THE HIGH COURT OF DELHI AT NEW DELHI

% Judgment delivered on: 23.05.2013

\+ W.P.(C) 284/2013

M/S MICROSOFT CORPORATION (I) PVT. LTD ..... Petitioner

versus

DEPUTY COMMISSIONER OF INCOME TAX AND ANR ..... Respondents

Advocates who appeared in this case:

For the Appellant : Mr Nageswar Rao, Mr Sandeep S. Karhail and Ms Sayaree Basu Mallik

For the Respondent : Mr N.P. Sahni, with Mr Ruchesh Sinha

CORAM:-
HON'BLE MR JUSTICE BADAR DURREZ AHMED
HON'BLE MR JUSTICE VIBHU BAKHRU

JUDGMENT

BADAR DURREZ AHMED, J (ORAL)

1. The petitioner has challenged the reopening of assessment in respect of the assessment year 2005-06, which was initiated by virtue of a notice under Section 148 of the Income-tax Act, 1961 (hereinafter referred to as "the Act") on 26.03.2012. The point of challenge raised by the petitioner is that the reopening of assessment was sought to be done after a period of four years, therefore, the conditions stipulated in the proviso to Section 147 of the Act would have to be complied with. One of the conditions was that a reopening could not be done until and unless there was failure on the part of the assessee to make a full and true disclosure of all material facts which were necessary for the assessment. It was contended by the learned counsel for the petitioner that in the present case,

this pre-condition was not satisfied inasmuch as (a) there is no mention or allegation that there was no full and true disclosure on the part of the assessee in the purported reasons behind the reopening of the assessment in respect of assessment year 2005-06; and (b) in fact there was a full and true disclosure on the part of the assessee and even no inference could be drawn from the purported reasons that there was no such full and true disclosure. It was also contended by the learned counsel for the petitioner that this was also a case of a mere change of opinion and, therefore, in view of the settled principles of law, the attempt at reopening the assessment which had been completed under Section 143(3) of the Act on 24.12.2008, was not supported by law.

2. The learned counsel for the petitioner drew our attention to the purported reasons which had been recorded prior to the issuance of the notice under Section 148 of the Act. The said recorded reasons read as under:-

> "<u>Reasons recorded u/s 147 of the I.T. Act, 1961</u>
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> 1. Section 37 of the Income Tax Act, 1961 provides that any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business, is allowable as deduction in computation of the income chargeable under the head `profits and gains of business or profession'.
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> i. The assessment of M/s Microsoft Corporation (India) Pvt. Ltd. for the assessee year 2005-06 was completed u/s 143(3) of the Income Tax Act in December 2008 determining Rs. 57,65,41,440/- as taxable income. It is found that the assessee had claimed and was allowed a deduction of Rs. 1,49,11,728/- on campaign expenditure for the launch of new product. Since this expenditure gave an enduring benefit to the assessee, it was required to be capitalized and added back to the income of the assessee. The omission resulted in allowance of inadmissible expenditure of Rs. 1,49,11,728/- involving short levy of income tax of Rs. 79,12,032/-including interest u/s 234B.

2. Under section 43B of the Income Tax Act, any sum payable to an employee as bonus or commission for services rendered are deductible on actual payment basis. Section 145 of the Income Tax Act, 1961, provides that income under the head "profits and gain of business or profession" is computed in accordance with the method of accounting regularly employed by the assessee. Where the assessee follows mercantile system of accounting, the annual profits are worked out on due or accrual basis i.e. after providing for all expenses for which a legal liability has arisen and taking credit for all receipts that have become due regardless of their actual receipt or payment. Only such expenses are allowable as deduction from a previous year's income as are relevant to that year.

i. It is found that the assessee pre-existing liability of Rs. 3,69,83,105/- in respect of Bonus payable [Annexure VIII of the Tax Audit (3CD) report] against which the assessee had paid Rs. 6,34,63,086/- during the year. Thus, the assessee had made payment of Rs. 2,64,79,981/- relating to prior period, which was in excess of the pre-existing liability allowable under section 43B. Therefore, the payment of business in excess of pre-existing liability was required to be added back to the taxable income of the assessee. The omission in taking into account the inadmissible expenditure resulted in allowance of prior period expenditure of Rs. 2,64,79,981/- in respect of pre-existing liability involving short levy of income tax of Rs. 1,40,50,046/- including interest u/s 234B.

3. Section 40A(7) of the Income Tax Act provides that no deduction is allowed in computing business income in respect of a mere provision made by the assessee in his books of account for the payment of gratuity to his employees. The provision made for the purpose of payment of sums by way of contribution towards the approved gratuity fund that has become payable during the previous year or for the purpose of making any payment on account of gratuity that has become payable during the previous years is, however eligible for deduction.

i. It is that the assessee was allowed a deduction of Rs. 76,35,763/- towards provision for payment of gratuity. However this payment has been depicted as inadmissible expenditure in column 17(i) of the Tax Audit (3CD) report submitted by the assessee. Therefore, this expenditure is required to be added back to the taxable

income of the assessee. The omission in taking into account the inadmissible expenditure resulted in allowance of excess deduction of Rs. 76,35,763/- involving short levy of income tax of Rs. 40,51,469/- including interest u/s 234B.

