclosure of the primary facts at the time of the original assessment. Production before the Income-tax Officer of the account book or other evidence from which material evidence could with due diligence have been discovered by the Income-tax Officer will not necessarily amount to disclosure contemplated by law. The duty of the assessee in any case does not extend beyond making a true and full disclosure of primary facts. Once he has done that his duty ends. It is for the Income-tax Officer to draw the correct inference from the primary facts. It is no responsibility of the assessee to advise the Income-tax . Officer with regard to the inference which he should draw from the primary facts. If an Income-tax Officer draws an inference which appears subsequently to be erroneous, mere change of

opinion with regard to that inference would not justify initiation of action for reopening assessment.

8. The grounds or reasons which lead to the formation of the belief contemplated by Section 147(a) of the Act must have a material bearing on the question of escapement of income of the assessee from assessment because of his failure or omission to disclose fully and truly all material facts. Once there exist reasonable grounds for the Income-tax Officer to form the above belief, that would be sufficient to clothe him with jurisdiction to issue notice. Whether the grounds are adequate or not is not a matter for the Court to investigate. The sufficiency of grounds which induce the income-tax Officer to act is, therefore, not a justiciable issue. It is, of course, open to the assessee to contend that the Income-tax Officer did not hold the belief that there had been such non-disclosure. The existence of the belief can be challenged by the assessee but not the sufficiency of reasons for the belief. The expression "reason to believe" does not mean a purely subjective satisfaction on the part of the Income-tax Officer. The reason must be held in good faith. It cannot be merely a pretence. It is open to the Court to examine whether the reasons for the formation of the belief have a rational connection with or a relevant bearing on the formation of the belief and are not extraneous or irrelevant for the purpose of the section. To this limited extent, the action of the Income-tax Officer in starting proceedings in respect of income escaping assessment is open to challenge in a Court of law (see observations of this Court in the case of Calcutta Discount Co Ltd. v. Income-tax Officer [1961]41ITR191(SC) and Narayanappa v. Commissioner of Income-tax. [1967]63ITR219(SC)

while dealing with corresponding provisions of the Indian Income-tax Act. 1922)."

22. The decision above holds good even after the amendment with effect from 1st April, 1989 as has been observed by a Division Bench of this Court in ***IPCA Laboratories Ltd. Vs. Gajanand Meena*** *(2001) 251 ITR 461* wherein it has been observed as under:-

> "The position of law after 1st April, 1989, is not in dispute. By virtue of a proviso to Section 147, no action can be taken for reopening after four years unless the AO has reason to believe that income has escaped assessment by reason of the failure on the part of the assessee to disclose fully and truly all material facts necessary for assessment. In the present case, the affidavit and the reasons disclosed indicate that the Department has purported to reopen the assessment only on the basis of change of opinion. This position is, in fact, conceded vide para 3 of the affidavit-in-reply dt. 13th march, 2001. The reasons also do not spell out failure on the part of the assessee to disclose fully and truly all material facts.... We are satisfied on the facts of the present case that reopening is sought on the basis of change of opinion. Further, even in the reasons, there is nothing to indicate that reopening is sought on the ground of the failure on the part of the Petitioner to disclose fully and truly all material facts."

> "Viewed in this light, the proviso to Section 147 of the said Act, carves out an exception from the main provisions of Section 147. If a case were to fall within

the proviso, whether or not it was covered under the main provisions of Section 147 of the said Act would not be material. Once the exception carved out by the proviso came into play, the case would fall outside the ambit of Section 147.

23. The Supreme court in ***Assistant Commissioner of Income-tax v. Rajesh Jhaveri Stock Brokers P. Ltd***. (2007) 291 ITR 500 has expounded and explained:-

> "The scope and effect of section 147 as substituted with effect from April 1, 1989, as also sections 148 to 152 are substantially different from the provisions as they stood prior to such substitution. Under the old provisions of section 147, separate clauses (a) and (b) laid down the circumstances under which income escaping assessment for the past assessment years could be assessed or reassessed. To confer jurisdiction under section 147(a) two conditions were required to be satisfied: firstly the Assessing Officer must have reason to believe that income, profits or gains chargeable to income tax have escaped assessment, and secondly he must also have reason to believe that such escapement has occurred by reason of either omission or failure on the part of the assessee to disclose fully or truly all material facts necessary for his assessment of that year. Both these conditions were conditions precedent to be satisfied before the Assessing Officer could have jurisdiction to issue notice under section 148 read with section 147(a). But under the substituted section 147 existence of only the first condition suffices. In other words if the Assessing Officer for whatever reason has reason to believe that income has escaped