4. Section 143(3) of the Income Tax Act, 1961 provides that in a scrutiny assessment, the Assessing Officer is required to make a correct assessment of total income or loss of the assessee and determine the correct sum payable by him or refundable to him on the basis of such assessment.

i. It is found that the Assessing Officer had disallowed the claim of the assessee for depreciation on ITG Networking equipments @60% and depreciation @25% was allowed to the assessee. However, the allowable depreciation was incorrectly computed in the para 4.3 of the assessment order. Due to this omission, the excess depreciation Rs. 42,38,742/- was added back to the income of the assessee instead of actual figure of Rs. 56,58,417/-. The mistake resulted in under assessment of income by Rs. 14,19,945/- involving short levy of tax of Rs. 7,53,410/- including interest u/s 234B.

5. Section 37 of the Income Tax Act, 1961 provides that any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business, is allowable as deduction in computation of the income chargeable under the head `profits and gains of business or profession'.

i. It is found that the assessee claimed and was allowed 100% revenue expenditure on the following computer / software related expenditure - (i) deduction of Rs. 3,37,81,547/- on 'translation of courseware / software in local language', and (ii) deduction of Rs. 88,49,138/- on design content and maintenance of website. Since this expenditure gave an enduring benefit to the assessee, it was required to be capitalized and the assessee was eligible for depreciation @60% on these capital expenditure. The omission resulted in underassessment of income by Rs. 1,70,52,274/- involving short levy of tax of Rs. 90,47,787/- including interest u/s 234B.

6. Section 37 of the Income Tax Act, 1961 provides that any expenditure, not being in the nature of capital expenditure, laid out wholly or exclusively for the purpose of business, is allowable as

deduction in computation of the income chargeable under the head `profits and gains of business or profession'.

i. It is found that the assessee claimed and was allowed deduction of Rs. 88,50,8411- for expenditure on 'consultancy for development of marketing strategy' and Rs. 4,54,41,136/- (Rs. 3,61,60,538/- + Rs. 92,80,598/-) on 'market research'. Since the expenditure on marketing intangibles gave an enduring benefit to the assessee, it was required to be capitalized and added back to the total income of the assessee. The omission resulted in underassessment of income by Rs. 5,42,91,977/- involving levy of tax of Rs. 3336.69 lacs including interest u/s 234B.

I, therefore, have reasons to believe that the income of Rs. 12,17,91,668/- has escaped assessment within the meaning of section 147 of the I.T. Act, 1961, due to omission on the part of the assessee to include this sum into its income for the relevant previous year."

3. The petitioner filed its objections to the said reasons on 10.05.2012, whereby, the petitioner took the specific plea that since there was no allegation that the petitioner had not made a full and true disclosure of all the material facts necessary for its assessment, the invocation of the provisions of Section 147 of the Act was itself not valid. The petitioner also raised the objection that the issues sought to be raised in the recorded reasons had been considered by the Assessing Officer at the time of the original assessment completed under Section 143(3) of the Act on 24.12.2008 and the present attempt at reopening the assessment is nothing but one in furtherance of a mere change of opinion, which is impermissible in law. It was also contended by the learned counsel for the petitioner that from the recorded reasons, it could not even inferred that there was no full and true disclosure on the part of the petitioner/assessee.

4. The learned counsel for the petitioner then drew our attention to the order dated 12.11.2012 passed by the Assessing Officer disposing of the said

objections. He contended that the said order dated 12.11.2012, which is also the subject matter of challenge in the present petition, was not a reasoned order at all. Referring to the said order, he submitted that paragraphs 1, 2 & 3, thereof merely reproduced the reasons recorded and fact that a notice had been served and that objections had been received from the petitioner and the nature of the objections. In paragraph 3, the provisions of Section 147 of the Act have also been quoted. The objections have only been dealt with, by the Assessing Officer, in paragraph 4 of the said order dated 12.11.2012, which reads as under:-

> "4. The objections raised by the assessee company and the case laws cited by it have been considered viz a viz the Explanation 1 to Section 147 which has been reproduced above. In view of the unambiguous meaning of Explanation 1, and the facts and circumstances of the case under which the reasons were recorded, the objections of the assessee are not acceptable and are therefore rejected."

5. According to the learned counsel for the petitioner, this manner of dealing with the objections is highly unsatisfactory and is not in accord with the decision of the Supreme Court in the case of ***GKN Driveshafts (India) Ltd. v. Income Tax Officer and Ors.***: **(2003) 259 ITR 19 (SC)**. In that decision the Supreme Court gave the following directions:-

> "5. We see no justifiable reason to interfere with the order under challenge. However, we clarify that when a notice under Section 148 of the Income Tax Act is issued, the proper course of action for the noticee is to file return and if he so desires, to seek reasons for issuing notices. The Assessing Officer is bound to furnish reasons within a reasonable time. On receipt of reasons, the noticee is entitled to file objections to issuance of notice and the Assessing Officer is bound to dispose of the same by passing a speaking order. In the instant case, as the reasons have been disclosed in these proceedings, the Assessing Officer has to dispose of the objections,

> if filed, by passing a speaking order, before proceeding with the assessment in respect of the abovesaid five assessment years."

6. The learned counsel for the petitioner submitted that the Assessing Officer was bound to dispose of the objections by passing a speaking order. According to him, the order dated 12.11.2012 could not be considered as a speaking order at all, as none of the objections raised by the petitioner have been specifically dealt with by the Assessing Officer. The learned counsel for the petitioner placed reliance on the decision of this court in ***Rose Serviced Apartments Pvt Ltd v. Dy. Commissioner of Income Tax*: (2012) 348 ITR 452 (Del.)** as also on another decision of this court in the case of ***Haryana Acrylic Manufacturing Company v. The Commissioner of Income Tax IV and Anr.*: (2009) 208 ITR 38 (Del)**, which was also relied upon in ***Rose Serviced Apartments*** *(supra)*. The learned counsel for the petitioner also placed reliance on the decision of the Bombay High Court in ***Hindustan Lever Ltd. v. R.B. Wadkar, Asst. Commissioner of Income Tax and Ors.*: (2004) 268 ITR 339 (Bom)**.

7. It was also pointed out by the learned counsel for the petitioner that in the course of the original assessment proceedings, a questionnaire had been furnished to the petitioner for its reply. The said questionnaire required the petitioner to give details on various aspects of the assessment, which, according to the learned counsel for the petitioner, also included those aspects which were sought to be covered under the recorded reasons. The said questionnaire reads as under:-

> "In connection with the pending proceedings as referred above, you are required to furnish the following information/evidence or documents:-
>
> 1. Give details of Travelling & Conveyance exceeding one lakh
>
> 2. Give details of Legal & Professional exceeding one lakh

3. Give details of Purchased Services exceeding one lakh

4. Details of claim of doubtful debt of Rs.3624334 claimed in computation of income

5. Claim of leave encashment expenses of computation.

6. Details of Admn Services, its nature and expenses details.

7. Exhibition expenses exceeding one lakh

8. Advertisement expenses exceeding one lakh give separate details of expenses in foreign currency.

9. During the year in the fixed asset schedule there are sales of assets which includes sale of vehicle and furniture please give details of persons to whom sales have been made and also inform if these purchasers are related to company.

10. Any impact on claim of depreciation in new of notes to A/c items.

11. During the year company has made various expenses in foreign currency as per details in notes to A/c give details & its purpose.

12. Details of assets written off as per item No.14 of Tax Audit Report and item No.17.

13. Considering disclaimer in Co1.17(f) of Tax Audit Report, explain how your accounts can be examined for compliance of provisions of section 40(9)

14. During the year vehicles were purchased give details of evidence of put to use of vehicles purchased in the month of March 2005.

15. Explain nature of foreign exchange fluctuation claimed in depreciation chart.

16. Details of contract with M.S. Decorators (P) Ltd. & it's A/c .

17. Explain purchase of furniture repair in new space occupied by assessee and its availability.

18. Refer to Annexure V of Tax Audit Report where these amounts have been debited in P&L account.

19. Please explain why amounts in annexure VIII,IX,X & XI are not disallowed as per section 43B

    Why prior period expenses as per Tax Audit Report be not disallowed.

    This letter may, please be treated as a part of notice u/s 142(1) of the I.T. Act, 1961. **It may please be noted that failure to comply with this notice will invite penal provisions u/s 271(1)(b) of the I.T. Act, 1961."**

8. The learned counsel for the petitioner submitted that in item nos. 12, 13, 18 & 19 of the questionnaire, there is specific reference to the Tax Audit Report (Form 3 CD). He submitted that these issues had been considered and the petitioner had furnished replies in respect thereof at the time of the original assessment proceedings. The very same issues are sought to be raised by the Assessing Officer in the recorded reasons. Therefore, according to the learned counsel for the petitioner, this reflected nothing but a mere change in opinion which is impermissible in law. The learned counsel for the petitioner also referred to item no. 8 of the questionnaire, wherein, the Assessing Officer had specifically requested for details of advertisement expenses exceeding ₹ 1 lac and separate details of expenses in foreign currency. He submitted that these very details formed the subject matter of the recorded reasons and, therefore, this was also a case of mere change in opinion.

9. For all these reasons, the learned counsel for the petitioner submitted that invocation of the provisions of Section 147 of the Act for reopening the assessment in respect of the assessment year 2005-06 was bad in law. Consequently, it was prayed that the impugned notice dated 26.03.2012 under Section 148 of the Act and all proceedings pursuant thereto including the order dated 12.11.2012 be quashed or set aside.

10. Mr Sahni appearing on behalf of the revenue contended that the reopening of assessment in the facts of the present case was clearly within the four corners of law. He submitted that this was a case where the petitioner had claimed expenditure under wrong heads and, therefore, this amounted to the assessee not having made a full and true disclosure of material facts which were necessary for its assessment. The learned counsel made detailed submissions with regard to each of the point nos. 1, 3, 4 & 5 of the recorded reasons to which we shall allude to below. He placed reliance on the decision of this court in the case of ***Dalmia Pvt Ltd v. Commissioner of Income Tax and Anr*** **: (2012) 348 ITR 469 (Del.)**. He also placed reliance on the decision of the Supreme Court in the case of ***M/s Phool Chand Bajrang Lal and Anr v. Income Tax Officer and Anr*** **: (1993) 203 ITR 456 (SC)** and ***Raymond Woollen Mills Ltd. v. Income Tax Officer and Ors*** **: (1999) 236 ITR 34 (SC)**.