> assessment it confers jurisdiction to reopen the assessment. It is, however, to be noted that both the conditions must be fulfilled if the case falls within the ambit of the proviso to section 147. The case at hand is covered by the main provision and not the proviso."
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> (emphasis supplied)

24. In ***Haryana Acrylic Manufacturing Co. vs. Commissioner of Income-Tax and Another, (2009) 308 ITR 38 (Delhi)***, a division bench of this Court has observed:-

> "Examining the proviso [set out above], we find that no action can be taken under Section 147 after the expiry of four years from the end of the relevant assessment year if the following conditions are satisfied:
>
> (a) an assessment under Sub-section (3) of Section 143 or this section has been made for the relevant assessment year; and
>
> (b) unless any income chargeable to tax has escaped assessment for such assessment year by reason of the failure on the part of the assessee:
>
> (i) to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148; or
>
> (ii) to disclose fully and truly all material facts necessary for his assessment for that assessment year.

Condition (a) is admittedly satisfied inasmuch as the original assessment was completed under Section 143(3) of the said Act. Condition (b) deals with a special kind of escapement of income chargeable to tax. The escapement must arise out of the failure on the part of the assessee to make a return under Section 139 or in response to a notice issued under Sub-section (1) of Section 142 or Section 148. This is clearly not the case here because the petitioner did file the return. Since there was no failure to make the return, the escapement of income cannot be attributed to such failure. This leaves us with the escapement of income chargeable to tax which arises out of the failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment for that assessment year. If it is also found that the petitioner had disclosed fully and truly all material facts necessary for its assessment, then no action under Section 147 could have been taken after the four year period indicated above. So, the key question is whether or not the petitioner had made a full and true disclosure of all material facts.

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. (supra) we had agreed with the view taken by the Punjab & Haryana High Court in the case of Duli Chand Singhania (supra) 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.....

With reference to explanation 1, it has been elucidated and clarified:

> ....In the present case, what is to be seen is whether the petitioner failed to make a full and true disclosure of all the material facts necessary for his assessment for the assessment year 1998-99. Explanation I to Section 147 also makes it clear that mere production before the Assessing Officer of account books or other evidence from which material evidence could, with due diligence have been discovered by the Assessing Officer, will not necessarily amount to disclosure within the meaning of the said proviso. This explanation, however, does not mean that production of account books and other evidence from which material evidence could with due diligence have been discovered by the Assessing Officer will not

in any event amount to disclosure within the meaning of the said proviso. The said explanation only stipulates that such evidence will not necessarily "amount to disclosure" within the meaning of the said proviso. However, we need not labour on this aspect any further inasmuch as we find that in this case, the Assessing Officer had made specific queries, inter alia, with regard to the share application money of Rs 5 lakhs received from Hallmark Healthcare Limited. The petitioner had supplied, in the course of the original assessment proceedings all the relevant documents such as the share application money form, confirmation from the applicant and the bank statement relating to the receipt of the cheque No. 201845 dated 17.10.1997 from Hallmark Healthcare Limited. It is only thereafter that the assessment was completed by the Assessing Officer on 07.03.2001. We have already noted above that in the assessment order itself, the Assessing Officer has recorded that the details as required were filed and verified. This in itself indicates that the Assessing Officer had applied his mind to the issue of the share application money and had accepted the assessee's claim after due verification. Furthermore, in the impugned order dated 02.03.2005 itself, the Assessing Officer has indicated that during the course of assessment proceedings, the petitioner had filed details in respect of share application money of Rs 5 lakhs in the name Hallmarks Healthcare Limited. However, the Assessing Officer has now sought to wriggle out of his remarks in the assessment order by stating that only photocopies for the application for equity shares were filed and that the copy of the bank account with the Indian Bank which was available did not indicate that verification had been done incorrectly and that the facts as presented by the petitioner had been

> accepted in the normal course of assessment proceedings. The Assessing Officer cannot be permitted to retract from the position that he did ask for specific information and that the information was supplied by the petitioner. And, more importantly, that the Assessing officer had examined and verified the information before finalizing the assessment under Section 143(3) of the said Act. In this background also, we feel that the petitioner had not failed to disclose fully and truly all material facts necessary for its assessment in respect of the assessment year 1998-99.

25. In view of the aforesaid reasoning, the present writ petition is allowed. The writ of certiorari is issued quashing the impugned order dated 1st November 2010 and the impugned notice dated 31st March 2010. The reassessment proceedings are set aside. In the facts of the case, there is no order as to costs.

SANJIV KHANNA, J.

CHIEF JUSTICE

May 31, 2011
Kkb