11. Mr Sahni placed particular emphasis on the provisions of Section 147 of the Act and, in particular, on Explanation 1 thereunder. The said provisions, to the extent relevant, are set out hereinbelow:-

> "**147. – Income Escaping Assessment** – If the Assessing Officer has reason to believe that any income chargeable to tax has escaped assessment for any assessment year, he may, subject to the provisions of sections 148 to 153, assess or reassess such income and also any other income chargeable to tax which has escaped assessment and which comes to his notice subsequently in the course of the proceedings under this section, or recompute the loss or the depreciation allowance or any other allowance, as the case may be, for the assessment year concerned (hereafter in this section and in sections 148 to 153 referred to as the relevant assessment year):
>
> **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:

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.

Explanation 2. - xxxxx xxxxx xxxxx xxxxx"

12. In the context of Explanation 1 set out above, Mr Sahni submitted that the mere fact that the Tax Audit Report was available with the Assessing Officer did not mean that there was disclosure within the meaning of the proviso to Section 147 of the Act. He submitted that even if the Assessing Officer could have, with due diligence, discovered material from the Tax Audit Report, it does not necessarily mean that the petitioner had made a full and true disclosure of material facts. Therefore, just because the items mentioned in the recorded reasons have been mentioned in the Tax Audit Report would not necessarily amount to disclosure in the context of the proviso to Section 147 of the Act. He also submitted that in the first round when the original assessment took place, there was no examination of the issues sought to be raised in the recorded reasons. Therefore, the present case was not a case of mere change of opinion inasmuch as, according to him, in the first round, no opinion had been formed by the Assessing Officer.

13. If we examine the recorded reasons, we find that item nos. 1, 5 & 6 of the recorded reasons essentially deal with the issue as to whether the expenses were

in the nature of revenue expenses or capital expenses. It is apparent that insofar as item no. 1 is concerned, it deals with campaign expenditure to the extent of ₹ 1,49,11,728/-. As per the recorded reasons, this expenditure was required to be capitalised and, therefore, ought to have been added back to the income of the assessee. Consequently, according to the recorded reasons, the omission resulted in allowance of inadmissible expenditure involving short levy of income-tax of ₹ 79,12,032/- including interest under Section 234B of the Act. Insofar as this item is concerned, the learned counsel for the petitioner, had already drawn our attention to the questionnaire which we have reproduced above. Item no. 8 of that questionnaire specifically dealt with advertisement expenses exceeding ₹ 1 lac. Referring to the details furnished by the petitioner, the learned counsel for the petitioner had drawn our attention to the reply to the questionnaire which was submitted by the petitioner on 13.10.2008. The reply *inter alia* reads as under:-

> "4. Details of Advertisement expenses exceeding Rs 1 lakhs
>
> During the subject year, MCIPL had incurred Advertisement expenses amounting to Rs 902,649,399. Detail of the Advertisement expenses exceeding Rs 1 lakhs has been enclosed as **Annexure 4** and detail of advertisement expenses incurred in foreign currency exceeding Rs 1 lakhs has been enclosed as **Annexure 4A."**

14. Annexure 4 referred to above, contained details of advertising expenses exceeding ₹ 1 lac incurred during the assessment year 2005-06. One of the items mentioned there was campaign expenditure for launch of new products to the extent of ₹ 1,49,11,728/- which is the very same item mentioned in item no. 1 of the recorded reasons. At this juncture, we may also refer to the expenses for consultancy for the development of marketing strategy which were also given as details of advertising expenses. The said item was for an amount of ₹ 88,50,841/- which is the same as referred to in item no. 6 of the recorded reasons. Under the

same details, market research expenses to the extent of ₹ 3,61,60,538/- have also been shown which is also the subject matter of item no. 6 of the recorded reasons. Furthermore, the said details also mention expenses towards design cost of website/prototype (₹ 8,49,138/-) and design content & maintenance of website/prototype (₹ 80,00,000/-) which, together total ₹ 88,49,138/-. This forms part of the recorded reason no. 5. Finally, the expenditure of translation of courseware/software in local language to the extent of ₹ 3,37,81,547/- has also been shown in the said Annexure-4 and this forms part of item no. 5 of the recorded reasons.

15. In other words, the details pertaining to the recorded reason nos. 1, 5 & 6 had been sought by the Assessing Officer and had been provided by the petitioner/assessee in the course of the original assessment proceedings. The only issue pertaining to these items (i.e., item nos. 1, 5 & 6 of the recorded reasons) is that they should not have been treated as revenue expenditure but, ought to have been treated as capital expenditure and, therefore, the said expenditure ought to have been added back to the income of the assessee. Whenever the issue of whether an expenditure is of a revenue or a capital nature arises, it almost always lends itself to debate. Therefore, the details having been sought in the original assessment proceeding and having been supplied by the assessee and the Assessing Officer having thereafter allowed the expenses as revenue expenses as claimed by the assessee, to take the view in the recorded reasons that the expenses were capital in nature, would clearly amount to a change of opinion.

16. Insofar as the disclosure part is concerned, it is evident that the concept of full and true disclosure applies not only to the stage of filing of the return but to the entire process of assessment under Section 143(3). This is also clear from the

decision of this court in the case of ***Honda Siel Power Products v. Dy. CIT*** : **(2012) 340 ITR 53 (Del.)** wherein this court held that "the term 'failure' on the part of the assessee" is not restricted to the income-tax return and the columns of the income-tax return or the tax audit report. The court held that the expression "failure to fully and truly disclose material facts" also relates to the stage of the assessment proceedings and that there can be omission and failure on the part of the assessee to disclose material facts fully and truly during the course of the assessment proceedings. Therefore, when the assessee furnishes details during the assessment proceedings, it cannot, at the subsequent stage of reopening be said that there was failure on the part of the assessee to disclose fully and truly all material facts necessary for his assessment. If there is a full and true disclosure in the course of the assessment proceedings, that will have to be regarded as a disclosure for the purpose of the proviso to Section 147 of the said Act. Therefore, insofar as item nos. 1, 5 & 6 of the recorded reasons are concerned, we find that there was no failure to disclose full and true material facts necessary for the assessment. Moreover, it is also a case of a mere change in opinion.

17. Insofar as recorded reason no. 3 is concerned, it pertains to the provision made for payment of gratuity to the extent of ₹ 76,35,763/-. It is noted in the recorded reasons that this payment had been depicted as inadmissible expenditure in column 17(i) of the Tax Audit Report (3CD) submitted by the petitioner. Therefore, according to the belief of the Assessing Officer, the expenditure was required to be added to the taxable income of the assessee and that the omission in taking into account the inadmissible expenditure had resulted in allowance of excess deduction of ₹ 76,35,763/- involving a short levy of income tax of ₹ 40,51,469/- including interest under Section 234B of the Act. In this context, it may be relevant to note that the recorded reasons themselves point out that the said item had been shown in column no. 17(i) of the Tax Audit Report which was

furnished by the assessee in the course of the assessment proceedings. We have also examined a copy of the said report and we find that item 17(i) of the said report falls on the same page as item no. 17(f) of the report. It falls on the next page to item no. 17(a) of the report. Item no. 17(a) deals with expenditure of a capital nature and, particularly, with the assets written off by the petitioner. Item No. 17(f) deals with amounts inadmissible under Section 40(a). The point of mentioning these items is that the Assessing Officer had examined the Tax Audit Report in detail and had asked for details and information which according to him were necessary for framing the assessment. This is not a case where Explanation 1 to section 147 of the Act can be pressed into service. It is not that the Assessing Officer, if he was diligent enough, could have discovered material evidence. Here, the Assessing Officer was diligent. He closely examined the Tax Audit Report and raised questions and sought information on aspects where he needed greater clarity.

18. Now, coming back to the Tax Audit Report and the question of admissibility of the provision made for gratuity, we find that Assessing Officer, in the questionnaire issued by him, specifically asked the petitioner to explain as to why the amounts mentioned in, *inter alia*, annexure (ix) should not be disallowed as per section 43B of the Act. This question would only have been raised if the Assessing Officer was satisfied that the provision for payment of gratuity was admissible on account of the fact that the gratuity fund was an approved fund. Upon such satisfaction, the next logical question for the Assessing Officer would be as to whether the payment had been made within the stipulated time as prescribed under Section 43B of the Act and, that is exactly what the Assessing Officer did. Therefore, we feel that insofar as the question of provision of payment for gratuity is concerned, the issue had been specifically examined by the Assessing Officer and, therefore, the recorded reasons attempted

to bring about a mere change in opinion. Apart from this, we also hold that there was full and true disclosure on the part of the petitioner inasmuch as this item had been specifically mentioned in the Tax Audit Report as item no. 17(i) and in annexure (ix) as also in the details furnished by the petitioner subsequent to the questionnaire.

19. This leaves us with the consideration of recorded reason no. 4 which pertains to depreciation on ITG networking equipment. It is contended in the recorded reasons that though the assessee had claimed depreciation on the said equipments @ 60%, the Assessing Officer had allowed depreciation at only @ 25%. However, while doing so, the Assessing Officer made a computational error and due to that excess depreciation to the extent of ₹ 14,19,945/- involving a short levy of tax of ₹ 7,53,410/- including interest under Section 234B of the Act had resulted. In other words, insofar as this item is concerned, it was merely a computational error on the part of the Assessing Officer. We feel that such computational error could have easily been corrected by the Assessing Officer under Section 154 of the Act. In fact, the Assessing Officer had initiated proceedings under Section 154. However, it appears that the Assessing Officer had ultimately dropped the same. Mr Sahni confirms the fact that Section 154 proceedings were not pursued further. In these circumstances, we feel that Assessing Officer would not be entitled to reopen the assessment. It is he who had made a computational error. The assessee, on his part, had fully and truly disclosed all the material facts with regard to the claim of depreciation at the time of the assessment. It is another matter that the Assessing Officer did not allow the claim of 60% depreciation but only allowed depreciation @ 25% and, while doing so, the Assessing Officer made an error in computing that amount.

20. We may also point out that we do not agree with the contention of Mr Sahni that the recorded reasons expressly indicate that there was failure on the part of the assessee to make a full and true disclosure of the material facts necessary for its assessment. Mr Sahni had placed reliance on the last sentence of the recorded reasons which reads as under:-

> "I therefore have reasons to believe that the income of Rs. 12,17,91,668/- have escaped assessment within the meaning of Section 147 of the IT Act, 1961, due to omission on the part of the assessee to include this sum into its income for the relevant previous years".

What is to be seen is that the expression used by the Assessing Officer is "due to omission on the part of the assessee to include this sum into its income". The allegation is not that there was no disclosure on the part of the assessee but that the assessee had not included the said amount as part of its income. This expression needs to be read in the context of the earlier part of the recorded reasons where the reasons essentially recorded that expenses should have been shown as capital expenditure and not as revenue expenditure and that the provision for payment of gratuity was inadmissible etc. It is not a statement that the petitioner had failed to disclose fully and truly any particular piece of information which was necessary for the purpose of assessment. Furthermore, we also cannot infer any such belief on the part of the Assessing Officer that there was a failure to make a full and true disclosure of material facts on the part of the assessee.

21. For the sake of completeness, we shall now consider the decisions cited at the bar. We shall first take up those decisions which were relied upon by the learned counsel for the petitioner. In ***Hindustan Lever Ltd*** *(supra)*, a Division Bench of the Bombay High Court, while considering

the argument that, even if the words "failure to disclose fully and truly all material facts relevant for assessment for the assessment year" were absent in the reasons recorded, still such reasons could be inferred from the text of the reasons recorded, observed as under:-

> "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.

Having recorded our finding that the impugned notice itself is beyond the period of four years from the end of the assessment year 1996-97 and does not comply with the requirements of the proviso to Section 147 of the Act, the Assessing Officer had no jurisdiction to reopen the assessment proceedings which were concluded on the basis of assessment under Section 143(3) of the Act. On this short count alone the impugned notice is liable to be quashed and set aside."

22. A Division Bench of this court, in the case of ***Haryana Acrylic*** *(supra)*, observed as under:-

"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.

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."

From the above, it is evident that merely having a reason to believe that income had escaped assessment is not sufficient for reopening the assessment beyond the four year period referred to above. It is essential that the escapement of income from assessment must be occasioned by the failure on the part of the assessee to, *inter alia*, disclose material facts, fully and truly. If this condition is not satisfied, there would be a bar to taking any action under Section 147 of the said Act.

23. The above decision in ***Haryana Acrylic*** *(supra)* was relied upon by another Division Bench of this court in ***Rose Serviced Apartments*** *(supra)*. Referring to Explanation I to Section 147 of the said Act, this court, in the latter decision, observed as under:-

> "17. Reading of the explanation 1 of the proviso makes it clear that mere production of books of accounts or other material from which the Assessing Officer could, with due diligence, have discovered escapement of income, does not bar reassessment proceedings. Yet at the same time if the proviso applies and the assessee has fully and truly disclosed all the material facts necessary for assessment for that assessment year, reassessment proceedings cannot be initiated."

24. In the context of this decision, we may point out that, in the present case, the said Explanation 1 would not come in the aid of the respondents inasmuch as the Assessing Officer was diligent and had closely examined the Tax Audit Report and raised questions and sought information on the aspects where he needed greater clarity. Furthermore, and, in any event, as

observed in ***Rose Serviced Apartments*** *(supra)*, where the assessee has fully and truly disclosed all the material facts necessary for assessments, re-assessment proceedings cannot be initiated.

25. Recently, this Bench in the case of ***CIT v. Suren International Pvt. Ltd.*** (ITA 289/2012) decided on 07.05.2013 had occasion to examine the provisions of Section 147 of the said Act. While doing so, this court referred to and relied upon ***Wel Intertrade Pvt. Ltd and Another v. ITO*****: (2009) 300 ITR 22 (Del)** as also ***Haryana Acrylic*** *(supra)*. It was observed that it is well-settled that in order to invoke the provisions of Section 147 of the said Act, after a period of four years from the end of the relevant assessment year, in addition to the Assessing Officer having reason to believe that any income has escaped assessment, it must also be established that the income had escaped assessment on account of the assessee failing to make a return under, *inter alia*, Section 139 or on account of failure on the part of the assessee to disclose fully and truly the necessary material facts. The court further observed as under:-

> "16. In the reasons as furnished by the Assessing Officer, we find that there is neither any allegation that the assessee had failed to truly disclose any material facts at the time of assessment, nor can we readily infer the same in view of the fact that a detailed enquiry had been conducted by the Assessing Officer with regard to the identity and creditworthiness of the share-applicants and genuineness of the transactions in relation to the share application money received by the assessee. Further the mere statement that the DRI has seized certain goods of the assessee and levied a penalty also cannot be stated to be a reason for reopening of assessment of the assessee as the said statement made is neither followed by

> the recording of a belief that the income escaped on that count or that the assessee has failed to disclose all relevant material, fully and truly, at the stage of the first assessment."

26. On the aspect of "mere change of opinion", this court had recently considered the Full Bench decision in ***<u>CIT v. Usha International Limited</u>: 348 ITR 485 (FB) (Del)*** and, in particular, point No.(3) of the observations contained in paragraph 13 of the said decision, which, inter alia, reads as under:-

> "13. It is, therefore, clear from the aforesaid position that:
>
> (1) Reassessment proceedings can be validly initiated in case return of income is processed under Section 143(1) and no scrutiny assessment is undertaken. In such cases there is no change of opinion;
>
> (2) Reassessment proceedings will be invalid in case the assessment order itself records that the issue was raised and is decided in favour of the assessee. Reassessment proceedings in the said cases will be hit by principle of "change of opinion".
>
> (3) Reassessment proceedings will be invalid in case an issue or query is raised and answered by the assessee in original assessment proceedings but thereafter the Assessing Officer does not make any addition in the assessment order. In such situations it should be accepted that the issue was examined but the Assessing Officer did not find any ground or reason to make addition or reject the stand of the assessee. He forms an opinion. <u>The reassessment will be invalid because the Assessing Officer had formed an opinion in the original assessment, though he had not recorded his reasons.</u>
>
> (underlining added)"

Para 39 of the Full Bench decision in ***Usha International Limited*** *(supra)* was also considered. The same was to the following effect:-

> "39. In view of the above observations we must add one caveat. There may be cases where the Assessing Officer does not and may not raise any written query but still the Assessing Officer in the first round/ original proceedings may have examined the subject-matter, claim, etc., because the aspect or question may be too apparent and obvious. To hold that the assessing officer in the first round did not examine the question or subject-matter and form an opinion, would be contrary and opposed to normal human conduct. Such cases have to be examined individually."

In the context of the above para 39, this court, in ***Maruti Suzuki India Limited*** *(supra),* observed as under:-

> "It is apparent from the above extract that even in cases where no query is raised by the assessing officer in the course of the original assessment proceedings it may yet be held that the assessing officer had examined the subject matter. This is so because the aspect or question in issue may be too apparent and obvious. However, the Full Bench cautioned by stating that such cases would have to be examined individually. It is, therefore, clear that even where no query is raised by the assessing officer and there is no discussion in the assessment order, it may yet be a case where the assessing officer would be considered to have examined the issue. However, we are not concerned with those type of cases inasmuch as in the present case the assessing officer had clearly raised a specific query with regard to bad debts/ advances written off and the petitioner/assessee had given details in respect thereof. It is obvious that since no such addition was made on that count, the assessing officer had considered and examined the position and held in favour of the petitioner/assessee. Therefore, we can safely conclude that, in the facts and circumstances of the present case, the assessing officer had, indeed, examined the issue at the time of the original assessment proceedings and had

> formed an opinion by not making any addition in respect thereof. Thus, the reopening of the assessment which had been concluded on 13.03.2006, would be nothing but a mere change of opinion."

27. We have already expressed our opinion that the present case would also be a case of change of opinion inasmuch as specific queries had been raised by the Assessing Officer in the questionnaire and which had been addressed by the petitioner during the course of the original assessment proceedings. All the above decisions fortify the conclusions that we have arrived at earlier.

28. It is now time to consider the decisions referred to by the learned counsel for the respondents. The decision of the Supreme Court in ***Phool Chand Bajrang Lal*** *(supra)* is the earliest in point of time. The learned counsel for the respondents had placed reliance on the following observations of the Supreme Court:-

> "From a combined review of the judgments of this Court, it follows that an Income-tax Officer acquires jurisdiction to reopen assessment under Section 147(a) read with Section 148 of the Income Tax 1961 only if on the basis of specific, reliable and relevant information coming to his possession subsequently, he has reasons which he must record, to believe that by reason of omission or failure on the part of the assessee to make a true and full disclosure of all material facts necessary for his assessment during the concluded assessment proceedings, any part of his income, profit or gains chargeable to income tax has escaped assessment. He may start reassessment proceedings either because some fresh facts come to light which where not previously disclosed or some information with regard to the facts previously disclosed comes into his possession which tends to expose the untruthfulness of those facts. In such situations, it is not a case of mere change of

opinion or the drawing of a different inference from the same facts as were earlier available but acting on fresh information. Since, the belief is that of the Income-tax Officer, the sufficiency of reasons for forming the belief, is not for the Court to judge but it is open to an assessee to establish that there in fact existed no belief or that the belief was not at all a bona fide one or was based on vague, irrelevant and non-specific information. To that limited extent, the Court may look into the conclusion arrived at by the Income-tax Officer and examine whether there was any material available on the record from which the requisite belief could be formed by the Income-tax Officer and further whether that material had any rational connection or a live link for the formation of the requisite belief. It would be immaterial whether the Income-tax Officer at the time of making the original assessment could or, could not have found by further enquiry or investigation, whether the transaction was genuine or not, if one the basis of subsequent information, the Income-tax Officer arrives at a conclusion, after satisfying the twin conditions prescribed in Section 147(a) of the Act, that the assessee had not made a full and true disclosure of the material facts at the time of original assessment and therefore income chargeable to tax had escaped assessment. The High Courts which have interpreted Burlop Dealer's case (Supra) as laying down law to the contrary fell in error and did not appreciate the import of that judgment correctly.

We are not persuaded to accept the argument of Mr. Sharma that the question regarding truthfulness or falsehood of the transactions reflected in the return can only be examined during the original assessment proceedings and not at any stage subsequent thereto. The argument is too broad and general in nature and does violence to the plain phraseology of Sections 147(a) and 148 of the Act and is against the settled law by this Court. We have to look to the purpose and intent of the provisions. One of the purposes of Section 147, appears to us to be, to ensure that a party cannot get away by wilfully making a false or untrue statement at the time of original assessment and

> when that falsity comes to notice, to turn around and say "you accepted my lie, now your hands are tied and you can do nothing". It would be travesty of justice to allow the assessee that latitude."

29. The said decision does not detract from the conclusions arrived at by us. On facts, we have held that the petitioner had not made a false or an untrue statement at the time of the original assessment. Therefore, the question of reopening the assessment on the ground that the same was being done when the falsity came to notice does not at all arise in the present case. We fail to see as to how the said decision comes to the aid of the respondents, particularly when, in the present case, on facts we have held that the petitioner had made a full and true disclosure of the material facts at the time of the original assessment. The next decision which was relied upon by the learned counsel for the petitioner is that of the Supreme Court in the case of ***Raymond Woollen Mills*** *(supra)* wherein the Supreme Court observed as under:-

> "In this case, we do not have to give a final decision as to whether there is suppression of material facts by the assessee or not. We have only to see whether there was prima facie some material on the basis of which the Department could reopen the case. The sufficiency or correctness of the material is not a thing to be considered at this stage. We are of the view that the court cannot strike down the reopening of the case in the facts of this case. It will be open to the assessee to prove that the assumption of facts made in the notice was erroneous. The assessee may also prove that no new facts came to the knowledge of the Income-tax Officer after completion of the assessment proceeding."

30. The said decision also, does not come to the aid of the respondents. This is because we are of the view that there was no *prima facie* material on the basis of which, in the present case, the Assessing Officer could reopen the case. The sufficiency or correctness of the material is not in issue at the present stage. We have expressed our view that there was no material on the basis of which the department could reopen the case inasmuch as the present case was one of mere change of opinion as also where there was no failure on the part of the petitioner to disclose fully and truly all the material facts necessary for its assessment. Therefore, the said decision of the Supreme Court in ***Raymond Woolen Mills Limited*** *(supra)* would also be of no assistance to the respondents' case.

31. Finally, the learned counsel for the respondents had placed reliance on a Division Bench of this court in ***Dalmia Pvt. Limited*** *(supra)*. In that decision, two points were considered. One was with regard to change of opinion and the other that the petitioner had not made a full and true disclosure. While addressing the first issue of change of opinion, the court held that the case before it was not one of change of opinion because a change of opinion would only arise when an Assessing Officer formed an opinion and decided not to make an addition and held that the assessee was correct. In that case, the Assessing Officer had asked specific and pointed queries with regard to the sundry creditors and had asked for confirmations, names, addresses and details of services rendered. In the original assessment order, there was no discussion, ground or reason why an addition was not made in spite of failure on the part of the assessee to furnish the confirmations and details. In that context, the court rejected the

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contention of the assessee that there was a change of opinion. Insofar as the aspect of change of opinion is concerned, the observations of the Division Bench in ***Dalmia Pvt. Ltd*** *(supra)* have been rendered in an entirely different and distinct factual matrix. It is apparent that the Assessing Officer had asked for specific information and confirmations and that the same had not been supplied by the assessee therein at the time of assessment. In the present case, the petitioner had furnished all the information which was sought by the Assessing Officer in the questionnaire and, therefore, the fact situation in the present case is entirely different from that which obtained in ***Dalmia Pvt. Ltd*** *(supra)*.

As regards the second question with regard to full and true disclosure of material facts, the Division Bench in ***Dalmia Pvt. Ltd*** *(supra)*, *inter alia*, observed as under:-

> "The second question which arises for consideration is whether the Assessee had made full and true disclosure of material facts. We have already reproduced above the contention of the Assessee in this regard in the objections. We have also referred to the two letters written by the Assessing Officer asking for details of sundry creditors being letters dated 14th September, 2005 and 14th October, 2005. The Petitioner was called upon and asked to furnish names and addresses of the sundry creditors and since when the amount was outstanding. The Petitioner was also asked to explain details of each creditor. There is nothing on record and it is not even the stand of the Petitioner that those details in respect of all parties were furnished. If there is No. disclosure and details were not furnished, there cannot be full and true disclosure. In W.P.(C) No. 9036/2007, Honda Siel Power Products Ltd. v. The Deputy Commissioner of Income Tax and Anr., decision dated 14th February, 2011, we had held: (page 59):

> ‘The term "failure" on the part of the Assessee is not restricted only to the income-tax return and the columns of the income-tax return or the tax audit report. This is the first stage. The said expression "failure to fully and truly disclose material facts" also relate to the stage of the assessment proceedings, the second stage. There can be omission and failure on the part of the Assessee to disclose fully and truly material facts during the course of the assessment proceedings. This can happen when the Assessee does not disclose or furnish to the Assessing Officer complete and correct information and details it is required and under an obligation to disclose. Burden is on the Assessee to make full and true disclosure.’

In such circumstances, it cannot be held that there was full and true disclosure by the Petitioner-Assessee. The second contention of the petitioner fails.”

The above observations would also not enable us to detract from the conclusions arrived at by us in the present case. As pointed out above, the decision in ***Dalmia Pvt. Ltd*** *(supra)* is clearly distinguishable as that was a case where the assessee had not furnished the details despite a request having been made by the Assessing Officer. It is in that context that the court observed that if there was no disclosure and details were not furnished, there cannot be full and true disclosure. In the present case, the situation is just the opposite. The information sought by the Assessing Officer had been supplied and furnished by the petitioner and it has already been held on facts by us that there was a full and true disclosure on the part of the petitioner. Therefore, the said decision in ***Dalmia Pvt. Ltd*** *(supra)* would also not come to the aid of the respondents.

32. In view of the foregoing discussion, the petitioner is entitled to succeed. The impugned notice dated 26.03.2012 and all proceedings pursuant thereto including the order dated 12.11.2012 are set aside.

33. The writ petition is allowed as above. There shall be no order as to costs.

BADAR DURREZ AHMED, J

VIBHU BAKHRU, J

MAY 23, 2013
RK